

AN ACT

TO DECLARE THE COMPILATION, COLLECTION AND REVISION OF THE GENERAL STATUTE LAW OF THE STATE AS REPORTED BY THE CODE COMMISSIONER PURSUANT TO SECTION 5, ARTICLE VI, OF THE CONSTITUTION OF 1895, THE CODE OF LAWS FOR 1942, AND THE ONLY GENERAL STATUTORY LAW OF THE STATE.

BE IT ENACTED by the General Assembly of the State of South Carolina:

SECTION 1: That the Report of the Code Commissioner made to the General Assembly for the year 1941, pursuant to requirements of Section 5, Article VI of the Constitution of 1895, and with such addition of the general statutes of 1941, and with such eliminations, corrections, general make up and arrangement made under and by virtue of the Act No.1015, of the General Assembly, approved the 24th day of July, 1940, in accordance with the Report of the Code Commissioner and Committee on Statutory Laws to the General Assembly for the year 1942 hereto attached, be, and the same is hereby, adopted as the Code of Laws of South Carolina, 1942, and said Code is hereby declared to be the only general statutory law of the State, on the 13th day of January, 1942.

SECTION 2: This Act shall take effect immediately upon its approval by the Governor.

Approved 26 day of September, 1942

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CODE OF LAWS
OF
SOUTH CAROLINA
1942

IN FIVE VOLUMES

Prepared, edited, annotated, and printed under the supervision
and direction of the Code Commissioner, with the assist-
ance, in an advisory capacity, of the Committee on
Statutory Laws of the General Assembly -
of South Carolina

VOLUME 1

Code of Civil Procedure

Code of Criminal Procedure

Criminal Code

Constitution of the United States of 1787

Constitution of the State of South Carolina, 1895

Rules of Court for the State Courts

JACOBS PRESS
CLINTON, S. C.
1942

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Preface

This Code, in 5 volumes, has been prepared, edited, annotated, and printed under the supervision and direction of the Code Commissioner, as provided by Article VI, Section 5, of the Constitution of South Carolina, 1895, and Act 1015 of the 1940 Acts and Joint Resolutions; and in compliance with Section 2117 of the Code of Laws of South Carolina, 1932, as amended by the said Act No. 1015 of the 1940 Acts and Joint Resolutions. The Committee on Statutory Laws of the General Assembly of South Carolina has met with the Code Commissioner frequently, to check on his work, and in an advisory capacity.

In order to retain as many as possible of the 1932 Code section numbers and since some of the sections were repealed, or became obsolete, the section numbers in this code do not always run consecutively.

Table showing disposition of sections in 1932 Code may be found in volume 5 after general index.

Rules and regulations issued under authority of general and permanent laws are published herein as required by act 132 of 1937 Acts and Joint Resolutions. The rules and regulations herein were in effect May 28, 1942.

Mr. Carlisle Roberts of Columbia, S. C., using the annotations in the 1932 Code as a basis prepared the annotations for this code. The cases annotated in this code come from volume 26 to part of volume 197 of South Carolina Reports; volume 1 thru volume 200 of South Eastern Reporter; volume 1 to page 360 of volume 15 of South Eastern Reporter, Second Series; volume 1 thru volume 300 of Federal Reports; volume 1 to page 640 of volume 120 of Federal Reporter, Second Series; volume 1 to page 176 of volume 39 of Federal Supplement; volume 1 thru volume 30 of Federal Cases; and volume 1 to page 382 of volume 312 of United States Supreme Court Reports.

The Michie Company of Charlottesville, Virginia, under the direction of Mr. A. Hewson Michie, using the index in the 1932 Code as a basis prepared the index for this code.

We acknowledge the cooperation and suggestions of members of bar and bench of this State and the several state departments in the presentation of this work.

Acknowledgment is hereby made to the West Publishing Company, of St. Paul, Minnesota, for a license permitting the use of the syllabi and digest paragraphs in the South Eastern Reporter, Federal Reporter and Federal Supplement in annotating this new code. The use of these syllabi or digest

paragraphs herein does not permit the re-use of same by any third party without the consent and license of the original copyright proprietor, the West Publishing Company. We also wish to make acknowledgement to the Frank Sheppard Company for permission to use their South Carolina Citations in tracing citations to the selected case series.

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Calhoun Thomas,
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M. H. Mims,

Committee on Statutory Laws.

Furman R. Gressette,
Code Commissioner.

Table of Contents

CODE OF CIVIL PROCEDURE

DEFINITIONS AND PRELIMINARY MATTER	SEC. 1
--	-----------

PART I

COURTS OF JUSTICE AND THEIR JURISDICTION

TITLE 1

DESIGNATION OF COURTS OF JUSTICE	9
--	---

TITLE 2

THE COURTS AND JUDICIAL OFFICERS	11
CHAPTER 1. The Supreme Court	11
Article 1. The Supreme Court and its Officers	11
Article 2. The Supreme Court and its Jurisdiction	26
CHAPTER 2. The Circuit Courts	33
Article 1. Circuit Courts and Judges	33
Article 2. Circuits and Terms of Courts	50
CHAPTER 3. County Courts	75
Article 1. General Provisions	75
Article 2. The Civil Court of Florence	102
Article 3. County Court in and for Greenville County	118
Article 4. County Court of Orangeburg	141
Article 5. County Court of Richland County	164
Article 6. County Court of Spartanburg County	182
CHAPTER 4. Probate Court	205
CHAPTER 4-A. Courts of Domestic Relations	256-1
Article 1. Courts of Domestic Relations in Counties with City over 70,000	256-1
CHAPTER 5. Courts of Magistrates	257
CHAPTER 6. The Civil and Criminal Court of Charleston	276
CHAPTER 7. The City Court and the Police Court of Charleston	289
CHAPTER 8. Attorneys, Solicitors and Counselors	312
CHAPTER 9. General Provisions Respecting the Administration of Justice	334

PART II

CIVIL ACTIONS

TITLE 3

GENERAL PROVISIONS	352
CHAPTER 10. General Provisions	352

	TITLE 4	SEC.
TIME OF COMMENCING CIVIL ACTIONS.....		355-1
CHAPTER 11. General Provisions.....		355-1
CHAPTER 12. Actions for the Recovery of Real Property.....		371
CHAPTER 13. Actions Other than for Recovery of Realty.....		386

	TITLE 4-A	
ACTIONS FOR SERVICES AGAINST COUNTIES OVER 85,000.....		396-1

	TITLE 5	
PARTIES TO CIVIL ACTIONS.....		397
CHAPTER 14. Parties to Civil Action Generally.....		397
CHAPTER 15. Wrongful Death Actions and Survival of Actions.....		410

	TITLE 6	
PLACE OF TRIAL OF CIVIL ACTIONS.....		420

	TITLE 7	
MANNER OF COMMENCING CIVIL ACTIONS.....		427
CHAPTER 16. Summons and Service.....		427
CHAPTER 17. Notices, Filing and Service of Papers.....		443

	TITLE 8	
PLEADINGS IN CIVIL ACTIONS.....		454
CHAPTER 18. The Complaint.....		454
CHAPTER 19. The Demurrer.....		457
CHAPTER 20. The Answer.....		467
CHAPTER 21. The Reply.....		471
CHAPTER 22. General Rules of Pleading.....		474
CHAPTER 23. Amendments and Relief in Case of Mistake.....		490

	TITLE 9	
PROVISIONAL REMEDIES IN CIVIL ACTIONS.....		499
CHAPTER 24. Arrest and Bail.....		499
CHAPTER 25. Attachment.....		527
CHAPTER 26. Claim and Delivery of Personal Property.....		552
CHAPTER 27. Injunction.....		565
Article 1. General Provisions.....		565
Article 2. Injunctions to Abate Certain Nuisances.....		575
CHAPTER 28. Receivership and Other Provisional Remedies.....		584

	TITLE 10	
TRIAL AND JUDGMENT IN CIVIL ACTIONS.....		585
CHAPTER 29. Judgment by Default or upon Frivolous Pleading.....		585
CHAPTER 30. Issues and Mode of Trial.....		588
CHAPTER 31. Trial by Jury.....		599
Article 1. General and Special Verdicts.....		599
Article 2. Drawing and Summoning Jurors.....		607
Article 3. Qualification, Exemption, Empaneling and Pay of Jurors.....		627
Article 4. Objection to Jurors.....		637
Article 5. Miscellaneous Provisions.....		643
CHAPTER 32. Trial by the Court.....		648
CHAPTER 33. Trial by Referee.....		652
CHAPTER 34. Judgments.....		657

	TITLE 11	SEC.
TRIAL AND JUDGMENTS, cont'd.....		665
WITNESSES AND EVIDENCE.....		665
CHAPTER 35. Offer to Compromise.....		665
CHAPTER 36. Agreed Case.....		668
CHAPTER 37. Confession of Judgment.....		670
CHAPTER 38. Admission or Inspection of Writings.....		673
CHAPTER 39. Examination of Parties.....		674
CHAPTER 40. Attendance of Witnesses.....		683
CHAPTER 41. Examination of Witnesses.....		691
Article 1. General Provisions.....		691
Article 2. Examination by Commission.....		693
Article 3. Examination before Clerk and Depositions <i>De Bene</i> <i>Esse</i>		703
CHAPTER 42. Provisions Respecting Methods of Proof.....		709

	TITLE 12	
EXECUTIONS AND PROCEEDINGS SUPPLEMENTARY TO EXECUTIONS.....		737
CHAPTER 43. Executions.....		737
CHAPTER 44. Proceedings Supplementary to Executions.....		746

	TITLE 13	
COSTS IN CIVIL ACTIONS.....		756

	TITLE 14	
APPEALS IN CIVIL ACTIONS.....		771
CHAPTER 45. Appeals in General.....		771
CHAPTER 46. Appeals to the Supreme Court.....		780
CHAPTER 47. Appeals to the Circuit Court from an Inferior Court.....		794

	TITLE 15	
MISCELLANEOUS PROVISIONS RESPECTING CIVIL ACTIONS.....		810
CHAPTER 48. Proceedings against Joint Debtors.....		810
CHAPTER 49. Motions and Orders.....		816
CHAPTER 50. Computation of Time.....		821
CHAPTER 51. Miscellaneous Provisions.....		823

	TITLE 16	
ACTIONS IN PARTICULAR CASES AND EXTRAORDINARY REMEDIES.....		826
CHAPTER 52. Actions against Foreign Corporations.....		826
CHAPTER 53. Substitutes for Scire Facias, Quo Warranto, and In- formations in the Nature of Quo Warranto.....		827
CHAPTER 54. The Writ of Mandamus.....		847

	TITLE 17	
PROCEEDINGS FOR RELIEF OF PERSONS ARRESTED IN CIVIL ACTIONS.....		851

	TITLE 18	
REMEDIES RELATING TO REAL PROPERTY.....		870
CHAPTER 55. Remedies against Guardians, Disseizors, etc.....		870
CHAPTER 56. Forcible Entry and Detainer, and Ejectment of Trespassers.....		885
Article 1. Forcible Entry and Detainer.....		885
Article 2. Summary Ejectment of Trespassers.....		894

	TITLE 19	
DEFINITIONS AND GENERAL PRINCIPLES.....		897

CODE OF CRIMINAL PROCEDURE

TITLE 20

CRIMINAL PROCEDURE

	SEC.
CHAPTER 57. Arrest, Examination, Commitment and Bail.....	907
CHAPTER 58. Jurisdiction of Magistrates and Their Courts.....	922
CHAPTER 59. Criminal Proceedings in Municipalities.....	952
Article 1. General Provisions.....	952
Article 2. Cities between 20,000 and 50,000.....	959
Article 3. Cities of 1,500 and not over 20,000.....	968
Article 4. Towns under 1,000.....	969
Article 5. Recorder, Bennettsville.....	970
Article 6. Recorder's Court for Columbia.....	971
Article 7. Municipal Court in Spartanburg.....	972
Article 8. Recorder, Pageland.....	972-6
CHAPTER 60. Proceedings in Courts of General Sessions.....	973
CHAPTER 61. Procedure Against Corporations.....	989
CHAPTER 62. Rights of Persons Accused.....	993
CHAPTER 63. Indictments and Trials.....	1000
CHAPTER 64. Appeals and New Trials.....	1024
CHAPTER 65. Judgment and Execution.....	1034
CHAPTER 66. The Writ of Habeas Corpus.....	1047
CHAPTER 67. Inquests on the Dead.....	1067

CRIMINAL CODE

TITLE 21

FELONIES AND MISDEMEANORS

CHAPTER 67-A. Offenses against the Government.....	1100-1
CHAPTER 68. Offenses against the Person.....	1101
CHAPTER 69. Offenses against Property.....	1132
CHAPTER 70. Trade Regulations and Offenses Against Public Policy.....	1231
CHAPTER 71. Offenses against the Public Peace.....	1380
CHAPTER 72. Offenses against Public Justice.....	1397
CHAPTER 73. Offenses against Morality and Decency.....	1432
CHAPTER 74. Offenses against Public Health.....	1465
CHAPTER 76. Offenses by Certain Officers.....	1508
CHAPTER 77. Transportation of, and Cruelty to, Animals.....	1593
CHAPTER 78. Bridges, Ferries, Highways and Rules of the Road.....	1604
CHAPTER 79. Offenses by and against Railroad Companies, their Agents and Employees.....	1692
CHAPTER 80. Offenses Relating to Assessment and Collection of Taxes.....	1718
CHAPTER 81. Bastardy and Vagrancy.....	1726
CHAPTER 82. Desecration of the Sabbath and of Religious Worship.....	1732
CHAPTER 83. Gambling.....	1738
CHAPTER 84. Fish and Game.....	1750
Article 1. General Provisions.....	1750
Article 2. Protection of Fish, Oysters, etc.....	1767
Article 3. Protection of Game.....	1777

		SEC.
Article	4. Protection of Fish, Game, etc., in Game Zones and Certain Other Subdivisions.....	1789
CHAPTER	86. Intoxicating Liquors.....	1829
Article	1. Manufacture, Sale, Possession, Transportation and Use	1829
Article	2. Provisions Relating to Sale of Alcohol, Nuisances, Seizures, etc., of Contrabands.....	1864
Article	3. When Unlawful Sell, Buy, Use, Transport and Pos- sess Alcoholic Liquors.....	1910
CHAPTER	88. Offenses Relating to Sailors and Immigrants.....	1924
CHAPTER	89. Accessories and Aiders to Felonies.....	1936

TITLE 22

PRISONS AND IMPRISONMENT

CHAPTER	90. Jails and Prisoners.....	1938
CHAPTER	91. State Penitentiary.....	1961
CHAPTER	92. Correctional Institutions.....	2014
Article	1. South Carolina Industrial School.....	2014
Article	2. John G. Richards Industrial Training School for Negro Boys.....	2021
Article	3. The State Industrial School for Girls.....	2024

CONSTITUTIONS

Constitution of the United States of 1787	1103
Constitution of the State of South Carolina, 1895	1159

COURT RULES

Rules of Practice for the Courts of Probate of South Carolina	1395
Rules of Practice of the Circuit Courts of South Carolina	1399
Rules of the Supreme Court of South Carolina	1432

CODE OF CIVIL PROCEDURE

Definitions and Preliminary Matter

1. Division of remedies.
2. Action.
3. Special proceeding.
4. Division of actions.
5. Criminal action.
6. Civil action.
7. No merger of civil and criminal remedies.
8. Division of Code of Procedure.

§ 1. Division of remedies.—Remedies in the courts of justice are divided into: 1. Actions. 2. Special proceedings.

1932 Code, § 1; Civ. P. '22, § 1; Civ. P. '12, § 1; Civ. P. '02, § 1; 1870 (14) 423, § 1.

Editor's note.—It might be pointed out at this place that the Code of Procedure has made no material changes in the primary rights of parties, or in the different causes of action. The procedure Code has only changed the mode by which redress is reached and applied. See *Anderson v. Lynch*, 37 S. C. 575, 16 S. E. 773.

The changes effected in the mode of redress relate to pleading and its incidents. *Price v. Brown*, 4 S. C. 144. It would serve no good purpose to place under this section a discussion of the cases pertaining to the subject of pleading. That subject is treated fully elsewhere in the Code.

§ 2. Definition of an action.—An action is an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense.

1932 Code, § 2; Civ. P. '22, § 2; Civ. P. '12, § 2; Civ. P. '02, § 1870; (14) 423, § 2.

As to commencement of actions, see § 357 and note thereto.

Editor's note.—For a statement of the distinction between, and the method of applying the remedy for a wrong, and the cause of action, or wrong itself, and the remedy or object of the action, see Bliss on Code Pleading, 3 Ed. § 2.

In general.—The definition of the term "action" as set out in this section has been substantially adopted in all codes of this State. *Henderson v. Hyatt*, 8 S. C. 112.

Nothing constitutes a cause of action under the Code which did not constitute a cause of action at law or suit in equity, prior to the adoption of the Code. *Southern Porcelain Co. v. Thew*, 5 S. C. 5; *Parker v. Jacobs*, 14 S. C. 112.

Illustrations of proceedings regarded as "actions."—This section has often served as a guide-post for the courts when called upon to determine whether the particular procedure adopted by a litigant can be considered an "action" within the meaning of a specific statute. We place below a few of the illustrative cases wherein the definition contained in this section has been applied.—Ed. Note.

"Action" for recovery of real property.—The word action as used in § 374, allowing a plaintiff two "actions" for the recovery of real property, is used in the

same sense as it is defined in the instant section. See *Walsh v. Evans*, 112 S. C. 131, 99 S. E. 546. See, also, *Columbia Water Power Co. v. Columbia Land & Inv. Co.*, 47 S. C. 117, 25 S. E. 48.

For illustration of "actions" for the recovery of real property, the practitioner is referred to § 374, analysis line III, B, 3, b.

Certiorari is a civil action.—Certiorari is not a special proceeding but is a civil action in which disbursement can be taxed against the losing party on appeal. *Smith v. Saye*, 131 S. C. 378, 127 S. E. 568; citing with approval *Rawl v. McCown*, 97 S. C. 1, 81 S. E. 958.

Attachment is incident to an action and is not a special proceeding.—Attachment being a form of process incident to an action, is embraced in the term "action" and is not a special proceeding. *Campbell v. Home Ins. Co.*, 1 S. C. 158; *Allen v. Portlow*, 3 S. C. 417.

An appeal from probate to circuit court upon the merits is an action.—An appeal from the probate court to the circuit court upon the merits is an action and not a special proceeding. *Henderson v. Hyatt*, 8 S. C. 112.

Criminal prosecutions are actions.—Criminal prosecutions are actions. *State v. Reynolds*, 48 S. C. 384, 26 S. E. 679.

Condemnation proceeding is a special proceeding and not an "action," hence

need not be commenced by service of summons and complaint. *Jennings et al. v. Sawyer et al.*, 182 S. C. 427; 189 S. E. 746.

Upon filing summons and complaint in office of clerk of court, they become public documents in public office, and since filing is public and official act in

course of judicial proceedings, which are generally defined as proceedings before court or judge, publication thereof is privileged, if fair and impartial report of such proceedings and without malice. *Lybrand v. The State Co.*, 179 S. C. 208; 184 S. E. 580.

§ 3. Definition of a special proceeding.—Every other remedy is a special proceeding.

1932 Code, § 3; Civ. P. '22, § 3; Civ. P. '12, § 3; Civ. P. '02, § 3; 1870 (14) 423, § 3.

Attachment of a crop under a lien is a special proceeding.—The attachment of a crop under an agricultural lien is a special proceeding under this section, and is not an action. *Johnstone v. Manigault*, 13 S. C., 403, 406; *Sease v. Hobson*, 33 S. C. 234, 11 S. E. 728.

Rule against sheriff for official misconduct is a special proceeding.—A rule

against a sheriff for official misconduct is a special proceeding under this section. *Emory v. Davis*, 4 S. C. 23.

Condemnation proceedings is a special proceeding and not an "action," hence need not be commenced by service of summons and complaint. *Jennings et al. v. Sawyer et al.*, 182 S. C. 427; 189 S. E. 746.

§ 4. Division of actions into civil and criminal.—Actions are of two kinds: 1. Civil. 2. Criminal.

1932 Code, § 4; Civ. P. '22, § 4; Civ. P. '12, § 4; Civ. P. '02, § 4; 1870 (14) 423, § 4.

§ 5. Definition of a criminal action.—A criminal action is prosecuted by the State, as a party, against a person charged with a public offense, for the punishment thereof.

1932 Code, § 5; Civ. P. '22, § 5; Civ. P. '12, § 5; Civ. P. '02, § 5; 1870 (14) 423, § 5.

Criminal prosecutions are actions.—*State v. Reynolds*, 48 S. C. 384, 26 S. E. 679.

§ 6. Definition of a civil action.—Every other is a civil action.

1932 Code, § 6; Civ. P. '22, § 6; Civ. P. '12, § 6; Civ. P. '02, § 6; 1870 (14) 423, § 6.

For illustrations of "actions" see § 2 and the note thereto.

Depositions as provided for in the Civil Code can only be used as evidence in civil actions including special

proceedings as distinguished from criminal actions as defined in §§ 1 to 6. In *re Perceval's Estate*, 108 S. C. 39, 40, 93 S. E. 243.

§ 7. Civil and criminal remedies not merged in each other.—Where the violation of a right admits of both a civil and criminal remedy, the right to prosecute the one is not merged in the other.

1932 Code, § 7; Civ. P. '22, § 7; Civ. P. '12, § 7; Civ. P. '02, 7; 1870 (14) 423, § 7.

Criminal prosecution cannot be shown in mitigation of damages in civil suit.—In a civil action for assault and battery

a criminal prosecution cannot be given in mitigation of damages. *Edwards v. Wessinger*, 65 S. C. 161, 164, 43 S. E. 518

§ 8. Division of the Code of Procedure.—This code of procedure is divided into two parts: the first relates to courts of justice and their jurisdiction; the second relates to civil actions in the courts of this State.

1932 Code, § 8; Civ. P. '22, § 8; Civ. P. '12, § 8; Civ. P. '02, § 8; 1870 (14) 423, § 8.

Second part of Code applies to court of common pleas unless express reference made to inferior courts.—The second part of the Code applies only to the court of common pleas except where ex-

press reference is made to the inferior courts. *Doty & Co. v. Duvall*, 19 S. C. 143.

Thus, nothing in this section should be construed so as to affect the operation

of § 692 of this Code. *State v. Kennedy*, 85 S. C. 146, 67 S. E. 152. The provisions of § 692 expressly apply also to criminal actions. *State v. Reynolds*, 48 S. C. 384, 26 S. E. 679.

On appeal from magistrate's court a circuit court may not consider affidavits

in criminal action.—The circuit court in hearing appeals from the magistrate's court based on alleged error of fact, may not consider affidavits as such practice relates only to civil actions under this section. *State v. Richardson*, 98 S. C. 147, 82 S. E. 353.

PART 1

Courts of Justice and Their Jurisdiction

TITLE 1

Designation of Courts of Justice

§ 9. The several courts of the State.—The following are courts of justice in this State:

1. The court for trial of impeachments.
2. The Supreme Court.
3. The circuit courts, to wit: (1) A court of common pleas; and (2) A court of general sessions.
4. County courts.
5. Probate courts.
6. Magistrates courts.
7. Civil and criminal court of Charleston.
8. City court and police court of Charleston.
9. Mayors and municipal courts.

1932 Code, § 9; Civ. P. '22, § 9; Civ. P. '12, § 9; Civ. P. '02, § 9; 1870, 423, § 9; Const. Art. V, 1; 1903 (24) 89; 1911 (27) 16.

§ 10. Their jurisdiction generally.—These courts shall exercise the jurisdiction now vested in them respectively, except as otherwise prescribed by this code of procedure or the laws of the State.

1932 Code, § 10; Civ. P. '22, § 10; Civ. P. '12, § 10; Civ. P. '02, § 10; 1870, 423, § 10; 1903 (24) 89; 1911 (27) 16.

TITLE 2

Courts and Judicial Officers

- CHAPTER 1. The Supreme Court, § 11.
- CHAPTER 2. The Circuits Courts, § 33.
- CHAPTER 3. County Courts, § 75.
- CHAPTER 4. Probate Court, § 205.
- CHAPTER 4-A. Courts of Domestic Relations, § 256-1.
- CHAPTER 5. Courts of Magistrates, § 257.
- CHAPTER 6. Civil and Criminal Court of Charleston, § 276.
- CHAPTER 7. The City Court and the Police Court of Charleston, § 289.
- CHAPTER 8. Attorneys, Solicitors and Counsellors, § 312.
- CHAPTER 9. General Provisions Respecting the Administration of Justice, § 334.

CHAPTER 1

The Supreme Court

ARTICLE 1. The Supreme Court and Its Officers, § 11.

ARTICLE 2. The Supreme Court and Its Jurisdiction, § 26.

ARTICLE 1

The Supreme Court and Its Officers

- | | |
|------------------------------|--------------------------------|
| 11. Justices. | 19. Salaries of justices. |
| 12. Quorum. | 20. Vacancies. |
| 14. Qualification. | 21. Special justices. |
| 15. Court of record. | 22. Roster of circuit judges. |
| 16. Messenger and attendant. | 23. Service of process. |
| 17. Clerk. | 24. Reports. |
| 18. Reporter. | 25. Costs in original actions. |

§ 11. Justices—election—term—quorum.—The Supreme Court shall consist of a Chief Justice and four associate justices, who shall be elected by a joint viva voce vote of the General Assembly for the term of ten years and shall continue in office until their successors are elected and qualified and shall be so classified that one of them shall go out of office every two years. The successors of the Chief Justice and associate justices shall each be elected at the session of the General Assembly next preceding the expiration of their respective terms. The time for the commencement of the terms of office shall be the first day of August after their election. In the absence of the Chief Justice, the justice oldest in service and present shall preside. If at any stated term of the court a quorum thereof shall not attend on the first day of the term, the justice or justices attending shall have the authority to adjourn the court from day to day for ten days after the time appointed for the commencement of said term, unless a quorum shall sooner attend; or unless a sufficient number of men learned in the law, commissioned by the Governor, as provided in section 21, to make a quorum shall sooner attend; and the business of the court shall not in such case be continued over to the next stated term thereof, until the expiration of said ten days.

1941 (42) 120.

§ 12. Quorum—adjournment—attendance—Chief Justice presides.—Any three of the justices shall constitute a quorum. It shall be the duty of all the justices to be present, and the Chief Justice shall preside.

1932 Code, § 11; Civ. P. '22, § 11; Civ. C. '12, § 3815; Civ. C. '02, § 2721; Const. Art. V. § 2; 1896 (22) 3; 1941 (42) 120.

§ 14. Qualification.—The justices of the Supreme Court shall qualify within twelve months after the date of their election by taking the constitutional oath or the office shall be declared vacant by the Governor. The oath shall be administered by a justice of said court or by a circuit judge.

1932 Code, § 14; Civ. P. '22, § 14; Civ. C. '12, § 3818; Civ. C. '02, § 2722; G. S. 2090; R. S. 2222; 1896 (22) 3.

§ 15. Court of record.—The Supreme Court shall be a court of record, and the records thereof shall at all times be subject to the inspection of the citizens of the State or other persons interested. The records shall be kept in a manner prescribed by the justices of the court.

1932 Code, § 15; Civ. P. '22, § 15; Civ. C. '12, § 3819; Civ. C. '02, § 2723; G. S. 2091; R. S. 2223; 1896 (22) 3.

§ 16. Messenger—attendant—librarian.

(1) **Messenger—attendant—salaries.**—The Supreme Court shall appoint a messenger of the court, and an attendant, to hold for the term of four years, and subject to removal by the court, and shall prescribe the duties of the officers so appointed. The messenger shall receive an annual salary of two hundred dollars. The attendant shall receive a salary of two hundred dollars.

(2) **Librarian.**—The library of the Supreme Court shall be in the custody and care of the clerk of said court, who shall annually, with the consent and approval of the court, employ some suitable person, as a departmental clerk, to care for and attend in the library and perform such duties with reference thereto as may be prescribed by the court. The librarian so employed may be discharged by order of the court at any time, and shall receive such compensation as may be provided by law. Any woman who has attained the age of twenty-one years, and has been a resident of this State for two years may be employed as such librarian.

1932 Code, § 16; Civ. P. '22, § 16; Civ. C. '12, § 3820; Civ. C. '02, § 2724; G. S. 2094; R. S. 2226; 1896 (22) 3; 1918 (30) 788.

§ 17. Clerk—fees and salary.—The Supreme Court shall also appoint a clerk, who shall hold his office for four years, and who shall have the custody and keeping of its records, and shall furnish certified copies thereof to persons desiring the same, upon the payment of the fees prescribed by law. And he shall receive a fee of fifty cents for each remittitur in civil cases, to be taxed as their costs and disbursements, and a similar fee for each certificate. His salary shall be eight hundred dollars per annum, to be paid out of the state treasury, on the warrant of the comptroller general.

1932 Code, § 17; Civ. P. '22, § 17; Civ. C. '12, § 3821; Civ. C. '02, § 2725; R. S. 2234 thru 2236; G. S. 2109 thru 2111; 1896 (22) 3.

Increase in appropriation held an increase in salary.—Where the annual appropriation for the salary of the clerk provided for a larger amount than fixed by statute it was held that all acts and

parts of acts inconsistent therewith were repealed and that the intent was to pay the clerk the amount provided for in the appropriation. *Brooks v. Jones*, 80 S. C. 443, 61 S. E. 946.

§ 18. Reporter to be appointed—duties—committee on publication of reports—alternative contracts.—The Supreme Court shall appoint a reporter for the term of four years, who shall take the constitutional oath before any one of the justices or the clerk of the Supreme Court. The clerk of the Supreme Court of this State is hereby required, upon the rendition of an opinion by the Supreme Court, to deliver forthwith to the reporter of said court a certified copy of all such decisions made by the court, together with a copy of the printed arguments and the brief of counsel, for use in publishing the South Carolina Reports, as hereinafter provided; should any copies furnished by the said clerk be used in the publication of any other reports than the official series of South Carolina Reports, the publisher shall pay

the said clerk the fees now provided by law for copies of opinions. The Speaker of the House of Representatives and the President of the Senate are hereby authorized and required to appoint a committee of three, composed of two members of the House of Representatives, to be appointed by the Speaker, and one member of the Senate, appointed by the President of the Senate, which committee shall contract for five years at a time for the prompt editing, publishing and distribution of the said opinions and bound volumes thereof; shall contract with the reporter of the Supreme Court to edit the reports of the cases decided by the Supreme Court, and with a competent publisher and printer, to print and distribute the same promptly.

The reports of the decisions shall contain at least such matter as is now found in the South Carolina Reports including a syllabus of the decisions, citations, statements of the testimony and pleadings sufficient to give an understanding of the case and the decision of the court, and an alphabetical list (at the end of the volume) of all cases mentioned in any way in the decisions, and a full and complete digest and index to the contents of the volume. Each volume shall contain not more than one thousand pages, exclusive of index.

1932 Code, § 18; Civ. P. '22, § 18; Civ. C. '12, § 3822; Civ. C. '02, § 2726; G. S. 2102 thru 2108; R. S. 2237 thru 2241; 1896 (22) 3; 1901 (23) 622; 1920 (31) 1049; 1929 (36) 52.

§ 19. Salaries.—The Chief Justice and associate justices, who are elected after the 14th day of March, 1935, shall each receive an annual salary of six thousand seven hundred and fifty (\$6,750.00) dollars a year and shall not be allowed any fees or perquisites of office, nor shall they hold any other office of trust or profit under the State, the United States or any other power.

1932 Code, § 19; Civ. P. '22, § 19; Civ. C. '12, § 3823; Civ. C. '02, § 2727; G. S. 2088; R. S. 2220; 1901 (23) 622; 1905 (24) 845; 1917 (30) 131; 1919 (31) 101; 1928 (35) 1237; 1935 (39) 88.

§ 20. Vacancies.—All vacancies in the Supreme Court shall be filled by elections as herein prescribed: *provided*, that if the unexpired term does not exceed one year such vacancy may be filled by executive appointment, but when a vacancy is so filled by either appointment or election the incumbent shall hold only for the unexpired term of his predecessor.

1932 Code, § 20; Civ. P. '22, § 20; Civ. C. '12, § 3824; Civ. C. '02, § 2728; G. S. 2088; R. S. 2220; 1901 (23) 622.

§ 21. Disqualified in certain cases—special justices.—No justice shall preside in any case or at the hearing thereof, in which he may be interested, or when either of the parties shall be connected with him by affinity or consanguinity within the sixth degree, or in which he may have been counsel, or has presided in any inferior court. In case all or any of the justices of the Supreme Court shall be thus disqualified, or be otherwise prevented from presiding in any cause or causes, the court, or the justices thereof, shall certify the same to the Governor of the State, and he shall immediately commission specially the requisite number of men learned in the law for the trial and determination thereof. When such appointments are made by the Governor, such person or persons shall receive as compensation for their services while so acting as associate justice of the Supreme Court for the time actually engaged in performing such services, the same salary allowance and expenses and stenographic hire as an associate justice

of the Supreme Court would receive for the same period. Such salary and expense allowance shall be figured in the ratio that the number of days such associate justice is actually engaged in sitting with the court bears to the number of days that the court is actually in session during the year, except that in the event such acting associate justice shall sit and hear only one cause, he shall receive only fifty per cent of the salary and allowances herein fixed. The same to be paid upon a voucher approved by the Chief Justice.

1932 Code, § 21; Civ. P. '22, § 21; Civ. C. '12, § 3825; Civ. C. '02, § 2729; Const. Art. V, 6 and 12; 1887 (19) 85; 1926 (34) 1040.

Sections 13 to 20, and 23 and 24 of the act of 1896 (22) 3, pertaining to the organization of the Supreme Court and referring to its jurisdiction and procedure therein, were transferred to §§ 26 to 29 in the Code of 1922 and are now embodied in §§ 26, 27 and 30 of this Code.

Objection as to disqualification must be made at the trial.—The objections as to consanguinity and affinity as provided for under this section must be made at the time of the trial. *Town v. Leake*, 71 S. C. 22, 50 S. E. 541.

§ 22. Assignment of roster of circuit judges—duties of clerk—compensation.—Between the first and fifteenth days of December in each year the Chief Justice, or in his absence or inability to attend, the senior associate justice, shall form a roster of the circuit judges of the several circuits in order to arrange a regular and continuous assignment and interchange of circuits among said judges, and make an order assigning the several circuit judges to hold the several circuit courts in all of the circuits of the State for the whole of the succeeding year in such order as will effect a continuous interchange of circuits according to said numerical series. Immediately thereupon the Chief Justice, or, in his absence or inability to act, the senior associate justice, shall direct the clerk of the Supreme Court to furnish each of the circuit judges, as well as the Chief Justice and senior associate justice, with a certified copy of said order, which shall be sufficient notice to the said circuit judges of their assignment aforesaid, and they shall proceed to hold the courts in the circuits to which they are respectively assigned at the time appointed by law for the several circuit courts to be held, and the clerk of the Supreme Court shall also forthwith transmit a certified copy of said order to the clerk of every circuit court of the State. As a compensation for the services thus required of the clerk of the Supreme Court, he shall be entitled to draw from the state treasurer, upon the warrant of the comptroller general, who is hereby directed to issue the same, the sum of ten dollars, to be paid out of any money in the state treasury not otherwise appropriated.

1932 Code, § 22; Civ. P. '22, § 22; Civ. C. '12, § 3826; Civ. C. '02, § 2730; 1896 (22) 3.

§ 23. Sheriffs serve process, etc.—The Supreme Court is empowered to require the sheriff of each and every county to whom any order or process issuing from said court may be directed to serve and execute the same, and shall have the same power to enforce such service and execution and to punish default thereon as is vested in circuit courts in processes issuing therefrom. The sheriff and clerk of each and every county, whenever required, shall attend any hearing in any case by any of the justices at the court house in any of the counties.

1932 Code, § 23; Civ. P. '22, § 23; Civ. C. '12, § 3827; Civ. C. '02, § 2731; 1896 (22) 3.

§ 24. Distribution of reports.—The state librarian shall distribute the

copies of the reports of the decisions of the Supreme Court of South Carolina purchased by the State as follows: to the office of the Governor of the State, of the attorney general of the State and of the attorney general of the United States, one copy each; to the circuit judges of the State, one copy each; to the library of the Supreme Court of the United States, the clerk of the circuit court of appeals of the United States for the fourth circuit, the library of the South Carolina University, the Charleston library society, and the clerk of the district court of the United States for the districts of South Carolina, one copy each; to the library of the Supreme Court of this State, eight copies; to every State and Territory of the United States from which the State receives two or more copies of each volume of their law reports, two copies each; and to every other State and Territory of the United States, one copy each; and all copies of South Carolina Reports, not heretofore disposed of and not distributed under the provisions of this section, shall be retained in the state library for the use of this State.

1932 Code, § 24; Civ. P. '22, § 24; Civ. C. '12, § 3828; Civ. C. '02, § 2732; G. S. 2107; R. S. 2242; 1880 (17) 533; 1908 (25) 1128; 1917 (30) 64; 1936 (39) 1350.

See § 2109 for copies send Library of Congress.

§ 25. Costs and disbursements in actions brought in original jurisdiction.

—In all actions and proceedings brought in the Supreme Court in its original jurisdiction, the court shall have the power to provide, by rule, order or otherwise, for the payment of reasonable costs and disbursements of the case by the losing party, or otherwise, as in the judgment of the court may be just and proper, such costs and disbursements to be taxed and adjusted by the clerk of said court under direction of the court; when the clerk has taxed such costs and disbursements under the direction of the court, he shall certify the taxation to the clerk of the court of common pleas for the county in which the party resides against whom such costs and disbursements have been taxed; the said clerk of the court of common pleas shall enter judgment therefor, as other judgments are entered, and shall issue execution for the enforcement of said judgment; the judgment so entered shall have the same force and effect in all respects as judgments rendered by the court of common pleas.

1932 Code, § 25; Civ. P. '22, § 25; Civ. '12, § 3829; 1909 (26) 162; 1941 (42) 140.

ARTICLE 2

The Supreme Court and Its Jurisdiction

26. Jurisdiction.

27. Powers on appeal.

28. Terms.

29. Printing of testimony.

30. Number to concur.

31, 32. Place of holding court.

§ 26. Jurisdiction of Supreme Court.

(A) **Remedial and original writs.**—The Supreme Court shall have power to issue writs or orders of injunction, mandamus, quo warranto, prohibition, certiorari, habeas corpus and other remedial and original writs: each of the justices of the Supreme Court shall have the same power at chambers, to administer oaths, issue writs of habeas corpus, mandamus, quo warranto,

certiorari, prohibition and interlocutory writs or orders of injunction as when in open court: *provided*, an appeal shall be allowed from his decision to the Supreme Court.

(B) Where issues of fact arise.—Whenever in the course of any such action or proceeding in the Supreme Court, arising in the exercise of the original jurisdiction conferred upon the court by the Constitution and laws of the State, an issue of fact shall arise upon the pleadings, or when an issue of fact shall arise upon a traverse to return in mandamus, prohibition, certiorari, or whenever the determination of any question of fact shall be necessary to the exercise of the jurisdiction conferred upon the Supreme Court, the said court shall have power to frame an issue therein and certify the same to the circuit court for the county wherein the cause shall have originated, or in case of original jurisdiction to the circuit court of the county in which the cause of action shall have arisen. The Supreme Court shall also have the same powers as are now possessed by the circuit court of the State for the appointment of referees to take testimony and report thereon, under such instructions as may be prescribed by said court, in any cases arising in the Supreme Court wherein issues of fact shall arise.

(C) Appellate jurisdiction in chancery.—The Supreme Court shall have appellate jurisdiction only in cases of chancery, and in such appeals they shall review the findings of fact as well as the law, except in chancery cases when the facts are settled by a jury and the verdict not set aside.

(D) Appellate jurisdiction in law cases.—The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:

(1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process, or removed there from any inferior court or jurisdiction, and final judgments in such actions: *provided*, if no appeal be taken until final judgment is entered, the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from.

(2) An order affecting a substantial right made in an action, when such order in effect determines the action and prevents a judgment from which an appeal might be taken, or discontinues the action, and when such order grants or refuses a new trial; or when such order strikes out an answer or any part thereof, or any pleading in any action; upon any appeal from an order granting a new trial on a case made, or on exceptions taken, if the Supreme Court shall determine that no error was committed in granting the new trial, it shall render judgment absolute upon the right of the appellant; and after the proceedings are remitted to the court from which the appeal was taken, an assessment of damages, or other proceedings to render the judgment effectual, may be then and there had in cases where such subsequent proceedings are requisite.

(3) A final order affecting a substantial right made in any special proceeding, or upon a summary application in any action after judgment, and upon such appeal to review any intermediate order involving the merits and necessarily affecting the order appealed from.

(4) An interlocutory order or decree in the court of common pleas, granting or continuing or modifying or refusing an injunction, or else granting or continuing or modifying or refusing the appointment of a receiver hereafter granted in any action: *provided*, that the notice of ap-

peal must be given within ten days from written notice of the filing of such interlocutory order or decree; and such appeal shall take precedence in the Supreme Court; and the proceedings in other respects in the court below shall not be stayed during the pendency of such appeal unless otherwise ordered by the court below.

1932 Code, § 26; Civ. P. '22, § 26; Civ. P. '12, § 11; Civ. P. '02, § 11; 1896 (22) § 1; 1901 (23) 623.

- I. Editor's Note.
- II. Subdivision (A).
- III. Subdivision (B).
- IV. Subdivision (C).
- V. Subdivision (D).
- A. General Considerations.
- B. Subsection (1).
- 1. Judgment or order "involving the merits."
- a. Rules stated.
- b. Illustrations.
- (1) Judgment or order "Involving the merits."
- (2) Judgment or order not "involving the merits."
- C. Subsection (2).
- 1. In general.
- 2. Judgment or order affecting a "substantial right."
- 3. Order granting or refusing new trial.
- D. Subsection (3).
- E. Subsection (4).

I. EDITOR'S NOTE.

There have been few cases which construe subdivisions A, B and C of this section. Most of the decided cases, wherein this section has been cited, deal primarily with one or more of the subsections contained in subdivision D. For the purpose of clarity each subdivision has been treated under a separate analysis line.

The annotations to this section have, in the main, been confined to the general principles gathered from the decided cases. A fair number of illustrations to each of the principles is also given in the following note. It is the hope of the editor that the general principles and illustrations set out in the following note will serve as a helpful guide in the construction of the provisions of this section.

II. SUBDIVISION (A).

Special damages must be shown before granting mandamus. — Mandamus will not be granted to compel the removal of dam obstructing a navigable stream unless the plaintiffs show special damages resulting to them, or damages other than naturally result to the general public. *State v. Charleston Light and Water Co.*, 68 S. C. 540, 47 S. E. 979.

Certiorari is enforceable against Governor where acting as judicial tribunal. — The Supreme Court has jurisdiction to enforce a writ of certiorari against the

Governor in a case in which he is created a judicial tribunal by the General Assembly. *State ex rel. Rawlinson v. Ansel*, 76 S. C. 395, 57 S. E. 185.

But certification of record of acts purely executive is not enforceable by certiorari. — The Supreme Court has no jurisdiction by certiorari to require the Governor to certify to it the record of acts which are purely executive and not judicial. *State ex rel. Rawlinson v. Ansel*, 76 S. C. 395, 57 S. E. 185.

Application for injunction vs. receiver proper in original jurisdiction of Supreme Court. — Supreme Court's order directing that industrial corporation's property in receivership be sold as going concern and negating applicability of statute providing that bidding in case of judicial sale of realty remain open for thirty days, was law of case, authorizing injunction proceedings in original jurisdiction of Supreme Court to restrain receivers from announcing at sale that statute applied. *Montgomery Crawford, Inc., et al. v. Arcadia Mills, et al*, 174 S. C. 252; 177 S. E. 151.

Single justice of Supreme Court has power to issue writ in court's original jurisdiction and make it returnable to court as whole. *King, Insurance Commissioner, v. Aetna Ins. Co. et al*, 168 S. C. 84, 167 S. E. 12.

Original proceeding by insurance commissioner for construction of statute and for injunction to prevent foreign fire insurance companies from doing business in state without complying with statute, is within jurisdiction of Supreme Court, as involving "public interests" and "special grounds of emergency," where federal court granted stay pending state court's decision. *Ibid.*

Proceeding in Supreme Court by summons and complaint instead of upon rule issued by court is irregular, but irregularity waived in view of grave emergency affecting a county. *Clary, County Supervisor, et al. v. Harvey, County Auditor*, 176 S. C. 512; 180 S. E. 673.

Proceedings for injunction. — As to proceedings for injunction in original jurisdiction, see *British American Mortgage Co. v. Jones*, 76 S. C. 218, 56 S. E. 983; *Dillingham v. Spartanburg*, 75 S. C. 549, 56 S. E. 381, 117 Am. St. Rep. 917.

For full treatment of the subject of in-

junction, see § 565, et seq. and the note thereto.

III. SUBDIVISION (B).

Issue of title may be certified for jury trial.—If in a case for an injunction to remove a cloud on a title it becomes necessary to settle an issue of title, the Supreme Court may under this section certify that issue to the circuit court to be tried by a jury. *Trustees of the University v. trustees of the Academy*, 85 S. C. 546, 67 S. E. 951.

Referee may take testimony of party refusing to make affidavit.—The Supreme Court has power to appoint a referee to take the testimony of a party declining to make an affidavit in proceedings before it. *State v. Marks*, 70 S. C. 448, 50 S. E. 14.

IV. SUBDIVISION (C)

Burden of proof is on appellant.—In equity cases the appellant has the burden of showing that the findings of the appellate court were against the preponderance of the evidence. *Boatwright v. Crosby*, 83 S. C. 190, 65 S. E. 174, 175; *Tindall v. Sublett*, 82 S. C. 199, 63 S. E. 960.

Error as to refusal of new trial involving issues of fact not reviewable.—Exceptions assigning error in the refusal of a motion for a new trial in a chancery case which merely involve questions of fact cannot be reviewed by the Supreme Court. *Tindal v. Sublett*, 82 S. C. 199, 63 S. E. 960.

V. SUBDIVISION (D).

A. General Considerations.

Connotation of the word "cases."—The word "cases" is used as comprehending special proceedings as contradicting distinguished from "actions." *Sease v. Dobson*, 36 S. C. 554, 15 S. E. 703.

Jurisdiction of Supreme Court over appeals from a city court is exclusive.—The jurisdiction of the Supreme Court over appeals from a city court is exclusive. *City Council v. Weller*, 34 S. C. 357, 13 S. E. 628.

And the absence of special provision as to jurisdiction does not affect the jurisdiction of such court.—The absence of a provision conferring jurisdiction to review appeals from a city court does not affect the jurisdiction of the Supreme Court. *City Council v. Weller*, 34 S. C. 357, 13 S. E. 628.

Appeals from a justice of same nature as appeals from the circuit court.—Appeals from a justice are of the same nature as appeals from the circuit court. *Western Union Tel. Co. v. Winnsboro*, 72 S. C. 42, 43, 51 S. E. 528.

Appeal from intermediate order leaving unaffected a former order is conclusive of appeal from the former order.—An appeal from an intermediate order leaving unaffected a former order is

conclusive of appeal from the former order. *Pringle v. Sizer*, 7 S. C. 131.

Appeal suspends further proceedings below.—An appeal from an order overruling a demurrer to the complaint because it did not state facts sufficient to constitute a cause of action stayed further proceedings below during the pendency of the appeal. *Hammond v. Railroad Co.*, 15 S. C. 10, 35; cited with approval in *National Exch. Bank v. Stelling*, 32 S. C. 102, 10 S. E. 766.

An appeal will not lie from a verdict when no judgment or order has been predicated thereon.—It has been held frequently that an appeal will not lie from a verdict of a jury on certain matters submitted to them but on which verdict no order or judgment has been predicated. *Broch v. Kirkpatrick*, 69 S. C. 231, 48 S. E. 72. See also, *All v. Hiers*, 59 S. C. 557, 38 S. E. 157; *Hutmacher v. Charleston Consol. Co.*, 63 S. C. 123, 40 S. E. 1029.

B. Subsection (1).

1. Judgment or order "Involving the Merits."

a. Rules Stated.

"Merits" includes all rights to which party is entitled.—The term "merits" is not very clearly defined. It certainly embraces more than the questions of law and fact, constituting the cause of action or defense. The word "merits" naturally bears the sense of including all that the party may claim of right in reference to his case. *Blakely v. Frazier*, 11 S. C. 122, 134.

The terms "involving the merits" and "necessarily affecting the judgments" are equivalent. *Blakely v. Frazier*, 11 S. C. 122. The terms must be regarded as different definitions of the same case. *Id.*

But order to "involve merits" must determine some substantial matter.—An order to involve the merits must finally determine some substantial matter forming the whole or a part of some cause of action or defense in the case in which the order is entitled. If the order merely affects the form of procedure, it does not involve the merits. *Henderson v. Wyatt*, 8 S. C. 112. The erroneous order must decide some point that goes to the very root of the matter involved. *Sease v. Dobson*, 34 S. C. 345, 13 S. E. 530, and the authorities therein cited.

It may be concluded that whenever a substantial right of the party to an action material to obtaining a judgment in such action is denied, a right of appeal lies to the Supreme Court. *Blakely v. Frazier*, 11 S. C. 122, 135.

And must not be mere exercise of court's discretion.—An order involving merely the exercise of discretion on the part of the court making it is not ap-

pealable, as error of law cannot be alleged against such an order. *Blakely v. Frazier*, 11 S. C. 122, 134; *Deal v. Deal*, 85 S. C. 262, 67 S. E. 241, 242.

Intermediate order affecting final judgment reviewable with final judgment.—An order intermediate in its nature and involving the merits of the case is reviewable on appeal from the final judgment, under subdivision (1), as an intermediate order of decree necessarily affecting the judgment. *McMaster v. Ford Motor Co.*, 122 S. C. 244, 115 S. E. 244. See *Hyatt v. McBurney*, 17 S. C. 143, 150; *Lee v. Fowler*, 19 S. C. 607.

In the dissenting opinion in the case of *Bodie v. Charleston & W. C. Ry. Co.*, 66 S. C. 302, 44 S. E. 943, it was said in construing this provision that where no notice of the appeal was given, and no exceptions taken at the time the intermediate order was made an appeal from such intermediate order may be taken along with the final judgment appealed from.

An order of the court that the report of a certain referee be printed is not a rule of the court so as to come under the Code for a payment of such printing and such an order is one affecting the judgment, and may be reviewed upon an appeal from the final judgment. *Scott v. Alexander*, 27 S. C. 15, 2 S. E. 706.

And it is better practice to await appeal from final judgment.—In *Capell v. Moses*, 36 S. C. 559, 15 S. E. 711, it is said that the better practice is to await appeal from final judgment and then have reviewed errors and defects in intermediate and interlocutory orders. The court further said that it is only in exceptional cases that an appeal from an intermediate or interlocutory order is viewed with favor.

b. Illustrations.

(1) Judgments or Order "Involving Merits."

An order setting aside a verdict without notice to successful party.—An order setting aside a verdict for the plaintiff without notice to him is an order which involves the merits and is reviewable before final judgment. *Williams v. Charleston*, 7 S. C. 71.

And an order refusing an oral demurrer involves the merits.—An order overruling an oral demurrer is an order involving the merits and hence reviewable. *Elliott v. Rollitzer*, 24 S. C. 81, 86. See also, *McCown v. McSween*, 29 S. C. 130, 7 S. E. 45.

Order refusing to change place of trial.—An order refusing to change the place of trial to the county where the defendant resides is an order involving the merits and hence reviewable before judgment. *Blakely v. Frazier*, 11 S. C. 122.

For statutory grounds for change of place of trial, see § 426 and the note thereto.

Order refusing to allow amendment upon legal grounds.—Although applications to amend pleadings are addressed to the discretion of the trial court yet where the refusal is based, not upon discretion, but upon legal grounds, an appeal will lie under this subdivision. *Sibley v. Young*, 26 S. C. 415, 2 S. E. 314.

An appeal from an order of reference on jurisdictional grounds may be had.—An appeal which raises a jurisdictional question may be taken from an order referring the case to a master to take testimony before the entry of a final judgment. *Simms v. Phillips*, 46 S. C. 149, 24 S. E. 97.

Order allowing an appeal from a verdict of a jury in an inferior court.—An order allowing an appeal to the court of common pleas from the verdict of a jury impaneled in an inferior jurisdiction is an order involving the merits within subsection 1. *Atlantic Coast Line R. Co. v. South Bound R. Co.*, 57 S. C. 317, 35 S. E. 553.

Order adjudging a person party to an action appealable.—An order adjudging that a person has been made a party to an action is appealable under subdivision (1). *National Exch. Bank v. Stelling*, 32 S. C. 102, 10 S. E. 766.

Order depriving party of legal mode of trial.—An order of reference that deprives a party of a mode of trial which the law allows him is an order which involves the merits and is appealable under this section. *Ferguson v. Harrison*, 34 S. C. 169, 13 S. E. 332; *McLaurin v. Hodges*, 43 S. C. 187, 20 S. E. 991; *Alston v. Limehouse*, 61 S. C. 1, 39 S. E. 192.

2. Judgment or Order Not "Involving the Merits."

Order denying motion to make pleading more definite.—An order denying a motion to require plaintiff to make more definite and certain his bill of complaint does not go to the merits. *Hawkins v. Wood*, 60 S. C. 521, 39 S. E. 9, 10. But an order denying a motion to make more definite a complaint by stating the causes of action separately, when the allegations are appropriate to two or more causes of action does affect the merits. *Blakely v. Frazier*, 11 S. C. 122. See also on this point, *Fladger v. Beckman*, 42 S. C. 547, 20 S. E. 790; *Pickett v. Fidelity & Casualty Co.*, 52 S. C. 584, 30 S. E. 614.

An order denying a motion to require the plaintiff to make his complaint more definite is not appealable until final judgment. *Fladger v. Beckman*, 42 S. C. 547, 20 S. E. 790, cited with approval in *Males v. Charleston Light & Water*

Co., 87 S. C. 254, 69 S. E. 292.

Order allowing an amendment to a complaint.—An order allowing an amendment to a complaint was held not to affect the merits of the case in the case of Buist v. Williams, 83 S. C. 321, 65 S. E. 343.

Order extending time for service of exceptions.—An order extending the time for serving the case and exceptions on appeal is not appealable under any of the subdivisions of this section. Deal v. Deal, 85 S. C. 262, 67 S. E. 241.

Order docketing a legal action.—An order docketing a legal action to which an equitable defense was interposed, on calendar 2, for the purpose of having the equitable defense tried by the court when it was already docketed on calendar 1, did not involve the merits and hence is not appealable under the section. Knox v. Campbell, 52 S. C. 461, 30 S. E. 485.

Order allowing reference in chancery suit.—An order of reference in an action to set aside a deed and mortgage on the grounds of fraud, when the pleading shows the question raised to be equitable in character, and it appears that the order was made after full statements by counsel is not appealable under subsection 1, nor under subsections 2 or 3. Ferguson v. Harrison, 34 S. C. 169, 13 S. E. 332. See, also, Brock v. Kirkpatrick, 69 S. C. 231, 48 S. E. 72.

Where a decree of foreclosure and an order of sale are made, and a reference to a master is made in order to ascertain the amount due and the defendant noted an appeal which was dismissed because the notice was not given in proper time it was held that no appeal would lie from an order by a succeeding judge confirming the report of the master, and ordering the sale, when no error is charged as to the report or order of confirmation, as the first decree was conclusive of every issue involved in the action. Wallace v. Carter, 32 S. C. 314, 11 S. E. 97.

An order of reference, the purpose of which is to take proof of claims against an insolvent partnership to close up its affairs, before a master, not involving the merits of any issue embraced in the case is not appealable under this subdivision. Jones v. Trumbo, 29 S. C. 26, 6 S. E. 887. See also, Palmetto v. Risley, 25 S. C. 309.

Order denying a reference to master in chancery suit.—A reference for the purpose of taking testimony is not demandable as a matter of right in any equity cause, hence an order denying such reference does not involve the merits of the action within subsection 1, nor does it affect any substantial right of

the appellant within subsection 2, hence such order is nonappealable. Farmer's Mut. Inc. Co. v. Berry, 53 S. C. 129, 31 S. E. 53.

Order allowing appeal from inferior court.—Where an appeal is allowed by a circuit court from the verdict of a jury in a proceeding to condemn land for a right of way such order of the circuit court in allowing the said appeal involves the merits of the case and affects the substantial rights of the parties, hence it can be reviewed on appeal under this subdivision. Atlantic Coast Line R. Co., v. South Bound R. Co., 57 S. C. 317, 35 S. E. 553.

Interlocutory order of injunction.—An interlocutory injunction made solely for the purpose of keeping the subject of the action in status quo until the merits of the action can be considered and determined, determines none of the rights of the parties to the action but simply prevents any interference with the subject of the action until those rights can be considered and adjudicated. Such order does not involve the merits and is unappealable under this subdivision. Garlington v. Copeland, 25 S. C. 41.

Interlocutory order directing seizure of property.—An interlocutory administrative order directing the sheriff to seize property in a claim and delivery action out of his county, does not involve the merits, hence is not appealable under this section. Easterling v. Odom, 98 S. C. 171, 82 S. E. 407.

Order discharging clerk for refusing to enter judgment.—An order discharging the clerk on rule for refusing to enter judgment and reinstating a case, is an order not involving the merits. McMillan v. McCall, 2 S. C. 390.

Order requiring security for costs.—An order requiring security for costs is an order not involving the merits. McMillan v. McCall, 2 S. C. 390.

Orders on motion to dissolve attachments.—Orders on motion to dissolve attachments do not involve the merits and are not reviewable before judgment. Allen v. Partlow, 3 S. C. 418.

Order refusing to vacate an order of arrest.—An order refusing to vacate an order of arrest does not come within this section. Hurst v. Samuels, 29 S. C. 476, 7 S. E. 822.

Order refusing a nonsuit.—An order refusing nonsuit is not an order involving the merits and such order is not reviewable before judgment. Agnew v. Adams, 24 S. C. 86.

Order allowing appeal denied by probate court.—An order of the circuit court allowing an appeal, which has been denied by the probate court as it merely affects the form of procedure does not

involve the "merits" and is not reviewable before judgment. *Henderson v. Wyatt*, 8 S. C. 112.

An order determining whether an appeal from the Probate Court was taken in time does not involve the merits. *Henderson v. Wyatt*, 8 S. C. 112.

Order denying issue out of chancery prior to hearing upon merits.—In an action for the purpose of having a deed cancelled where the plaintiff is neither in possession of the premises conveyed nor does he set up any title thereto but bases his claim solely upon an equity growing out of an alleged fraud practiced on him, an order refusing his motion for an issue for a jury in advance of the hearing upon the merits does not deny the plaintiff any substantial rights to which he is entitled nor does it involve the said merits within this section and is unappealable either under subsection 1 or 2. *DuPont v. DuBos*, 33 S. C. 389, 11 S. E. 1073.

Cited but not construed. *Copeland v. Copeland*, 60 S. C. 135, 38 S. E. 269; *Sandel v. State*, 122 S. E. 571; *Mauldin v. City Council*, 64 S. C. 444, 42 S. E. 202.

C. Subsection (2).

1. In General.

See the treatment under the next foregoing analysis line and the authorities therein discussed.

Prior law as to necessity of consent to appeal.—Under the former standing of this section it was necessary that the appellant give his consent in the notice of appeal from an order granting a new trial. The provisions requiring such consent as a condition of the appeal were later stricken from the statute by amendment. For a construction of such provision, see *Caston v. Brock*, 14 S. C. 104.

Terms of statute are mandatory.—The terms of this statute are mandatory and it is perfectly clear that this court must entertain appeals from orders which grant new trials when they are based upon errors of law. *Daughty v. Northwestern R. Co.*, 92 S. C. 361, 75 S. E. 553. See also, *Ingram v. Hines*, 126 S. C. 509, 120 S. E. 493.

Order striking portion of pleading is appealable.—An order sustaining a demurrer which has the effect of striking out a part of the complaint is appealable under this section. *Miles v. Charleston Light & Water Co.*, 87 S. C. 254, 69 S. E. 292.

But order refusing to strike is not appealable.—There is no provision for appeal made under this section for a refusal to strike out a pleading or a part thereof. *Cooper v. Atlantic Coast Line R. Co.*, 78 S. C. 562, 59 S. E. 704.

The reason for this distinction is that

if the circuit court errs in striking out any material allegations of a good cause of action or good defense, it is impossible to remedy it in the course of the trial because the evidence and issues are submitted to the jury according to the pleadings, and on appeal from the final judgment the Supreme Court could not say there was error of law in confining the evidence and charge to the pleadings. This same reasoning does not apply where the court refuses to strike out a portion of a pleading. See *Harbert v. Atlanta, etc., Ry Co.*, 74 S. C. 13, 53 S. E. 1001.

The question whether a verdict is contrary to the weight of evidence cannot be determined on appeal.—Whether or not a verdict is capricious or contrary to the weight of the evidence cannot be determined on appeal. *Cooper v. Atlantic Coast Line R. Co.*, 78 S. C. 562, 59 S. E. 704; citing *Blowers v. So. Ry.*, 74 S. C. 221, 222, 54 S. E. 368. See also, *Ingram v. Hines*, 126 S. C. 509, 120 S. E. 493.

When judgment absolute can be rendered.—The appellate court can render judgment absolute only in those cases where there is no error in the order appealed from and the questions of law involved are conclusive of case both as to law and merits. *Snipes v. Davis*, 131 S. C. 298, 127 S. E. 447; *Walker v. Guinn*, 134 S. C. 510, 133 S. E. 444.

2. Judgments or Order Affecting.

a. "Substantial Right."

Editor's note.—Almost every case which has considered this subsection for the purpose of ascertaining whether a substantial right has been affected by the order or judgment appealed from, has cited and discussed subsection (1). In the illustration of orders "involving the merits," within the meaning of that phrase in subsection (1), we have made numerous references to the provisions of subsection (2), showing whether or not the particular case could be considered as "affecting a substantial right." To avoid repetition of these illustrations, we merely refer the practitioner to those illustrations.

Order upon motion for continuance does not affect a substantial right.—An order made upon a motion for a continuance and not when the merits of the case were under consideration cannot be construed or in any respect regarded as "involving the merits" or affecting a substantial right. *Latimer v. Latimer*, 42 S. C. 205, 20 S. E. 159, citing this subsection and subsection one.

Order denying legal mode of trial affects a substantial right.—An order denying a party the mode of trial to which he is entitled by law, and requiring him

to submit to some other mode of trial is an order affecting a substantial right and is appealable under this section. *Ferguson v. Harrison*, 34 S. C. 169, 13 S. E. 332.

Order striking out a portion of the complaint affects a substantial right.—An order on demurrer to a complaint which in effect strikes out a portion thereof is an order affecting a substantial right. *Miles v. Charleston Light and Water Co.*, 87 S. C. 254, 69 S. E. 292.

An order refusing a petition to be made party to a cause affects a substantial right.—An order refusing a petition to be made a party to a cause is an order affecting a substantial right under this section and is appealable. *Rutledge v. Tunno*, 63 S. C. 205, 41 S. E. 308.

Order giving judgment by default appealable.—An order refusing leave to the defendant to file his answer and giving judgment by default against him is appealable. *Ayer v. Chasserean*, 18 S. C. 597.

Order allowing appeal from inferior court.—An order allowing an appeal to the court of common pleas from the verdict of a jury empaneled in an inferior court is an order affecting a substantial right. *Atlantic Coast Line R. Co. v. South Bound R. Co.*, 57 S. C. 317, 35 S. E. 553.

Order allowing reference in chancery suit.—See this catchline under analysis line, "judgment or order not involving the merits," IV, B, 1, b, 2.

Order denying issue out of chancery prior to hearing upon merits.—An order denying a motion for issue for a jury, in advance of hearing upon the merits, does not affect a substantial right within the meaning of this subsection. *DuPont v. DuBos*, 33 S. C. 389, 11 S. E. 1073.

Cited but not construed in Citizen's Bank v. Heyward, 144 S. C. 365, 142 S. E. 651.

3. Order Granting or Refusing New Trial.

Editor's note.—The provisions of this section relating to appeals from orders granting or denying motions for new trials must be read in connection with § 34, which confers upon the circuit courts the power to entertain such motions. The editor has deemed it expedient to place under § 34 most of the annotations pertaining to the appellate review of the decision on such motions. We therefore refer the practitioner to the treatment there found. In order, however, to insure an understanding of the relation between the two sections and to assist the practitioner in connecting the annotations to the two sections, we set forth the following principles:

As § 34 has been judicially construed,

the granting of motions for new trials lies within the discretion of the court, *State v. David*, 14 S. C. 428; *Durant v. Philpot*, 16 S. C. 116; *Sams v. Hoover*, 33 S. C. 401, 12 S. E. 8, and the exercise thereof will not usually be disturbed, *State v. Hawkins*, 121 S. C. 290, 114 S. E. 538, 27 A. L. R. 1083, unless the court committed an error of law, *Hall v. Northwestern R. Co.*, 81 S. C. 522, 62 S. E. 848, and the instant section does not attempt to make an order granting a new trial appealable when it is based solely upon questions of fact, *Doughty v. Northwestern R. Co.*, 92 S. C. 361, 75 S. E. 553, citing *Massey v. Adams*, 3 S. C. 254, 263; *Caston v. Brock*, 14 S. C. 104, but where there has been an abuse of the court's discretion, its order granting or denying a motion for new trial will be reviewed. *Darlington Oil Co. v. Pee Dee Oil Co.*, 68 S. C. 46, 46 S. E. 720; *Miller v. Atlantic Coast Line R. Co.*, 95 S. C. 471, 79 S. E. 645, citing *State v. David*, 14 S. C. 432. See, also, *Planter's Oil Co. v. Lightsey*, 98 S. C. 3, 81 S. E. 1102.

Order granting new trial cannot be reviewed on appeal from final judgment obtained in second trial if notice of intention to appeal therefrom is not given as required by law. *DePass v. Broad River Power Co.*, 173 S. C. 387; 176 S. E. 325.

Awards under Workmen's Compensation Act appealable to Supreme Court.—Provision of Workmen's Compensation Act that judgment of the court of common pleas rendered in a workmen's compensation case shall have same effect, and all proceedings in relation thereto shall thereafter be the same as though judgment had been rendered in a suit duly heard and determined by court of common pleas, authorizes an appeal from judgment of court of common pleas to Supreme Court, and all proceedings in relation thereto after judgment of court of common pleas is rendered are the same as provided in Code of Procedure with reference to appeals from other judgments, including supersedeas provisions contained in the Code. *McDonald et al. v. Palmetto Theaters et al.*, 196 S. C. 38; 11 S. E. (2d) 444.

Applied in *Walker v. Quinn*, 134 S. C. 510, 133 S. E. 444; *Miller v. Atlantic Coast Line R. Co.*, 95 S. C. 471, 79 S. E. 645; *Ingram v. Hines*, 126 S. C. 509, S. E. 493; *Gunter v. Fallow*, 78 S. C. 457, 59 S. E. 70; *State v. Shaw*, 64 S. C. 566, 569, 43 S. E. 14, 60 L. R. A. 801; *Lampley v. Atlantic Coast Line R. Co.*, 77 S. C. 319, 57 S. E. 1104.

D. Subsection (3).

Applies to collateral proceedings after judgment.—Subsection 3 of this section was intended to apply only to collateral

proceedings arising after judgment. *Kennedy v. City of Greenville*, 78 S. C. 124, 58 S. E. 989.

And to matters of independent nature arising after judgment.—This subdivision was intended to provide a remedy where matters either of an independent nature, or collateral to any action, arise upon a special proceeding, and where matters arise upon a summary proceeding in an action after judgment. *Cureton v. Hutchinson*, 3 S. C. 606, cited with approval in *Kennedy v. City of Greenville*, 78 S. C. 124, 58 S. E. 989.

And was not intended to apply to motion for new trials.—The idea that this section was intended to apply to motions for new trials is negated by a special provision in subdivision 2 on this identical subject. *Kennedy v. City of Greenville*, 78 S. C. 124, 58 S. E. 989.

An error in granting a new trial cannot be reviewed on appeal from judgment on a subsequent trial. *Kennedy v. City of Greenville*, 78 S. C. 129, 58 S. E. 989.

See the analysis line, "order granting or refusing new trial," V, C, 3.

"Special proceeding" is defined by statute.—The term "special proceeding" must be taken in the sense of the Code. It is defined in §§ 2 and 3. *Allen v. Partlow*, 3 S. C. 417, to which reference is hereby made.

Rule against sheriff as to return of process is a special proceeding.—A proceeding by rule against a sheriff touching the return of process is a "special proceeding" and a final order thereon is in the nature of a final judgment, on appeal from which the court may revise any intermediate order in the same proceeding involving the merits and necessarily affecting the judgment. *Emory v. Davis*, 4 S. C. 23.

As is a proceeding to enforce an agricultural lien.—The seizure and sale of a crop under the agricultural lien laws as provided for by the Civil Code are a special proceeding within the meaning of this section. *Johnston v. Manigault*, 13 S. C. 403.

But order dissolving an attachment is not made in a special proceedings.—An order dissolving an attachment is not an order made in "a special proceeding" and hence is not appealable under this subsection. *Allen v. Partlow*, 3 S. C. 417.

Orders affecting a substantial right.—For numerous illustrations of orders held to affect a "substantial right" and those not affecting a substantial right, see the analysis line, "Judgment or order affecting a substantial right," V, C, 2.

Order setting aside a homestead upon summary application after judgment af-

fects a substantial right.—An order setting aside an assignment of a homestead made upon a summary application after judgment affects a substantial right and is appealable. *Weatherly v. Jackson*, 3 S. C. 228.

Orders in certiorari staying proceeding below is a final order.—Orders in certiorari permanently staying proceedings below is a final order. *Coleman v. Keels*, 30 S. C. 614, 9 S. E. 270.

Orders refusing a writ of mandamus appealable.—An order refusing a writ of mandamus is appealable under this section. *Ex parte Mackey*, 15 S. C. 322, 328.

An order on quo warranto containing a preliminary injunction does not involve the merits.—An order on quo warranto containing a preliminary injunction does not involve the merits and is not appealable under this subdivision. *State v. Westmoreland*, 29 S. C. 1, 6 S. E. 847.

E. Subsection (4).

Appeal from interlocutory order granting temporary injunction lies.—An appeal lies from an interlocutory order granting a temporary injunction. *Lamar v. Croft*, 73 S. C. 407, 53 S. E. 540. See, also, *Williams v. Jones*, 62 S. C. 472, 40 S. E. 881.

Though questions of fact are involved.—In an action for an accounting, an order dissolving a temporary injunction and refusing to appoint a receiver would be reviewed on appeal, though questions of fact were involved. *Lyles v. Williams*, 96 S. C. 290, 80 S. E. 470.

But appeal does not lie after nuisance is abated.—An appeal from an order dissolving a temporary injunction does not lie after such nuisance is abated. *Wright v. Columbia*, 77 S. C. 416, 57 S. E. 1096.

Refusal of interlocutory order of injunction on grounds of jurisdiction appealable.—The refusal of an interlocutory order of injunction to restrain the defendants from selling a house on the grounds of want of jurisdiction is appealable. *Salinas v. Aultman & Co.* 49 S. C. 325, 27 S. E. 385.

Conclusions of circuit judge not to be disturbed unless clearly erroneous.—The appointment of a receiver and the granting of an order of injunction are discretionary and the court will not disturb the conclusions of the circuit judge, unless there has been an abuse of discretion showing that the order is clearly erroneous. *Lyles v. Williams*, 96 S. C. 290, 80 S. E. 470.

Applied as to denial of injunction. *South Bound R. R. Co. v. Burton*, 63 S. C. 348, 41 S. E. 451; *Lamar v. Croft*, 73 S. C. 407, 411, 53 S. E. 540.

§ 27. Powers in appeals—time file decisions—attach copy opinion to judgment—fees.

(1) **Reverse, modify, etc., judgments or decrees.**—The Supreme Court may reverse, affirm or modify the judgment, decree or order appealed from in whole or in part, and as to any or all of the parties, and the judgment shall be remitted to the court below to be enforced according to law. When a judgment or decree is reversed or affirmed by the Supreme Court, every point made and distinctly stated in the cause and fairly arising upon the record of the case shall be considered and decided, and the reason thereof shall be concisely and briefly stated in writing and preserved in the record of the case.

(2) **Time file decisions.**—The justices of the Supreme Court shall file their decisions in sixty days from the last day of the court at which the cases were heard.

(3) **Clerk attach opinion to judgment—fees.**—The clerk of the Supreme Court shall attach to the judgment remitted to the court below, a copy of the opinion of the Supreme Court, if any, rendered in such cases, and shall receive as his fee for services in remitting the judgment and opinion the sum of one dollar and fifty cents in each case, to be taxed against the losing party, by the clerk of the court of common pleas, and when collected, by any officer or attorney, shall be remitted to the clerk of the Supreme Court; and he shall be entitled to charge and collect a fee of one dollar and fifty cents for any opinion, judgment or order which he may furnish any party ordering same.

1932 Code, § 27; Civ. P. '22, § 27; Civ. P. '12, § 12; Civ. P. '02, § 12; 1896 (22) 7; 1904 (24) 389.

The word "appellate" is impliedly used herein.—Under this section the word "appellate," as impliedly used herein, is a general and comprehensive term referring to all causes and questions over which the court was authorized to exercise the power of review. *Sandel v. State*, 128 S. C. 178, 122 S. E. 571.

General jurisdiction in equity cases.—The Supreme Court has jurisdiction in an equity case to inquire if an interlocutory injunction is properly dissolved and if there was an error in refusing to appoint a receiver. *Lyles v. Williams*, 96 S. C. 290, 80 S. E. 470. Therefore, it has no power to grant leave to the defendant to answer over. *Johnson v. Dawkins*, 20 S. C. 528, 533.

Court has inherent power to modify or vacate decree.—The inherent power of the Supreme Court to modify or vacate its decision during the term in which it is made, and before its judgment is remitted to the Circuit Court is not doubted. *Citizens Bank v. Heyward*, 144 S. C. 365, 142 S. E. 651.

But it can only affirm, reverse or remand for new trial in law cases. In a case at law the Supreme Court cannot modify the judgment below; it can only reverse or affirm such judgment and remand for a new trial if necessary. *Hasford v. Wynn*, 22 S. C. 309, 313.

Judgment when remitted to circuit court is unalterable by that court.—The judgment when remitted cannot be altered or modified in any form by the Circuit court but must be enforced to the letter. *Pringle v. Sizer*, 3 S. C. 335, 337; *Ex parte Dunovant*, 16 S. C. 299, 300; *Ex parte Knox*, 17 S. C. 207, 217.

And needs no further action if affirmed.—If the judgment be affirmed, it needs no further action by the Circuit Court. *Adger v. Pringle*, 13 S. C. 33, 36.

But circuit court may enter an order where its judgment is varied or modified.—If the judgment of the Circuit Court is varied or modified by the Supreme Court, and the judgment is remitted to the Circuit Court such court may enter an order making the judgment of the Supreme Court the judgment of the Circuit Court. *Adger v. Pringle*, 13 S. C. 33, 36.

And the enforcement of the judgment is unaffected by pending motion to recall remittitur.—The action of the Circuit Court is not affected by any pending motion to recall the remittitur, *Adger v. Pringle*, 13 S. C. 33, 36, unless there are stay proceedings. The Circuit Court is not bound to take notice of pending proceedings to have the judgment of

the Supreme Court reviewed. *Id.*

Nor may remittitur be returned to Supreme Court for correction of errors.

—After a remittitur is once sent down, the Supreme Court has no further power to order it returned so as to correct such errors. *Carpenter v. Lewis*, 65 S. C. 400, 403, 43 S. E. 881.

The amount of the remittitur is res judicata after the case is sent down, and cannot be corrected on a second trial, though it appears that the calculation is erroneous. *Carpenter v. Lewis*, 65 S. C. 400, 43 S. E. 881. See, also, *Sullivan v. Speights*, 14 S. C. 358.

Because Supreme Court loses jurisdiction when remittitur is issued.—The Supreme Court loses jurisdiction when the remittitur is issued, and not when filed below. *Ex parte Dunovant*, 16 S. C. 299, 300; *Brooks v. Brooks*, 16 S. C. 621. And it cannot entertain a motion for rehearing after it is issued. *Sullivan v. Speights*, 14 S. C. 358, 360; *Ex parte Dial*, 14 S. C. 584, 585.

“Under the rules of this court when a case is heard here and determined, the remittitur to the court below is not sent down immediately, but is retained in every case for ten days, unless the court directs other wise; and on application showing sufficient cause either of the justices at chambers may direct by order that it be further retained until the third day of the next session. The object of this is to reserve jurisdiction over the case, so that, should either of the parties desire to make any motion in reference thereto, they might have the opportunity to do so, and the court the power to hear it. After the remittitur, however, is sent down, the case passes beyond the reach of the court, and its jurisdiction is lost, and no motion can be heard by this court on the matter thereafter.” *Sullivan v. Speights*, 14 S. C. 358, quoted in *Carpenter v. Lewis*, 65 S. C. 400, 43 S. E. 881. See, also, the authority therein cited.

The Supreme Court has held that its control of the judgment ends when the remittitur has been sent down. *State v. Adams*, 83 S. C. 149, 65 S. E. 220, and the authorities there cited.

Where the defendant had been convicted of murder and had noted an appeal from such judgment, and the judgment was affirmed, and a remittitur was acted on by the Circuit Court,

and a day for the execution reassigned, it was too late for a motion to recall such remittitur for the purpose of a reconsideration of a petition for a rehearing. *State v. Merriman*, 35 S. C. 607, 14 S. E. 394.

Strong case must support motion to stay remittitur.—Where an applicant in a criminal case moves for a stay of remittitur with leave to make a motion below for a new trial, on the grounds of newly discovered evidence, at least a prima facie case must be made out in support of the motion; otherwise such motion must be dismissed. *State v. Jacobs*, 28 S. C. 608, 6 S. E. 577.

A remittitur which states that the judgment below is affirmed is a sufficient transcript of the judgment above. *Ex parte Dial*, 14 S. C. 584, 586.

And if stayed, court may entertain petition for rehearing.—The power of the Supreme Court to entertain petitions for a rehearing, while the remittitur is being stayed has never been questioned. *Citizen's Bank v. Heyward*, 144 S. C. 365, 142 S. E. 651.

But petition for rehearing does not itself stay remittitur.—The filing of a petition for a rehearing does not stay remittitur; there must be an order from one of the justices. *Ex parte Dunovant*, 16 S. C. 299, 300. But see *Supreme Court Rule 17*, which now changes such procedure.

And while stayed, the judgment is in control of court.—As long as the remittitur is stayed, the judgment of the Supreme Court is absolutely under the control of that court. *Citizen's Bank v. Heyward*, 144 S. C. 365, 142 S. E. 651, 657.

No original decisions can be made upon a point not ruled below.—This court can make no original decision upon a point not ruled upon below. *Railroad Com. v. R. R. Co.*, 22 S. C. 220, 231.

Court cannot originally determine right to counsel fees.—The court cannot originally determine the right to counsel fees. *Otis v. Brown*, 20 S. C. 586.

Remittitur which orders a new trial sets aside the judgment appealed from.—A remittitur which orders a new trial in effect sets aside the verdict and judgment appealed from. *State v. Stephens*, 13 S. C. 285, 287.

As to the granting of new trials, see § 34 and the note thereto.

§ 28. Hearings.

(1) **Terms—notice—docketing.**—The Supreme Court shall hold at least nine terms in each year at the seat of government, commencing on the second Mondays in each month, except the months of July, August and September, and each of said terms shall be continued for so long a period as the public interest may require. The court may also hold such additional

number of terms or sessions as the public interest may require, the time and place therefor to be appointed and fixed by the court, ten days' notice of such time and place to be given to the attorneys or counsel appearing in the cases docketed, in such manner as the court by its rules or orders may provide. The court may by general rules prescribe and provide the order in which cases shall be docketed, and the priority thereof on the calendar, subject to the provisions of the following subsection 2.

(2) Priority of appeals.—On a second and each subsequent appeal to the Supreme Court, or when an appeal has once been dismissed for defect or irregularity, the cause shall be placed upon the calendar as of the time of filing the first appeal and may be noticed and put on the calendar for any succeeding term; and whenever, in any action or proceeding in which the State or any state officer or any board of state officers is or are sole plaintiff or defendant, an appeal has been, or shall be, brought up from any judgment or order for or against him or them in any court, such appeal shall have preference in the Supreme Court and may be moved by either party out of the order on the calendar.

(3) Disposition of appeals not reached.—If the cases on the calendar and set for hearing cannot be heard in the period allotted, the court shall continue the same to be heard after the regular call of the cases for that session or may call an extra term for the hearing of the same or continue them to the next stated term thereafter.

(4) Court may make rules.—The court shall have full power and authority to establish and promulgate such rules and regulations as may be necessary to carry into effect the provisions of this section and to facilitate the work of the Supreme Court.

(5) Docketing fees—taxation.—In all appeals, other than in criminal cases, the appellant shall, when the return is filed with the clerk of the Supreme Court, pay to said clerk a fee of three dollars to be retained by him as his compensation for docketing the cause and keeping counsel advised as to the time when the cause is to be called for hearing, as the court may provide in its rules; which fee shall be taxed against the losing party as a part of the costs and disbursements in the Supreme Court.

1932 Code, § 28; Civ. P. '12, § 13; Civ. P. '02, § 13; 1870 (14) 314; 1896 (22) 1; 1897 (22) 488; 1916 (29) 687; 1923 (33) 32.

§ 29. Printing of testimony upon appeals to Supreme Court.—On all appeals to the Supreme Court from the county court, court of common pleas, and court of general sessions, when it is necessary to print the testimony, or any part thereof, the same shall be printed in question and answer form as taken by the official stenographer unless otherwise agreed to by parties or attorneys. Only the necessary and pertinent testimony to which one or more exceptions relate shall be printed, and in case more than the necessary testimony is printed, then the court shall tax the cost of all testimony unnecessarily printed against the offending party.

1932 Code, § 29; 1923 (33) 107.

As to inability of party to pay for printing of papers connected with appeals, see § 779 and the note thereto.

Printing of entire record unnecessary, where appeal is based on exceptions to judge's charge; only such as pertinent should be printed. *Andrews v. Hurst*,

et al., 163 S. C. 86; 161 S. E. 331. To same effect, *State v. Singletary*, 167 S. C. 543; 166 S. E. 725.

Where exceptions raise only questions of law, not in any wise dependent for solution on the evidence, it is unnecessary to print any of the evidence. *Gar-*

risson v. Coca-Cola Bottling Co., 174 S. C. 396; 177 S. E. 656.

But where exceptions raised question of motion for directed verdict, solution of which required that the testimony be included in record for appeal, order of circuit judge settling case for appeal and

requiring appellant to print the testimony is not error, although very little of testimony was essential to decision reached by Supreme Court. Kiriakides v. Equitable Life Assur. Soc. of the United States, 174 S. C. 140; 177 S. E. 40.

§ 30. Number to agree to constitute a judgment—when circuit judges to sit also.—In all cases decided by the Supreme Court the concurrence of three of the justices shall be necessary for a reversal of the judgment below; subject to the provisions hereinafter prescribed. Whenever upon the hearing of any cause or question before the Supreme Court, in the exercise of its original or appellate jurisdiction, it shall appear to the justices thereof, or any three of them, that there is involved a question of constitutional law, or of conflict between the Constitution and laws of this State and of the United States, or between the duties and obligations of her citizens under the same, upon the determination of which the entire court is not agreed; or whenever the justices of the said court, or any two of them, desire it on any cause or question so before said court, the Chief Justice, or in his absence the presiding associate justice, shall call to the assistance of the Supreme Court all the judges of the circuit court: *provided*, that when the matter to be submitted is involved in an appeal from the circuit court the circuit judge who tried the case shall not sit. A majority of the justices of the Supreme Court and circuit judges shall constitute a quorum. The decision of the court so constituted, or a majority of the justices and judges sitting, shall be final and conclusive. In such case the Chief Justice, or in his absence the presiding associate justice, shall preside. Whenever the justices of the Supreme Court and the judges of the circuit court meet together for the purposes aforesaid, if the number thereof qualified to sit constitute an even number, then one of the circuit judges must retire, and the circuit judges present shall determine by lot which of their number shall retire. Whenever the circuit judges are called to sit with the justices of the Supreme Court for the determination of any cause or causes, the actual traveling and other expenses of each judge so attending shall be paid by the Governor out of his civil contingent fund upon an itemized statement made out and certified to by each judge.

1932 Code, § 30; Civ. P. '22, § 29; Civ. P. '12, § 14; Civ. P. '02, § 14; 1870 (14) 314.

Construction of the term en banc as used in notes to this section.—The term "court en banc" as used in the following constructions of this section is but a designation of the Supreme Court sitting with the circuit judges as provided for under this section. For a history of the term, see *Citizen's Bank v. Heyward*, 144 S. C. 365, 142 S. E. 651.

The court en banc is a consultative one.—The court en banc differs materially from the Supreme Court, in that it is merely a consultative one, like the English Court of Exchequer Chamber, whose judgments are authoritative though the suitor had no right to appeal to it. The court en banc is called into existence by the justices of the Supreme Court, only when they may desire to consult with the circuit judges as to par-

ticular causes or questions. *Citizen's Bank v. Heyward*, 144 S. C. 365, 142 S. E. 651.

Which loses its jurisdiction on deciding the question submitted.—The court en banc has no fixed terms and loses jurisdiction when it has answered the questions submitted by filing with the clerk of the Supreme Court, its written decision signed by a majority of the justices and judges. Its functions are then exhausted. *Hinson v. Pickett*, 2 Hill Eq. 355, quoted in *Citizen's Bank v. Heyward*, 144 S. C. 365, 142 S. E. 651.

Circuit judges not called unless one of named contingencies exist.—Where neither contingency as provided for by this section for the calling in of the circuit judges occurs the Circuit Court will not be called in merely because the Su-

preme Court is divided, and the parties desire an authoritative determination of the question involved. *City of Florence v. Brown*, 49 S. C. 332, 27 S. E. 273.

Supreme Court cannot modify or set aside a judgment of the court en banc.—The chief justice and the three associ-

ate justices, sitting as the Supreme Court, cannot set aside or in any wise lessen the force and effect of a judgment rendered by the court sitting en banc composed of the Supreme Court justices and the circuit judges. *State v. Adams*, 83 S. C. 149, 150, 65 S. E. 220.

§ 31. Sheriffs provide rooms, etc.—If, at any term of the Supreme Court, proper and convenient room both for the consultation of the judges and the holding of the court, with furniture, attendants, fuel, lights and stationery, suitable and sufficient for the transaction of its business, be not provided for in the place where by law the court may be held, the court may order the sheriff of the county to make such provision, and the expenses incurred by him in carrying the order into effect shall be paid from the state treasury.

1932 Code, § 31; Civ. P. '22, § 30; Civ. P. '12, § 15; Civ. P. '02, § 15; 1870 (14) 495.

§ 32. Places hold courts—adjournment.—The Supreme Court may be held in other buildings than those designated by law as places for holding courts, and at a different place, at the same city or town, from that at which it is appointed to be held. Any one or more of the judges may adjourn the court with the like effect as if all were present.

1932 Code, § 32; Civ. P. '22, § 31; Civ. P. '12, § 16; Civ. P. '02, § 16; 1870 (14) 314.

CHAPTER 2

The Circuit Courts

ARTICLE 1. Circuit Courts and Judges, § 33.

ARTICLE 2. Circuits and Terms of Courts, § 50.

ARTICLE 1

Circuit Courts and Judges

33. When open.

34. New trials.

35. Change of venue.

36, 37. Judges' power at chambers.

38. Powers in other circuits.

39, 40. Duties.

41. Salaries.

42. Neglect of duty.

43. Disability of judges.

44. Special judges.

45. Juries for special court.

47. Salary of special judge.

48, 49. Stenographer.

§ 33. Always open for certain purposes. — The circuit courts shall be deemed always open, for the purpose of issuing and returning mesne and final process and commissions, and for making and directing all interlocutory motions, orders, rules and other proceedings whatever, preparatory to the hearing of all causes pending therein upon their merits; and it shall be competent for any judge of the said courts, upon reasonable notice to the parties, in the clerk's office or at chambers, and in vacation as well as in term, to make, direct, and award, all such process, commissions, and interlocutory orders, rules, and other proceedings, whenever the same are

not grantable of course, according to the rules and practice of the court.

1932 Code, § 33; Civ. P. '22, § 32; Civ. C. '12, § 3830; Civ. C. '02, § 2733; G. S. 2112; R. S. 2244; 1868 (14) 136.

As to general powers of judges at chambers, see § 37 and the note thereto.

Editor's Note.—This section has almost always been cited in connection with § 37 which pertains to the power of circuit judges at chambers. The practitioner should refer, therefore, to the annotations placed under § 37. The note to the instant section is confined to those cases involving orders which bear upon the preparation of the hearing of causes upon the merits, though such orders may have been entered in chambers. The major treatment of the subject of the power of judges at chambers is reserved for the note to § 37.

Section is calculated to facilitate the hearing of cases.—It was said in the dissenting opinion in the case of *Simms v. Phillips*, 46 S. C. 149, 24 S. E. 97, that the very object of the section was to enable a circuit judge at chambers to grant all such preliminary orders as are necessary or calculated to facilitate the hearing of cases upon their merits when the proper time arrives for that purpose.

"Other proceeding whatever" is broad and extensive term.—In the dissenting opinion in the case of *Simms v. Phillips*, 46 S. C. 149, 24 S. E. 97, it was said that the term "other proceedings whatever" is very broad and extensive and was no doubt intended to include all orders necessary to prevent delay at the hearing. See, also, *Ellen v. Ellen*, 26 S. C. 99, 1 S. E. 413.

Order granting alimony pendente lite is an interlocutory one.—An order granting alimony pendente lite is an interlocutory one within the meaning of this section. *Messervy v. Messervy*, 80 S. C. 277, 61 S. E. 442. The granting of such an order does not involve the determination of the merits of the case. *Id.*

Writs of assistance may be granted at chambers.—A writ of assistance, to enable the sheriff to put the purchaser at a judicial sale in possession, may be granted at chambers. *Murchison v. Miller*, 64 S. C. 425, 42 S. E. 177; *Ex parte Qualls*, 71 S. C. 87, 50 S. E. 646.

Order bringing in new parties may be granted at chambers.—An order bringing in new parties to an action as provided for by law may be granted at chambers. *Hellams v. Prior*, 64 S. C. 543, 43 S. E. 25.

So also an order amending a complaint.—This section, it is true does not expressly give to a judge at chambers the power to amend a complaint but we think the general power given to make, direct, and award process commissions, and interlocutory orders, and other proceedings whatever, preparatory to the hearing of all cases pending in the courts, necessarily includes the power to amend a complaint. *Ellen v. Ellen*, 26 S. C. 99, 1 S. E. 413; cited in the dissenting opinion in *Simms v. Phillips*, 46 S. C. 149, 24 S. E. 97.

Order of reference for purpose of taking testimony granted at chambers.—An order of reference for the purpose of taking testimony as to the amount due in an action of foreclosure may be made at chambers in a county other than that in which the action is pending if properly granted on notice. *Bank v. Fennell*, 55 S. C. 379, 33 S. E. 485. See, also, the dissenting opinion in the case of *Simms v. Phillips*, 46 S. C. 149, 24 S. E. 97.

Issues involving examination of long accounts may be referred at chambers.—A judge at chambers has power without consent to refer issues involving examination of long accounts. *Montague v. Best*, 65 S. C. 455, 43 S. E. 963.

Motion for discontinuance may be heard and granted at chambers.—A motion for discontinuance may be heard and granted at chambers under this section and § 37. *Shelton v. Southern R. Co.*, Carolina div., 80 S. C. 74, 61 S. E. 220.

Receiver's certificates issuable at chambers.—A judge has power at chambers, under this section, to authorize the issuance of receiver's certificates. *State v. Port Royal & A. Ry. Co.*, 45 S. C. 413, 23 S. E. 363; *Hixson v. Floyd*, 73 S. C. 202, 53 S. E. 167.

§ 34. May grant new trials—rules.—Circuit courts shall have power to grant new trials in cases where there has been a trial by jury for reasons for which new trials have usually been granted in the courts of law of this State; and they shall have power to administer all necessary oaths or affirmations, and punish, by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same, and to make and establish all necessary rules for the orderly conducting of business in said courts: *provided*, such rules are not repugnant to the laws

of the State or the rules prescribed by the justices of the Supreme Court and circuit judges.

1932 Code, § 34; Civ. P. '22, § 33; Civ. C. '12, § 3831; Civ. C. '02, § 2734; G. S. 2113; R. S. 2245; 1868 (14) 136.

Editor's note.—This section was taken unchanged from the Code of 1922 wherein it composed § 33 of the Code of Civil Procedure.

Prior to the adoption of the Constitution of 1868 and the act from which this section was taken, the circuit courts in this State had no power to grant new trials. That could be done only by the Supreme Court. But under the Constitution of 1868 and the present Constitution, the provisions of which are substantially if not identically the same as those of the Constitution of 1868, the power to grant new trials, which is an appellate power, *State v. David*, 14 S. C. 428, 430, is denied to the Supreme Court, which has appellate jurisdiction only in equity cases (see § 26, subd. D), and its power in law cases is limited to the correction of errors of law. See *Southern Power Co. v. White*, 92 S. C. 219, 75 S. E. 459, and the authority therein cited.

Section should be liberally construed.—This section should be liberally construed as to the granting of new trials. *Elmore v. Scurry*, 1 S. C. 139.

Circuit court's power said to be inherent.—It has been said that the power to grant new trials in cases tried by the circuit courts was one of their inherent powers. *State v. Bailey*, 1 S. C. 1; *State v. David*, 14 S. C. 428, 430; cited in *Southern Power Co. v. White*, 92 S. C. 219, 75 S. E. 459. See, also, *State v. Williams*, 108 S. C. 295, 93 S. E. 1006.

Power not deprived by constitutional guaranty of trial by jury.—The constitutional guaranty of a trial by jury does not deprive the circuit court of the power to set aside a verdict fixing the compensation in condemnation proceedings and grant a new trial. *Southern Power Co. v. White*, 92 S. C. 219, 75 S. E. 459.

Section applies to cases which are properly before court.—The power to grant new trial as given to the circuit court under this section is given only in those cases which are properly before it and not in cases where the courts have been divested of jurisdiction by appeal to the Supreme Court, although the appeals have been disposed of and the remittitur sent down. *State v. Hawkins*, 121 S. C. 290, 114 S. E. 538.

As to effect of remittitur from Supreme Court after case is reviewed on appeal, and the duty of the circuit court to enforce the judgment, see § 27 and the note thereto.

The power may be exercised by court "or judge."—It is true that this section, standing alone, purports to confer authority to hear and determine motions for new trials only upon the "circuit courts." The section must however be read in connection with §§ 36 and 37, which confer upon regular and special judges the authority to exercise at chambers all powers and jurisdiction which they have and exercise in open court, "except for the determination of such matters as necessitate trial by jury." The exception, just quoted, would not, of course, apply to the determination of motions for new trials. So that, motions for new trials may now be presented to and heard by circuit judges at chambers or in open court. See *State v. Hawkins*, 121 S. C. 290, 114 S. E. 538, 541, saying that motions for new trials upon after discovered evidence should be made to the circuit court "or judge." And see *State v. David*, 14 S. C. 428, which though decided prior to the 1925 amendment of § 37, said that such motions may be made to the circuit courts "or judges."

In *State v. Chavis*, 34 S. C. 132, 13 S. E. 317, decided prior to the amendment of § 37, it was said that the power to hear motions for new trials given by this section is conferred upon the circuit courts and not upon judges, and therefore a judge in chambers has no power to grant a new trial in a criminal case on the ground of newly discovered evidence, the court also saying that the distinction between the powers of circuit courts and judges at chambers is well recognized, especially in regard to motions for a new trial.

And it is properly presented to the circuit court or judge.—A motion for a new trial upon after-discovered evidence in a case in which the circuit court has not been deprived of its jurisdiction by appeal or otherwise, should be made before the circuit court or judge. *State v. Hawkins*, 121 S. C. 290, 114 S. E. 538.

But if case pending on appeal a motion to suspend the appeal is necessary.—If the case is pending on appeal to the supreme court a motion should be made before that court to suspend the appeal in order that the motion for a new trial may be made before the circuit court or judge. *State v. Hawkins*, 121 S. C. 290, 114 S. E. 538.

And if appeal is concluded then motion for new trial is made in Supreme

Court.—If the appeal has been concluded and the remittitur has been sent down, a motion should be made in the Supreme Court, and not elsewhere, for the defendant to be allowed to make the motion for a new trial. If the motion is shown to be meritorious the Supreme Court will take proper steps to enable the defendant to make his motion for a new trial upon after-discovered evidence before the Circuit Court, the only court that may hear such motions upon their merits. *State v. Hawkins*, 121 S. C. 290, 114 S. E. 538.

Motion must be made within reasonable time.—The motion for a new trial must be made at a time that will reasonably admit of the consideration of the motion before the day assigned for an electrocution, for instance, or at such time before such day as shall be prescribed by a rule of the Supreme Court. But even if the motion in such case should be made at a time as will not admit of its consideration before the day fixed for the electrocution the court will nevertheless entertain it if the defendant shall upon proper showing to the Governor procure a temporary respite from the sentence, thereby giving the court time in which to consider the preliminary motion referred to. *State v. Hawkins*, 121 S. C. 290, 114 S. E. 538.

But no specific time is provided for.—The statute empowering the circuit courts to grant new trials on after-discovered evidence does not limit the time within which the motion must be made. *Sams v. Hoover*, 33 S. C. 401, 12 S. E. 8, quoted in *State v. Williams*, 108 S. C. 295, 93 S. E. 1006.

The granting of the motion lies in discretion of court.—A judge has discretionary power to grant new trials on after-discovered testimony, *State v. David*, 14 S. C. 428; *Tarrant v. Gilletson*, 14 S. C. 620; *State v. Workman*, 15 S. C. 540; *Durant v. Philpot*, 16 S. C. 116; *Waring v. R. R.*, 16 S. C. 416; *Sams v. Hoover*, 33 S. C. 401, 12 S. E. 8, in suits of equity as well as in actions at law. *Durant v. Philpot*, 16 S. C. 116; *Covington v. Covington*, 47 S. C. 263, 25 S. E. 193.

And this is true even after affirmance on appeal.—Even after judgment has been affirmed on appeal, it is within the discretionary power of the Circuit Court to grant a new trial on the ground of newly-discovered evidence. *State v. Lee*, 80 S. C. 367, 61 S. E. 657, cited in *State v. Williams*, 108 S. C. 295, 93 S. E. 1006.

And the exercise thereof will not usually be disturbed.—In the consideration of a motion for a new trial for after-discovered evidence the circuit judge may exercise his discretion and his decision will not be disturbed on appeal unless the alleged after-discovered evi-

dence is so lacking in merits that the granting of a new trial would amount to a clear abuse of his discretion. *State v. Hawkins*, 121 S. C. 290, 114 S. E. 538. See the authority therein cited.

Unless the court committed an error of law.—If the order of the judge in granting or refusing a new trial is based upon an error of law, then his ruling on the motion is subject to review and may be set aside. See *State v. Hawkins*, 121 S. C. 290, 114 S. E. 538, and the authorities cited there. See, also, *Hall v. Northwestern R. Co.*, 81 S. C. 522, 62 S. E. 848.

The granting or refusing a motion for a new trial, made on the ground that the verdict is excessive, is within the discretion of the circuit judge, and this court will not disturb his conclusions unless the order was based on an error of law. *Hall v. Northwestern R. Co.*, 81 S. C. 522, 62 S. E. 848.

The decision of a trial judge in granting a new trial on the ground that the verdict was excessive does not involve a question of law and will not be disturbed on appeal. *Stuckey v. Atlantic Coast Line R. Co.*, 57 S. C. 395, 35 S. E. 550.

Or unless abuse of discretion is apparent.—An order granting a new trial because the verdict is against the great weight of testimony will not be disturbed unless abuse of discretion is shown. *Darlington Oil Co. v. Pee Gee Oil Co.*, 68 S. C. 46, 46 S. E. 720.

And the burden is on the appellant to show an abuse of discretion.—The burden is upon the appellant to show that there has been some abuse of such discretion. *Darlington Oil Co. v. Pee Gee Oil Co.*, 68 S. C. 46, 46 S. E. 720.

But no abuse of discretion is shown where a trial judge refuses to substitute his judgment for that of the jury.—It is no abuse of discretion for a trial judge to decline to substitute his judgment on the facts for that of the jury. *McGhee v. Wells*, 57 S. C. 280, 35 S. E. 529.

And this is true even though the judge if trying the issue would have reached different conclusion.—It is not an error of law for the court to refuse a motion for a new trial even though the court in trying the fact would have reached a different conclusion on the evidence before the jury. *McGhee v. Wells*, 57, S. C. 280, 35 S. E. 529.

Or would have allowed a different recovery.—A new trial should not be granted merely because the judge would have found a less amount than that found by the jury, unless the opinion of the judge amounts to a clear and fixed conviction that injustice has been done by an excessive verdict. *Hall v. Northwestern R. Co.*, 81 S. C. 522, 62 S. E. 848;

Bodie v. Charleston & W. C. Ry. Co., 66 S. C. 302, 44 S. E. 943.

But arbitrary conditions cannot be imposed upon granting of motion.—An abandonment of appeal cannot be imposed as a condition for a new trial. *Hall v. N. W. R. R. Co.*, 81 S. C. 522, 62 S. E. 848. Nor can any arbitrary conditions be imposed. *Jackson v. So. Oil Co.*, 81 S. C. 564, 62 S. E. 854.

Judge's conclusion as to new trial is therefore usually conclusive.—The judge's conclusion as to the new trial when founded on the facts at trial is final. *Brickman v. R. R.*, 8 S. C. 173; *Steele v. R. R.*, 11 S. C. 589; *Warren v. Lagrove*, 12 S. C. 45; *Steele v. R. R.*, 14 S. C. 324; *Woods v. R. R.*, 19 S. C. 579; *McGhee v. Wells*, 57 S. C. 280, 35 S. E. 529, 532.

But the denial of motion is not conclusive as to facts and grounds subsequently presented.—The right to a new trial on newly-discovered testimony, when sufficient, is as fully settled and guaranteed by law as any other right and cannot be lost because a new trial had been once refused upon facts wholly different from and not involving this newly-discovered testimony. *State v. Williams*, 108 S. C. 295, 93 S. E. 1006.

New trial as to one of several causes of action applies to all if verdict is general.—Where a new trial is granted as to one cause of action, and the verdict is a general one, it is also granted as to the other causes of action involved in the case. *Lampley v. Atlantic Coast Line Co.*, 63 S. C. 462, 41 S. E. 517.

Where a general verdict is rendered which is against one defendant and is in favor of the other defendant, the granting of a new trial as to one, continues the case as to the other. *Barfield v. Coker & Co.*, 73 S. C. 181, 53 S. E. 170, and the authorities therein cited.

New trials permissible where excessive verdicts rendered.—It is well settled that the power to grant new trials as given by this section extends to the granting of new trials for excessive verdicts in actions of tort for unliquidated damages, on condition that the plaintiff shall refuse to remit the amount adjudged to be excessive. *Nettles v. Harrison*, 2 McCord, 230, cited in *Hall v. Northwestern R. Co.*, 81 S. C. 522, 62 S. E. 848. See, also, authority therein cited.

Or where verdict gives inadequate damages.—The modern rule is that a new trial may be granted, in actions for torts when the verdict is grossly inadequate, for the same reasons as those governing where the verdict is excessive. *Bodie v. Charleston, etc., Ry. Co.*, 66 S. C. 302, 44 S. E. 943.

If it is apparent that injustice has been done.—When the circuit judge has a

clear conviction that injustice has been done by an excessive verdict then it is his duty to relieve the injustice by ordering a new trial. *Hall v. Northwestern R. Co.*, 81 S. C. 522, 62 S. E. 848.

Unless the excess is remitted.—Where an excessive verdict has been rendered, a new trial should be granted if the party refuses to remit the excess. *Hall v. Northwestern R. Co.*, 81 S. C. 522, 62 S. E. 848.

And the amount of the verdict cannot be reduced without allowing option of a new trial nisi.—An order of the circuit judge is erroneous if it reduces the amount of the verdict without allowing the plaintiff the option of a new trial nisi. *Gwathmey v. Foor Hotel Co.*, 121 S. C. 237, 113 S. E. 688. See, generally, the numerous authorities therein cited.

An error in the amount of the verdict should be corrected by a new trial. *Wilson v. R. R.*, 16 S. C. 587, 592; *Levi v. Legg*, 23 S. C. 282.

New trial should be granted where jury disregards charges of the judge.—In a case where the jury disregards the judge's charge a new trial should be granted. *Dent v. Bryce*, 16 S. C. 1, 14; *Thompson v. Lee*, 19 S. C. 489.

Variance between testimony and indictment is ground for new trial.—A new trial is the remedy where there is a variance between the testimony and a material allegation of the indictment. *State v. Hamilton*, 17 S. C. 462.

Legitimate rules of circuit courts have the force of law and must be complied with.—Rules of circuit courts made under this section which are not repugnant to or in conflict with law, have all the force of law and must be complied with. *State v. Atterberry*, 129 S. C. 464, 124 S. E. 648.

And it is doubtful whether they may be suspended by Supreme Court.—The circuit court having power under this section to make its own rules, there is doubt that this court has the power to suspend them in a particular case. *State v. Atterberry*, 129 S. C. 464, 124, S. E. 648.

Amend verdict.—See § 605, and for full discussion, *Anderson v. Aetna Casualty and Surety Co.*, 175 S. C. 254, 178 S. E. 819.

Oath administered to witness by de facto deputy clerk not within this section. *State v. Brandon*, 186 S. C. 448; 197 S. E. 113.

New trial on after discovered evidence properly granted where only witnesses who observed alleged incident did not make their knowledge known until after trial. *Rikard v. Great Atlantic & Pacific Tea Co.*, 165 S. C. 355; 164 S. E. 11.

Contempt.—Sentence of 90 days to county jail of juror for contempt in vio-

lating court's instruction by discussing case with others during court recess is justified. *State v. Babb*, 161 S. C. 305, 159 S. E. 633. See also No. 339.

Motion over telephone without notice.—Granting a new trial on ex parte motion over telephone after case disposed of without notice or hearing is error. *Barton v. Scott*, 165 S. C. 491, 164 S. E. 129.

Granting of motion for new trial on grounds verdict not sustained by evidence, is not appealable, if based on trial judge's view of the facts; otherwise, if ruling based on law. *Morrison v. South Carolina State Highway Department*, 181 S. C. 258; 187 S. E. 344. For statute pertaining to the change of place of trial, see § 426 and the note thereto.

§ 35. Change of venue—when and how made.—The circuit courts shall have power to change the venue in all cases, civil and criminal, pending therein, and over which said courts have original jurisdiction, by ordering the record to be removed to another county in the same circuit. The application for removal must be made to the judge sitting in regular term by some party interested, or by the solicitor of the circuit or accused, supported by affidavit that a fair and impartial trial cannot be had in the county where such action or prosecution was commenced. The State shall have the same right to make application for a change of venue that a defendant has in cases of murder, arson, rape, burglary, perjury, forgery or grand larceny: *provided*, no change of venue shall be granted in such cases until a true bill has been found by a grand jury. Four days notice of such application in civil and criminal cases shall be given to the adverse party, and if a change is ordered, it shall be to a county in the same judicial circuit: *provided, further*, that such adverse party to whom said notice is given shall have the right to waive the same; and the circuit judge shall have the power, upon application made to him by either party, upon proper cause shown, to shorten or extend the time for the hearing of such application for a change of venue.

1932 Code, § 35; Civ. P. '22, § 34; Civ. C. '12, § 3832; Civ. C. '02, § 2735; G. S. 2114; R. S. 2246; 1870 (14) 839; 1896 (22) 12; 1905 (24) 845.

For statute pertaining to the change of place of trial, see § 426 and the note thereto.

Editor's note.—It is difficult to understand how it can be said to be technically correct, in a criminal case, to speak of a change in the venue. The venue is a material averment in the indictment, *State v. Addison*, 2 S. C. 356, 361, and cannot be altered by the court. The grand jury is sworn and their presentments and bills are limited to matters within the county for which they sit. The term "change of venue" has, in some way, crept into the law books and into legislative acts. As it is used in this section it means no more than a change of the trial from the county in which the bill was found, to some other within the jurisdiction of the court. In fact, the language of this section gives the construction which it intends by the use of the words "to change the venue," for it authorizes the change to be made by ordering the record to be removed, for trial, to some other county within the circuit. The practitioner is especially referred to the note to § 426 providing for the change of place of trial upon speci-

fied grounds.

Change of venue is discretionary with court.—The power to change the venue as provided for under this section is discretionary. *Taylor v. Williamson*, McMul. Eq. 348; *State v. Coleman*, 8 S. C. 238; *McFail v. Barnwell County*, 54 S. C. 368, 32 S. E. 417; *Utsey v. Charleston*, etc., R. Co., 38 S. C. 399, 17 S. E. 141.

But it is a judicial and not an arbitrary discretion.—*State v. Davis*, 138 S. C. 532, 137 S. E. 139, 140; *State v. Francis*, 152 S. C. 17, 149 S. E. 348, 352, citing *State v. Jackson*, 110 S. C. 273, 96 S. E. 416.

And should be exercised only for cause shown.—The exercise of the power granted under this section must be for a good and sufficient cause shown. *Taylor v. Williamson*, McMul. Eq. 348; *Blakely v. Frazier*, 11 S. C. 122.

In a capital case it is not sufficient cause to change the venue to show that a sum of money has been raised by subscription by some of the citizens of the district to apprehend the criminal, he having escaped from custody. *State v. Williams*, 2 McCord 383.

In the case of *State v. Davis*, 138 S. C.

532, 137 S. E. 139, it was held that a motion for a change of venue was erroneously refused, in view of a showing of a strong sentiment against defendant in the county where the offense was committed.

A change of venue was granted where the sheriff was the brother of the person killed by the defendant, had taken part in the drawing of jurors, by his deputy had served them, and had just been re-elected to his office for a term of four years. *State v. Sullivan*, 39 S. C. 400, 17 S. E. 865, cited in *State v. Martin*, 155 S. C. 495, 152 S. E. 738.

But where the sheriff has no personal interest or personal connection with the prosecution a change of venue will not be granted. *State v. Martin*, 155 S. C. 495, 152 S. E. 738, 739.

For other illustrations of what constitutes a sufficient showing that a fair and impartial trial cannot be had, the practitioner is referred to the authorities cited throughout this note, which in the main has been confined to the general principles applicable to the provisions of this section.—Editor's Note.

And the affidavits should be strong.—The affidavits provided for by this section should be strong. *State v. Williams*, 2 McC. 383, and this is true even in civil cases. *Id.*

But oral testimony of witnesses in open court may be used.—The provisions of this section that the application for removal be "supported by affidavits, etc.," are complied with when witnesses are introduced in open court, and sworn by the presiding judge, and their statements, at the time and place, are reduced to writing by the official stenographer. *State v. Sullivan*, 39 S. C. 400, 17 S. E. 865.

And review lies only where discretion is abused.—Where there is no abuse of discretion shown in granting a change of venue, the Supreme Court will not consider whether a proper showing was made in the court below authorizing the granting of the motion. *Carroll v. Charleston & S. R. Co.*, 61 S. C. 251, 39 S. E. 364; *Gower v. Thomson*, 6 S. C. 313; *Parker v. Grimes*, 9 S. C. 284; *Blakely v. Frazier*, 11 S. C. 122.

Named ground for change of venue is exclusive.—This section relates only to a change of venue because a fair and impartial trial cannot be had in the county of the venue and the section does not give the courts power to change the venue on the other grounds specified in § 426, subdivisions 1 and 3. *Hanley v. Charleston Light & Power Co.*, 110 S. C. 340, 96 S. E. 519.

And the "Promotion of Justice" may not be used as ground for change.—A judge at chambers has no power under

this section to grant a change of venue on the ground that the end of justice would be promoted thereby. *Castles v. Lancaster County*, 74 S. C. 512, 55 S. E. 115.

But section does not affect court's power to change the place of trial.—This section was not intended, nor does it affect, the power of the court to remove causes for the reasons state in subdivision 1 and 3 of § 426. *Handley v. Charleston Light and Water Co.*, 110 S. C. 340, 96 S. E. 519.

As to when the place of trial may be changed, see § 426 and note thereto.

Time for filing applications.—Both the court of general sessions and of common pleas may be open at the same time, and hence an application for a change of venue may be heard after the opening of the court of common pleas. *State v. Hunter*, 79 S. C. 91, 60 S. E. 226.

In regard to a motion for a change of the venue in a civil case, because it was not laid in the proper county, a difference of practice has obtained between the courts of New York and those of England. In the latter it must be made before plea filed.—10 Bac., Title Venue, E., 371. But in the former it will be entertained even after issue joined, where no delay or loss of trial will be the consequence. — *Delavan v. Baldwin*, 3 Caines, 104; *Kent v. Dodge*, 3 John. 447. *State v. Addison*, 2 S. C. 356, 361, 363.

Motions for a change of venue may be made before answer on four days' notice where wrong county is named in the complaint. *Fishburne v. Minott*, 72 S. C. 572, 52 S. E. 646.

Four days' notice must be given.—This section originally provided for the giving of twenty days' notice of application for change of venue. See *Willoughby v. Northeastern R. Co.*, 46 S. C. 317, 24 S. E. 308. This section as it now stands is in conformity with § 448, providing for the giving of four days' notice of the filing of motions.—Ed. Note.

In a case where the defendant was arraigned on the 9th day of the month and the trial was set for the 12th, the last day of the term, it was held that there was no error in denying the motion then made for the first time for a continuance on the grounds that the arraignment was so delayed that it was impossible to give the required notice for a change of venue. *State v. Bethune*, 86 S. C. 143, 67 S. E. 466, 467.

As to the computation of time, see § 821 and note thereto.

Motion may be heard at chambers.—A judge at chambers has power to make an order for a change of venue. *Utsey v. Charleston S. & N. R. Co.*, 38 S. C. 399, 17 S. E. 141; *Dennis v. McKnight et al.*, 161 S. C. 213; 159 S. E. 557.

Attention is called to the fact that § 37 was amended by act of 1925, so as to enable judges at chambers to exercise the same power and jurisdiction as they exercise in open court, with certain exceptions therein mentioned.—Ed. note.

Change of venue allowed even though only one county composes the circuit.—Under the provision in this section saying that a change of venue shall be to a county in the same judicial circuit, where there was but one county in the judicial circuit it was said that a change of venue is a common law right and the court is bound to grant it unless that right is taken away by some express statute. The judge had a right to grant such a change in view of Const. Art. I, § 5, and Const. U. S. Amend. 14 §§ 1, and 426 of the Code of Civil Procedure. *State v. Harvey*, 128 S. C. 494, 122 S. E. 860.

Granting of motion serves to stay proceedings in original court.—Where a change of venue was granted, a stay of proceedings in the original court followed as a necessary result without any motion therefor. *Fishburne v. Minott*, 72 S. C. 572, 52 S. E. 646.

Presentation of motion is a waiver of irregularity in drawing grand jury.—

Motion for a change of venue brought after, as required by law, the return of a true bill by the grand jury, was held to be a waiver of an irregularity in the drawing of the grand jury where the error complained of was not jurisdictional and the defendant was estopped to deny that the bill was valid. *State v. Richardson*, 149 S. C. 121, 146 S. E. 676.

Prejudice existing in county from which removal is sought, need not be directed solely against applicant for change of venue, but can exist in favor of opposing litigant such as to prevent applicant from receiving a fair and impartial trial. *Johnston v. Belk-McKnight Co., of Newberry, S. C., Inc.*, 194 S. C. 490; 10 S. E. (2nd) 1.

Alleged fraudulent joining of defendant for purpose of securing jurisdiction cannot be taken advantage of when raised for first time by exceptions to order refusing change of venue. *Anderson v. Boughman*, 167 S. C. 164; 166 S. E. 83. Evidence should be taken, as in *Adams v. Fripp*, 108 S. C. 234; 94 S. E. 109.

Failure to docket case does not prevent court's hearing motion for change of venue. *Dennis v. McKnight et al.*, 161 S. C. 213; 159 S. E. 557.

§ 36. Powers of circuit judges at chambers as to writs, demurrers, equity cases, etc.—The judges of the court of common pleas shall have power at chambers to grant writs of prohibition, mandamus and certiorari, and to hear and determine demurrers and motions to set aside or stay execution in the same manner, in every respect as if the court were actually sitting, and with the consent of all such adult parties as may have answered, or their attorneys, in a cause, and of the guardian ad litem of infants therein; to hear and determine any matter not properly triable before a jury, and the persons, respectively, shall have the same right of appeal as if the decision was made in open court; they may hear and determine actions for partition and foreclosure suits when not contested, either within or without the county where the land in question lies, and may grant all writs and processes in such actions at chambers, in like manner with the same effect as are now granted in term time, with the consent of all such adult parties as may have answered or their attorneys, and of the guardian ad litem of infants therein, and in default cases not requiring the verdict of a jury may render judgment as in open court.

In all contested equity cases when the testimony has all been taken, any party may have the case heard and determined by any judge within the circuit in which the case is pending, at chambers as fully and effectually as if heard in open court by giving the adverse party or parties, or their attorneys ten days written notice of time and place of such hearing.

1932 Code, § 36; 1922 (32) 903.

Ed. note.—Due to the similarity of this section to § 37 all of the annota-

tions to the two sections have been placed under the latter section.

§ 37. Powers of circuit and special judges at chambers—authority in adjoining circuit.

(1) **Stated.**—All regular and special judges shall have at chambers in any county within the circuit in which they are resident or in the circuit in which they are assigned to hold court, all powers and jurisdiction, which they have and exercise in open court in any county within said circuit, except for the determination of such matters as necessitates trial by jury. They may hear and determine actions for partition and foreclosure suits and all other equity matters concerning real estate whether within or without the county where the land in question lies: *provided*, in all contested matters the adverse party shall be entitled to notice of the time and place of any hearing at chambers, which notice when not otherwise fixed by statute or rule, shall be at least ten days prior thereto. *And provided further*, that no hearing, except with consent, shall be had outside the judicial circuit of the judge having jurisdiction; *and provided further*, that where the service is made by publication the ten days' notice of application for judgment may be inserted in the first or any subsequent publication or mailed at the last known residence of the defendant or defendants: *and provided further*, that in all other cases except by consent, and in partition and foreclosure suits and cases where summons are served by publication, the notice of the application for judgment shall not be made until after the time for answering or making return has expired: *and provided further*, that circuit judges shall have the power to grant orders and decrees in cases arising in the circuit in which they may be at the time the presiding judges therein or resident judges thereof when they are temporarily absent from the circuit; *provided*, that this provision shall not be construed so as to nullify or limit any other powers conferred on circuit judges by any one or more provisions of this section. *Provided, further*, that circuit judges shall have the power to hear appeals from magistrates' courts and/or municipal courts to the courts of general sessions, and the court of common pleas, upon notice herein required being given for the hearing of the same.

(2) **Judge of adjoining circuit to have jurisdiction when no resident or special judge is on circuit.**—In case any judicial circuit is without a resident judge, by reason of death, absence, disqualification or otherwise and no other judge, special or regular, is presiding therein, then jurisdiction in all matters arising in such circuit is conferred upon and shall be exercised by the resident judge of the adjoining circuit or by any judge presiding therein; and any judge exercising such jurisdiction shall first satisfy himself of the necessity of same by affidavit of the moving party.

1932 Code, § 37; Civ. P. '22, § 35; Civ. C. '12, § 3833; Civ. C. '02, § 2736; G. S. 2115; R. S. 2247; 1818 (7) 321; 1882 (28) 38; 1887 (19) 813; 1891 (20) 1123; 1899 (23) 30; 1908 (25) 1055; 1920 (31) 806; 1921 (32) 281; 1925 (34) 94; 1930 (36) 1247; 1933 (38) 50; 1937 (40) 79.

Cross reference.—As to purposes for which the circuit court shall always be deemed open, see § 33 and note thereto. As to motions and orders generally, see § 817 and note thereto. For certain powers at chambers given to the Justices of the Supreme Court and the judges of the circuit courts by the State Constitution, see article V, § 25, State Constitution.

Editor's note.—The provisions of the sections mentioned in the above cross

reference are very closely related to the provisions of the instant section. The practitioner will no doubt find it helpful to read the respective annotations placed under those sections, in connection with the following note.

Successful bidder at a foreclosure sale a "party" within the meaning of this section.—A successful bidder at a foreclosure sale is a "party" within the meaning of this section and as such is

entitled to the ten days' notice herein provided for. *Blatt v. Blount*, 121 S. C. 78, 113 S. E. 467, 469.

Judge at chambers has no jurisdiction to hear a motion to vacate a judgment.—See the above catchline under § 817, subd. 2, where the cases of *Turner v. Foreman*, 47 S. C. 31, 24 S. E. 989; *Bank v. Mellett*, 44 S. C. 383, 22 S. E. 444, 445; *Clawson v. Hutchinson*, 14 S. C. 517; *Charles v. Jacobs*, 5 S. C. 348, are treated.

Nor can a final order given in court be vacated at chambers.—In a case where a judge issued a writ of certiorari from the court of common pleas, and an order entered on the return of such writ, restraining permanently a magistrate from issuing his warrant to eject a tenant it was held that such order was final, and that it could not be vacated by a circuit judge at chambers, not even by the judge who presided at court when such order was made, unless it was procured by fraud or misrepresentation. *Coleman v. Keels*, 30 S. C. 614, 9 S. E. 270.

A judgment cannot be corrected at chambers without the consent of parties.—A judge at chambers has no power or jurisdiction to correct a judgment of the circuit court without the consent of all the parties. *Middleton v. Denmark Ice and Fuel Co.*, 97 S. C. 457, 81 S. E. 157. See, also, the authority therein cited.

A judge cannot grant a perpetual injunction at chambers against the consent of the party. *Hornsby v. Burdell*, 9 S. C. 303, or until the issues of the action have been heard and determined. *Id.*

An order of sale in partition suit may be granted at chambers without the consent of the parties in interest. *Woodward v. Elliot*, 27 S. C. 368, 3 S. E. 477.

Written consent of parties is unnecessary.—It is said in *Pearson v. Breeden*, 79 S. C. 302, 60 S. E. 706, that wherever the consent of the parties is necessary for the exercise at chambers of the powers given by this section, such consent need not be in writing.

Jury trial cannot be given at chambers in quo warranto.—It was said in the case of *State v. Gibbes*, 109 S. C. 135, 95 S. E. 346, 348, that a judge at chambers in a quo warranto proceeding could not have given the parties a jury trial.

Application for mandamus cannot be heard out of circuit.—A circuit judge while holding court in a circuit other than his own has no jurisdiction to hear and determine at chambers, in such circuit an application for mandamus in a cause which arose in his circuit. *State v. Smith*, 50 S. C. 558, 27 S. E. 933.

Nor may a demurrer be heard in county other than that in which action is

pending.—A judge of another county than that in which the action is pending does not have jurisdiction to hear and determine a demurrer pertaining to that action in chambers. *Hernlin v. People's Bank*, 135 S. C. 313, 133 S. E. 549.

Nonresident judge at chambers may order a jury drawn while presiding in the circuit.—See the above catchline under § 38, where the case of *State v. Powers*, 59 S. C. 200, 37 S. E. 690, 692, is treated.

Motion for discontinuance may be heard and granted at chambers.—See the above catchline under § 33 where the case of *Shelton v. Southern R. R.*, *Carolina Div.*, 80 S. C. 74, 61 S. E. 220 is treated.

Receiver's certificate issuable at chambers.—See the above catchline under § 33 where the cases of *State v. Port Royal & A. Ry Co.*, 45 S. C. 413, 23 S. E. 363; *Dixon v. Floyd*, 73 S. C. 202, 53 S. E. 167, are treated.

Order granting alimony pendente lite is an interlocutory order.—See the above catchline under § 33 where the case of *Messervy v. Messervy*, 80 S. C. 277, 61 S. E. 442, is treated.

Resident judge of circuit had jurisdiction to give default judgment, when record showed action was triable in another county in same circuit. *McInnis v. Caulk*, 176 S. C. 399; 180 S. E. 340.

This section, as regards circuit judge's jurisdiction in adjoining circuit, not superseded by statute for filling circuit judge vacancies (§ 44). *Winn v. Harby et al.*, 166 S. C. 99, 164 S. E. 434.

Circuit court could not assume jurisdiction in adjoining circuit for circuit judge's disqualification, where such adjoining circuit had three other courts in session. *Ibid.*

Matters which may be heard without jury may be heard by judge of adjoining circuit in his own circuit. *Ibid.*

Record must show compliance with statute, including absence of resident judge and fact that no other judge, special or regular, is presiding in the circuit, in order that judge of an adjoining circuit may exercise jurisdiction. *Ex parte Hart et al.*, 186 S. C. 125; 195 S. E. 253.

Where affidavits mistakenly alleged that resident judge was absent from circuit, and orders were signed by judge of adjoining circuit, the latter had no jurisdiction of subsequent proceeding to vacate such orders, in absence of further showing that resident judge was absent. *Ibid.*

Nor did judge of adjoining county have jurisdiction to vacate orders signed by him after they had been filed in county in which action was brought. *Ibid.*

Change of venue.—Motion for change of venue may be heard by circuit judge at chambers. *Dennis v. McKnight et al.*, 161 S. C. 213; 159 S. E. 557.

§ 38. Powers of judges holding courts in other circuits.—Every judge, while holding the circuit court for any circuit pursuant to the provisions of the law of this State, shall be invested with powers equal to those of the judge of such circuit, and may hear and determine all causes and motions and grant all orders in open court or at chambers which it is competent for the judge residing in such circuit to hear, determine, or grant, any law, usage, or custom to the contrary notwithstanding.

1932 Code, § 38; Civ. P. '22, § 36; Civ. C. '12, § 3834; Civ. C. '02, § 2737; G. S. 2116; R. S. 2248; 1878 (16) 395.

Cross reference.—As to power of circuit court and special judges at chambers, see § 37 and note thereto. As to the purposes for which the circuit courts shall always be deemed open, see § 33 and note thereto. As to motions and orders generally, see § 817 and note thereto. As to special sessions of circuit courts, see § 69 and note thereto. As to provision where a judge is unable to hold court, see § 44 and note thereto.

Section should be construed with § 69.—This section should be construed with § 69 of this Code. Section 69 of this Code should be regarded as a limitation upon the general powers of circuit judges when only an extra term of court is being held. *Sims v. Phillips*, 46 S. C. 149, 24 S. E. 97, 99.

Jurisdiction of special judge may be limited to the county to which he is commissioned.—A special judge whose commission is limited to a particular county has no jurisdiction to try matters arising elsewhere in the circuit. *Evans v. Town of Edgefield*, 132 S. C. 380, 129 S. E. 207, 210.

§ 39. Judges discharge all duties on circuits.—Every circuit judge in this State shall at all times have jurisdiction to discharge and perform all the duties of his office within the circuit wherein he resides, except the holding of circuit courts therein when some other circuit judge shall be engaged in holding said courts.

1932 Code, § 39; Civ. P. '22, § 37; Civ. C. '12, § 3835; Civ. C. '02, § 2738; G. S. 2117; R. S. 2249; 1878 (16) 395.

Cross references.—As to the power of the justices of the Supreme Court and the judges of the circuit court at chambers as given by the State Constitution, see article V, § 25. As to power of circuit and special judges at chambers, see § 37 and note thereto. As to power of judges holding court in other circuits, see § 38 and note thereto.

Editor's note.—Sections 13 and 14 of article V of the State Constitution should be read in connection with this and the preceding section. *State v. Smith*, 50 S. C. 558, 27 S. E. 933, 934.

Judge sitting in one circuit cannot de-

Under this section and § 39, a judge is given no jurisdiction to grant a writ of certiorari in a case tried in another circuit while the judge thereof is holding court therein. *State v. Black*, 34 S. C. 194, 13 S. E. 361, 364.

And only such business as appears on the calendar may be transacted.—When a judge is assigned for a special term of court he can transact no other business than that on the calendar. *Sims v. Phillips*, 46 S. C. 149, 24 S. E. 97, 99.

A non-resident judge may make an order at chambers requiring a jury to be drawn, while presiding in the circuit. *State v. Powers*, 59 S. C. 200, 37 S. E. 690, 692.

Motion for discontinuance may be heard and granted at chambers.—See the above catchline under § 33 where the case of *Shelton v. Southern R. R.*, Carolina Div., 80 S. C. 74, 61 S. E. 220, is treated.

Cited but not construed in *State v. Williams*, 52 S. C. 416, 29 S. E. 814, 815; *In re Doran*, 129 S. C. 26, 123 S. E. 501, 503.

termine mandamus proceeding arising in another circuit.—A judge cannot hear and determine at chambers in another circuit an application for a writ of mandamus in a case arising within his own circuit. *State v. Smith*, 50 S. C. 558, 27 S. E. 933.

This section was cited in support of the conclusion that the court of common pleas while sitting in one circuit, has no jurisdiction over a case pending in another circuit. *State v. Smith*, 50 S. C. 558, 27 S. E. 933, 934.

Jurisdiction of special judge may be limited to the county to which he is

commissioned.—See the above catchline under § 38 where the cases of *Evans v. Town of Edgefield*, 132 S. C. 380, 129 S. E. 207, 210; *State v. Black*, 34 S. C. 194, 13 S. E. 361, 364, are treated.

Evidential value of signing of order outside of circuit.—The fact that a judge

signs an order of bail outside of his circuit for a prisoner of his circuit does not necessarily show that he heard the application beyond his circuit. *State v. Satterwhite*, 20 S. C. 536.

Cited but not construed in *Shelton v. Southern Ry.*, 80 S. C. 74, 61 S. E. 220.

§ 40. Not absent themselves from State without permission.—No circuit judge shall absent himself from this State without leave first granted in writing by the Chief Justice or presiding associate justice.

1932 Code, § 40; Civ. P. '22, § 38; Civ. C. '12, § 3836; Civ. C. '02, § 2739; G. S. 2119; R. S. 2250; 1877 (16) 229.

§ 41. Salaries of judges.—All circuit judges, who are elected after the 14th day of March, 1935, shall receive an annual salary of six thousand seven hundred fifty (\$6,750.00) dollars a year.

1932 Code, § 41; Civ. P. '22, § 39; Civ. C. '12, § 3837; Civ. C. '02, § 2740; G. S. 2420; R. S. 2351; 1893 (21) 417; 1919 (31) 101; 1929 (36) 7; 1935 (39) 88.

Payment of salaries of circuit judges.
—See annotations under article V, sec-

tion 9, and article X, section 9, State Constitution.

§ 42. Amenable for neglect of duty as to holding terms, etc.—proceedings.—If any circuit judge shall fail or neglect to hold the term or terms of any court of general sessions or common pleas in any circuit to which he may be assigned until the business of said courts shall have been disposed of, or the end of the term, or terms, arrives, or shall fail to recognize and obey the order of assignment of the Chief Justice or presiding associate justice, or shall violate any provisions of this chapter, the attorney general of the State shall, upon any reliable information of the same, by official communication, bring such violations of this chapter to the notice of the General Assembly at its first session, and such circuit judge shall be held amenable to proceedings for neglect of duty, as provided in the Constitution.

1932 Code, § 42; Civ. P. '22, § 40; Civ. C. '12, § 3838; Civ. C. '02, § 2741; G. S. 2124; R. S. 2255; 1877 (16) 229.

§ 43. Judges notify Chief Justice of inability or disability to hold court.—It shall be the duty of each circuit judge, when disabled by sickness or other cause to hold any court to which he may be assigned, to give, or cause to be given, prompt notice of such inability or disability to the Chief Justice, so that his place may be temporarily filled and the court held according to law.

1932 Code, § 43; Civ. P. '22, § 41; Civ. C. '12, § 3839; Civ. C. '02, § 2742; R. S. 2256; 1892 (21) 4.

Cited but not construed in *Haughton v. Order of U. C. T.*, 108 S. C. 73, 90 S. E. 393.

§ 44. Special judges — appointment — powers. — Whenever any circuit judge, pending his assignment to hold the courts of any circuit, shall die, resign, be disabled by illness, or shall be excused for any other reason considered sufficient in the opinion of the Chief Justice of the Supreme Court, and likewise in case of a vacancy in the office of circuit judge of any circuit, or if a special session of the court of general sessions or common pleas be ordered as provided for in section 69, the Chief Justice of the

Supreme Court may assign any other disengaged circuit judge to hold the courts of any such circuits, to fill any appointment made necessary by such vacancy or to hold any special session of the circuit court that may be ordered by the Chief Justice. And in the event there be no other disengaged circuit judge available to hold said courts, then the Governor shall immediately commission as special judge such persons learned in the law, as shall be recommended by the Supreme Court, or by the Chief Justice thereof if the Supreme Court be not in session, to hold the courts of any such circuit, or to hold any special session thereof which may be ordered by the Chief Justice, as aforesaid.

Should there be a vacancy in the office of Chief Justice of the Supreme Court, or in case of his absence from the State, or in case of his illness or incapacity from whatever cause, then the power and authority vested and the duties imposed upon the Chief Justice by the provision of this section and section 69 shall be exercised and discharged by the senior associate justice of the Supreme Court in point of service who is at the time within the State and is not ill or otherwise incapacitated, and his acts in exercising said powers and discharging said duties shall be as effectual as though performed by the Chief Justice of the Supreme Court.

Whenever a special judge shall be appointed to hold any court, he shall have and exercise all the powers and duties that a regular judge would have if presiding.

Whenever the time fixed for holding any of the courts of general sessions or common pleas of this State shall be found not sufficient for the trial of all cases before said court, a like assignment of a disengaged circuit judge, or commission of a special judge, may be had to hold the court to which the judge then holding such over crowded court may have been in due course next assigned, and the term of such overcrowded court shall proceed until the cases before it are disposed of.

1932 Code, § 44; Civ. P. '22, § 42; Civ. C. '12, § 3840; Civ. C. '02, § 2743; G. S. 2123; R. S. 2254; 1896 (22) 11; 1925 (34) 5; 1929 (36) 258; 1931 (37) 257; 1935 (39) 55.

Cross reference.—As to special sessions of circuit courts, see section 69 and note thereto.

Editor's note.—It appears that this section originated in the act of 1799. By that act the governor was authorized to appoint and commission some fit and proper person to sit as judge in case any of the judges on the circuit should happen to be sick or become unable to hold the court in his circuit. See *Taylor v. Shrine*, 3 Brev. 516; cited in *Norton v. County*, 6 Supt. Ct. 1128.

Formerly provisions were made in a separate section for a special court of general sessions when a request was made therefor by the solicitor to the Governor. See *State v. Gallman*, 79, S. C. 229, 60 S. E. 682, 684.

Section is constitutional.—The power thus conferred by section 69 and this section is easily sustainable under the provisions of the constitution, Article V, § 6. *State v. Gossett*, 117 S. C. 76, 108 S. E. 290, 292, 16 A. L. R. 1299.

Power herein conferred is not an absolute one.—The power conferred by

this section and § 69 is not an absolute power but is controlled by considerations which safeguard the rights and interests of those whose rights and interests will be determined by such tribunal. *State v. Gossett*, 117 S. C. 76, 108 S. E. 290, 292, 16 A. L. R. 1299.

And it is a discretionary power.—It is a discretionary power to be exercised as a judicial function. *State v. Gossett*, 117 S. C. 76, 108 S. E. 290, 292, 16 A. L. R. 1299.

The appointment of a special judge is not essentially an executive function.—The appointment of a special judge to preside over the special or regular court is not essentially and intrinsically an executive function, within the classification of legislative, executive, and judicial powers under Article I, § 14, of the constitution, but may be regulated by statute. *State v. Davis*, 88 S. C. 204, 70 S. E. 417, 419.

Appointment of special judge without the suggestion of supreme court void.—The governor has no power, under this section and § 69, to commission a special

judge not recommended by the Supreme Court, or chief justice if the Supreme Court be not in session. *State v. Davis*, 88 S. C. 204, 70 S. E. 417, 419.

Power of Governor to appoint a special judge to hold the regular term of a given county questioned.—In view of the provisions of this section it is questionable whether the governor has the power to appoint a special judge to hold the regular term of the court for a given county. It appears that in such case the appointment can be made only for the courts of the circuit, and not for the court of a particular county. *Evans v. Town of Edgefield*, 132 S. C. 380, 129 S. E. 207, 209.

Holding over court for more than a week beyond the date fixed for its ad-

journment was not error in view of this section. *State v. Bigham*, 133 S. C. 491, 131 S. E. 603, 611. See also, *State v. Underwood*, 127 S. C. 1, 120 S. E. 719; *State v. Gregory*, 127 S. C. 87, 120 S. E. 499.

Confining of special term to disposition of cases on criminal docket does not render order nugatory.—Because the special term of the court of general sessions, ordered, by the governor under this and the following section was needlessly confined to the disposition of all cases on the criminal docket such fact did not render the order nugatory. *State v. Gallman*, 79 S. C. 229, 60 S. E. 682.

Cited but not construed in *Haughton v. Order of U. C. T. of A.*, 108 S. C. 73, 93 S. E. 393; *State v. Henderson*, 136 S. C. 363, 134 S. E. 364.

§ 45. Clerk notify authorities and jurors of special terms.—When notified of such appointment, the clerk of the said court shall notify the proper authorities, and the grand jury shall be summoned to attend, if it be a court of sessions, and a petit jury shall be drawn and summoned, if jury cases are to be tried, in the regular manner, for the purpose of said court, and as the same may be necessary, and the clerk shall notify said special judge of the time fixed for holding said special term of court.

1932 Code, § 45; Civ. P. '22, § 43; Civ. C. '12, § 3842; Civ. C. '02, § 2745; 1900 (23) 329.

Cross reference.—As to the appointment of special judges, see § 44 and note thereto.

Publication of notice is unnecessary.—It is not necessary that formal notice of a special term called by the governor be published by the clerk over his signature. *State v. Davis*, 88 S. C. 204, 70 S. E. 417.

And notification of proper authorities

by clerk is presumed.—It must be presumed in absence of anything to the contrary on the holding of a special term presided over by a special judge that the proper authorities were notified by the clerk and everything was conducted in a regular manner. *State v. Davis*, 88, S. C. 204, 70 S. E. 417, 419.

Cited but not construed in *State v. Gallman*, 79 S. C. 229, 60 S. E. 682.

§ 47. Salary of special judge.—The special judge shall be allowed for his services ten dollars per day and his necessary expenses, and the same per diem for not exceeding five days for the preparation of his decrees.

1932 Code, § 47; Civ. P. '22, § 45; Civ. C. '12, § 3844; Civ. C. '02, § 2747; 1900 (23) 329.

§ 48. Stenographer for special term of court—appointment.—It shall be lawful for the presiding judge at any special term of the circuit court, where the official stenographer is performing the duties of his office at a court then being held in some other county of the circuit to appoint a stenographer for said term of the court, who shall perform the duties of the office of court stenographer for said term of court.

1932 Code, § 48; Civ. P. '22, § 46; Civ. C. '12, § 3845; Civ. C. '02, § 2748; 1900 (23) 329.

§ 49. Stenographer appointed for special term of court—compensation.—The stenographer appointed under the provision of the foregoing section shall receive the same compensation as that allowed by law to the official stenographer in proportion to the time of service, to be paid out of the

county treasury, upon the warrant of the clerk of the court, approved by the presiding judge, and also the usual fees for copies of testimony and reports of court proceedings, to be paid by the parties ordering the same.

1932 Code, § 49; Civ. P. '22, § 47; Civ. C. '12, § 3846; Civ. C. '02, § 2749; 1900 (23) 329.

ARTICLE 2

Circuits and Terms of Courts

50. Fourteen circuits.
51. First circuit.
52. Second circuit.
53. Third circuit.
54. Fourth circuit.
55. Fifth circuit.
56. Sixth circuit.
57. Seventh circuit.
58. Eighth circuit.
59. Ninth circuit.
60. Tenth circuit.
61. Eleventh circuit.
62. Twelfth circuit.

63. Thirteenth circuit.
64. Fourteenth circuit.
64.-1. Jurisdiction of judges presiding at terms beginning last Monday in April.
65 and 66. General sessions and common pleas.
67 and 71. Adjournment.
68. Call off terms of common pleas.
69. Special sessions.
70. Petit jurors.
72. Oath.
73. A court of record.
74. Clerk and deputy clerk.

§ 50. State divided into fourteen circuits.—The State is divided into fourteen judicial circuits as follows:

The first circuit shall be composed of the counties of Calhoun, Dorchester and Orangeburg. The second circuit shall be composed of the counties of Aiken, Bamberg and Barnwell. The third circuit shall be composed of the counties of Clarendon, Lee, Sumter and Williamsburg. The fourth circuit shall be composed of the counties of Chesterfield, Darlington, Marlboro and Dillon. The fifth circuit shall be composed of the counties of Kershaw and Richland. The sixth circuit shall be composed of the counties of York, Chester, Lancaster and Fairfield. The seventh circuit shall be composed of the counties of Cherokee, Spartanburg and Union. The eighth circuit shall be composed of the counties of Abbeville, Greenwood, Laurens and Newberry. The ninth circuit shall be composed of the counties of Charleston and Berkeley. The tenth circuit shall be composed of the counties of Anderson and Oconee. The eleventh circuit shall be composed of the counties of Lexington, McCormick, Saluda and Edgefield. The twelfth circuit shall be composed of the counties of Florence, Georgetown, Horry and Marion. The thirteenth circuit shall be composed of the counties of Greenville and Pickens. The fourteenth circuit shall be composed of the counties of Allendale, Hampton, Colleton, Jasper and Beaufort.

1932 Code, § 50; Civ. P. '22, § 48; Civ. P. '12, § 17; Civ. P. '02, § 17; 1912 (27) 827; 1914 (28) 579, 636; 1916 (29) 688, 717; 1919 (31) 5; 1870 (14), § 17; 1868 (14) 5, 72; 1869 (14) 198; 1872 (15) 146; 1878 (16) 376; 1871 (14) 659, § 2; 1882 (17) 682; 1889 (20) 518; 1871 (14) 696, § 6; 1897 (22) 583, § 10 and 597, § 5; 1897 (22) 592, § 7; 1897 (22) 609, § 11; Con., 1895, page 96 and 1896 (22) 250, § 6; 1899 (23) 31, § 5; 1898 (22) 879; 1899 (23) 179, § 4; 1908 (25) 1002, 1283; 1910 (26) 867; 1926 (34) 1041; 1927 (35) 68; 1931 (37) 51.

§ 51. Courts in first circuit.

(1) **Terms.**—The courts of the first judicial circuit shall be held in the several counties of said circuit as follows:

(a) **CALHOUN COUNTY.**—The court of general sessions for Calhoun County shall be held at St. Matthews as follows: on the fourth Monday in May; first

Monday in December; and the court of common pleas for the said county shall be held at St. Matthews on the fourth Monday in April, the fourth Monday in September, without jury, and the third Monday in November. And in addition to the terms of the court of common pleas above provided for there shall be terms of such court during each of the weeks in which there are fixed terms of court for the court of general sessions, and immediately upon the conclusion of the business of the court of general sessions such court shall open, and the petit jurors drawn to serve in the court of general sessions shall serve as petit jurors in the court of common pleas, and at such terms any and all business may be transacted as may be done at any other term of the court of common pleas.

(b) DORCHESTER COUNTY.—The court of general sessions for the county of Dorchester shall be held at St. George on the first Monday in April and the third Monday in October. The court of common pleas for the said county shall be at St. George on the third Monday in April, the third Monday in May and the second Monday in November, the duration of said courts shall be for one week each; and also a court of common pleas at the said place on the second Monday in July, without a jury.

(c) ORANGEBURG COUNTY.—The court of general sessions for the county of Orangeburg shall be held at Orangeburg the first Monday in January, two weeks; first Monday in May, two weeks; second Monday in September, two weeks. The court of common pleas for the county of Orangeburg shall be held at Orangeburg on the third Monday in March, two weeks; first Monday in June, two weeks, the first Monday in October, two weeks.

1932 Code, § 51; Civ. P. '22, § 49; Civ. P. '12, § 18; Civ. P. '02, § 18; 1886 (19) 473; 1898 (22) 684; 1901 (23) 624; 1908 (25) 1010; 1909 (26) 230; 1911 (27) 88; 1912 (28) 771, 772; 1913 (28) 117; 1915 (29) 387, 547; 1916 (29) 690; 1917 (30) 145; 1919 (31) 238; 1921 (32) 56; 1923 (33) 103; 1925 (34) 59; 1926 (34) 935; 1928 (35) 1204; 1931 (37) 123; 1934 (38) 1260; 1939 (41) 279; 1941 (42) 118.

§ 52. Courts in second circuit.

(1) **Terms.**—The courts of the second judicial circuit of South Carolina shall be held as follows:

(a) AIKEN COUNTY.—The court of general sessions for the county of Aiken shall be held at Aiken on the fourth Monday in January, two weeks; the first Monday in May, two weeks; the first Monday in October, two weeks. The court of common pleas for said county of Aiken shall be held at Aiken on the second Monday in January for a term of two weeks; on the fourth Monday in March, three weeks; on the first Monday in June, two weeks; on the second Monday in November, three weeks.

(b) BAMBERG COUNTY.—The court of general sessions for Bamberg County shall be held at Bamberg on the third Monday of February, one week; on the second Monday in September, one week. The court of common pleas for said county shall be held at Bamberg on the third Monday in April, two weeks; on the second Monday in July, one week; and on the fourth Monday in October, two weeks.

(c) BARNWELL COUNTY.—The court of general sessions for Barnwell County shall be held at Barnwell on the fourth Monday in February, one week; the fourth Monday in May, one week; the third Monday in September, one week. The court of common pleas for said county shall be held at Barnwell the second Monday in March, two weeks; the third Monday in June, two weeks; the first Monday in December, two weeks.

1932 Code, § 52; Civ. P. '22, § 50; Civ. P. '12, § 19; Civ. P. '02, § 19; 1897 (22) 444;

1910 (26) 542; 1911 (27) 87; 1912 (27) 770; 1914 (28) 607; 1915 (29) 198; 1916 (29) 691, 699; 1917 (30) 135; 1919 (31) 43; 1920 (31) 855; 1924 (33) 930; 1926 (34) 991; 1933 (38) 320; 1935 (39) 308; 1937 (40) 573; 1941 (42) 118.

Cited but not construed in *State v. Gregory*, 127 S. C. 87, 120 S. E. 499.

§ 53. Courts in third circuit.

(1) **Terms.**—The courts of the third circuit shall be held as follows:

(a) **CLARENDON COUNTY.**—The court of general sessions at Manning, for the county of Clarendon, on the fourth Monday in January, one week, the third Monday in June, one week, and the second Monday in September one week. The court of common pleas at the same place on the first Monday in March, two weeks, the fourth Monday in June, one week, and the third Monday in October, two weeks.

(b) **LEE COUNTY.**—The court of general sessions at Bishopville, for the county of Lee, the first Monday in February, one week, on the second Monday in June, one week, and on the first Monday in September, one week. The court of common pleas at the same place, on the fourth Monday in March, two weeks, the fourth Monday in September, one week, and the fourth Monday in November, two weeks.

(c) **SUMTER COUNTY.**—The court of general sessions at Sumter, for the county of Sumter, on the second Monday in February, two weeks, on the first Monday in July, one week, and on the first Monday in November, two weeks. The court of common pleas at the same place on the second Monday in January, two weeks, on the second Monday in April, three weeks, on the second Monday in July, one week, on the first Monday after fourth Monday in September, two weeks, and on the second Monday in December, two weeks: *provided*, that no jury trial of civil cases shall be had at the summer term of common pleas court in Sumter county except by agreement of a majority of the bar of said county.

(d) **WILLIAMSBURG COUNTY.**—The court of general sessions at Kingstree, for the county of Williamsburg on the second Monday after the second Monday in February, one week, on the first Monday in June, one week, and on the third Monday in September one week. The court of common pleas at the same place on the third Monday in March, one week, on the fourth Monday in May, one week, on Wednesday first succeeding the first Monday in June, and on the third Monday in November, one week; *provided*, that no jury trial of civil cases shall be had at the June term except by consent. The petit jurors for the first and third terms of the court of general session shall not be required to attend the first, second and fourth terms of the court of common pleas, but separate juries shall be drawn and summoned for said courts.

(2) **Draw separate juries for certain terms, Lee, Sumter and Williamsburg Counties.**—Separate juries are drawn for the court of general sessions and the courts of common pleas for all terms for Sumter County and for the first and third terms for Lee and Williamsburg Counties.

1932 Code, § 53; Civ. P. '22, § 51; Civ. P. '12, § 20; Civ. P. '02, § 18; 1884 (18) 886; 1896 (22) 22; 1900 (23) 311; 1902 (23) 1194; 1910 (26) 541; 1914 (28) 531; 1916 (29) 693; 1924 (33) 1187; 1928 (35) 1288; 1929 (36) 79; 1931 (37) 320, 376; 1934 (38) 1466; 1936 (39) 1481; 1939 (41) 184; 1940 (41) 1771; 1941 (42) 118.

§ 54. Courts in fourth circuit.

(1) **Terms.**—The regular terms of the circuit courts of the fourth judicial

circuit shall be as follows:

(a) **COURTS OF GENERAL SESSIONS:** At Chesterfield for Chesterfield County, on the first Monday in February, second Monday in June, second Monday in November; at Bennettsville for Marlboro County, on the second Monday in February, first Monday in June and fourth Monday in October; at Darlington for Darlington County, on the second Monday in January, third Monday in March, third Monday in June and first Monday in November; at Dillon for Dillon County, on the second Monday in March, fourth Monday in June and third Monday in November.

(b) **COURTS OF COMMON PLEAS:** At Chesterfield for Chesterfield County, on the first Monday in January, the third Monday in February, third Monday in April, fourth Monday in May, first Monday in September and first Monday in October and fourth Monday in November; at Bennettsville for Marlboro County, on the third Monday in January, first Monday in March, fourth Monday in April, third Monday in May, second Monday in October and first Monday in December; at Darlington for Darlington County, on the fourth Monday in January, fourth Monday in February, fourth Monday in March, second Monday in April, second Monday in May, third Monday in September, second Monday in December; at Dillon for Dillon County, on the first Monday in April, first Monday in May and second Monday in September, and third Monday in October.

(2) **Time pleadings, etc., returnable.**—All recognizances, pleadings, notices and papers, whether dated heretofore or hereafter, shall be returnable and applicable to the terms of the court as fixed by this section, and the clerk of the court for each county in the fourth judicial circuit shall give two weeks' notice of each and every term of the court in some newspaper published in the county, stating the day of the month on which the next court will open for the county.

1932 Code, § 54; Civ. P. '22, § 52; Civ. P. '12, § 21; Civ. P. '02, § 21; 1883 (18) 305; 1887 (19) 999; 1897 (22) 404; 1901 (23) 627; 1910 (26) 544; 1911 (27) 80; 1922 (32) 780; 1924 (33) 932; 1925 (34) 233; 1932 (37) 1213; 1934 (38) 1400; 1935 (39) 440; 1937 (40) 573; 1940 (41); 1646, 1754, 1844; 1941 (42) 151, 118.

§ 55. Courts in fifth judicial circuit.

(1) **Terms.**—The courts of the fifth judicial circuit shall be held as follows:

(a) **KERSHAW COUNTY.**—The court of general sessions for Kershaw County shall be held at Camden on the third Monday in February, the fourth Monday in June, and the fourth Monday in October; and the court of common pleas for said county on the fourth Monday in February, the second Monday in June, and the first Monday in November, said terms of common pleas court to continue for two weeks each.

(b) **RICHLAND COUNTY.**—The court of general sessions for Richland County shall be held at Columbia on the second Monday in January for two (2) weeks; on the second Monday in April for two (2) weeks; on the third Monday in May for two (2) weeks; on the Tuesday following the first Monday in September for three (3) weeks; and on the second Monday in December for two (2) weeks; and the court of common pleas for said county on the fourth Monday in January for two (2) weeks; on the second Monday in March for three (3) weeks, the first week of which shall be for the disposal of motions, equity matters and any other matters not requiring the attendance of a jury, and the other two weeks for the disposal of

jury matters; on the first Monday in May for two (2) weeks; on the fourth Monday in September for three (3) weeks, and on the third Monday in November for three (3) weeks, two weeks of which shall be for the disposal of jury matters, and the other week, which includes Thanksgiving Day, shall be for the disposal of motions, equity matters and other matters not requiring the attendance of a jury.

(2) Terms designated.—The courts held under the provisions hereof in the fifth circuit, during the first four months of the year, shall be known as the spring term of the court of general sessions and the spring term of the court of common pleas; during the next four months as the summer terms of said court, respectively; and during the last four months as the fall terms of said courts, respectively. And the two sessions of the court of common pleas herein appointed for Richland County during the spring term and the two sessions of said court for Richland County herein appointed during the fall term, shall be known as the first and second sessions, respectively of such terms.

(3) Time for pre-trial motions and non-jury matters—summoning of jurors.—The first day of each term of the court of common pleas provided for in this circuit, shall be set aside for pre-trial motions and all matters not requiring a jury, except those terms in Richland County of which the entire first or last week is set aside for such purpose, as herein provided for. Where the first day of the terms of the court of common pleas is set aside for pre-trial motions and matters not requiring a jury, as herein provided for, that the jury for the said court of common pleas shall not be summoned to appear on the first day of such term, but shall be summoned to appear on the second day of such term.

(4) Memorial Day, Richland County.—The first day of the term of the court of common pleas for Richland County to commence on the first Monday in May, shall be set aside and designated as Memorial Day, at which time memorial exercises shall be held for the members of the Richland County bar who have died during the previous months. The day set aside as Memorial Day, where there are such exercises to be held, shall be taken up with such exercises, and there shall not be taken up any business of the court.

(5) Exhibits introduced in evidence in trial of jury cases.

(a) **STENOGRAPHER KEEP.**—Subject to the directions of the presiding judge before whom the cause is tried, and of the resident judge of the circuit in all other instances, exhibits introduced in evidence in the trial of jury cases in the courts of common pleas and general sessions of the fifth judicial circuit shall be in the custody and keeping of the official court stenographer during the trial and until the final disposition of the case, whether on appeal or otherwise. *Provided*, that exhibits may be introduced in evidence subject to immediate withdrawal by counsel, provided such be stated in the record and so directed by the presiding judge, and in such event the official court stenographer shall be permitted access to such exhibits at any and all times necessary for the purpose of making his transcript requested by counsel on either side.

(b) **STENOGRAPHER SURRENDER AFTER FINAL DISPOSITION OF CAUSE.**—At the final disposition of a cause the official court stenographer is authorized to surrender any or all exhibits to counsel representing the parties owning the same, and take a receipt therefor, and in the event said counsel shall

fail or refuse to receipt therefor, the official court stenographer is authorized to file such exhibits with the clerk of the court and the said clerk of court is directed to receipt for the same.

(c) **APPEALS.**—For the convenience of counsel on either side in perfecting an appeal, the official court stenographer is authorized with the consent of counsel who introduced the exhibit, to turn over to counsel perfecting the appeal any exhibit or exhibits in the case, upon receipt given therefor; but the official court stenographer shall at any and all times have access to same when necessary in preparing transcript which may be ordered by counsel on either side.

(d) **STATUTE APPLICABLE ONLY IN FIFTH JUDICIAL CIRCUIT.**—The provisions of this subsection shall apply only in the fifth judicial circuit.

(e) **POWERS OF JUDGES.**—Nothing in this subsection shall be construed to limit the right of the presiding judge in the cause, or the resident judge of the circuit at all other times, to order any other disposition of any exhibit introduced in evidence in any cause.

(6) **Stenographer for courts of general sessions—appointment—compensation.**—The resident circuit judge of the fifth judicial circuit is hereby authorized to appoint some competent stenographer who shall be the regular official stenographer for the courts of general sessions for the fifth judicial circuit, who shall receive as compensation for his services the sum of six hundred (\$600.00) dollars per annum, three hundred of which shall be payable monthly upon the warrant of the comptroller general in the same manner as now provided for the payment of the salaries of other state officers, and three hundred of which shall be paid by the counties of Richland and Kershaw, the former two hundred and the latter one hundred dollars: *provided*, that the said stenographer shall also be entitled to receive the fees now fixed by law for all transcripts furnished by him: *provided, further*, that should the judge of the said circuit, for any reason satisfactory to himself, find it to the best interests of the circuit, to designate the regular circuit stenographer of said circuit, appointed pursuant to the provisions of the Code of Civil Procedure, to act also as stenographer for the general sessions court, that during the time the said circuit stenographer performs such duties in the court of general sessions he shall be entitled to the salary provided herein in addition to his salary as circuit stenographer, and the fees incident to such position, and that the salary appropriated by the State shall be paid by the comptroller general upon the order of the circuit judge designating the said circuit stenographer for the time he is so designated.

1932 Code, § 55, 986; Civ. P. '22, § 53; Civ. P. '22, § 77; Civ. P. '12, § 22; Civ. P. '02 § 22; 1877 (16) 299; 1896 (22) 24; 1899 (23) 33; 1910 (26), 541; 1912 (27) 768; 1913 (28) 13; 1915 (29) 175; 1919 (31) 18; 1922 (32) 799; 1924 (33) 933; 1926 (34) 991, 999; 1938 (40) 1918; 1939 (41) 424; 1940 (41) 1699; 1941 (42) 118.

§ 56. Courts in sixth circuit.

(1) **Terms.**—The courts of the sixth judicial circuit shall be held as follows:

(a) **CHESTER COUNTY.**—The court of general sessions at Chester, for the county of Chester, on the first Monday in January, on the first Monday in March, the first Monday in July and the first Monday in October; and the court of common pleas at the same place, commencing on the second Monday in January, the first Monday after the fourth Monday in March, the

third Monday in May and on the second Monday after the fourth Monday in October, and each term of the court of common pleas shall continue for a term of two weeks if so much be necessary. *Provided*, that at the term of the court of general sessions to be held on the first Monday in January only jail cases shall be called for trial, but this shall not be construed to prevent the trial at such term of persons out on bond who consent thereto.

(b) **FAIRFIELD COUNTY.**—The court of general sessions at Winnsboro, for the county of Fairfield, on the third Monday in February, the second Monday in June and the first Monday in September; and the court of common pleas at the same place on the second Monday in March, the third Monday in July, and the second Monday in October.

(c) **LANCASTER COUNTY.**—The court of general sessions at Lancaster, for the county of Lancaster, on the fourth Monday in February, the third Monday in June, and the third Monday in September; and the court of common pleas at the same place on the fourth Monday in March, and the fourth Monday in October.

(d) **YORK COUNTY.**—The court of general sessions at York, for the county of York, on the fourth Monday in January and on the third Monday after the fourth Monday in March, on the second Monday in July, the second Monday in September and on the fourth Monday after the fourth Monday in October; and the court of common pleas at the same place on the Wednesday first following the Mondays fixed for the holding of the court of general sessions at the same place; on the first Monday in May and continuing for a term of two weeks; except there shall be no term of the court of common pleas to follow the court of general sessions which is provided for on the fourth Monday in January: *provided*, that the court of common pleas, where following the court of general sessions at the same term of the circuit for said county, may be opened immediately after the adjournment of such court of general sessions, if the work of the latter be concluded in less than two days. *Provided, further*, that nothing herein contained shall be held to limit the court of general sessions to two days, if the work of the court is not concluded in such time: *provided further*, that where the court of common pleas follows the court of general sessions at the same term of the court for said county, calendar one of the court of common pleas shall not be called peremptorily until the Mondays following the Mondays fixed for holding the court of general sessions at said place, but this latter provision shall not apply to the summer term: *provided, further*, that jury trials of civil cases shall not be had at the January term; and *provided, further*, that only one venire of jurors shall be drawn for the February term, the jurors for said term to be summoned to attend on the Monday first following the convening of the court, for services during that week of the said term.

(2) **Duration of terms of common pleas—equity cases.**—There shall be allowed for the trial of jury cases, equity cases, motions and special matters, if the business of the court demands it, at least two weeks each at the spring and winter terms of court of common pleas for Fairfield, Chester and York Counties, and one week at the spring term and two weeks at the winter term of court of common pleas for the county of Lancaster.

(3) **Auctioneers and stenographers, York County.**—The clerk of the court for York County is authorized to appoint one or more official court auc-

tioners for York County to cry legal public sales. The said auctioneer for York County shall receive as a fee for his service \$3.00 for each such sale, whether the sale is made as a whole or in parcels, which auctioneer's fee shall be taxed as a part of the court costs and expenses. The clerk of court or special referee in each case in York County in which he presides shall appoint an official stenographer who shall be paid a minimum of \$5.00 for each reference taken and transcribing testimony which stenographer's fees shall be taxed and paid as a part of the court costs in such case.

(4) Stenographer and auctioneer, Lancaster County.—The clerk of court of Lancaster County is authorized to engage the services of a stenographer in judicial hearings before him in matters referred to him by an order of the circuit court, and to tax in the costs of the proceedings three (\$3.00) dollars for each hearing to cover the compensation of such stenographer.

The said clerk is also authorized and empowered to employ an auctioneer in making judicial sales who shall receive the following fees for his services: two (\$2.00) dollars for the sale of the first tract or parcel of land and fifty (50c) cents for the sale of each additional tract under the same order of court. In cases where more than one tract is sold, together, the fee shall be two (\$2.00) dollars for each such sale. The fees shall be taxed and paid as part of the costs in the proceedings in which the sales are made.

1932 Code, § 56; Civ. P. '22, § 54; Civ. P. '12, § 23; Civ. P. '02, § 23; 1885 (19) 223; 1899 (22) 34; 1900 (23) 312; 1907 (25) 617; 1911 (27) 64; 1916 (29) 698; 1922 (32) 838; 1925 (34) 29; 1928 (35) 1216; 1929 (36) 41; 1930 (36) 1098, 1264; 1933 (38) 136; 1934 (38) 1199, 1254; 1935 (39) 237; 1937 (40) 452; 1938 (40) 1698; 1941 (42) 118.

§ 57. Courts in seventh circuit.

(1) Terms.—The courts of the seventh judicial circuit shall be held as follows:

(a) CHEROKEE COUNTY.—The court of common pleas for Cherokee County shall convene at Gaffney on the first Monday of March for two weeks, on the first Monday of July for one week, and on the first Monday of November for two weeks. The court of general sessions for Cherokee County shall convene at Gaffney on the third Monday of March for one week, on the second Monday of July for one week, and on the third Monday of November for two weeks.

(b) SPARTANBURG COUNTY.—The court of common pleas for Spartanburg County shall convene on the third Monday of January for three weeks, on the fourth Monday of March for four weeks, on the fourth Monday of May for three weeks, on the third Monday of July for one week, and on the fourth Monday of September for four weeks; the court of general sessions for Spartanburg County shall convene at Spartanburg on the first Monday of January for two weeks, on the fourth Monday after the fourth Monday of March for one week, on the third Monday after the fourth Monday of May for one week, on the fourth Monday of July for one week, and on the fourth Monday after the fourth Monday of September for one week.

(c) UNION COUNTY.—The court of common pleas for Union County shall convene at Union on the second Monday of February for two weeks; on the first Monday of May for two weeks; on the first Monday of September for two weeks; and on the first Monday of December for one week. The court of general sessions shall convene at Union on the fourth Monday of February for one week; on the third Monday of May for one week; on the third Monday of September for one week; and on the second Monday of De-

cember for one week.

(2) **When continue general sessions term.**—If the business of the court of general sessions is not concluded at the end of any week, except the second week in January at Spartanburg, the petit jury drawn for that term of the sessions court shall be continued for the next week, or until the business of the sessions court is completed.

(3) **Stenographer for court of general sessions—salary—by whom paid.**—The resident circuit judge of the seventh judicial circuit is hereby authorized to appoint some competent stenographer for the courts of general sessions for the seventh judicial circuit, who shall receive as compensation for his services the sum of eight hundred dollars per annum, two hundred and sixty-six and 66-100 dollars of which shall be paid monthly upon the warrant of the comptroller general in the same manner as now provided for the payment of the salaries of the other state officers, and two hundred and sixty-six and 66-100 dollars of which shall be paid monthly by the county of Spartanburg, one hundred and thirty-three and 33-100 dollars of which shall be paid by the county of Union, and one hundred and thirty-three and 33-100 dollars of which shall be paid by the county of Cherokee: *provided*, that the stenographer shall also be entitled to receive the fees now fixed by law for all transcripts furnished by him: *provided, further*, that when the stenographer of the court of common pleas does not furnish transcripts as promptly as required by law and otherwise perform his duties, then the stenographer of the court of general sessions shall at once perform the duties of the stenographer of the court of common pleas until the said stenographer shall have furnished all transcripts required; and the stenographer of the court of general sessions shall receive the compensation and fees of the stenographer of the court of common pleas while performing the duties as aforesaid.

1932 Code, §§ 57, 987; Civ. P. '22, §§ 55, 78; Civ. P. '12, § 24; Civ. P. '02, § 24; 1914 (28) 602; 1916 (29) 695; 1889 (20) 359; 1896 (22) 25; 1898 (22) 685; 1899 (23) 35; 1906 (25) 48, 49; 1908 (25) 1011; 1913 (38) 30; 1916 (29) 695; 1917 (30) 137; 1919 (31) 186; 1922 (32) 815; 1931 (37) 256; 1933 (38) 189; 1934 (38) 1240; 1935 (39) 405; 1937 (40) 106; 1941 (42) 118.

Cited but not construed in *State v. Henderson*, 136 S. C. 363, 134 S. E. 364.

§ 58. Courts of eighth circuit.

(1) **Terms.**—The courts of the eighth circuit shall be held as follows:

(a) **ABBEVILLE COUNTY.**—The court of general sessions at Abbeville for the county of Abbeville, on the fourth Monday in February; the first Monday in June; and the first Monday in September; and the court of common pleas at the same place, on the fourth Monday in March, to last for two weeks, if so much be necessary, and on the second Monday in October, for one week, and on the second Monday in December for one week.

(b) **GREENWOOD COUNTY.**—The court of general sessions at Greenwood, for the county of Greenwood the first Monday in January, the second Monday in April, the fourth Monday in June and the second Monday in September; and the court of common pleas at the same place on the first Monday in March, the third Monday in April, the first Monday after the fourth Monday in September and the third Monday in November.

(c) **LAURENS COUNTY.**—The court of general sessions at Laurens, for the county of Laurens, on the third Monday in February, the second Monday in June, the fourth Monday in September and the second Monday in No-

vember; and the court of common pleas, at the same place, on the second Monday in March and the second Monday in May, to continue for three weeks, if so much be necessary, and on the fourth Monday in October for two weeks if necessary.

(d) **NEWBERRY COUNTY.**—The court of general sessions at Newberry, for the county of Newberry, on the third Monday in March, on the third Monday of June, and on the third Monday in October, for one week; and the court of common pleas, at the same place, on the fourth Monday in January, on the fourth Monday in April, on the third Monday in September, on the fourth Monday in November, to continue for two weeks if necessary.

1932 Code, § 58; Civ. P. '22, § 56; Civ. P. '12, § 25; Civ. P. '02, §§ 24, 25; 1889 (20) 360; 1891 (20) 1113; 1896 (22) 26; 1899 (23) 37; 1900 (23) 314; 1901 (23) 629; 1910 (26) 538; 1916 (29) 696; 1919 (31) 113; 1920 (31) 807; 1922 (32) 1039; 1925 (34) 277; 1928 (35) 1152; 1932 (37) 1390; 1934 (38) 1446; 1939 (41) 485; 1941 (42) 118, 129.

See generally, *State v. Washington*, 82 S. C. 341, 64 S. E. 386.

§ 59. Courts of ninth circuit.

(1) **Terms.**—The courts of the ninth circuit shall be held as follows:

(a) **CHARLESTON COUNTY.**—The court of general sessions for the county of Charleston shall be held at Charleston on the first Monday in March, two weeks; on the first Monday in June, two weeks; on the second Monday in September, two weeks; on the first Monday in December, two weeks. The court of common pleas for said county shall be at the same place on the first Monday in February, four weeks; on the fourth Monday in March, five weeks; on the fourth Monday in October, five weeks.

(b) **BERKELEY COUNTY.**—The court of general sessions for the county of Berkeley shall be held at Moncks Corner on the second Monday in May, one week; on the third Monday in October, one week. The court of common pleas for the said county shall be held at the same place on the third Monday in March, one week; on the fourth Monday in September, two weeks, if so much be necessary.

1932 Code, § 59; Civ. P. '22, § 57; Civ. P. '12, § 26; Civ. P. '02, § 18; 1884 (18) 686; 1887 (19) 987; 1894 (21) 717; 1898 (22) 683; 1899 (23) 258; 1900 (23) 309; 1909 (26) 163; 1913 (28) 19, 31; 1915 (29) 179; 1917 (30) 138; 1920 (31) 725; 1921 (32) 203; 1923 (33) 128; 1925 (34) 280; 1926 (34) 1047, 1048; 1930 (36) 1135; 1931 (37) 245; 1941 (42) 118.

§ 60. Courts in tenth circuit.

(1) **Terms.**—The courts of the tenth circuit shall be held as follows:

(a) **ANDERSON COUNTY.**—The court of general sessions at Anderson, for the county of Anderson, beginning on the first Monday in February, the second Monday in May, the first Monday in September and the third Monday in November; and the court of common pleas, at same place, beginning on the second Monday in March, the second Monday in April, and the third Monday in June, the first Monday in October and the first Monday in December.

(b) **OCONEE COUNTY.**—The court of general sessions, at Walhalla, for the county of Oconee, beginning the first Monday in March, the first Monday in July and the first Monday in November; and the court of common pleas, at the same place, beginning on the fourth Monday in March, the second Monday in July and the third Monday in October.

1932 Code, § 60; Civ. P. '22, § 58; Civ. P. '12, § 27; Civ. P. '02, § 25; 1908 (25) 1013; 1912 (27) 549; 1913 (28) 138; 1914 (28) 608; 1941 (42) 118.

§ 61. Courts in eleventh circuit.

(1) **Terms.**—The courts of the eleventh circuit shall be held as follows:

(a) **LEXINGTON COUNTY.**—The court of general sessions for the county of Lexington, at Lexington court house, on the third Monday in January, the fourth Monday in May, and the second Monday in September; and the court of common pleas, at the same place, on the third Monday in April, the fourth Monday in June, and the fourth Monday in November.

(b) **McCORMICK COUNTY.**—The court of general sessions for the county of McCormick, at McCormick court house, on the first Monday in February, the second Monday in June, the first Monday in October; and the court of common pleas, at the same place, on Wednesday after the first Monday in February, Wednesday after the second Monday in June and Wednesday after the first Monday in October; and the same panel of petit jurors shall be eligible to serve for both the courts of general sessions and common pleas, at each term of court.

(c) **SALUDA COUNTY.**—The court of general sessions for the county of Saluda shall convene at Saluda court house on the fourth Monday in February, the third Monday in May, and the fourth Monday in September. The terms of the court of common pleas for Saluda County shall convene at Saluda court house as follows: the spring term of court of common pleas shall convene on the fourth Monday in March; the summer term of court of common pleas shall convene immediately upon the conclusion of the work of the May court of general sessions, and the same panel of petit jurors shall be eligible to serve both the courts of general sessions and common pleas at May term of said courts. The fall term of court of common pleas shall convene on the second Monday in November.

(d) **EDGEFIELD COUNTY.**—The court of general sessions for the county of Edgefield, at Edgefield court house, on the first Monday in March, the second Monday in July and the third Monday in October; and the court of common pleas, at the same place, on the second Monday in March, Wednesday after the second Monday in July, the third Monday in July, and the fourth Monday in October; the same panel of petit jurors shall be eligible to serve for both the courts of general sessions and common pleas at the July term of court. *Provided*, that a new panel of petit jurors shall be drawn as now provided by law for the term commencing the third Monday in July.

(2) **Calendars call.**—The presiding judge shall call calendars two and three peremptorily on Wednesday after the opening of the sessions court, or as soon before or thereafter as there may be time for the same and the court deems it proper, in the counties of Lexington and Saluda, but in no event shall the calling of said calendars or the hearing of cases thereon be allowed to interfere with business of the sessions court.

1932 Code, § 61; Civ. P. '22, § 59; Civ. P. '12, § 28; Civ. P. '02, § 22; 1877 (16) 299; 1896 (22) 24; 1897 (22) 433; 1899 (23) 33, 685; 1909 (26) 169; 1916 (29) 717; 1917 (30) 53; 1930 (36) 1111, 1170; 1936 (39) 1332; 1941 (42) 118, 164.

...Cited but not construed in *Burwell & Dunn Co. v. Chapman*, 59 S. C. 581, 38 S. E. 222.

§ 62. Courts in twelfth circuit.

(1) **Terms.**—The courts of the 12th judicial circuit shall be held as follows:

(a) **HORRY COUNTY.**—The court of general sessions at Conway, for the

county of Horry, on the first Monday in March for two weeks, on the first Monday in June for one week and on the first Monday in October for two weeks; and the court of common pleas at the same place on the Wednesday succeeding the Mondays herein fixed for the holding of the court of general sessions at said place.

The court of common pleas at Conway, for the county of Horry, on the first Monday in February, for two weeks, on the first Monday in May, for one week; on the first Monday in September, for two weeks and on the second Monday in December, for one week.

(b) MARION COUNTY.—The court of general sessions at Marion, for the county of Marion, on the third Monday in March, for one week; on the second Monday in June, for one week; and on the third Monday in October, for one week.

The court of common pleas at Marion, for the county of Marion, on the third Monday in April, for one week; on the fourth Monday in May, for one week and on the third Monday in November for two weeks.

(c) FLORENCE COUNTY.—The court of general sessions at Florence, for the county of Florence, on the first Monday in January, for one week; on the fourth Monday in March, for two weeks and on the third Monday in June, for one week and on the fourth Monday in October, for two weeks.

The court of common pleas at Florence, for the county of Florence, on the third Monday in February, for two weeks; on the second Monday in May, for one week; on the third Monday in September for two weeks and on the third Monday in January, for one week.

(d) GEORGETOWN COUNTY.—The court of general sessions at Georgetown for the county of Georgetown, on the second Monday in April, for one week; on the fourth Monday in June, for one week and on the second Monday in November for one week.

The court of common pleas at Georgetown, for the county of Georgetown, on the fourth Monday in January, for one week; on the third Monday in May, for one week, and on the first Monday in December, for one week.

1932 Code, § 62; Civ. P. '22, § 60; Civ. P. '12, § 29; Civ. P. '02, §§ 20, 21; 1909 (26) 23; 1915 (29) 71; 1919 (31) 76; 1920 (31) 718; 1923 (33) 140; 1924 (33) 934; 1928 (35) 1250; 1932 (37) 1375; 1934 (38) 1242, 1232; 1936 (39) 1336; 1939 (41) 238; 1941 (42) 118.

Cited but not construed in *McLaurin v. Kelly*, 40 S. C. 486, 19 S. E. 143.

§ 63. Courts in thirteenth circuit.

(1) **Terms.**—The courts of the thirteenth circuit shall be held as follows:

(a) GREENVILLE COUNTY.—Court of common pleas at Greenville for the county of Greenville, the fourth Monday in January, three weeks; the fourth Monday in March, two weeks for jury trials and one week for equity cases; third Monday in May, two weeks; third Monday in June, two weeks; second Monday in September, two weeks; second Monday in October, two weeks and the second Monday in November, two weeks for jury trials and one week for equity cases. Court of general sessions at Greenville for the county of Greenville the second Monday in January, two weeks; second Monday in March, two weeks; first Monday in May, two weeks; first Monday in September, one week; fourth Monday in October, two weeks; and the first Monday in December, one week.

(b) PICKENS COUNTY.—The court of general sessions at Pickens, for the

county of Pickens, the third Monday in February, one week; first Monday in June, one week; fourth Monday in September, one week. The court of common pleas at Pickens for the county of Pickens, the fourth Monday in February, two weeks; the second Monday in June, one week; the first Monday in October, one week.

1932 Code, § 63; Civ. P. '22, § 61; Civ. P. '12, §§ 19, 26; Civ. P. '02, § 19; 1883 (18) 462; 1884 (18) 886; 1896 (22) 20; 1900 (23) 310; 1901 (23) 624; 1910 (26) 542; 1911, 1922 (32) 841; 1923 (33) 101; 1927 (35) 78; 1929 (36) 38; 1932 (37) 1335; 1937 (40) 347.

§ 64. Courts in fourteenth circuit.

(1) **Terms.**—The courts in the fourteenth judicial circuit shall be held as follows:

(a) **ALLENDALE COUNTY.**—The courts of general sessions for the county of Allendale, at Allendale, on the 3rd Monday in April, for one week; on the first Monday in July, for one week; and on the 3rd Monday in October for one week. The court of common pleas for said county of Allendale, at Allendale, on the 4th Monday in April for two weeks, and on the 2nd Monday in November for one week.

(b) **BEAUFORT COUNTY.**—The courts of general sessions for the county of Beaufort, at Beaufort, on the first Monday in March for not longer than one week, on the fourth Monday in June for not longer than one week, and on the fourth Monday in November for not longer than one week. The courts of common pleas for the said county of Beaufort, at Beaufort, shall convene on the third Monday of March for two weeks, and the fourth Monday in June as soon as the court of general sessions shall have concluded, and shall continue during the remainder of the week, and on the second Monday in December for one week.

(c) **COLLETON COUNTY.**—The courts of general session for the county of Colleton, at Walterboro, on the first Monday in April, for one week; on the second Monday in June, for one week and on the third Monday in September, for one week. The court of common pleas for said county of Colleton, at Walterboro, on the second Monday in April, for one week, on the fourth Monday in May, for one week, on the fourth Monday in October, for two (2) weeks.

(d) **HAMPTON COUNTY.**—The courts of general sessions for the county of Hampton, at Hampton, on the third Monday in February for not longer than one week; and on the first Monday in June for not longer than one week; and on the second Monday in October for not longer than one week; the courts of common pleas for said county of Hampton, at Hampton, on the first Monday in February for not longer than two weeks, on the Wednesday following the first Monday in June for not longer than the remainder of said week, and on the fourth Monday in September for not more than two weeks.

(e) **JASPER COUNTY.**—The courts of general sessions for the county of Jasper at Ridgeland, South Carolina, on the fourth Monday in February for one week; the third Monday in May for two weeks; the third Monday in June for one week, and the third Monday in November for one week. The courts of common pleas for said county shall convene as soon as the courts of general sessions shall have concluded, except that during the week commencing the third Monday in November, there shall be no regular term of the court of common pleas. There shall also be terms of the

court of common pleas for said county on the second Monday in May for one week, and the first Monday in December for one week.

1932 Code, § 64; Civ. P. '22, § 62; Civ. P. '12, §§ 19, 26; Civ. P. '02, § 19; 1883 (18) 462; 1884 (18) 886; 1896 (22) 20; 1900 (23) 310; 1901 (23) 624; 1910 (26) 542; 1911 (27) 87; 1912 (27) 580, 770; 1913 (28) 19, 31; 1914 (28) 607; 1915 (29) 79, 198; 1916 (29) 700; 1917 (30) 37, 49; 1920 (31) 919; 1922 (32) 929; 1923 (33) 182; 1925 (34) 18; 1926 (34) 929; 1928 (35) 1179, 1264; 1929 (36) 26; 1931 (37) 257; 1934 (38) 1539; 1935 (39) 87; 1941 (42) 118.

§ 64-1. Jurisdiction of circuit judges presiding at term beginning last Monday in April.—Any judge of the circuit courts of this State, who may be presiding at a court in any county in the State at the term beginning the last Monday in April of any year, shall have jurisdiction of all matters throughout such term, notwithstanding said term may extend into the month of May.

1941 (42) 189.

§ 65. Open general sessions court during term of common pleas court.—Whenever provision is made for holding the court of common pleas the presiding judge, during the time allowed for the holding of the court of common pleas, may open the court of general sessions and transact all or such business of the court of general sessions except trials by jury as said judge may deem expedient.

1932 Code, § 65; 1929 (36) 209; 1941 (42) 118.

§ 66. Open common pleas court during term of general sessions court.—The court of common pleas shall be open at all terms of the court of general sessions for the transaction of all business of regular terms of the court of common pleas except trial by jury. *Provided*, cases in the court of common pleas may be tried during the term of any court of general sessions on consent of the parties or their attorneys to any of such cases, and when same does not conflict with the business of the court of general sessions.

1932 Code, § 66; Civ. P. '22, § 63; Civ. P. '12, § 30; Civ. P. '02, § 26; 1878 (16) 703; 1888 (18) 586; 1904 (24) 422; 1914 (28) 570; 1916 (29) 700; 1941 (42) 118.

This section applies wherever provision is made by statute for the opening of the general sessions only. *Burwell & Dunn Co. v. Chapman*, 59 S. C. 581, 38 S. E. 222, 224.

Judge is required to open court of common pleas.—A judge is not only authorized but required to open the court of common pleas at the conclusion of the

court of general sessions. *Burwell & Dunn Co. v. Chapman*, 59 S. C. 581, 38 S. E. 22, 224; cited in *Ward v. Western Union Tel. Co.*, 62 S. C. 274, 40 S. E. 670.

The common pleas opened under the authority of this section is not a regular term. *McLaurin v. Kelly*, 40 S. C. 486, 19 S. E. 143, 144.

§ 67. Adjourn court of common pleas.—Should the business before the court of general sessions at any term not be completed on the arrival of the day fixed by law for the holding of the court of common pleas for said county, the judge presiding may, in his discretion, adjourn said court of common pleas until the business of the court of general sessions shall have been concluded. But the provisions of this section shall not apply to the courts held in the county of Newberry.

1932 Code, § 67; Civ. P. '22, § 64; Civ. P. '12, § 31; Civ. P. '02, § 27; 1870 (14) § 27; 1889 (20) 359.

See § 71 also for adjournment of circuit courts.

Before adjournment the court of com-

mon pleas must first be opened.—It is necessary to the adjournment herein provided for, that the court of common

pleas should be first opened on the day fixed for its holding. *McKellar v. Parker*, 29 S. C. 237, 7 S. E. 295, 296.

But such opening is by operation of law and not by formality.—Where the officers and machinery are present in the court house on the day fixed for the meeting of the court of common pleas, that court is then opened by operation of law without any formality. *Hardin v. Trimmier*, 30 S. C. 391, 9 S. E. 342; *Miller v. George*, 30 S. C. 526, 9 S. E. 659; *State v. Hasty*, 76 S. C. 105, 56 S. E. 669; cited in *State v. Hunter*, 79 S. C. 91, 60 S. E. 226.

Thus the court of common pleas may be opened and adjourned without adjourning general sessions.—The court of common pleas can be opened and adjourned without adjourning the court of general sessions, when the business before the latter court has been completed. *McKellar v. Parker*, 29 S. C. 237, 7 S. E. 295.

The foregoing paragraph clearly shows that the court of general sessions and

the court of common pleas may be open at the same time. *State v. Hunter*, 79 S. C. 91, 60 S. E. 226, 227; citing with approval *McKellar v. Parker*, 29 S. C. 237, 7 S. E. 295.

Case begun in general sessions may be finished in common pleas session.—A criminal case begun during the week assigned for holding the court of general sessions might be continued and ended in the following week assigned for the trial of cases in the court of common pleas. *State v. Hasty*, 76 S. C. 105, 56 S. E. 669, cited with approval in *State v. Hunter*, 79 S. C. 91, 60 S. E. 226, 227.

A judge has no power to keep the court open beyond time for his holding court in another county.—The conclusion is irresistible that a judge has no power to take a recess and keep the court open, or to adjourn it beyond the time fixed by statute for his holding the court of another county. *Haughton v. Order of U. C. T. of America*, 108 S. C. 73, 93 S. E. 393, 394.

§ 68. Call off terms of common pleas court fixed by statute.—Regular terms of the court of common pleas fixed by statute shall not be called off by the request of the members of the bar in the county where the court is to be held unless at least three-fourths of the resident members of such bar having cases for trial at that time request the same, in writing, of the judge who is to preside at such court.

1933 (38) 264.

§ 69. Special sessions of circuit courts.

(1) **Notice.**—Whenever the public interest shall require the holding of a special session of the court of general sessions in any county of the State and such fact satisfactorily appears by petition of the solicitor of the judicial circuit in which such county is situate, and whenever it satisfactorily appears by petition of a majority of the members of the bar of any county that the public interest requires a special session of the court of common pleas for said county, said petitions to be first approved by the resident circuit judge or the circuit judge last presiding in such county and to be duly filed with the clerk of the Supreme Court, a special session of the court of general sessions or common pleas may be ordered for any such county by the Chief Justice of the Supreme Court; that the special session of court so ordered shall be held at such time and for such term, and such notice of the holding thereof shall be given, as may be provided in the order therefor, and which order shall be transmitted to and filed by the clerk of court of said county.

(2) **Presiding judge call special session of circuit court — notice — judge.**—Whenever it shall satisfactorily appear to any circuit judge that the public interest requires the holding of a special session of the court of general sessions or common pleas in any county, in which he is at the time presiding over the court then in session, such circuit judge may order a special session of the court of general sessions or common pleas to be held for said county at such time and such term, and such notice of the

holding thereof shall be given, as he may by order provide, which order shall be entered upon the records of the clerk of said court. And when such special session is so ordered only the circuit judge ordering the same shall hold said court, unless he be incapacitated to do so because of his illness or the illness of some member of his immediate family, or for any other reason considered sufficient in the opinion of the Chief Justice of the Supreme Court, and in that event the Chief Justice of the Supreme Court shall order some other disengaged circuit judge or special judge to hold said court.

(3) Matters to be considered at special session of general sessions.—At any special session of the court of general sessions provided for and held under the provisions of this section all cases duly docketed shall be subject to trial, and all processes, writs, and recognizances of every kind, whether respecting juries, witnesses, bail or otherwise, which relate to the cases to be tried at the said special session, shall be considered as belonging to such session in the same manner as if they had been issued or taken in reference thereto; and all cases pending for trial at any special session of said court, which are not tried or otherwise disposed of shall at the close thereof be considered as of course removed to the next stated term of court.

(4) Trial of causes at special session of common pleas.—That any special session of the court of common pleas, provided for and held under the provisions of this section, no cause shall be tried unless the same shall have been previously docketed upon some one of the calendars of the last preceding regular term of said court: *provided*, that any cause may be docketed and tried by mutual consent of attorneys of record of said cause.

(5) Resident judges may call special sessions.—The resident judge of each judicial circuit in this State shall have the same right and powers at chambers to order special terms of the circuit courts (general sessions and common pleas) as is by this section given to presiding judges; and such courts, when ordered, shall be held by the resident judge unless another judge is assigned to hold the same by the Chief Justice as hereinbefore provided for presiding judges, and such courts, when ordered, shall be governed by the same procedure as, and subject to all provisions of this section.

1932 Code, § 69; Civ. P. '22, § 66; Civ. P. '12, § 33; Civ. P. '02, § 28; 1873 (14), § 28; 1878 (16) 395, § 3; 1884 (18) 770; 1931 (37) 257; 1934 (38) 1204.

Cross reference. — As to provisions where a judge is unable to hold court, see § 44 and note thereto. As to the powers of judges holding court in other circuits, see § 38 and note thereto.

Editor's note.—Section 44 provided who is to act when the chief justice is incapacitated or out of the state. This constitutes an example of the connection between § 44 and this section. Section 44 should be referred to in all instances.

Section is constitutional.—The power conferred by this section and § 44 is easily sustainable under the provisions of the Constitution, Article V, § 6. *State v. Gossett*, 117 S. C. 76, 108 S. E. 290, 16 A. L. R. 1299.

Legislative intent is to limit jurisdiction of circuit judges.—The intention of the legislature was to limit the jurisdiction

of the circuit judge when presiding at an extra term of the court to the unfinished business of the court. *Simms v. Phillips*, 46 S. C. 149, 24 S. E. 97, 99.

This section must be regarded as a limitation upon the general powers of circuit judges when only an extra term of court is being held. *Simms v. Phillips*, 46 S. C. 149, 24 S. E. 97, 99.

Power of chief justice to order a special term is not absolute.—The power to order a special term of court conferred on the chief justice of the Supreme Court, or the presiding associate justice thereof, by this section and § 44 is not an absolute power but is controlled by considerations safeguarding the rights and interests of those whose rights and interests will be determined by the special tribunal. *State v. Gossett*, 117 S. C.

76, 108 290, 16 A. L. R. 1299.

The appointment of a special judge is not essentially an executive function.—See this catchline under § 44, where is treated the case of *State v. Davis*, 88 S. C. 204, 70 S. E. 417, 419.

Appointment of special judge without the suggestion of supreme court void.—See this catchline under § 44, where is treated the case of *State v. Davis*, 88 S. C. 204, 70 S. E. 417, 419.

Order of reference cannot be granted at special term unless docketed at preceding regular term.—An order of reference cannot be granted at a special term in any case not docketed at the preceding regular term. *Simms v. Phillips*, 46 S. C. 149, 24 S. E. 97, 100.

But if no objection is raised any cause may be heard.—Where a party without objection participates at an extra term of the circuit court in a trial of a cause not docketed on the calendar of the preceding regular term he will be deemed to have waived his objection that such cause was not docketed on the calendar of the said regular term. *Rivers v. Priester*, 58, S. C. 194, 36 S. E. 543, 546.

The requirements as to publication as set out by this section do not apply to the ordering of a special court under §§ 43, 44. *State v. Davis*, 88 S. C. 204, 70 S. E. 417, 419.

Cited but not construed in *Haughton v. Order of U. C. T.*, 108 S. C. 73, 93 S. E. 393.

§ 70. Petit jurors in common pleas and general sessions.—Petit jurors summoned to attend the court of general sessions in any county, except the county of Charleston, shall also attend and serve as jurors for the court of common pleas next ensuing in and for said county, except as otherwise provided in section 625.

1932 Code, § 70; Civ. P. '22, § 67; Civ. P. '12, § 34; Civ. P. '02, § 29; 1870 (16), § 29.

§ 71. Adjournment of circuit courts.—The judge of the circuit court shall have power to direct any circuit court in this circuit to be adjourned over to a future day designated in a written order to the clerk of said court, whenever there is a dangerous and general disease at the place where said court is usually holden.

1932 Code, § 71; Civ. P. '22, § 68; Civ. P. '12, § 35; Civ. P. '02, § 30; 1870 (16), § 30.

See § 67 for adjournment of circuit courts.

Judge cannot continue existence of a term after its expiration fixed by law.—When the term of court fixed by law has expired, the judge has no power to continue its existence and convene it at another time. *Ex parte Lilley*, 7 S. C. 373.

But may order adjournment from day today till a fixed day before next court.

—But judge may order adjournment of court from day to day till a fixed day

before the next succeeding court, and try a cause on the day. *DeLeon v. Barrett*, 22 S. C. 412.

Inquiry as to conditions cannot be made after order of adjournment.—An adjournment having been made under this section because of the condition herein mentioned, no inquiry can be made as to whether such conditions actually existed. *Adicks v. Allison & Bratton*, 21 S. C. 256; cited in *Haughton v. Order of U. C. T.*, 108 S. C. 73, 93 S. C. 393, 395.

§ 72. Before whom circuit judge may qualify.—The circuit judges of this State, upon their election, shall qualify by taking the oaths required by the Constitution of this State before a justice of the Supreme Court, a circuit judge, a clerk of the Supreme Court, or a clerk of the court of common pleas, or a probate judge of the county, and shall forthwith enter upon their duties; and said oaths must be filed in the office of the secretary of state.

1932 Code, § 72; Civ. P. '22, § 69; Civ. P. '12, § 36; Civ. P. '02, § 31; 1870 (16), § 31; (17) 502; 1898 (22) 688.

§ 73. Circuit courts made courts of record.—The circuit courts herein established shall be courts of record, and the books of record thereof shall, at all times, be subject to the inspection of any person interested therein.

1932 Code, § 73; Civ. P. '22, § 70; Civ. P. '12, § 37; Civ. P. '02, § 32; 1870 (14), § 32.

§ 74. Clerk and deputy clerk of circuit court.—The clerk elected in each county pursuant to section 27 of article V of the Constitution shall be clerk of the courts of general sessions and common pleas, and may appoint a deputy, who may perform the duties of clerk, for whose acts such clerk shall be responsible, and a record of whose appointment shall be made in the clerk's office, and such appointment may be revoked at the pleasure of the clerk; and in case no clerk exists, the judge shall have authority to appoint a person who shall perform the duties of clerk, and said deputy clerk, or the one appointed by the judge, shall be required to give the usual bond before entering on the duties of the office.

1932 Code, § 74; Civ. P. '22, § 71; Civ. P. '12, § 38; Civ. P. '02, § 33; 1870 (16), § 33.

A deputy clerk may perform any duty that his principal may perform.—

A deputy clerk of the court may perform any and all the duties pertaining to the office of his principal. *Linley v. Cit. National Bank*, 108 S. C. 372, 94 S. E. 874, 877.

Generally as to the foregoing chapter.
—Proceedings of a circuit court, held by the judge of another circuit, at a

time unauthorized by law, are void. *Ex parte De Hay*, 3 S. C. 564.

Where, after the regular session of a circuit court has commenced, an act transfers the county to another circuit and fixes another day for holding the court, it has jurisdiction to continue its session and to try cases. *Shelton v. Mabin*, 4 S. C. 451.

CHAPTER 3

County Courts

- ARTICLE 1. General Provisions, § 75.
- ARTICLE 2. The Civil Court of Florence, § 102.
- ARTICLE 3. County Court in and for Greenville County, § 118.
- ARTICLE 4. County Court of Orangeburg, § 141.
- ARTICLE 5. County Court of Richland County, § 164.
- ARTICLE 6. County Court of Spartanburg County, § 182.

ARTICLE 1

General Provisions

- | | |
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| 75, 76. Establishment. | 89, 96, 97. Solicitor. |
| 77. Jurisdiction. | 90. Clerk. |
| 78. A court of record. | 91. Sheriff. |
| 79. Pleading and practice. | 92. Bailiffs. |
| 80. Laws applicable. | 93. Compensation of jurors and witnesses. |
| 81. Appeals. | 94, 95. Magistrate. |
| 82, 83, and 88. Jurors. | 98, 99. Judge and solicitor. |
| 84, 85. County judge. | 100. Stenographer. |
| 86. Terms. | 101. Counties excepted. |
| 87. Grand jury. | |

§ 75. Establishment—petition—election. — Whenever one-third of the qualified registered electors of any county in this State shall file a petition with the clerk of the circuit of such county, praying for an election to be held in such county on the question of the establishment of a county

court therein, it shall be the duty of the said clerk within ten days to make an order thereon, and serve the same on the commissioners of election, requiring the said commissioners of election of such county to hold an election, after first giving at least thirty days' notice thereof in the newspapers of such county, upon the question of establishing a county court in such county, not later than sixty days nor earlier than forty days thereafter. Said petition shall be accompanied by a certificate of the board of supervisors of registration that the names appearing upon said petition constitute one-third of the qualified registered electors of such county: *provided*, that an election on said question shall not be had in any county oftener than once in four years; that at such election the question of the establishment of such county court shall be submitted to the electors in this form: "Shall a county court be established for the county of _____?" inserting the name of the county in which the electors voting are resident, and upon this question the electors shall vote "Yes" or "No."

1932 Code, § 75; Civ. P. '22, § 72; Civ. C. '12, § 3847; Civ. C. '02, § 2750; 1900 (23) 322.

§ 76. Establish on a majority vote of the county.—In the event a majority of the qualified electors voting at such election in any one or more of the counties of the State shall vote "Yes" upon such question, then such county court shall be, and hereby is, established in and for each of the counties in which a majority of the qualified electors so vote, with such jurisdiction and powers as is hereinafter provided.

1932 Code, § 76; Civ. P. '22, § 73; Civ. C. '12, § 3848; Civ. C. '02, § 2751; 1900 (23) 322.

§ 77. Jurisdiction in criminal and civil cases.—The said county court shall have jurisdiction to try and determine all criminal cases, except cases for murder, manslaughter, rape and attempt to rape, arson, common law burglary, bribery and perjury. The said court shall likewise have jurisdiction to try and determine all civil cases and special proceedings, both at law and in equity, where the value of the property in controversy or the amount claimed does not exceed one thousand dollars, and shall likewise hear and determine appeals taken from judgments rendered by magistrates: *provided*, that the county court shall not have jurisdiction to try any action involving the title to real estate.

1932 Code, § 77; Civ. P. '22, § 74; Civ. C. '12, § 3849; Civ. C. '02, § 2752; 1900 (23) 322.

§ 78. Court of record.—The said county court shall be a court of record, and the same presumption in favor of its jurisdiction and the validity of its judgments shall be indulged as in the case of judgments rendered by the circuit court.

1932 Code, § 78; Civ. C. '22, § 75; Civ. C. '12, § 3850; Civ. C. '02, § 2753; 1900 (23) 322.

§ 79. Forms of pleading and practice.—The same form of pleading and the same rules of procedure, practice and evidence shall obtain in the said county court as is provided by law for the conduct and trial of cases, civil and criminal, in the circuit courts: *provided*, in all criminal cases wherein the punishment does not exceed a fine of one hundred dollars and im-

prisonment for thirty days, the same shall be tried without presentment by a grand jury on information filed by the county solicitor.

1932 Code, § 79; Civ. P. '22, § 76; Civ. C. '12, § 3851; Civ. C. '02, § 2754; 1900 (23) 322.

§ 80. General laws applying to county courts.—All general laws and statutory provisions applying generally to the circuit courts of this State and trials of causes therein shall apply to the said county court, and the conduct and trial of causes therein, where not inconsistent with any of the provisions of this article.

1932 Code, § 80; Civ. P. '22, § 77; Civ. C. '12, § 3852; Civ. C. '02, § 2755; 1900 (23) 322.

§ 81. Appeals from judgments.—The right of appeal shall exist from the judgment of the said county court to the circuit court: *provided*, that on appeal to the circuit court the same shall be heard by the presiding judge without a jury, as in case of appeals from courts of magistrates, and all of the rules, practice and procedure now governing appeals from the said courts of magistrates shall apply to appeals from the county court to the circuit court, and the circuit court shall have the same power in passing upon and deciding the same as now possessed in passing upon and deciding appeals from the courts of magistrates: *provided, further*, that in all appeals taken from the judgment of the county court to the circuit court, the stenographer of the county court shall make in writing a transcript of the testimony and other proceedings had in the cause in the county court, certified by the county judge, and lodge the same with the clerk of the circuit court at least fifteen days before the next term of the said circuit court, upon being paid by the party so appealing three cents per hundred words for the said transcript. In case of the failure or refusal of the party so appealing to pay for the said transcript, such appeal shall be dismissed by the circuit court as for want of prosecution; *provided*, if the party appealing makes it appear by affidavit that he is not able to pay for such transcript of the testimony, then the stenographer shall furnish the same free of charge: *provided*, that in no case shall the stenographer's fee exceed ten dollars. In case the attorneys for the appellant and respondent shall agree upon a statement of the case as prepared by them for the hearing before the circuit court, such statement of the case shall be a sufficient return from the county court, and no transcript or other paper from the county courts shall be necessary.

1932 Code, § 81; Civ. P. '22, § 78; Civ. C. '12, § 3853; Civ. C. '02, § 2756; 1900 (23) 322.

§ 82. Rights of challenge of jurors in county courts.—In the selection of a jury for the trial of criminal cases in said county court, the accused, when charged with a misdemeanor, shall be entitled to peremptory challenges not exceeding three, and the State two; and in the trial of cases of felony, the accused shall be entitled to peremptory challenges not exceeding five, and the State three. In cases where there are two or more persons jointly indicted and so tried, the accused shall be jointly entitled to six peremptory challenges in cases of misdemeanor and eight peremptory challenges in cases of felony, and no more.

1932 Code, § 82; Civ. P. '22, § 79; Civ. C. '12, § 3854; Civ. C. '02, § 2757; 1900 (23) 322.

§ 83. Petit jury—trial without a jury.—Where a jury is required by law in the trial of causes, civil and criminal, in said court, such jury shall consist of six persons. All criminal cases wherein the punishment does not exceed a fine of one hundred dollars or imprisonment for thirty days shall be tried before the county judge without a jury, unless a trial by jury is demanded by the accused. Such cases wherein a trial by jury is not so demanded shall be carried to the foot of the calendar, to await trial by the county judge after the jury cases for the term have been disposed of.

1932 Code, § 83; Civ. P. '22, § 80; Civ. C. '12, § 3855; Civ. C. '02, § 2758; 1900 (23) 322.

§ 84. Judge—election—term, etc.—At the next ensuing general election the qualified electors of each of the counties in which a majority of the said electors shall have voted for the establishment of said county court, shall elect a resident attorney at law thereof as county judge. Such county judge shall be the presiding judge of the county court, and shall hold his office for four years and until his successor has been elected and has qualified. The said county judge, before entering upon the duties of his office, shall take the same oath of office as that required by law of circuit judges, and shall be commissioned in the same manner as circuit judges.

1932 Code, § 84; Civ. P. '22, § 81; Civ. C. '12, § 3856; Civ. C. '02, § 2759; 1900 (23) 322.

§ 85. Jurisdiction.—As to all cases and special proceedings within the jurisdiction of the county court and pending therein, the county judge of the county shall have the same jurisdiction with reference thereto, both in open court and at chambers, as is possessed by circuit judges over cases pending in the circuit courts over which they are presiding or in the circuits in which they are resident.

1932 Code, § 85; Civ. P. '22, § 82; Civ. C. '12, § 3857; Civ. C. '02, § 2760; 1900 (23) 322.

§ 86. Terms.—The said county court shall hold its first term on the first Monday in the calendar month next succeeding the election and qualification of said county judge, and hold a term beginning on the first Monday in every alternate month thereafter: *provided*, should the time at which any term of said court is fixed conflict with the time of holding the circuit court for such county, then the term of the county court shall begin on the Monday succeeding the time for the final adjournment of the circuit court. The said county court shall continue in session at each of its said terms until the business before it has been disposed of; and shall be open for the trial of cases, civil and criminal, from the beginning to the end of each of its said terms.

1932 Code, § 86; Civ. P. '22, § 83; Civ. C. '12, § 3858; Civ. C. '02, § 2761; 1900 (23) 322.

§ 87. Grand jury.—The grand jury as drawn in accordance with law for service upon the court of general sessions in each of the said counties shall constitute the grand jury for the said county court, and shall meet with the said county court at each of its terms, except the term next succeeding each session of the circuit court, at which term the grand jury need not meet

with the county court.

1932 Code, § 87; Civ. P. '22, § 84; Civ. C. '12, § 3859; Civ. C. '02, § 2762; 1900 (23) 322.

§ 88. How jurors shall be drawn.—The board of jury commissioners as constituted by law in each of the counties of the State for the drawing of jurors for the circuit courts shall constitute the board of jury commissioners for the drawing of jurors to attend upon the sessions of the county court, and the law relating to the qualifications, drawing and summoning of jurors for attendance upon the circuit courts shall apply to the qualifications, drawing and summoning of jurors for the county court: *provided*, that not more than eighteen persons shall be drawn and summoned to attend at the same time at any session of the county court unless the court shall otherwise order. Jurors drawn and summoned shall appear and attend upon the sessions of the said county court for which summoned until excused or discharged by the judge presiding: *provided*, that service as a juror in the county court shall not be held to exempt the juror from service as such in the circuit court in the same year.

1932 Code, § 88; Civ. P. '22, § 85; Civ. C. '12, § 3860; Civ. C. '02, § 2763; 1900 (23) 322.

New trial for unlawful interference with drawing of jury is required, even though there was no proof that rights of plaintiff were affected, where defendant in his affidavit denying charges against him admitted he made offer of \$3 to

constable, for constable to select and impanel jury upon whom defendant could rely to render judgment without prejudice. *Orr v. Jeffcoat*, 180 S. C. 66; 185 S. E. 41.

§ 89. Duty of the county solicitor.—It shall be the duty of the county solicitor to prepare and, through the presiding judge of the court of general sessions, submit to the grand jury, while in attendance upon the court of general sessions, bills of indictment in all cases pending in the county court where the punishment exceeds a fine of one hundred dollars or imprisonment for thirty days, and have not been previously acted on by the grand jury; and the grand jury shall act thereon, and report the same to the presiding judge, and the said judge shall direct the clerk of the court of general sessions to report the same to the presiding judge of the county court at its next ensuing term. All cases in which bills of indictment are so found shall stand for trial by the county court as though found by the grand jury while in attendance upon the county court.

1932 Code, § 89; Civ. P. '22, § 86; Civ. C. '12, § 3861; Civ. C. '02, § 2764; 1900 (23) 322.

§ 90. Clerk of circuit court ex officio clerk of county court.—The clerk of the circuit court shall be ex officio clerk of the county court, and shall keep such calendars, minutes and records of the said county court, and the causes therein pending, and attend and perform such duties as the clerk thereof, as is required of him by law as clerk of the circuit court. For services performed as clerk of the county court he shall receive the same compensation as if performed by him as clerk of the circuit court.

1932 Code, § 90; Civ. P. '22, § 87; Civ. C. '12, § 3862; Civ. C. '02, § 2765; 1900 (23) 322.

§ 91. Duty of sheriff.—The sheriff of the county shall attend upon all sessions of the said county court, and shall be subject to the orders thereof,

and shall execute the orders, writs and mandates of the said county court as required by law of him with reference to the circuit court. For all such service he shall receive the same compensation as is allowed by law for similar services in the circuit court: *provided*, that for serving each venire for the county court, the sheriff shall receive the sum of ten dollars.

1932 Code, § 91; Civ. P. '22, § 88; Civ. C. '12, § 3863; Civ. C. '02, § 2766; 1900 (23) 322.

§ 92. Bailiffs—appointment—compensation.—The presiding judge of the said county court may appoint a sufficient number of bailiffs, not exceeding three, to attend upon the said court, and be subject to the orders thereof. Such bailiffs shall receive as compensation for their services one dollar per day for the time actually engaged, and shall not be retained in attendance upon the court longer than the exigencies of the business of the court shall require.

1932 Code, § 92; Civ. P. '22, § 89; Civ. C. '12, § 3864; Civ. C. '02, § 2767; 1900 (23) 322.

§ 93. Compensation of jurors and witnesses.—Grand and petit jurors in attendance upon the sessions of the said county court shall receive as a compensation for their services one dollar per day, and five cents per mile for necessary travel in going to and returning from the county seat. Witnesses in attendance upon the said county court shall receive the same compensation as witnesses in attendance upon the circuit court.

1932 Code, § 93; Civ. P. '22, § 90; Civ. C. '12, § 3865; Civ. C. '02, § 2768; 1900 (23) 322.

§ 94. Criminal jurisdiction and duties of magistrates in counties where county courts established.—The jurisdiction of magistrates in criminal cases in all counties wherein said county court shall be established is hereby abolished: *provided*, it shall be the duty of said magistrates, and they shall have the power, to issue warrants and hold preliminary examinations in all criminal cases, and take such action therein as is now provided by law in criminal cases beyond their jurisdiction; in committing or binding over defendants and witnesses, it shall be the duty of said magistrates to commit and bind over for trial at the next ensuing session of the county court—except in those cases over which the county court has no jurisdiction, in which case the said magistrates shall commit or bind over for trial in the court of general sessions: *provided, further*, it shall be the duty of said magistrates, in binding over witnesses, to appear and testify, on behalf of the State, before the county court in cases wherein the punishment exceeds a fine of one hundred dollars or imprisonment for thirty days, to insert a provision in the recognizance requiring said witnesses to appear and testify in said case before the grand jury at the next ensuing term of the circuit court, when the said next ensuing term of the circuit court is appointed by law to be held before a term of the county court; it shall be the duty of said magistrates, immediately after committing or binding over a defendant for trial, to lodge with the clerk of the court by which the said defendant is to be tried, all papers and proceedings connected with the said case: *provided*, that the circuit solicitor shall have the power to direct what cases may be tried before the court of sessions in all cases when the said court has concurrent jurisdiction with the county court.

1932 Code, § 94; Civ. P. '22, § 91; Civ. C. '12, § 3866; Civ. C. '02, § 2769; 1900 (23) 322.

§ 95. Civil jurisdiction of magistrates in counties where county courts established.—The jurisdiction of magistrates in civil cases and special proceedings in all counties wherein said county court shall be established is hereby limited to cases and proceedings wherein the value of the property in controversy or the amount claimed does not exceed twenty-five dollars.

1932 Code, § 95; Civ. P. '22, § 92; Civ. C. '12, § 3867; Civ. C. '02, § 2770; 1900 (23) 322.

This section inapplicable to magistrates in Richland County. *Pickens v. Maxwell Bros. & Quinn*, 176 S. C. 404; 180 S. E. 348.

§ 96. Solicitor—appointment—term, etc.—It shall be the duty of the Governor, upon the recommendation of the members of the General Assembly from each of the counties where said county court has been established, to appoint for each of said counties a resident attorney at law as county solicitor, whose term of office shall continue until his successor shall have been elected by the qualified electors of the county at the next succeeding general election, and until his said successor qualifies. After the first term herein provided for, the term of the county solicitor shall be for four years, and until the election and qualification of a successor, the qualified electors electing such successor at the general election occurring every four years.

1932 Code, § 96; Civ. P. '22, § 93; Civ. C. '12, § 3868; Civ. C. '02, § 2771; 1900 (23) 322.

§ 97. Duties of solicitor.—The said county solicitor shall represent the State in all cases brought before the said county court wherein the State is a party, and shall have the same powers and perform the same duties with reference thereto as a circuit solicitor with reference to cases brought before the court of general sessions. He shall also attend all inquests held by the coroner, aid in procuring evidence, and represent the State in the examination of witnesses at such inquests; and he shall ex officio be the legal adviser of the county board of commissioners without extra compensation.

1932 Code, § 97; Civ. P. '22, § 94; Civ. C. '12, § 3869; Civ. C. '02, § 2772; 1900 (23) 322.

Solicitor may enter nolle prosequi at any time before jury is impaneled and sworn, without consent of the court. *State v. Charles*, 183 S. C. 188; 190 S. E. 466.

Hence, where nolle prosequi was entered by solicitor before jury was impaneled and sworn, subsequent proceedings at direction of court, resulting in conviction, were nugatory. *Ibid.*

§ 98. Salaries of judges and solicitors.—The said county judge shall receive as compensation for his services the sum of one thousand dollars per annum, and the said county solicitor the sum of three hundred dollars per annum, to be paid by the county.

1932 Code, § 98; Civ. P. '22, § 95; Civ. C. '12, § 3870; Civ. C. '02, § 2773; 1900 (23) 322.

§ 99. Judge and solicitor prohibited practicing in cause of which county court has jurisdiction.—The said county judge and county solicitor are prohibited from practicing as attorneys at law in any cause or matter of which the said county court has jurisdiction, or may acquire jurisdiction,

and upon conviction of any willful violation of this section, the offender shall be adjudged to have forfeited his office and shall be sentenced to pay a fine of not less than two hundred nor more than five hundred dollars, and be imprisoned for a period of not less than one month nor more than six months: *provided*, the said county solicitor shall be at liberty to practice in all causes and matters on the civil side of said court.

1932 Code, § 99; Civ. P. '22, § 96; Civ. C. '12, § 3871; Civ. C. '02, § 2774; 1900 (23) 322.

§ 100. Judge shall appoint a stenographer—salary of, etc.—The county judge in each of the counties wherein the said county court is established shall appoint for the said county court an official stenographer, who shall attend upon the sessions of the said court and perform the same duties in connection therewith as are performed by circuit stenographers in the circuit courts. The said stenographer shall receive from the county wherein he is appointed a salary of three hundred dollars per year.

1932 Code, § 100; Civ. P. '22, § 97; Civ. C. '12, § 3872; Civ. C. '02, § 2775; 1900 (23) 322.

§ 101. Counties excepted.—The provisions of this article shall not apply to the counties of Abbeville, Anderson, Bamberg, Beaufort, Berkeley, Charleston, Chester, Chesterfield, Clarendon, Cherokee, Dorchester, Edgefield, Fairfield, Florence, Greenwood, Georgetown, Horry, Marion, Lancaster, Laurens, Lexington, Marlboro, Orangeburg, Oconee, Pickens, Saluda, Sumter, Union, Williamsburg, Kershaw, Barnwell, Spartanburg, Greenville and York: *provided*, that sections 77 through 100, in so far as the same shall pertain to or have any effect or bearing whatsoever upon the county court of Richland County, as now created, constituted, operating, and proceeding under sections 164 through 181, inclusive, or amendments thereto, are hereby repealed.

1932 Code, § 101; Civ. P. '22, § 98; Civ. C. '12, § 3873; Civ. C. '02, § 2776; 1900 (23) 322; 1934 (38) 1200.

ARTICLE 2.

The Civil Court of Florence

102, 103. Jurisdiction.
104, 105, 112. Jurors.
106, 107. Judge.
108. Stenographer.
109. Clerk.
110. Sheriff.

111. Bailiffs.
112. Witnesses.
113. Pleading and practice.
114. Sessions.
115, 117. Appeals.
116. Transfer of causes.

§ 102. Established—territorial jurisdiction.—A court inferior to the circuit court, and to be known as "The Civil Court of Florence," is hereby established for the city of Florence and the following territory adjacent thereto, in the county of Florence, to wit: the townships of Florence, Black Swamp, Jefferies, McMillian, Cain, Pee Dee, Lake, Lee, Lake City, Motts, Lynch, Effingham, James Cross Roads, Cartersville, Timmons ville, Ebenezer and Tans Bay.

1932 Code, § 102; 1929 (36) 119.

Florence civil court has jurisdiction of foreign corporation which has agent in city of Florence and is doing business

there. *McLaughlin v. International Harvester Co.*, 173 S. C. 338; 175 S. E. 810.

§ 103. Jurisdiction.—The said civil court shall have jurisdiction to try and determine all civil cases and special proceedings, both at law and in equity, where the value of the property in controversy, or the amount claimed, does not exceed the sum of four thousand (\$4,000.00) dollars, but such jurisdiction shall not extend to cases where the title to real estate is in question. *Provided*, that no suit shall be brought, commenced or filed in said court unless and until the plaintiff shall have made a deposit with the clerk of said court to pre-pay the costs of the action, the minimum of which deposit shall be two and 50/100 (\$2.50) dollars.

1932 Code, § 103; 1929 (31) 119; 1932 (37) 1286; 1934 (38) 1537.

Effect of counterclaim in excess of jurisdictional amount. — The question whether the action of a defendant in interposing a counterclaim for more than the jurisdictional amount fixed by statute ousts the court of jurisdiction to try plaintiff's cause of action, is an interesting one. The general rule is that the jurisdiction is determined by the amount claimed by the plaintiff without reference to any defense or plea set up by the defendant. *Corley v. Evans*, 69 S. C. 520, 48 S. E. 459, 460. Under this rule it is

held that where the jurisdiction of a court of limited jurisdiction has been fixed by the plaintiff's demand, the interposition by defendant of a counterclaim in excess of such jurisdictional amount, will not oust the court's jurisdiction. *Dupree v. Gilland*, 156 S. C. 109, 152 S. E. 873. See, also, *Corley v. Evans*, *supra*.

See the catchline "Effect of Counterclaim," under § 257, analysis line "Subdivision (1)," II.

§ 104. Jurors.—The board of jury commissioners as constituted by law in the county of Florence for the drawing of jurors for the circuit courts shall constitute the board of jury commissioners for the drawing of jurors for the said civil court and the law relating to the qualifications, drawing and summoning of jurors for attendance upon the circuit courts shall apply to the qualifications, drawing and summoning of jurors for the said civil court, *provided* that no more than twenty persons shall be drawn and summoned to appear at the same time at any session of the civil court unless the court shall otherwise order. The jurors drawn and summoned shall appear and attend the sessions of the said court until excused or discharged by the judge presiding: *provided*, that service as a juror in said court shall be held to exempt a juror from service as such in the said civil court or in the circuit court for the same year.

1932 Code, § 104; 1929 (36) 119.

§ 105. Juries.—Juries in the said civil court shall consist of six persons.

1932 Code, § 105; 1929 (36) 119.

§ 106. Judge.—There shall be a judge of said civil court who shall be an attorney, resident within the jurisdictional limits thereof, with at least five years actual experience in the practice of law, and who shall be commissioned by the Governor, upon the recommendation of the majority of the members of the bar residing within said jurisdictional limits, said commission to become effective upon confirmation by the Senate. He shall hold office for four years and until his successor has been appointed and has qualified. Said judge, before entering upon the duties of his office, shall take the same oath of office as required by law of circuit judges and shall

be commissioned in the same manner as circuit judges. He shall receive as compensation the sum of thirty-six hundred (\$3,600.00) dollars per annum, to be paid in monthly installments by the county treasurer upon the warrant of the board of county commissioners. The said judge shall be debarred from practice of law in all matters within the jurisdiction of said civil court.

1932 Code, § 106; 1929 (31) 119; 1934 (38) 1537; 1939 (41) 315.

§ 107. Powers of judge.—As to all cases and special proceedings within the jurisdiction of the said civil court and pending therein, the said judge shall have the same jurisdiction with reference thereto both in open court and at chambers, as is possessed by circuit judges over cases pending in the circuit courts, over which they are presiding, or in the circuit in which they are resident, and said judge shall have the power to grant writs of injunction and habeas corpus, and shall also have the power to punish any person or persons guilty of any act in contempt of the said court.

1932 Code, § 107; 1929 (36) 119.

§ 108. Stenographer.—There shall be an official stenographer of the said court, who shall be appointed by the judge thereof and who shall hold office during the pleasure of said judge. He shall receive as compensation the sum of twelve hundred (\$1200.00) dollars per annum. He shall, upon request of any parties litigant furnish transcripts, for which he shall be allowed to charge the party furnished same a fee of twenty-cents per one hundred words, which fee shall be paid by the party so furnished and which shall be considered a necessary disbursement in the taxation of costs.

1932 Code, § 108; 1929 (31) 119; 1939 (41) 315.

§ 109. Clerk—records—judgments.—The clerk of the circuit court shall be ex officio clerk of the said civil court and shall keep such calendars, minutes and records of the said civil court and the causes pending therein, and attend and perform such duties as clerk thereof, as is required of him by law as clerk of the circuit court. Judgments recovered in the civil court shall be entered of record and recorded in the same books as judgments of the circuit court. The clerk shall make up, before each term of court, a jury issue docket, on which shall be placed all matters to be tried before a jury, that are at issue, under the pleadings, at least seven days before the commencement of the term. All cases shall be tried in their order on the docket unless changed or varied by the court for its convenience, and in the furtherance of justice. For services performed as clerk of said civil court the clerk shall receive such fees in civil matters as are now allowed him by law.

1932 Code, § 109; 1929 (36) 119.

§ 110. Sheriff.—The sheriff of the county shall attend upon all sessions of the said civil court, and shall be subject to the orders thereof, and shall execute the orders, writs and mandates of the said civil court as is required of him with reference to the circuit court. For all such services he shall receive the same compensation allowed by law for similar service in the

circuit court: *provided*, that for serving each venire in the civil court he shall be allowed the sum of thirty (\$30.00) dollars.

1932 Code, § 110; 1929 (36) 119.

§ 111. Bailiffs.—The presiding judge of the said civil court may appoint a sufficient number of bailiffs, not exceeding two, to attend upon the said court and execute the orders thereof. Such bailiffs shall receive as compensation the sum of two (\$2.00) dollars per day for the time actually engaged, and shall not be retained in attendance upon the court longer than the exigencies of the business of the court shall require.

1932 Code, § 111; 1929 (36) 119.

§ 112. Compensation of jurors—of witnesses.—Jurors in attendance upon the sessions of the said court shall receive the same compensation as jurors in attendance upon the circuit court. Witnesses in attendance upon the said civil court shall likewise receive the same compensation as witnesses in attendance upon the sessions of the circuit court.

1932 Code, § 112; 1929 (36) 119.

§ 113. Pleadings and practice.—The same forms of pleading and the same rules of practice and evidence shall obtain in the said civil court as are provided by law for the conduct and trial of civil cases in the circuit courts.

1932 Code, § 113; 1929 (36) 119.

§ 114. Sessions.—The said court shall hold its sessions in the county courthouse, at the county seat of the county of Florence, the first session to be held on the first Monday of the calendar month next succeeding the appointment and qualification of the judge thereof and thereafter a term shall be held beginning on the first Monday in each and every month. The said court shall continue in session in each of its said terms until the business before it has been disposed of, and shall be open for the trial of cases from the beginning to the end of each of its said terms. The judge of the said court shall maintain open court at all times for the hearing of causes without a jury, provided that during the month of August of each year there shall be no session of said court held.

1932 Code, § 114; 1929 (36) 119.

§ 115. Appeals from magistrates.—The said civil court shall likewise have jurisdiction to hear and determine appeals from all magistrate's courts within the territorial limits of its jurisdiction.

1932 Code, § 115; 1929 (36) 119.

§ 116. Transfer of causes.—All cases now pending in the circuit court of which the said civil court shall have jurisdiction shall be transferred to the said civil court for trial upon motion by either party thereto.

1932 Code, § 116; 1929 (36) 119.

§ 117. Appeals.—Appeals shall be taken from said civil court in all cases direct to the Supreme Court and shall be presented in the same manner and under the same rules as are now prescribed for appeals from the circuit court.

1932 Code, § 117; 1929 (36) 119.

ARTICLE 3.

County Court in and for Greenville County

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| 118. Established. | 129. Terms. |
| 119. Jurisdiction. | 130. Jury commissioners—jurors. |
| 120. Appeals. | 131. Clerk—records—cost in civil cases. |
| 121. Court of record. | 132. Sheriff—cost in civil cases. |
| 122. Transfer of causes. | 133. Pay of jurors and witnesses. |
| 123. Statutes applicable. | 134. Judge. |
| 124. Procedure. | 135. County solicitor. |
| 125. Grand jury—indictments. | 136. Court crier—bailiffs. |
| 126. Juries—jury trials. | 137. Stenographer. |
| 127. Judge—powers. | 138. Costs. |
| 128. Appeals. | 139. Saving clause. |

§ 118. **Established.**—A majority of the qualified electors of the county of Greenville having voted at the general election of 1920 in favor of the establishment of a county court in and for said county as provided by the act of the General Assembly approved February 19, 1920, a county court is established in and for said county in pursuance of the said act of the General Assembly with such jurisdiction as is hereinafter provided.

1935 (39) 6.

§ 119. **Jurisdiction—civil appeals from magistrate courts.**—The said county court shall have concurrent jurisdiction with the court of common pleas in all civil cases and special proceedings, both at law and in equity, where the amount demanded in the complaint does not exceed five thousand (\$5,000.00) dollars or when the value of the property involved does not exceed five thousand (\$5,000.00) dollars; and in all other civil cases and special proceedings, both at law and in equity, in which there is no money demand, or in which the right involved cannot be monetarily measured. *Provided, however,* that all prior civil cases and special proceedings in which there is no money demand or in which the right involved cannot be monetarily measured are hereby validated in regard to the jurisdiction of said county court and *provided, further,* that in all mortgage foreclosures where the amount of the sum claimed in the complaint does not exceed the sum of five thousand (\$5,000.00) dollars, that the said county court shall have concurrent jurisdiction with the court of common pleas regardless of the value of the property involved; and *provided, further,* that all prior mortgage foreclosures in the said county court are hereby validated in regard to the jurisdiction of said county court where the amount of the sum claimed in the complaint did not exceed the jurisdictional amount regardless of the value of the property involved. Said court shall have concurrent jurisdiction with the circuit court to hear and determine all appeals in civil cases from judgments rendered by magistrate's courts; and the proceedings on such appeal shall be the same as is now provided for appeal from said last named courts to the courts of common pleas.

1935 (39) 6; 1940 (41) 1714.

§ 120. **Criminal appeals from inferior courts.**—The said county court shall have jurisdiction to hear and determine appeals in all criminal cases from the magistrates' court and from municipal courts, or town councils of any of the cities and towns in Greenville County; proceedings on such appeal

shall be the same as are now provided for appeal from said last named courts to courts of general sessions.

1935 (39) 6.

§ 121. Court of record.—The said county court shall be a court of record and have a seal inscribed with the words “County Court of Greenville”, and the same presumption in favor of its jurisdiction and the validity of its judgments and decrees shall hold as in cases of judgments rendered by the circuit courts.

1935 (39) 6.

§ 122. Transfer of causes.—The said county judge shall have jurisdiction to remove to the court of common pleas of said county, any case where it may appear to his satisfaction that the case or any part thereof is not within the jurisdiction of the county court, or any case in which the judge has been of counsel, has any personal interest in, or is connected by blood or marriage to any of the parties to the suit.

1935 (39) 6.

§ 123. Statutes applicable.—All general laws and statutory provisions applicable generally to the circuit courts and courts of general sessions of this State and trial of cases therein shall apply to said county court and to the conduct and trial of cases therein where not inconsistent with this article.

1935 (39) 6.

§ 124. Procedure.—The same form of pleadings and the same rules of procedure, practice and evidence shall obtain in the county court as is provided by law for the trial of civil and criminal cases in the circuit court where not inconsistent with the provisions of this section: *provided*, that the pleadings or copies thereof in cases for trial before the said court shall be filed in the clerk’s office, as now provided by law for the circuit court, before six o’clock in the afternoon of the Monday preceding the first day of the next ensuing term of the said county court, and the clerk shall forthwith enter the case upon the appropriate calendar.

1935 (39) 6.

§ 125. Grand jury—indictments.—The grand jury, as drawn in accordance with law for service upon the court of general sessions, for Greenville County, shall constitute the grand jury for the said county court, and need not meet with the said county court, except when ordered to do so by the county judge. The solicitor of the thirteenth judicial circuit, or the county solicitor, if one is provided for by law, shall prepare all bills of indictment wherein a person is entitled to a presentment of a grand jury, and he shall present said indictments to the grand jury, of such cases as the county court has jurisdiction, at each session of the court of general sessions, and it shall be the duty of the clerk of court of general sessions to certify said bills of indictment to the county court for trial or disposition thereof where true bills are found by the said grand jury. The county judge shall have the authority to submit to the grand jury, when called into his court, such bills of indictment as he may desire to submit to them, when the offenses

charged are within the jurisdiction of said county court.

1935 (39) 6.

§ 126. Juries—jury trials.—Where a jury is required by law in the trial of all civil and criminal cases in said court, said jury shall consist of six persons. In all actions either party may demand a jury trial in all cases in which a trial by jury is granted of right under the Constitution and laws of this State, but such demand must be made on or before the case is called for trial, and the failure to make such demand shall be a waiver of said right of trial by jury. The empaneling of juries in all criminal cases in said court shall be according to the practice now established in the courts of general session. In the selection of a jury for the trial of criminal cases in said county court, the accused, when charged with misdemeanor, shall be entitled to peremptory challenges not exceeding three, and the State two; and in the trial of cases of felony, the accused shall be entitled to peremptory challenges not exceeding five, and the State three. In cases where there are two or more persons jointly indicted and so tried, the accused shall be jointly entitled to four peremptory challenges in cases of misdemeanors and the State two, and in each case of felony, the defendants jointly shall be entitled to six peremptory challenges and the State four. The empaneling of juries in all civil cases in which the jury shall be charged with the trial of any issue shall be according to the practice now established in the court of common pleas, except the list of jurors now required by law to be furnished shall consist of ten, from which list each party shall alternately strike until there remains but six, which shall constitute the jury to try the case or issue.

1935 (39) 6.

§ 127. Judge—powers.—In all cases and special proceedings within the jurisdiction of the county court and pending therein, the judge of the county court shall have the same jurisdiction, both in open court and at chambers, as is possessed by the circuit judges over cases pending in the circuit courts over which they are presiding, or in the circuits in which they are residents: *provided*, that said county judge shall have the power to issue writs of habeas corpus in all cases; and to grant bail in all cases triable in the county court. The county court shall be open at all times, at the convenience of the county judge, for the purpose of taking pleas of guilty and imposing sentences in all criminal cases within the jurisdiction of this court with the consent of the accused.

1935 (39) 6.

§ 128. Appeals.—In all criminal and civil actions and special proceedings of which said county court shall have jurisdiction, the right of appeal shall be to the Supreme Court of the State, in the same manner and pursuant to the same rules, practice and procedure as now govern appeals from circuit courts.

1935 (39) 6.

§ 129. Terms.—The terms of the county court of Greenville County shall be as follows: civil court on the first Monday in January for two weeks, on the first Monday in March for two weeks, on the first Monday in June for

two weeks, on the first Monday in September for one week, on the first Monday in October for one week, on the first Monday in November for one week, and on the second Monday in December for two weeks; criminal court on the third Monday in February for two weeks, on the third Monday in April for two weeks, on the fourth Monday in September for two weeks: *provided*, that in addition to the terms aforesaid the judge of the county court shall have authority and power to call special or extra sessions of either civil or criminal court in said county at such other times as the judge or court shall order, and continue for such time as is necessary to dispose of the business of the court: *provided*, the notice as provided by law in the court of common pleas has been given. And, *provided further*, in addition to the aforesaid terms, the Greenville County court shall be in session at all times and open for the transaction of such business as can be disposed of without a jury. And *provided further*, the county judge may in his discretion adjourn or suspend any term before or after the day fixed by law for the opening of the term.

1935 (39) 6; 1937 (40) 333.

§ 130. Jury commissioners—drawing, summoning and attendance of jurors.—The board of jury commissioners, as constituted by law in said county for the drawing of jurors for the circuit court, shall constitute the board of jury commissioners for the drawing of jurors to attend upon the sessions of the county court, and such commissioners shall, upon the order of said court, at such time as shall be fixed, from the jury box (whether the same has been previously drawn or not) draw a panel of petit jurors, and the clerk of said court shall immediately issue to the sheriff a venire containing the names of the persons thus drawn as petit jurors, which venire shall be returnable at such time as may be named by the said court, and the persons so served shall be the jurors for said court, and the law relating to the qualifications, drawing and summoning of jurors of the circuit court shall apply, except as is herein otherwise provided: *provided*, that not more than eighteen persons shall be drawn and summoned to attend the same time at any session of the county court, unless the court shall otherwise order. Jurors drawn and summoned shall appear and attend upon the sessions of the county court for which summoned until excused or discharged by the judge thereof: *provided*, that services as jurors in the county court shall not be held to exempt a juror from services as such in the circuit court in the same year. The board of jury commissioners as constituted by law in said county, for the drawing of grand and petit jurors for the circuit court shall constitute the board of jury commissioners for the drawing of grand and petit jurors to attend upon the sessions of the county court and that the provisions of law applicable to drawing grand and petit jurors in the courts of general sessions shall obtain and apply in criminal cases in the county court.

1935 (39) 6..

§ 131. Clerk—records—cost in civil cases.—The clerk of the circuit court shall be ex officio clerk of the county court, and shall keep such calendars, minutes and records of the said county court, and the cases pending therein, and attend and perform the duties as the clerk thereof, as is required of him by law as clerk of the circuit court. The costs of the clerk in civil

cases in the county court shall be the same as those allowed in similar cases in the court of common pleas. The county commissioners of said county shall provide all books necessary for keeping records of said court, for which the clerk shall receive no additional compensation.

1935 (39) 6, 46.

§ 132. Sheriff—cost in civil cases.—The sheriff of the county shall attend upon all sessions of the said county court and shall be subject to the orders thereof, and shall execute the orders, writs and mandates of the said county court as required by law of him in reference to the circuit court. The costs and fees of the sheriff in civil cases in the county court shall be the same as those allowed in similar cases in the court of common pleas.

1935 (39) 6.

§ 133. Pay of jurors and witnesses.—Jurors in attendance upon the sessions of the county court shall receive as compensation for their services the same per diem and mileage as is allowed said jurors in the circuit court. Witnesses in attendance upon said county court shall receive the same compensation as witnesses in attendance upon the circuit court.

1935 (39) 6.

§ 134. Judge—further powers—term—appointment—oath—salary—vacancy—special judge—law practice.—The presiding judge of the county court shall possess all the powers in respect to preserving order or punishing for contempt of court as now possessed by circuit judges. The term of office for the county judge shall be four years from the date of the expiration of his predecessor's term. Said appointment shall be made by the Governor in the following manner: on the first Tuesday in December, 1934, and every four (4) years thereafter, the Greenville Bar Association shall assemble in the court house at an hour to be fixed by the president of the association (*provided*, that if unable to assemble on that day, a meeting shall be held thereafter as quickly as possible, due notice being given by the president of the association) and shall select from the lawyers of Greenville Bar Association one of their number who shall receive a majority vote of the lawyers present. His name shall be immediately transmitted to the chairman of the Greenville County delegation for approval or disapproval by the delegation. The chairman of said delegation shall forthwith call the delegation to meet on the question of approval or disapproval of the nominee of said bar association. If said delegation approves the selection from said association, the chairman shall immediately transmit his name to the Governor for appointment and the Governor shall thereupon appoint him, his term of office commencing on the termination of the office of the present Greenville County judge. If said delegation shall disapprove of a nominee from said bar association, the chairman of the delegation shall immediately notify the president of the bar association to this effect and said association shall be called together, at a notice of not less than two days, to select another name and transmit to the delegation, and the said delegation shall act on said name as in the first instance and so on, until a judge has been selected by a majority of the bar association and approved by the Greenville County delegation. The expression "Greenville County Bar Association" as used herein shall mean every lawyer in Green-

ville County admitted to practice in the Supreme Court of this State who has an office in Greenville County for the practice of law, but shall not include attorneys who have been admitted to practice who are in other lines of business. The said county judge, before entering upon the duties of his office, shall take the same oath of office as required by law for circuit judges, and shall be commissioned in the same manner as circuit judges. The salary of the county judge shall be three thousand and five hundred (\$3,500.00) dollars per annum, to be paid by the county in monthly installments; said judge shall not charge on the facts, but declare the law only. All vacancies in the office of county judge shall be filled by appointment by the Governor in the same manner as provided herein for the original appointment. In case of absence or inability of the county judge, at the time fixed for holding any term of said court, the Governor may appoint some other suitable person, being an attorney at law, to hold said term of court as special county judge. The county judge, as provided for in this section, shall not be allowed to practice law in any court in Greenville County, but may practice in the probate court, U. S. district court and Supreme Court: *provided*, that no judge of the county court shall appear as counsel for anyone in any case transferred from the said county court to the court of common pleas, where he has been of counsel or where he is interested in the case, however remote.

1935 (39) 6.

§ 135. County solicitor—election—term—salary.—There shall be selected by the legislative delegation a county solicitor from the members of the Greenville bar to prosecute all criminal cases before the county court, to serve until January 1, 1941, and until his successor is elected and qualified. That the successors to the county solicitor selected by the legislative delegation, as herein provided, shall hold office for terms of four (4) years and until their respective successors shall have been elected and qualified. The successors of the county solicitor selected by the legislative delegation, as herein provided, shall be elected in the general election in Greenville County in the year 1940 and every fourth year thereafter, in like manner as other county officers are elected. The salary of the county solicitor shall be one thousand nine hundred eighty (\$1,980.00) dollars a year payable monthly by the county treasurer upon the warrant of such county solicitor.

1935 (39) 6; 1937 (40) 41.

§ 136. Court crier—bailiffs.—The clerk of court of Greenville County, South Carolina, is hereby authorized and empowered to employ a court crier and two bailiffs for the county court of Greenville County at an expense of not exceeding two (\$2.00) dollars per day, each, for each day's service actually rendered in said court while the said court is in session.

1935 (39) 6.

§ 137. Stenographer.—The said county judge shall appoint for the said county court an official stenographer, who shall attend upon the sessions of said court and perform the same duties in connection therewith as are performed by the circuit stenographer in the circuit court. The said stenographer shall receive from the said county the salary of nine hundred (\$900.00) dollars per annum, to be paid by the county in monthly install-

ments, and in addition such fees as provided by law for stenographers in the circuit court and courts of general sessions.

1935 (39) 6.

The stenographer is a ministerial officer at the court.—The stenographer is an appointee and ministerial officer of the court. His duty to take stenographic notes is under the direction of the presiding judge. *State v. Campbell*, 131 S. C. 357, 127 S. E. 439, 440.

But the power of the court to function does not depend on his presence.—When a stenographer is not available, due to inadequate provision for the compensation of such an assistant or to other causes, the power of the court to function may not be held to depend wholly

upon the presence of a stenographer. *State v. Campbell*, 131 S. C. 357, 127 S. E. 439, 440.

And in case of his absence the trial judge may make provisions for the preservation of the records.—In case of the absence of the stenographer proper provisions may be made for the preservation of the record of the court's proceedings and such provision is within the control of the trial judge in the exercise of a sound discretion. *State v. Campbell*, 131 S. C. 357, 127 S. E. 439, 440.

§ 138. Costs.—All costs and disbursements allowing the prevailing party, and all costs and fees allowed officers of court in actions in the court of common pleas shall be allowed in actions in this court.

1935 (39) 6.

§ 139. Saving clause.—If any part of §§ 118 thru 139 shall be declared unconstitutional by the Supreme Court of South Carolina, it shall not affect the remaining portions of said sections.

1935 (39) 6.

ARTICLE 4

County Court of Orangeburg

141. Established.
142. Judge and solicitor.
143. Jurisdiction.
144. A court of record.
145. Laws applicable.
146. Procedure.
147. Jurors.
148. Jurisdiction.
149. Appeals.
150. Terms.
151. Jury commissioners.
152. Clerk.

153. Sheriff.
154. Jurors and witnesses.
155. Judges' salary.
156. Solicitor.
157. Criminal cases.
158. Grand jury.
159. Equity cases.
160. Stenographer.
161. Transfer of causes.
162. Costs.
163. Quarters.

§ 141. Established.—A county court is established, in and for the county of Orangeburg, with such jurisdiction, powers and limitations as may be hereinafter provided.

1932 Code, § 141; 1925, (34) 161.

See § 156, which provides for the county court of Orangeburg. circuit solicitor to be the solicitor of the

§ 142. Judge — appointment — oath — term — vacancy. — The Governor shall appoint a county judge upon the recommendation of a majority of the members of the Orangeburg County Bar Association, at a meeting to be held by the said Orangeburg County Bar Association, of which five days'

notice shall be given by mail to the members thereof by its chairman. The county judge shall be a resident practicing attorney of the Orangeburg County bar, and shall qualify and take the oath of office provided for circuit judges. That the term of office of the county judge shall be for four years from the date of his qualification, and he shall serve until his successor is likewise appointed and shall have qualified. In case of a vacancy in such office, the Governor shall appoint his successor for the unexpired term in like manner upon the recommendation of the Orangeburg County Bar Association.

1932 Code, § 142; 1925 (34) 161; 1933 (38) 564.

§ 143. Jurisdiction—appeals.

(a) **Civil**—The said county court shall have concurrent jurisdiction with the court of common pleas in all civil cases and special proceedings, both at law and in equity, in which the amount demanded in the complaint does not exceed three thousand (\$3,000.00) dollars, or in which the value of the property involved does not exceed three thousand (\$3,000.00) dollars; and in all other civil cases and special proceedings, both at law and in equity, in which there is no money demanded, or in which the right involved cannot be measured or fixed by any monetary value.

(b) **Criminal**.—The said county court shall have concurrent jurisdiction with the court of general sessions in all criminal cases, except murder, manslaughter, rape, or attempt to rape, arson, common law burglary, bribery, perjury and forgery; and concurrent jurisdiction with the magistrate courts in all criminal cases within the jurisdiction of the magistrate courts.

(c) **Appeals**.—The said county court shall have concurrent jurisdiction with the court of common pleas and the court of general sessions, respectively, to hear and determine all appeals in civil cases and criminal cases, respectively, from judgments rendered by the magistrate courts, and all other inferior courts; and the proceedings on such appeals shall be the same as now provided for appeals in such cases from the magistrate courts to the court of common pleas and the court of general sessions, respectively.

1932 Code, § 143; 1925 (34) 161.

§ 144. To be a court of record—seal—presumption as to proceedings.—The said county court shall be a court of record and have a seal inscribed with the words: "County Court of Orangeburg County;" and the same presumption in favor of its jurisdiction and the validity of its judgments and decrees shall hold as in the case of jurisdiction, judgments and decrees of the circuit courts.

1932 Code, § 144; 1925 (34) 161.

§ 145. General laws applicable unless inconsistent—entry of judgments—procedure in minor criminal cases.—The general laws and statutory provisions, and rules of court, applicable generally to the circuit courts of this State, and the trials of cases therein, shall apply to said county court and to the conduct and trial of cases therein where not inconsistent with this article: *provided*, that any judgment rendered may be entered upon the third day after such rendition, or upon the same day with leave of the court: *and provided*, that in all criminal cases wherein the punishment does

not exceed a fine of one hundred dollars or imprisonment for thirty days, the same shall be tried, without presentment by a grand jury, on information or indictment filed by the circuit solicitor.

1932 Code, § 145; 1925 (34), 161; 1933 (38) 564.

§ 146. Pleadings—procedure—rules of evidence—filing of pleadings.—

The same forms of pleadings and the same rules of procedure, practice and evidence shall obtain in the county court as is provided by law for the trial of civil and criminal cases in the circuit court where not inconsistent with the provisions of this article: *provided*, that the pleadings or copies thereof in a case for trial before the said county court shall be filed in the office of the clerk of court, as now provided by law in the circuit court, before noon of the Monday preceding the first day of the next ensuing term of the said county court, and the clerk shall forthwith enter the cases upon the appropriate calendar.

1932 Code, § 146; 1925 (34) 161.

§ 147. Selection of juries.—(a) In the trial of all civil actions at law in the said county court, and in the trial of all issues ordered to be framed by the judge in equity cases in said court, it shall be the duty of the clerk of said court to furnish the parties or their attorneys with a list of ten of the jurors to be drawn and selected by ballot from the whole number of jurors who are in attendance, the names on said lists to be numbered from one to ten, from which said list the parties or their attorneys shall alternately strike by number, the plaintiff striking first, until there shall be left but six names, which shall constitute the jury to try the case or issue: *provided*, that objections for cause shall be allowed and vacancies in the panel filled in the manner now provided in the court of common pleas.

(b) In the selection of a jury for the trial of criminal cases in said county court the accused, when charged with a misdemeanor, shall be entitled to peremptory challenges not exceeding three, and the State two; and in the trial of cases of felony, the accused shall be entitled to peremptory challenges not exceeding five, and the State three. In cases where there are two or more persons jointly indicted and so tried, the accused shall be jointly entitled to six peremptory challenges in cases of misdemeanor, and eight peremptory challenges in cases of felony, and no more. A jury for the trial of cases in the county court shall consist of six.

1932 Code, § 147; 1925 (34) 161.

§ 148. Jurisdiction of county judge.—In all cases and special proceedings within the jurisdiction of the county court and pending therein, the judge of the county court shall have the same jurisdiction, both in open court and at chambers as is possessed by the circuit judges over cases pending in the circuit court over which they are presiding, or in the circuits in which they are residents: *provided*, that said county judge shall have the power to issue writs of habeas corpus in all cases and to grant bail in all cases triable in the county court. The county court shall be open at all times, at the convenience of the county judge, for the purpose of taking pleas of guilty and imposing sentences in all criminal cases within the jurisdiction of this court with the consent of the accused. The county judge shall also review summarily and without notice upon oral or written

application, the amount of bail fixed by the clerk of court or any magistrate in the county in any criminal case for the purpose of reducing or increasing such bail pending trial or appeal; and may call to his aid for such purpose the circuit solicitor.

1932 Code, § 148; 1925 (34) 161; 1933 (38) 564.

§ 149. Appeals to be to Supreme Court.—In all civil actions, criminal cases and special proceedings of which said county court shall have jurisdiction, the right of appeal shall be to the Supreme Court of the State, and in the same manner and pursuant to the same rules, practice and procedure as now governs appeals from circuit courts.

1932 Code, § 149; 1925 (34) 161.

§ 150. Terms of court.—The county court shall be held on the second Mondays of February, March, April, May, July, September and November, and at such other times as the judge or court shall order, and continue for such time as is necessary to dispose of the business before the court: *provided*, that said court shall always be open for the transaction of all such business as can be disposed of without a jury: *and provided, further*, that each week which may be designated for jury trials shall be considered a term, and the county judge may designate the time for holding both the civil and the criminal terms.

1932 Code, § 150; 1925 (34) 161.

§ 151. Jury commissioners — jury lists — panels — venires. — The board of jury commissioners as constituted by law in said county for the circuit court shall constitute the board of jury commissioners for the said county court, and such commissioners shall, annually during the month of December of each year proceed to prepare a jury list for said county court in the manner and under the provisions now relating to the preparation of the jury list for the circuit courts, which list may contain the names of any person now or hereafter appearing on the jury list prepared for the circuit courts, which list may contain the names of any person now or hereafter appearing on the jury list prepared for the circuit court of said county; the said jury commissioners shall be provided with a strong, substantial box, without apertures or openings when closed, to be known as the "Jury Box for County Court," which shall be prepared, secured and kept by them in like manner as is now provided to be done in the case of the jury box for the circuit courts; they shall place in a special apartment in the said jury box (which special apartment shall be known as the "Tales Box") the names of not less than three hundred nor more than eight hundred of such persons whose names appear on said list as reside within ten miles of the court house, from which tales box shall be drawn jurors to supply deficiencies arising from any cause or emergency during the sitting of the court. The names of persons placed in said tales box shall be also placed in the said jury box; such commissioners shall, at least ten days before the convening of the court, and after five days' notice of such drawing from the jury box, which notice may be given either by posting same on the court house door or publication in a newspaper published in said county, draw a panel of petit jurors, and the clerk of said court shall immediately issue to the sheriff a venire containing the names of the persons thus

drawn as petit jurors, which venire shall be returnable at such time as may be named, and the persons so served shall be the jurors for said court; and the law relating to the qualifications, drawing and summoning jurors of the circuit court shall apply, except as herein otherwise provided: *provided*, that not more than eighteen persons shall be drawn and summoned to attend at the same time at any session of the county court, unless the court shall otherwise order. Jurors drawn and summoned shall appear and attend upon the sessions of the county court for which summoned until discharged by the judge thereof: *provided*, that service as jurors in the county court shall not be held to exempt a juror from service as such in the circuit court in the same year, nor shall service as a juror in the circuit court be held to exempt a juror from service as such in the county court in the same year, nor shall a juror be required to serve in such county court for a full week more than once in the same year.

1932 Code, § 151; 1925 (34) 161.

§ 152. Clerk—costs—records—entry of judgments on abstract—indexing.

—The clerk of the circuit court shall be ex officio clerk of the county court and shall keep such calendars, minutes and records of the said county court, and the cases therein pending, and attend and perform the duties as the clerk thereof, as is required of him by law as clerk of the circuit court. The costs and fees of the clerk in civil cases in the county court shall be the same as those allowed in similar cases in the court of common pleas. The county commissioners of said county shall provide all books necessary for keeping records of said court. In all civil cases tried in the county court the clerk shall make up and file a judgment roll along with and in the same manner as if the judgment had been rendered in the court of common pleas; he shall also enter the judgment in the abstracts of judgments of the court of common pleas as if such judgment were a judgment of the court of common pleas; and he shall also index such judgments in the indices of judgments of the court of common pleas in the same manner as if such judgments were judgments of the court of common pleas for said county.

1932 Code, § 152; 1925 (34) 161; 1935 (39) 254.

§ 153. Duty of sheriff—fees—bailiffs.—The sheriff of the county, or his deputy, shall attend upon all sessions of the said county court, and shall be subject to the orders thereof, and shall execute the orders, writs and mandates of the said county court as required by law of them in reference to the circuit court. The costs and fees of the sheriff in civil and criminal cases in the county court shall be the same as those allowed in similar cases in the court of common pleas and general sessions. The sheriff shall appoint such bailiffs as may be necessary, with the approval of the judge.

1932 Code, § 153; 1925 (34) 161.

§ 154. Pay of jurors—of witnesses.—Jurors in attendance upon the sessions of the county court shall receive as compensation for their services the same per diem and mileage as is allowed said jurors in the circuit court. Witnesses in attendance upon the said county court shall receive the same compensation as witnesses in attendance upon the circuit court.

1932 Code, § 154; 1925 (34) 161.

§ 155. Compensation of county judge—special county judges.—The salary of the county judge shall be three thousand (\$3,000.00) dollars per annum, to be paid monthly by the county, and in addition he shall be allowed twenty-five (\$25.00) dollars per month for office rent and expenses. In case of the absence or inability of the county judge at the time fixed for holding the terms of said court or in case of disqualification for trial of any case in said court, upon request of the county judge, or a majority of the members of the Orangeburg County Bar Association, the Governor may appoint some other suitable person, being an attorney at law, to hold said term or terms of the county court that may be designated by the Governor, or to try any special case, as special county judge, who shall be entitled to the same per diem as special circuit judges are now allowed by law.

1932 Code, § 155; 1925 (34) 161.

§ 156. Solicitor—duties—inability to serve.—The circuit solicitor shall be the solicitor for the said county court, and who shall receive no compensation therefor except that provided for him as his salary as circuit solicitor. In case of sickness, disability or inability of the circuit solicitor to serve for any reason at any term, or in any case, the county judge may appoint some attorney to serve in his place. It shall be the duty of the circuit solicitor to appear for and represent the State in all criminal cases tried in the said county court; he shall prepare and hand out to the grand jury all such indictments as may be necessary; he shall also appear for and represent the State in all appeals from the said county court; he shall also appear for and represent the State in all appeals in criminal cases from the magistrate's court in the county court. The said circuit solicitor shall also advise with and aid the grand jury of the county in its duties, and also the coroner or magistrate in inquisitions.

1932 Code, § 156; 1925 (34) 161; 1933 (38) 564.

§ 157. Preparation of criminal cases for county court.—The magistrates of Orangeburg County are required to promptly file with the clerk of the court, all papers in criminal prosecutions, triable in the county court, and they shall make all bonds and recognizance of witnesses and defendants returnable to the next ensuing term of said county court. It shall be the duty of the clerk of court to notify the circuit solicitor upon the filing of such papers and turn same over to him. The said magistrates are required to make a list of such witnesses as they deem material on the back of the arrest warrant, and while he shall be careful to furnish the names of witnesses deemed necessary to establish the charge in the warrant, he shall be equally careful not to furnish the names of any witnesses whose testimony is immaterial.

1932 Code, § 157; 1925 (34) 161; 1933 (38) 564.

§ 158. Grand jury.—The grand jury drawn for and serving in the court of general sessions for Orangeburg County shall constitute the grand jury of the said county court and shall so serve and act upon all necessary indictments of the said court, and the said grand jury shall attend upon the sessions of the said county court, whenever notified so to do by request of the circuit solicitor and order of the county judge; the circuit solicitor shall appear at the regular terms of the court of general sessions and may hand

out indictments at that time to the grand jury for the county court cases and the grand jury shall act upon such indictments as in indictments presented for cases in the court of general sessions. The grand jurors shall receive as compensation for their services in attendance upon the county court the same pay as allowed by law in the court of general sessions.

1932 Code, § 158; 1925 (34) 161; 1933 (38) 564.

§ 159. Trial of equity cases.—In actions on the civil side of court in which reference to the master may, under the law, now be necessary, said actions may be heard and determined by the said county judge, either in term time or at chambers, without referring the same, upon testimony taken before the said judge; and likewise in all cases where a jury trial may not be necessary or required. All sales to be made by the county judge as in cases before the court of common pleas.

1932 Code, § 159; 1925 (34) 161; 1932 (37) 1171.

See section 3703-7.

§ 160. Stenographer.—The circuit court stenographer shall be the stenographer for the said county court, and he shall attend upon the sessions of the said court and perform the duties in connection therewith as he performs in the circuit court, and who shall receive no compensation therefor except that provided for him as his salary as circuit court stenographer. The said stenographer shall furnish transcripts of the proceedings upon request of the parties litigant and shall be entitled to receive as compensation therefor a fee of five cents per hundred words for all transcripts so furnished, which shall be paid by the litigant requesting the same, except in criminal cases where the defendant may satisfy the court that he is unable to pay for such transcript, when the same shall be furnished without fee by the court stenographer; and the said stenographer shall write out for the county judge and the circuit solicitor without charge such records, excerpts and transcripts as they may require.

1932 Code, § 160; 1925 (34) 161; 1933 (38) 564.

See § 138 and the note thereto.

§ 161. Transfer of causes.—Any case pending in the court of common pleas upon the establishment of the county court for Orangeburg County may be transferred to the county court for trial upon motion, after five days' notice to the opposite party, to be heard in open court or at chambers, if it shall appear that such action may have been brought originally in the county court, if then established, and if, in the opinion of the court or circuit judge at chambers, it would serve the best interests of all parties concerned for such case to be transferred for such trial to the county court; and likewise any case, within the jurisdiction of the county court, that may hereafter be brought in the court of common pleas in the said county may be transferred to the county court for trial; and any case brought in the county court may be transferred to the court of common pleas for trial upon motion of either party, as herein provided for the transfer of cases to the county court, by the county judge, if, in the opinion of such county judge, it would serve the best interests of all parties concerned for such case to be transferred for trial to the court of common pleas. The county judge

may change the place of trial of any case pending in his court to the circuit court in another county in the same manner as provided by law in respect to changing place of trial in cases pending in the circuit court.

1932 Code, § 161; 1925 (34) 161.

§ 162. Court costs.—All costs and disbursements allowed the prevailing party, and all costs and fees allowed officers of the court in actions in the court of common pleas, shall be allowed in actions in the county court.

1932 Code, § 162; 1925 (34) 161.

§ 163. Quarters for court.—The county highway commission of Orangeburg County shall make provisions for holding the sessions of the said county court by setting apart suitable quarters in the Orangeburg County court house therefor.

1932 Code, § 163; 1925 (34) 161.

ARTICLE 5

County Court of Richland County

- | | |
|---------------------------|--------------------|
| 164. Establishment. | 174. Clerks. |
| 165. Jurisdiction. | 175. Sheriffs. |
| 166. Court of record. | 176. Witnesses. |
| 167. Laws applicable. | 177. Judge. |
| 168. Procedure. | 178. Bailiffs. |
| 169, 173, 176. Jury. | 179. Stenographer. |
| 170. Special proceedings. | 180. Costs. |
| 171. Appeal. | 181. Quarters. |
| 172. Sessions | |

§ 164. County court for Richland County.—A majority of the qualified electors voting at an election held, as provided by law, upon the question of the establishment of a county court for the county of Richland, having voted in favor thereof, a county court is hereby established in and for said county of Richland with such jurisdiction as is hereinafter provided.

1932 Code, § 164; Civ. P. '22, § 99; 1917 (30) 156.

See § 101 as effect of certain sections on this article.

§ 165. Jurisdiction.—The said county court shall have concurrent jurisdiction with the court of common pleas in all civil cases and special proceedings, both at law and in equity, where the amount demanded in the complaint does not exceed three thousand (\$3,000.00) dollars, or when the value of the property involved does not exceed three thousand (\$3,000.00) dollars, and in all other civil cases and special proceedings, both at law and in equity, in which there is no money demand, or in which the right involved cannot be monetarily measured. That the said court shall have concurrent jurisdiction with the circuit court to hear and determine all appeals in civil cases from judgments rendered by magistrates' courts; and the proceedings on such appeal shall be the same as is now provided for appeal from said last named courts to the courts of commons pleas and general sessions.

1932 Code, § 165; Civ. P. '22, § 100; 1917 (30) 156; 1921 (32) 123.

Cross reference.—As to effect of counterclaim in excess of jurisdictional amount in the civil court of Florence, see § 103 and note thereto. As to effect of counterclaim in excess of jurisdictional amount in magistrate courts, see § 257 and note there placed. See § 101 as to effect of certain sections on this article.

Prayer for relief is not considered part of complaint in fixing jurisdictional amount.—An action in claim and delivery for an automobile, where the complaint alleged that by reason of the defendant's fraudulent acts in obtaining possession of the car, and by its malicious detention, the plaintiff had been damaged to the extent of \$2,500, the case was within the jurisdiction of the county court as provided for by this section, despite the prayer for judgment for possession of the automobile (worth \$1,250), and for damages in the sum of \$2,500, the complaint, of which the prayer is no part, and the affidavit, not showing the amount claimed was in excess of \$3,000. *Williams v. Workman*, 113 S. C. 487, 101 S. E. 833.

Cited as to concurrency of the jurisdiction herein provided for. *Strickland v. Seaboard Air Line Ry. Co.*, 112 S. C. 67, 98 S. E. 853.

Magistrate's jurisdiction.—§§ 75 thru

101 reducing magistrate's jurisdiction in civil cases to amount not exceeding \$25 is inapplicable to magistrate in Richland county. *Pickens v. Maxwell Bros. & Quinn*, 176 S. C. 404; 180 S. E. 348.

No concurrent jurisdiction with magistrates' courts, but appellate jurisdiction. *Moore v. Moore*, 187 S. C. 144; 197 S. E. 507.

Under statutes providing for summary ejectment of trespassers by magistrate and authorizing appeal in such proceedings, and the statute conferring on county court of Richland county concurrent jurisdiction with circuit court to hear appeals from magistrate's courts, the county court of Richland county had no concurrent jurisdiction with magistrate's court in summary proceeding against trespasser and hence was without authority to issue rule to show cause, or writ in such proceeding, and all proceedings thereunder were of no force and effect. *Ibid.*

And action of defendant in appearing and pleading to the petition and defending action on merits in county court did not constitute waiver of question of jurisdiction of court, since court had no jurisdiction of subject matter of the action. *Ibid.*

§ 166. Courts of record—seal—presumption as to validity of judgments and decrees.—The said county court shall be a court of record, and have a seal inscribed with the words, "County Court of Richland County," and the same presumption in favor of its jurisdiction and the validity of its judgments and decrees shall hold as in case of judgments rendered by the circuit court.

1932 Code, § 166; Civ. P. '22, § 101; 1917 (30) 156.

§ 167. General laws to apply—entry of judgment.—All general laws and statutory provisions applicable generally to the circuit courts of this State and trial of cases therein shall apply to said county courts and to the conduct and trial of cases therein where not inconsistent with this article: *provided*, that any judgment rendered, other than that upon the verdict of a jury, may be entered upon the day of such rendition.

1932 Code, § 167; Civ. P. '22, § 102; 1917 (30) 156; 1918 (30) 748.

§ 168. Forms of pleading—rules of evidence—filing of pleadings. — The same forms of pleadings and the same rules of procedure, practice and evidence shall obtain in the county court as is provided by law for the trial of civil cases in the circuit court, where not inconsistent with the provisions of this article: *provided*, that the pleadings or copies thereof in a case for trial before the said court shall be filed in the clerk's office, as now provided by law for the circuit court, before six o'clock in the afternoon of the Wednesday preceding the first day of the next ensuing term of the said

county court, and the clerk shall forthwith enter the cases upon the appropriate calendar.

1932 Code, § 168; Civ. P. '22, § 103; 1917 (30) 156.

§ 169. Jury trial—waiver.—Where a jury is required by law in the trial of all civil cases, in said court, said jury shall consist of six persons. In all civil actions either party may demand a jury trial in all cases in which a trial by jury is granted of right under the Constitution and laws of this State, but such demand must be made on or before the first day of the term, or upon the call of the calendar on the first day of the term, and the failure to make such demand shall be a waiver of said right of trial by jury.

1932 Code, § 169; Civ. P. '22, § 104; 1917 (30) 156.

§ 170. Powers in cases and special proceedings—may grant bail and issue writs of habeas corpus.—In all cases and special proceedings within the jurisdiction of the county court and pending therein the judge of the county court shall have the same jurisdiction both in open court and at chambers, as is possessed by circuit judges over cases pending in the circuit court over which they are presiding, or in the circuits in which they are residents: *provided*, that said county judge shall have the power to issue writs of habeas corpus in all cases and to grant bail, except in capital cases.

1932 Code, § 170; Civ. P. '22, § 105; 1917 (30) 156.

§ 171. Appeal—procedure.—In all civil actions and special proceedings of which said county court shall have jurisdiction, the right of appeal shall be to the Supreme Court of the State, in the same manner and pursuant to the same rules, practice and procedure as now govern appeals from circuit courts.

1932 Code, § 171; Civ. P. '22, § 106; 1917 (30) 156.

§ 172. Sessions—open always for certain business.—The county court shall be held at the discretion of the county judge at such times as he may deem necessary to properly dispatch the business of the court, and continue for such time as is necessary to dispose of the business before the court: *provided*, that said court shall always be open for the transaction of such civil business as can be disposed of without a jury: *and provided further*, that each week which may be designated for jury trials shall be considered a term.

1932 Code, § 172; Civ. P. '22, § 107; 1917 (30) 156; 1918 (30) 748.

§ 173. Juries.—The board of jury commissioners as constituted by law in said county for the drawing of the jurors for the circuit court shall constitute the board of jury commissioners for the drawing of jurors to attend upon the sessions of the county court, and such commissioners shall, upon the order of said court, at such times as shall be fixed, and after five days' notice of such drawing, from the jury box (whether the same has been previously drawn or not), draw a panel of petit jurors, and the clerk of said court shall immediately issue to the sheriff a venire containing the names of the persons thus drawn as petit jurors, which venire shall be returnable at such times as may be named by the said court,

and the persons so served shall be the jurors for said court, and the law relating to the qualification, drawing and summoning of jurors of the circuit court, shall apply, except as herein otherwise provided: *provided*, that not more than eighteen persons shall be drawn and summoned to attend at the same time at any session of the county court, unless the court shall otherwise order. Jurors drawn and summoned shall appear and attend upon the sessions of the county court for which summoned until excused or discharged by the judge thereof: *provided*, that services as jurors in the county court shall not be held to exempt a juror from services as such in the circuit court in the same year, nor shall a juror be required to serve in such county court more than once in the same year: *provided, further*, that plaintiff and defendant in a cause shall, each, be allowed to strike three jurors.

1932 Code, § 173; Civ. P. '22, § 108; 1917 (30) 156; 1918 (30) 748.

Waiver of objections to juror.—By failure to make objections to juror which attorney for plaintiff could by due diligence have discovered before jury was selected, right to make objections was waived. *Altman v. Efird Bros. Co.*, 180 S. E. 205; 185 S. E. 543.

§ 174. Clerks—duties—compensation.—The clerk of the circuit court shall be ex officio clerk of the county court, and shall keep such calendars, minutes and records of the said county court, and the cases therein pending, and attend and perform the duties of the clerk thereof, as is required of him by law as clerk of the circuit court. The costs and fees of the clerk in civil cases in the county court shall be the same as those allowed in similar cases in the court of common pleas. The county commissioners of said county shall provide all books necessary for keeping records of said court.

1932 Code, § 174; Civ. P. '22, § 109; 1917 (30) 156; 1918 (30) 748.

§ 175. Sheriff—duties—compensation.—The sheriff of the county shall attend upon all sessions of the said county court, and shall be subject to the orders thereof, and shall execute the orders, writs and mandates of the said county court as required by law of him in reference to the circuit court. That the cost and fees of the sheriff in civil cases in the county court shall be the same as those allowed in similar cases in the court of common pleas.

1932 Code, § 175; Civ. P. '22, § 110; 1917 (30) 156.

§ 176. Compensation of jurors and witnesses.—Jurors in attendance upon the sessions of the county court shall receive as compensation for their services the same per diem and mileage as is allowed said jurors in the circuit court. Witnesses in attendance upon the said county court shall receive the same compensation as witnesses in attendance upon the circuit court.

1932 Code, § 176; Civ. P. '22, § 111; 1917 (30) 156.

§ 177. Judge — term — oath — salary — vacancy — special judge — not to practice in certain cases.—It shall be the duty of the Governor to appoint a resident attorney at law of Richland County as county judge, who shall receive the largest number of votes at the time of the submission of this article to the people for its approval, and who shall hold office until the next general election and until his successor shall be appointed and quali-

fied and who shall be the presiding judge of said county court. The said judge of said court shall possess all the powers in respect to preserving order or punishing for contempt of court as now possessed by circuit judges. The term of office for the county judge shall be four years from the date of the expiration of his predecessor's term. At the next general election, and at every alternate election thereafter, an election shall be had for county judge, whose term of office shall be four years from date of expiration of his predecessor's term of office, or until his successor has been elected and qualified. The said county judge before entering upon the duties of his office, shall take the same oath of office as required by law of all circuit judges, and shall be commissioned in the same manner as circuit judges. The salary of the county judge shall be five thousand five hundred (\$5,500.00) dollars per annum, to be paid by the county in monthly installments. Said judge shall not charge on the facts, but shall declare the law only. All vacancies in the office of county judge shall be filled by appointment by the Governor, such appointments holding for the unexpired terms of his predecessor. In case of absence or inability of the county judge, at the time fixed for holding any term of said court, the Governor may appoint some other suitable person (being an attorney at law) to hold said term of court as special county judge. The county judge, as provided for in this section, shall not be allowed to practice law in the courts of this State.

1932 Code, § 177; Civ. P. '22, § 112; 1917 (30) 156; 1918 (30) 748; 1920 (31) 743; 1921 (32) 123; 1926 (34) 1042; 1929 (36) 135.

§ 178. Bailiffs—compensation.—The said judge of the county court may appoint a sufficient number of bailiffs, not to exceed two, to attend upon the said court, and be subject to the orders thereof; and the said bailiffs shall have the same power as constables of said county, and one of said bailiffs shall receive as compensation three (\$3.00) dollars per day for the time actually engaged, and shall not be retained in attendance upon the court longer than the exigencies of the court may require, and the other bailiff shall attend upon the court daily and receive as compensation the sum of twelve hundred (\$1,200.00) dollars per annum, to be paid by the county in monthly installments, reckoning from January 1, 1920.

1932 Code, § 178; Civ. P. '22, § 113; 1917 (30) 156; 1918 (30) 748; 1919 (31) 147; 1920 (31) 943.

§ 179. Stenographer.—The said county judge shall appoint for the said county court an official stenographer, who shall attend upon the sessions of said court and perform the duties in connection therewith as performed by the circuit stenographer in the circuit court. The said stenographer shall receive from the county the salary of two thousand dollars (\$2,000.00) per annum reckoning from January 1, 1921, to be paid by the county in monthly installments, and, in addition, such fee as provided herein: *provided*, that no stenographer of the county court shall appear as counsel in said court.

1932 Code, § 179; Civ. P. '22, § 114; 1917 (30) 156; 1918 (30) 748; 1919 (31) 235; 1921 (32) 123.

§ 180. Costs and disbursements.—All costs and disbursements allowed the prevailing party, and all costs and fee allowed officers of court in

actions in the court of common pleas, shall be allowed in actions in this court.

1932 Code, § 180; Civ. P. '22, § 115; 1917 (30) 156.

§ 181. Court room—code and acts to be furnished.—The county commissioners of Richland County shall make provisions by setting apart suitable quarters in the court house for holding the sessions of said county court, and shall provide the said court with the volumes of the Code of Laws of South Carolina, as at present published and as may hereafter be published, together with the public acts of the General Assembly for each year as they are issued, beginning with 1912.

1932 Code, § 181; Civ. P. '22, § 116; 1917 (30) 156; 1918 (30) 748.

ARTICLE 6

County Court of Spartanburg County

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| 182. Establishment. | 194. Sheriff and bailiffs. |
| 183. Judge and solicitor. | 195. Jurors and witnesses. |
| 184. Jurisdiction. | 196. Judge's salary. |
| 185. Court of record. | 197. Solicitor. |
| 186. Rules and regulations. | 198. Criminal cases. |
| 187. Procedure. | 199. Grand jury. |
| 188. Jury. | 200. Trial by the court. |
| 189. Powers of judge. | 201. Stenographer. |
| 190. Appeals. | 202. Transfer of cause. |
| 191. Terms. | 203. Cost. |
| 192. Jury commissioners. | 204. Quarters. |
| 193. Clerk. | |

§ 182. County court established in Spartanburg County.—A county court hereby is forthwith established in and for the county of Spartanburg, with such jurisdiction, powers and limitations as may be hereinafter provided.

1932 Code, § 182; 1930 (36) 1117.

§ 183. Judge and solicitor.

(a) **Judge—appointment—term—vacancy.**—The Governor shall appoint a county judge upon the recommendation of a majority of the members of the Spartanburg County legislative delegation in the General Assembly at a meeting to be held by the said Spartanburg County legislative delegation, of which five days' notice shall be given by mail to the members thereof by its chairman. The county judge shall be a resident practicing attorney of the Spartanburg County bar, and shall qualify and take the oath of office provided for circuit judge. That the term of office of the county judge shall be four years from the date of his qualification, and he shall serve until his successor is likewise appointed and shall have qualified. In case of a vacancy in such office, the Governor shall appoint his successor for the unexpired term in like manner upon the recommendation of the Spartanburg County legislative delegation.

(b) **Solicitor—term—election—vacancy.**—There shall be appointed by the Governor, upon the recommendation of the Spartanburg County legislative delegation in the General Assembly, a county solicitor, who shall

qualify and be commissioned by the Governor as in the case of circuit solicitors. The county solicitor so appointed shall serve until the next ensuing general election, at which his successor shall be elected for a term of four years, and at every alternate general election thereafter there shall be an election for county solicitor for a term of four years, who shall serve until his successor has been elected or appointed and shall have qualified. In case of a vacancy in the office of county solicitor the same shall be filled by appointment by the Governor upon the recommendation of a majority of the members of the Spartanburg County legislative delegation by ballot, such appointee to hold until the next ensuing general election thereafter, at which time there shall be elected a county solicitor for the unexpired term only.

1932 Code, § 183; 1930 (36) 1117.

§ 184. Jurisdiction.—(a) The said county court shall have concurrent jurisdiction with the court of common pleas in all civil cases and special proceedings, both at law and in equity, in which the amount demanded in the complaint does not exceed three thousand (\$3,000.00) dollars, or in which the value of the property involved does not exceed three thousand (\$3,000.00) dollars; and in all other civil cases and special proceedings, both at law and in equity, and in which there is no money demanded, or in which the right involved cannot be measured or fixed by any monetary value.

(b) The said county court shall have concurrent jurisdiction with the court of general sessions in all criminal cases, except murder, manslaughter, rape, or attempt to rape, arson, common law burglary, bribery, perjury and forgery, and concurrent jurisdiction with the magistrate courts in all criminal cases within the jurisdiction of magistrate courts.

(c) The said county court shall have concurrent jurisdiction with the court of common pleas and the court of general sessions, respectively, to hear and determine all appeals in civil cases and criminal cases, respectively, from judgments rendered by the magistrate courts, and all other inferior courts; and the proceedings on such appeals shall be the same as now provided for appeals in such cases from the magistrate courts to the court of common pleas and the court of general sessions, respectively.

1932 Code, § 184; 1930 (36) 1117.

§ 185. Court of record.—The said county court shall be a court of record and have a seal inscribed with the words: "County Court of Spartanburg County"; and the same presumption in favor of its jurisdiction and the validity of its judgments and decrees shall hold as in the case of jurisdiction, judgments and decrees of the circuit courts.

1932 Code, § 185; 1930 (36) 1117.

§ 186. Rules and regulations.—The general laws and statutory provisions, and rules of court, applicable generally to the circuit court of this State, and the trials of cases therein, shall apply to said county court and to the conduct and trial of cases therein where not inconsistent with this article: *provided*, that any judgment rendered may be entered upon the third day after such rendition, or upon the same day with leave of the court: *and provided*, that in all criminal cases wherein the punishment does not exceed a fine of one hundred dollars or imprisonment for thirty days, the

same shall be tried, without presentment by a grand jury, on information or indictment filed by the county solicitor.

1932 Code, § 186; 1930 (36) 1117.

§ 187. Pleadings — procedure—practice—evidence. — The same form of pleadings and the same rules of procedure, practice and evidence shall obtain in the county court as is provided by law for the trial of civil and criminal cases in the circuit court where not inconsistent with the provisions of this article: *provided*, that the pleadings or copies thereof in a case for trial before the said county court shall be filed in the office of the clerk of court, as now provided by law in the circuit court, before noon of the Monday preceding the first day of the next ensuing term of the said county court, and the clerk shall forthwith enter the cases upon the appropriate calendar.

1932 Code, § 187; 1930 (36) 1117.

§ 188. Juries—civil—criminal—number.—(a) In the trial of all civil actions at law in the said county court, and in the trial of all issues ordered to be framed by the judge in equity cases in said court, it shall be the duty of the clerk of the said court to furnish the parties or their attorneys with a list of ten of the jurors to be drawn and selected by ballot from the whole number of jurors who are in attendance, the names on said lists to be numbered from one to ten, from which said list the parties or their attorneys shall alternately strike by number, the plaintiff striking first, until there shall be left but six names, which shall constitute the jury to try the case or issue: *provided*, that objections for cause shall be allowed and vacancies in the panel filled in the manner now provided in the court of common pleas.

(b) In the selection of a jury for the trial of criminal cases in said county court the accused, when charged with a misdemeanor, shall be entitled to peremptory challenges as is now provided by law for trial of similar cases in the court of general sessions; and in the trial of cases of felony, the accused shall be entitled to peremptory challenges as is now provided by law for the trial of similar cases in the court of general sessions, and the State the same number as now provided by law in the court of general sessions. A jury for the trial of cases in the county court shall consist of six.

1932 Code, § 188; 1930 (36) 1117.

§ 189. Power of judge—open court.—In all cases and special proceedings within the jurisdiction of the county court and pending therein, the judge of the county court shall have the same jurisdiction, both in open court and at chambers, as is possessed by the circuit judges over cases pending in the circuit courts over which they are presiding, or in the circuits in which they are residents: *provided*, that said county judge shall have the power to issue writ of habeas corpus in all cases and to grant bail in all cases triable in the county court. The county court shall be open at all times, at the convenience of the county judge, for the purpose of taking pleas of guilty and imposing sentences in all criminal cases within the jurisdiction of this court with the consent of the accused. The county judge shall also review summarily and without notice upon oral or written

application, the amount of bail fixed by the clerk of court or any magistrate in the county in any criminal case for the purpose of reducing or increasing such bail pending trial or appeal; and may call to his aid for such purpose the county solicitor.

1932 Code, § 189; 1930 (36) 1117.

§ 190. Appeals.—In all civil actions, criminal cases and special proceedings of which said county court shall have jurisdiction, the right of appeal shall be to the Supreme Court of the State, and in the same manner and pursuant to the same rules, practice and procedure as now governs appeals from circuit courts.

1932 Code, § 190; 1930 (36) 1117.

§ 191. Terms.—The county court shall be held on the second Mondays of February, March, April, May, July, September and November, and at such other times as the judge or court shall order, and continue for such time as is necessary to dispose of the business before the court: *provided*, that said court shall always be open for the transaction of all such business as can be disposed of without a jury: *and provided, further*, that each week may be designated for jury trials shall be considered a term, and the county judge may designate the time for holding both the civil and criminal terms: *provided, further*, that whenever the time designated by the county judge for the holding of civil or criminal terms shall be insufficient for the trial of all cases before the court, said term may be continued into the following week and jurors may be held over into the following week.

1932 Code, § 191; 1930 (36) 1117; 1932 (37) 1194.

§ 192. Jury commissioners—duties—jurors — tales box. — The board of jury commissioners as constituted by law in said county for the circuit court shall constitute the board of jury commissioners for the said county court, and such commissioners shall, immediately upon the establishment of the said county court, and annually thereafter during the month of December of each year, proceed to prepare a jury list for said county court in the manner and under the provisions now relating to the preparation of the jury list for the circuit court, which list may contain the names of any person now or hereafter appearing on the jury list prepared for the circuit court of said county; that the said jury commissioners shall be provided with a strong, substantial box, without apertures or openings when closed, to be known as the "Jury Box for County Court," which shall be prepared, secured and kept by them in like manner as is now provided to be done in the case of the jury box for the circuit courts; that they shall place in a special apartment in the said jury box (which special apartment shall be known as the "Tales Box") the names of not less than three hundred nor more than eight hundred of such persons whose names appear on said list as reside within ten miles of the court house, from which tales box shall be drawn jurors to supply deficiencies arising from any cause or emergency during the sitting of the court. The names of persons placed in said tales box shall be also placed in the said jury box; that such commissioners shall, at least ten days before the convening of the court, and after five days' notice of such drawing from the jury box, which notice may be given either by posting same on the court house door or

publication in a newspaper published in said county, draw a panel of petit jurors, and the clerk of said court shall immediately issue to the sheriff a venire containing the names of the persons thus drawn as petit jurors, which venire shall be returnable at such times as may be named, and the persons so served shall be the jurors for said court; and the law relating to the qualifications, drawing and summoning jurors of the circuit court shall apply, except as herein otherwise provided: *provided*, that not more than eighteen persons shall be drawn and summoned to attend at the same time at any session of the county court, unless the court shall otherwise order. Jurors drawn and summoned shall appear and attend upon the sessions of the county court for which summoned until discharged by the judge thereof: *provided*, that service as jurors in the county court shall not be held to exempt a juror from service as such in the circuit court in the same year, nor shall service as a juror in the circuit court be held to exempt a juror from service as such in the county court in the same year, nor shall a juror be required to serve in such county court for a full week more than once in the same year. *provided*, when the business of the court is not completed during the week for which jurors are drawn, said jurors may be held for service during the following week, but such jurors may be excused from service during the second week for any good cause appearing to the court, and if so excused, shall not be required to report for duty at the next term of court, and vacancies caused by excusing jurors from service during the second week shall be filled from the tales box.

1932 Code, § 192; 1930 (36) 1117; 1932 (37) 1194.

§ 193. Clerk of court—duties—fees—judgments.—The clerk of the circuit court shall be ex-officio clerk of the county court and shall keep such calendars, minutes and records of the said county court, and the cases therein pending and attend and perform the duties as the clerk thereof, as is required of him by law as clerk of the circuit court. The costs and fees of the clerk in civil cases in the county court shall be the same as those allowed in similar cases in the court of common pleas. The county commissioners of said county shall provide all books necessary for keeping records of said court. In all civil cases tried in the county court the clerk shall make up and file a judgment roll along with and in the same manner as if the judgment had been rendered in the court of common pleas; he shall also enter the judgment in the abstracts of judgments of the court of common pleas as if such judgment were a judgment of the court of common pleas; and he shall also index such judgments in the indices of judgment of the court of common pleas in the same manner as if such judgments were judgments of the court of common pleas for said county.

1932 Code, § 193; 1930 (36) 1117; 1932 (37) 1128.

§ 194. Sheriff—duties—bailiffs.—The sheriff of the county, or his deputy, shall attend upon all sessions of the said county court, and shall be subject to the orders thereof, and shall execute the orders, writs and mandates of the said county court as required by law of them in reference to the circuit court. That the costs and fees of the sheriff in civil and criminal cases in the county court shall be the same as those allowed in similar cases in the court of common pleas and general sessions. The sheriff shall

appoint such bailiffs as may be necessary, with the approval of the judge.
1932 Code, § 194; 1930 (36) 1117.

§ 195. Jurors—witnesses—compensation.—Jurors in attendance upon the sessions of the county court shall receive as compensation for their services the same per diem and mileage as is allowed said jurors in the circuit court. Witnesses in attendance upon the said county court shall receive the same compensation as witnesses in attendance upon the circuit court.
1932 Code, § 195; 1930 (36) 1117.

§ 196. Judge's salary—special judges—how appointed.—The salary of the county judge shall be three thousand (\$3,000.00) dollars per annum, to be paid monthly by the county. In case of the absence or inability of the county judge at the time fixed for holding the terms of said court or in case of disqualification for trial of any case in said court, upon request of the county judge, or a majority of the members of the Spartanburg County Bar Association, the Governor may appoint some other suitable person, being an attorney at law, to hold said term or terms of the county court that may be designated by the Governor, or to try any special case, as special county judge, who shall be entitled to the same per diem as special circuit judges are now allowed by law.
1932 Code, § 196; 1930 (36) 1117.

§ 197. Solicitor's salary—special solicitors—duties.—The county solicitor shall receive a salary of fifteen hundred (\$1,500.00) dollars per annum, payable in monthly installments by the county. In case of sickness, disability or inability of the county solicitor to serve for any reason at any term, or in any case, the county judge may call upon the circuit solicitor, or appoint some other attorney to serve in his place. It shall be the duty of the county solicitor to appear for and represent the State in all criminal cases tried in the said county court; he shall prepare and hand out to the grand jury all such indictments as may be necessary; he shall appear for and represent the State in all appeals from the said county court, and may call upon the circuit solicitor for such assistance as may be necessary; he shall also appear for and represent the State in all appeals in criminal cases from the magistrate's court in the county court. The said county solicitor shall also advise with and aid the grand jury of the county in its duties, and also the coroner or magistrates in inquisitions. The said county solicitor shall not practice law in criminal cases in the magistrate's court of Spartanburg County, nor shall he appear for the defense in any criminal cases in the court of general sessions for said county.
1932 Code, § 197; 1930 (36) 1117.

As to right of solicitor to nolle prose-qui, see annotation § 97.

§ 198. Duties of magistrates—clerk of court.—The magistrates of Spartanburg County are required to promptly file with the clerk of court all papers in criminal prosecutions, triable in the county court, and they shall make all bonds and recognizance of witnesses and defendants returnable to next ensuing term of said county court. It shall be the duty of the clerk of the court to notify the county solicitor upon the filing of such papers and turn same over to him. The said magistrates are required to make a

list of such witnesses as they deem material on the back of the arrest warrant, and while he shall be careful to furnish the names of witnesses deemed necessary to establish the charge in the warrant, he shall be equally careful not to furnish the names of any witnesses whose testimony is immaterial.

1932 Code, § 198; 1930 (36) 1117.

§ 199. Grand jury.—The grand jury drawn for and serving in the court of general sessions of Spartanburg County shall constitute the grand jury of the said county court and shall so serve and act upon all necessary indictments of the said court, and the said grand jury shall attend upon the sessions of the said county court, whenever notified so to do by request of the county solicitor and order of the county judge; the county solicitor shall appear at the regular terms of the court of general sessions and may hand out indictments at that time to the grand jury for the county court cases, and the grand jury shall act upon such indictments as in indictments presented for cases in the court of general sessions. The grand jurors shall receive as compensation for their services in attendance upon the county court the same pay as allowed by law in the court of general sessions.

1932 Code, § 199; 1930 (36) 1117.

§ 200. Certain civil causes may be heard by judge.—In actions on the civil side of court in which reference to the master may, under the law, now be necessary, said actions may be heard and determined by the said county judge, either in term time or at chambers, without referring the same to the said master, upon testimony taken before the said judge; and likewise in all cases where a jury trial may not be necessary or required. All sales to be made by the master, as in cases before the court of common pleas.

1932 Code, § 200; 1930 (36) 1117.

§ 201. Stenographer—salary—duties.—The said county judge shall appoint for said county court an official stenographer, to serve at his pleasure, who shall attend upon the sessions of the said court and perform the same duties in connection therewith as are performed by the stenographers in the circuit court. That the said stenographer shall receive for such services a salary of nine hundred (\$900.00) dollars per annum, payable monthly by the county, and the said stenographer shall furnish transcripts of the proceedings upon request of the parties litigant, and shall be entitled to receive as compensation therefor a fee of five cents per hundred words for all transcripts so furnished, which shall be paid by the litigant requesting the same, except in criminal cases where the defendant may satisfy the court that he is unable to pay for such transcript, when the same shall be furnished without fee by the court stenographer; and the said stenographer shall write out for the county judge and the county solicitor without charge such records, excerpts and transcripts as they may require.

1932 Code, § 201; 1930 (36) 1117.

§ 202. Transfer cases to county court from common pleas—vice versa—change of venue.—Any case pending in the court of common pleas upon

the establishment of the county court for Spartanburg County may be transferred to the county court for trial upon motion, after five days' notice to the opposite party, to be heard in open court or at chambers, if it shall appear that such action may have been brought originally in the county court, if then established, and if, in the opinion of the court or circuit judge at chambers, it would serve the best interests of all parties concerned for such case to be transferred for such trial to the county court; and likewise any case, within the jurisdiction of the county court, that may be hereafter brought in the court of common pleas in the said county may be transferred to the county court for trial; and any case brought in the county court may be transferred to the court of common pleas for trial upon motion of either party, as herein provided for the transfer of cases to the county court, by the county judge, if in the opinion of such county judge, it would serve the best interests of all parties concerned for such case to be transferred for trial to the court of common pleas. The county judge may change the place of trial of any case pending in his court to the circuit court in another county in the same manner as provided by law in respect to changing place of trial in cases pending in the circuit court.

1932 Code, § 202; 1930 (36) 1117.

§ 203. Costs.—All costs and disbursements allowed the prevailing party, and all costs and fees allowed officers of the court in actions in the court of common pleas, shall be allowed in actions in the county court.

1932 Code, § 203; 1930 (36) 1117.

§ 204. Location.—The county board of control for Spartanburg County shall make provisions for holding the sessions of the said county court by setting apart suitable quarters in the Spartanburg County court house therefor.

1932 Code, § 204; 1930 (36) 1117.

CHAPTER 4

Probate Court

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| 205. Sessions. | 224. Times and places for holding courts. |
| 206. Court of record. | 225. When open. |
| 207. Clerk. | 226. Adjournment. |
| 208. Jurisdiction. | 227. Papers filed with auditor. |
| 209. Guardians. | 228 thru 236, 251. Appeals. |
| 210, 211. County in which proceedings
instituted. | 237. Manner of commencing proceedings |
| 212. Small estates. | 238. Rules by supreme court. |
| 213. Final discharge. | 239. Contempt. |
| 214. Guardianship. | 240. Enrollment of decrees. |
| 215. Disqualification of judge. | 241. Index of decrees. |
| 216. Oath. | 242. Executions. |
| 217. Warrants and processes. | 243, 245 thru 249. Minors. |
| 218. Contumacy. | 244. Witnesses. |
| 219. Depositions. | 250. Violation of court order. |
| 220. Exclusive jurisdiction. | 251. Appeals. |
| 221. No collateral impeachment. | 252. Fees. |
| 222. When minor may choose guardian. | 253, 254. Orphanage. |
| 223. Authorized to permit sale and set-
tle accounts of guardian. | 255. Juvenile courts in certain counties. |
| | 256. Children's court for Greenville
County. |

§ 205. Sessions.—A court of probate is hereby established in each of the several counties in this State, which shall hold a session on the first Monday in each month, at or near the court house, and continue thereafter so long as the business may require.

1932 Code, § 205; Civ. P. '22, § 163; Civ. P. '12, § 39; Civ. P. '02, § 34; 1868 (14) 76; 1869 (14) 241; 1870 (14) § 35.

§ 206. Court of record—clerk.—The court of probate shall be a court of record, and have a seal; may appoint a clerk, and may remove him at pleasure; and on failure of the court to appoint such clerk, the judge of the court shall perform all the duties of clerk: *provided*, that no person holding the office of clerk of the probate court under and by virtue of the appointment of the probate judge of any county of this State, shall practice in such court as an attorney or counsellor at law: *provided*, that in Anderson, Richland, Spartanburg, Horry and Barnwell Counties, when so qualified, by appointment by the probate judge for said counties, the clerk may do and perform any and all of the duties appertaining to the office of his principal. The said probate judge for said counties may take such bond and security from his clerk as he shall deem necessary to secure the faithful discharge of the duties of the appointment, but shall in all cases be answerable for the neglect of duty or misconduct in office of his clerk.

1932 Code, § 206; Civ. P. '22, § 164; Civ. P. '12, § 40; Civ. P. '02, § 35; 1870 (14) 36; 1877 (16) 233; 1918 (30) 833; 1927 (35) 103, 251; 1929 (36) 78; 1932 (37) 1261.

Probate court is not an inferior court.

—The court of probate, though of limited jurisdiction, is a court of record with large powers, and, as to proceedings within its jurisdiction, cannot be said to be in the ordinary sense of the term, an inferior court. *Burnett v. Burnside*, 33 S. C. 276, 11 S. E. 787. See, also, *Thomas v. Poole*, 19 S. C. 323; *Turner v. Malone*, 24, S. C. 398.

And its functions are judicial in nature.—The functions of the court are judicial, and not merely ministerial, resting on the discretion of the judge, not only in making an order of sale of property to pay debts of decedent, but executing title. *Burnett v. Burnside*, 33 S. C. 276, 11 S. E. 787.

So that appeal, not mandamus, is the remedy for error.—Appeal is the only remedy to circuit court when probate court commits error and mandamus will not lie to force a probate judge to execute title to property within his jurisdiction. *Burnett v. Burnside*, 33 S. C. 276, 11 S. E. 787, 788.

See generally.—As to facts appearing on the record of clerk of the probate court not being subject to collateral at-

tack, see the catchline, "and are not subject to collateral attack except for fraud" in note to § 208, post, in which the case of *Federall v. Bouknight*, 25 S. C. 275 is discussed.

As to proper venue for removal of an executor, see the catchline, "proceeding for removal of executor should be instituted in county of probate" in note to § 211, in which the case of *Smith v. Heyward*, 107 S. C. 542, 93 S. E. 195 is discussed.

Extent of liability of clerk's bond.—Act of clerk of probate court in appointing himself guardian of estate was not within purview of his duties and is not covered by his surety bond. *Brooks v. U. S. F. & G. Co.*, 161 S. C., 66; 159 S. E. 488.

Bond from clerk to judge of probate was given for judge's protection. The public must look for its protection to bond of judge of probate. *Ibid*.

Court of record.—The probate court is a court of record, and its orders, decrees, etc., should be in writing and properly entered of record. *Ellis Estate v. Brown et al.*, 162 S. C. 136, 160 S. E. 260.

§ 207. Duties of clerk.—The clerk of the court of probate shall keep a true and fair record of each order, sentence, and decree of the court, and of all other things proper to be recorded; and on the legal fees being paid, shall give true and attested copies of the files and proceedings of the court. All copies so attested shall be legal evidence in the courts of this state.

1932 Code, § 207; Civ. P. '22, § 165; Civ. P. '12, § 41; Civ. P. '02, § 36; 1870 (14) 37.

Right to copies of record contingent upon payment of fees.—The payment of of the fees as set out in this section is a prerequisite to the right to obtain a certified copy of the probate record and the failure of the probate judge to issue a certified copy on administratrix's demand without tender of the fees was not indifference of the court. *Boggs-Tate*

Co. v. Bishop, 149 S. C. 69, 146 S. E. 677.

And mandamus will lie to enforce that right.—Upon payment of fees the right to a certified copy of the probate record vests, and mandamus will lie to compel the court to give "true and attested copies of the files and proceedings of that court." *Boggs-Tate Co. v. Bishop* 149 S. C. 69, 146, S. E. 677, 679.

§ 208. Jurisdiction of judges.—Every judge of probate, in his county, shall have jurisdiction in all matters testamentary and of administration, in business appertaining to minors, and the allotment of dower, in cases of idiocy and lunacy, and of persons non compos mentis.

1932 Code, (14) § 208; Civ. P. '22, § 166; Civ. P. '12, § 42; Civ. P. '02, § 37; 1870 (14) § 38.

See the section immediately following and the note there placed.

Extent of court's jurisdiction is not clearly defined.—The extent of the jurisdiction of a probate judge over "matters testamentary and of administration," and "in business appertaining to minors" as conferred by the constitution has not yet been determined. *Thomas v. Poole*, 19 S. C. 323.

As to jurisdiction of probate court being limited to period of infancy of ward, in matter relating to guardians of minors, etc., see *Waller v. Cresswell*, 4 S. C. 353, treated under the section immediately following, catchline "Which Jurisdiction Possibly Exists Only During Infancy of Ward."

But it extends to claims against the estate of a deceased person.—A probate court undoubtedly has jurisdiction to ascertain claims against the estate of a deceased person. See *Gaston v. Gaston*, 80 S. C. 157, 61 S. E. 393; *Dyson v. Jones*, 65 S. C. 308, 43 S. E. 667.

The probate court has power to render judgment on contract in favor of a creditor against decedent's estate when it becomes proper to determine what debts exist against a decedent's estate in a proceeding to sell land in aid of assets to pay the debts of the estate and to marshal and administer such assets. *Dyson v. Jones*, 65 S. C. 308, 43 S. E. 667, 671.

As to court's jurisdiction to sell real estate in aid of assets, and its power to marshal assets of decedent, see § 211 and the note thereto.

And it may appoint an administrator de bonis non where vacancy occurs.—Under this and the five following sections as well as the State Constitution, Art. 5, § 19, §§ 8968, 9015, 9027, a probate court has power to appoint an administrator de bonis non, if otherwise proper, whenever a vacancy occurs in the official representation of a decedent's estate. *McNair v. Howle*, 123 S. C.

252, 116 S. E. 279, 285.

Even after it has discharged the general administrator.—See this catchline under § 213, where is treated the case of *McNair v. Howle*, supra.

And the court may appoint a guardian ad litem for an infant defendant.—Whenever a minor is made a party to a cause in the court of common pleas, the probate court has the power to appoint a guardian ad litem for the minor. *Trapter v. Waldo*, 16 S. C. 289.

In probate of wills the jurisdiction extends only to its execution and not to its construction. *Prater v. Whittle*, 16 S. C. 40.

Letters testamentary cannot be granted to one as executor not nominated by the will. *Blakely & Copeland v. Frazier*, 20 S. C. 144.

What are not cases of "matters testamentary or of administration." *Caldwell v. Little*, 15 S. C. 236.

It has jurisdiction over dower.—The probate court has jurisdiction over cases involving disputes as to the right of dower and the titles of land. See *Tibbett v. Langley Man. Co.*, 12 S. C. 465.

Though questions of fact be involved.—The probate court has jurisdiction of actions dealing with "the allotment of dower" even though questions of fact are involved. *Stewart v. Blease*, 4 S. C. 44.

It may settle an estate upon petition of executors.—A probate court has jurisdiction to settle an estate upon petition of the executors as being a matter testamentary. In *re Covin's Est.*, 20 S. C. 476.

Personal action against an administrator is not within court's jurisdiction.—The probate court has no jurisdiction of an action against an administrator in his personal character for a wrong done in the course of his administration. *Roberts v. Johns*, 10 S. C. 101.

A probate court has no jurisdiction over an action by a cestui que trust against his trustee for an accounting, un-

less it involves matters testamentary. *Poole v. Brown*, 12 S. C. 556.

A probate court has no jurisdiction over an action by one legatee against another to recover money paid to her in excess of her share as it was found to be by the probate court. *Miller v. Stark*, 29 S. C. 325, 7 S. E. 501, 503.

Court's jurisdiction concurrent with that of court of common pleas unless matter is res judicata.—The probate court has no such exclusive jurisdiction as will preclude a judicial inquiry by the court of common pleas into matters testamentary and of administration when the subject matter of such inquiry is not already res judicata by virtue of a judgment of the probate court. *Beatty v. National Surety Co.*, 132 S. C. 45, 128 S. E. 40, 43.

But the principle of comity will be respected.—If, however, at the time of the commencement of an action in the court of common pleas there is an action or proceeding pending in the court of probate which properly embraces the subject-matter of the inquiry sought to be conducted in the court of common pleas, then under the principle of comity the court of common pleas will decline to entertain jurisdiction of such inquiry. *Beatty v. National Surety Co.*, 132 S. C. 45, 128 S. E. 40, 43, citing *Epperson v. Jackson*, 83 S. C. 157, 65 S. E. 217.

As to exclusiveness of jurisdiction once acquired, see § 220 and the note thereto.

And this concurrent jurisdiction is illustrated in the allotment of dower.—A probate court does not have exclusive jurisdiction in "the allotment of dower" but its jurisdiction is concurrent with that of the court of common pleas in such matters. *Witte Bros v. Clarke*, 17 S. C. 323.

As well as in cases of idiocy, lunacy and non compos mentis.—The jurisdiction of a probate court "in cases of idiocy, lunacy and non compos mentis," is not exclusive but concurrent with that of the court of common pleas. *Walker v. Russel*, 10 S. C. 82.

And in a proceeding for accounting by an administrator.—In an action for an accounting against an administrator the court of common pleas has concurrent jurisdiction with the probate court. *Beatty v. National Surety Co.*, 132 S. C. 45, 128 S. E. 40, 43.

In an action upon an administrator's bond, a judgment of the probate court establishing a devastavit or breach of

bond is not a prerequisite to maintaining such action in the court of common pleas. *Beatty v. National Surety Co.*, 132 S. C. 45, 128 S. E. 40; *Chapman v. Smith*, 133 S. C. 122, 130 S. E. 212; *Bailey v. Cooley*, 153 S. C. 78, 150 S. E. 473.

Before the adoption of the constitution of 1868 and the present Code of Civil Procedure it seems that no action could be maintained on the administrator's bond at law until a decree be rendered against the administrator either by the ordinary or the court of equity. This rule was grounded on the common law distinction between courts of law and courts of equity. See *Beatty v. National Surety Co.*, 132 S. C. 45, 128 S. E. 40, 42. —Ed. Note.

Judgments and decrees of court are binding on parties to record.—Judgments and decrees of a probate court, a court of limited jurisdiction but with extensive powers, are as binding upon the parties to the record as the judgment of any court. *Dyson v. Jones*, 65 S. C. 308, 43 S. E. 667, 670.

Even to the exclusion of the right of homestead when not asserted.—The judgment of a probate court as to the necessity of a sale and the sale of realty binds all parties to the record even to the exclusion of right of homestead not asserted. *Dyson v. Jones*, 65 S. C. 308, 43 S. E. 667, 671.

And are not subject to collateral attack except for fraud.—The decree of a probate court determining the amount of a note is binding on the parties to the record and cannot be assailed in a collateral action except upon some ground of equitable cognizance, as fraud. *Dyson v. Jones*, 65 S. C. 308, 43 S. E. 667, 671.

A judgment of the probate court, regular on its face, cannot be attacked in a collateral proceeding. *Tederall v. Bouknight*, 25 S. C. 275, 280. And this is true of the granting of letters of administration. *Phoenix Bridge Co. v. Castleberry*, 131 Fed. 175, note of which is placed under § 220.

Order on ex parte proceeding in probate court is not final and binding on trust beneficiaries unless brought before court. *State ex rel. Daniel, Atty. Gen., v. Strong, et al.*, 185 S. C. 27, 192 S. E. 671.

Validity of petitioner's marriage to deceased may be determined by probate court as an incident to determining right to administration. *Ex Parte Blizzard*, 185 S. C. 132, 193 S. E. 633.

§ 209. In relation to guardians.—The judge of probate shall have jurisdiction in relation to the appointment and removal of guardians of minors, insane and idiotic persons, and persons non compos mentis, and in relation

to the duties imposed by law on such guardians, and the management and disposition of the estates of their wards. He shall exercise original jurisdiction in relation to trustees appointed by will.

1932 Code, § 209 (14); Civ. P. '22, § 167; Civ. P. '12, § 43; Civ. P. '02, § 38; 1870 (14) § 39; Con. Art: V., § 19.

Cross reference.—See the next foregoing section and the note thereto. As to prohibition against collateral attack on court's jurisdiction, see § 221 and the note thereto.

Court has general jurisdiction over estates of minors and of their guardians.—Under the Constitution of 1895, Art. 5, § 19, and the provisions of this and § 223, the probate court is not inferior court but a court of independent and general jurisdiction of certain special subjects among which are matters appertaining to the estate of minors and the duties imposed by law upon their guardians. *Williams v. Weeks*, 70 S. C. 1, 48 S. E. 619, 620. See also, *Dunlap v.*

Probate judge is vested with such powers as legislature sees fit. *Bradford v. Richardson*, 111 S. C. 205, 97 S. E. 58.

Which jurisdiction possibly exists only during infancy of ward.—The question whether or not a probate court has jurisdiction to compel a guardian to account for the estate of his ward, where the proceedings are commenced by the ward after arriving of age, was not actually decided by the court in *Waller v. Creswell*, 4 S. C. 353, but the language used by the court would seem to indicate that it is doubtful, at least, whether jurisdiction exists in such case.

But objection for lack of jurisdiction must be seasonably made.—Objection that the probate court is without jurisdiction in a case because of its being instituted by a ward after attaining his majority will not be considered when made for the first time in the Supreme Court. *Waller v. Creswell*, 4 S. C. 353.

When a court takes cognizance of cases in which the very nature of its organization prevents it from entertaining the issues made between the parties, and its means of administration prevent an enforcement of any judgment it may therein pronounce, the objection to its jurisdiction may be made at any time; but where, having jurisdiction over the general subject, limited only by some qualification, as, possibly, here, the age of the party complaining, in the language of Chancellor Harper in *Miller v. Furse*, Bail Eq., 191, "there can be no hardship in requiring the objection to be made, in the first instance, before the delay and expense of preparing the case for

trial," quoted, with approval in *Waller v. Creswell*, 4 S. C. 353, 356.

Court may require new bond of guardian where old one appears insufficient.—It is within the jurisdiction of a probate judge when jeopardy of a minor's estate is brought to his attention to inquire into the sufficiency of the guardian's bond, and, if necessary, to require a new one of adequate amount with sufficient sureties. *Williams v. Weeks*, 70 S. C. 1, 48 S. E. 619, 620.

And the taking thereof is a ministerial duty where necessity therefor appears.—If, after inquiry into the insufficiency of a guardian's bond, a probate judge holds a new bond to be necessary, his taking of the new bond becomes a ministerial duty. *Williams v. Weeks*, 70 S. C. 1, 48 S. E. 619.

Court does not have express power to appoint personal guardian for minors.—This section does not expressly confer on the probate court the power to appoint guardians of the persons of minors, therefore the right of a guardian appointed by a probate court to the custody of an infant child is inferior to the right of the child's father to his custody. *Ex parte Davidge*, 72 S. C. 16, 51 S. E. 269.

The appointment of a trustee to take the place of a deceased testamentary trustee, is not embraced within the jurisdiction conferred by this section. *Thomas v. Poole*, 19 S. C. 323.

Approve expenditure of corpus of estate.—Probate court may approve the expenditure of part or all of corpus of estate belonging to infants, when reasonably necessary for their maintenance or education. *Beckwith et al. v. McAlister*, 165 S. C. 1, 162 S. E. 623.

But cannot authorize release of infant's property to pay parents' debts, even though infants participated in enjoyment of benefits for which debts were incurred. *Ibid.*

See generally.—As to freedom of probate judge's grant of administration on non-resident from collateral attack except for defect on record, see the catchline "And a Negative Showing of Defect Will Not Warrant Collateral Attack," in note to § 221, in which is discussed the case of *Dunlap v. Savings Bank*, 69 S. C. 270, 48 S. E. 49.

§ 210. Administration and probate of wills.—The probate of the will and the granting of administration of the estate of any person deceased shall

belong to the judge of probate for the county in which such person was last an inhabitant; but if such person was not an inhabitant of this State, the same shall belong to the judge of probate in any county in which the greater part of his or her estate may be.

1932 Code, § 210; (14) Civ. P. '22, § 168; Civ. P. '12, § 44; Civ. P. '02, § 39; 1870 (14) § 40.

Cross reference.—As to prohibition against collateral attack on court's jurisdiction, see § 221 and the note thereto. As to exclusiveness of jurisdiction once acquired, see § 220 and the note thereto.

As to the freedom from attack in a collateral proceeding of the jurisdiction of a probate judge on a negative showing in the record, see catchline "And a Negative Showing of Defect Will Not Warrant Collateral Attack," in note to § 221, wherein is treated the case of *Dunlap v. Savings Bank*, 69 S. C. 270, 48 S. E. 49.

State of domicile and not state of

death proper for administration of estate.—The state of testator's domicile and not the state in which he died while temporarily absent from state of domicile is proper place for administration of his estate. *Henson v. Wolfe*, 130 S. C. 273, 125 S. E. 293.

Validity of petitioner's marriage to deceased may be determined by probate court as an incident to determining right to administration. *Ex parte Blizzard*, 185 S. E. 132, 193 S. E. 633.

See generally, *Phoenix Bridge Co. v. Castleberry*, 131 Fed. 175.

§ 211. Settle estate in county where will proved or administration granted.—All proceedings in relation to the settlement of the estate of any person deceased shall be had in the probate court of the county in which his will was proved or administration of estate was granted.

1932 Code, § 211; Civ. P. '22, § 169; Civ. P. '12, § 45; Civ. P. '02, § 40; 1870 (14) § 41; 1873 (15) 496; 1936 (39) 1420.

In general.—This section is said to give to the probate judge important judicial functions. *Hodges v. Fabian*, 31 S. C. 212, 9 S. E. 820, 822.

Court may sell realty and marshal the assets of estate.—Under this section and § 208 a probate court has jurisdiction to sell real estate in aid of assets, and may marshal and administer the assets of a decedent. *Dyson v. Jones*, 65 S. C. 308, 43 S. E. 667, 670.

Which power is derived from the State Constitution.—It has been said that the jurisdiction to sell real estate as set out in this section is conferred on the probate court by the Constitution (see Const., S. C. 1895, Art. 5, § 19). See *McNamee v. Waterburg*, 4 S. C. 156.

But this jurisdiction must be determined before ordering the sale.—The jurisdiction to sell real estate in aid of assets being founded on the insufficiency of the personal assets to pay the decedent's debts must be judicially determined before ordering a sale of the realty. *Dyson v. Jones*, 65 S. C. 308, 43 S. E. 667, 670; *Hand v. Kelly*, 102 S. C. 151, 86 S. E. 382; *Dorn v. Stidham*, 139 S. C. 66, 137 S. E. 331.

Whenever it shall appear to "his satisfaction" that the personal estate is insufficient for the payment of the debts of an intestate, the probate judge shall determine the necessity of a sale, lands to be sold, etc. *Hodges v. Fabian*, 31 S. C. 212, 9 S. E. 820.

Which determination must include an accounting of the personal assets.—A determination of the right to sell the realty must include an accounting of the personal assets, it not being known whether there is insufficiency of personal assets until both assets and debts are ascertained. *Dyson v. Jones*, 65 S. C. 308, 43 S. E. 667, 670.

And the extent of their insufficiency.—Having the power to determine the fact of insufficiency of the personal assets, the probate court has the power to determine the extent of the insufficiency of the personal assets, especially in view of the express jurisdiction to marshal and administer assets. *Dyson v. Jones*, 65 S. C. 308, 43 S. E. 667, 671.

And only the interest of the testator may be sold.—The interest of the testator in the land can be sold but not the rights of the parties to the action in such lands as heirs of another party. *McLaurin v. Rion*, 24 S. C. 407.

And court may pass upon validity of title thereto.—It seems that a probate judge can determine the validity of an alleged deed under which one of the defendants claim title to the land about to be sold as descended from the intestate. See *Gregory v. Rhoden*, 24 S. C. 90.

But judge cannot be mandamusd to sell realty or to execute title thereto.—Mandamus will not be against a probate judge to compel him to make a sale of realty in aid of assets or execute title

to lands sold in aid of the assets. *Burnett v. Burnside*, 33 S. C. 276, 11 S. E. 787.

And the order of sale is not subject to collateral attack.—If a probate judge has jurisdiction of the subject matter and of the parties, his order for a sale of decedent's lands as set out in this section must be regarded as a judgment of a competent court upon a matter within its jurisdiction and not subject to collateral attack. *Hodges v. Fabian*, 31 S. C. 212, 9 S. E. 820. See, also, dissenting opinion in *Bradley v. Calhoun*, 116 S. C. 7, 106 S. E. 843, 847.

Nor is the order for sale void when proceeds thereof equal or exceed the debts of estate.—Although the insufficiency of the personal property for the payment of a decedent's debts is the foundation of a probate court's jurisdiction to sell realty of decedent, yet his order of sale is not void at the moment the proceeds of the sale touch the full payment of the debts. *Hodges v. Fabian*, 31 S. C. 212, 9 S. E. 820.

Under the provisions of this section and § 208 an order of a probate judge for the sale of land the proceeds of which were in excess of the insufficiency of the assets to pay decedent's debts was valid and not subject to collateral attack. *Hodges v. Fabian*, 31 S. C. 212, 9 S. E. 820.

Probate judge cannot sell as land of deceased land surrendered to distributees of deceased by his mortgagor. *Harrison v. Lightsey*, 32 S. C. 293, 10 S. E. 1010.

Probate of will or grant of letters is prerequisite to sale of realty for debt.—An action by a creditor for the sale of realty in aid of the assets cannot be brought until the will of testator has been probated or letters of administration granted. *Whitesides v. Barber*, 24 S. C. 373.

Probate court and common pleas court have concurrent jurisdiction to sell realty.—It seems that the probate court's jurisdiction to make a sale of realty as provided for in this section is concur-

rent with that of court of common pleas. See *McNamee v. Waterbury*, 4 S. C. 156; *Jordan v. Moses*, 10 S. C. 431; *Finley v. Robertson*, 17 S. C. 435; *Scruggs v. Foot*, 19 S. C. 274; *Shaw v. Barksdale*, 25 S. C. 204; *Dorn v. Stidham*, 139 S. C. 66, 137 S. E. 331.

But the principle of comity will be respected.—See this catchline under § 208, where is treated the case of *Beatty v. National Surety Co.*, 132 S. C. 45, 128 S. E. 40, 43.

And this concurrent jurisdiction extends to an action for accounting of proceeds of sale.—Probate court and court of common pleas have concurrent jurisdiction over an action against an administrator for an accounting of funds from the sale of realty as here provided for and the court first acquiring jurisdiction should retain it. *Epperson v. Jackson*, 83 S. C. 157, 65 S. E. 217.

Section not applicable to action against a surety on an administrator's bond.—This and § 221 are not applicable to an action against a surety on an administrator's bond for breach of the bond. *Beatty v. National Surety Co.*, 132 S. C. 45, 128 S. E. 40, 44.

Proceeding for removal of executor should be instituted in county of probate.—Under this and § 220 a suit to remove an executor should be brought in the county in which the testatrix lived, owned real and personal property, and in which her will was duly filed for probate. *Smith v. Heyward*, 107 S. C. 542, 93 S. E. 195.

And this is true of an action for accounting by an executor of an executor.—Under the provisions of this section an action against a personal representative of an executor's estate for an accounting of the management of testatrix's estate by the deceased executor must be brought in the probate court which probated the testatrix's will and first obtained jurisdiction. *French v. Way*, 93 S. C. 522, 76 S. E. 617. See, also, § 220 and note thereto.

See generally, *Phoenix Bridge Co. v. Castlebury*, 131 Fed. 175.

§ 212. Certain probate notices or citations not required to be published.—It shall not be necessary to publish in any newspaper, any notice or citation relating to any estate in the courts of probate, where the value of such estate or estates, does not exceed five hundred dollars: *provided*, that in such cases the notices required by law shall be posted at the door of the court house of the county where such estate or estates may be situated, for the time required by law.

1932 Code, § 212; Civ. P. '22, § 170; Civ. P. '12, § 46; (20) 1911 (28) 135; 1933 (38) 493.

§ 213. When to grant discharge to administrators, etc.—It shall not be lawful for any judge of probate in this State to grant a final discharge to

any executor, administrator, trustee, guardian, or committee, unless such executor, administrator, trustee, guardian or committee shall have finally accounted for the estate in his hands, and have given notice in a newspaper of the county (if there be no newspaper published in the county, then in some newspaper having the greatest circulation therein) for the space of at least one month, that on a day certain application will be made to the said judge of probate for a final discharge. No such discharge shall affect any distributee, legatee, cestui que trust, ward, or lunatic, who has not been made a party to such application, either by personal service of the notice, or by publication in the mode provided for absent defendants.

1932 Code, § 213; Civ. P. '22, § 171; Civ. P. '12, § 47; Civ. P. '02, § 41; 1869 (14) 263, § 1; 1894 (21) 719.

Editor's note.—Formerly this section had a proviso that the publication of notice of application for discharge should be tri-weekly in Charleston and Richland counties. See *Quick v. Campbell*, 44 S. C. 386, 22 S. E. 479, 482.

Discharge of administrator is not conclusive of settlement of estate.—The granting of a discharge to an administrator in accordance with the provisions of this section does not conclusively determine that the estate has been wholly and completely settled. *McNair v. Howle*, 123 S. C. 252, 116 S. E. 279, 285.

And court may appoint administrator de bonis non.—See this catchline under § 208, where is treated the case of *McNair v. Howle*, supra.

Even after it has discharged the general administrator.—Under its broad constitutional and statutory powers, a probate court may appoint an administrator de bonis non after it has discharged the general administrator even though that order of discharge has not been revoked. *McNair v. Howle*, 123 S. C. 252, 116 S. E. 279, 285.

The approval of the final report and discharge of a former administrator may have the force and effect of a judgment vacating the office, yet it is not conclusive that the estate has been wholly settled so as to preclude the appointment of an administrator de bonis non. *McNair v. Howle*, 123 S. C. 252, 116 S. E. 279.

Though the discharge will protect general administrator from further liability.—Where an administrator has fully, fairly, and faithfully administered the estate in his hands, and, after due advertisement, as set out in this section, and after due service of personal notice upon those entitled thereto, has obtained an order of discharge from the probate court, such decree should protect him from further liability and should relieve him from any obligation again

to take up the burden of the trust by reason of after-discovered claims or assets. *McNair v. Howle*, 123 S. C. 252, 116 S. E. 279, 284. See, also, § 208 and note thereto.

"One month" means one calendar month.—The publication for one month of an application for discharge of an administrator means one calendar month. *Brock v. Kirkpatrick*, 72 S. C. 491, 52 S. E. 592.

As to general method of computing time, see § 821 and the note thereto.

As to computation of time for publication of notices, see § 822 and note thereto.

Order of discharge is binding on heirs after six years.—After a lapse of six years an order discharging an administrator of a surety on an administrator's bond, as set out here, will become binding on the heirs of the estate for the protection of which the bonds was given and on a co-surety thereon. *Quick v. Campbell*, 44 S. C. 386, 22 S. E. 479.

This section does not limit jurisdiction of court of common pleas.—It has been said that the provisions of this section and §§ 220, 221 and 264 were not intended to limit the jurisdiction of the court of common pleas but only to prescribe the limits of the jurisdiction of the probate courts as between themselves. See *Jordan v. Moses*, 10 S. C. 431.

Surety on official bond of probate judge liable to distributees for funds converted by judge, where checks payable to probate judge and to distributees were prepared and delivered by the administrator to the judge, who converted proceeds of checks to his personal use. *Hunter et al. v. Boykin et al.*, 195 S. C. 23, 10 S. E. (2d) 152.

As to concurrent jurisdiction existing between probate court and court of common pleas, see §§ 208, 211 and their respective notes.

§ 214. Proceedings relative to estates under guardianship.—All proceedings in relation to the property or estate of any person under guardianship

shall be had in the court of probate of the county in which the guardian was appointed.

1932 Code, § 214; Civ. P. '22, § 172; Civ. P. '12, § 48; Civ. P. '02, § 42; 1870 (14) § 42.

§ 215. Judges not to act when interested—when judges of adjoining county to act.—No judge of probate shall act as such in the settlement of any estate wherein he is interested as heir or legatee, executor or administrator, or as guardian or trustee of any person; in every such case the judge of probate of any adjoining county shall have jurisdiction, and it shall be his duty, upon application, to attend at some term of the court of probate in which such case may be pending, which shall not interfere with the duties of his own county, and hear and determine such case.

1932 Code, § 215; Civ. P. '22, § 173; Civ. P. '12, § 49; Civ. P. '02, § 43; 1870 (14) § 43.

Decision as to probate of will is not binding on appeal from judgment of special probate judge.—Where a circuit judge has decided that probate of a will by a judge from another county called in by the judge of the county of decedent's residence, who had been appointed executor under the will and letters testamentary, could not be granted because the substituted probate judge had no such power, such decision is not binding on a judge on appeal from the probate of the same will by a judge specially

commissioned by the Governor for that purpose. In re Mear's Estate, 75 S. C. 482, 56 S. E. 7.

Disqualification of judge; waiver.—Where probate judge was then guardian of petitioner in action for accounting against former guardian, such judge was disqualified; this might be waived by former guardian, but such waiver would not be binding on her bondsman. Lide et al. v. Fidelity & Deposit Co., of Maryland, et al., 179 S. C. 161, 183 S. E. 771.

§ 216. Power to administer oath.—The judge or clerk of the probate court shall have power to administer all oaths necessary in the transaction of business before the probate court, and all oaths required by law to be administered to persons executing trusts under the appointment of said court.

1932 Code, § 216; Civ. P. '22, § 174; Civ. P. '12 § 50; Civ. P. '02, § 44; 1870 (14) § 44.

§ 217. Probate court may issue warrants and processes.—Probate courts may issue all warrants and processes, in conformity to the rules of law, which may be necessary to compel the attendance of witnesses, or to carry into effect any order, sentence, or decree of such courts, or the powers granted them by law.

1932 Code, § 217; Civ. P. '22, § 175; Civ. P. '12, § 51; Civ. P. '02, § 45; 1870 (14) § 45.

§ 218. In cases of contumacy, may commit to jail.—If any persons shall refuse or neglect to perform any lawful order, sentence, or decree of a probate court, such court may issue a warrant, directed to any sheriff or constable in the State, requiring him to apprehend and imprison such person in the common jail of the county, and if there be no jail in the county, then in the jail of the adjoining county, until he shall perform such order, sentence or decree, or be delivered by due course of law.

1932 Code, § 218; Civ. P. '22, § 176; Civ. P. '12, § 52; Civ. P. '02, § 46; 1870 (14) § 46.

§ 219. When deposition may be taken and used.—When a witness whose testimony is necessary to be used before any probate court shall reside

out of this State, or out of the county where said court is holden, or more than thirty miles from the county seat or by reason of age or bodily infirmity, shall be unable to attend in person, the court may issue a commission to one or more competent persons to take the testimony of such witness; and depositions taken according to the provisions of the law for taking dispositions to be used on the trial of civil causes may be used on the trial of any question before the probate court where such testimony may be proper.

1932 Code, § 219; Civ. P. '22, § 177; Civ. P. '12 § 53; Civ. P. '02, § 47; 1870 (14) § 47.

§ 220. Exclusive jurisdiction after once acquired.—When any probate court shall have first taken cognizance of the settlement of the estate of a deceased person, such court shall have jurisdiction of the disposition and settlement of all the personal estate of such deceased person to the exclusion of all other probate courts.

1932 Code, § 220; Civ. P. '22, § 178; Civ. P. '12, § 54; Civ. P. '02, § 48; 1870 (14) § 48.

See § 208 and the note thereto.

As to the jurisdiction of a personal representative of an executor who died in a different jurisdiction, see the catch-line "And This Is True of an Action for Accounting by an Executor of an Executor," in note to § 211, wherein is treated the case of *French v. Way*, 93 S. C. 522, 76 S. E. 617.

Grant of letters gives court cognizance of estate.—A probate court first takes cognizance of, the settlement of an estate, to comply with the provisions of this section, when it grants letters of administration, as the filing of the petition is *ex parte* and the issue of citation is a ministerial act. *Phoenix Bridge Co. v. Castleberry*, 131 Fed. 175.

And such grant of letters is not subject to collateral attack.—It is a settled rule of law of the state courts of South Carolina that the first grant of letters of administration by a domestic probate court—even when made by a court not having jurisdiction of the particular estate in question—cannot be collaterally attacked. *Phoenix Bridge Co. v. Castleberry*, 131 Fed. 175.

Except where jurisdiction is lacking.

—The right of collateral attack on a judgment for want of jurisdiction is a question of general law, therefore a judgment of a state court is not binding on a Federal court in which the state court decision is relied on. *Phoenix Bridge Co. v. Castleberry*, 131 Fed. 175.

The federal and state courts are foreign to each other, though sitting in the same state, in that the jurisdiction of the one is always subject to collateral attack in the other when a judgment of the one is relied on in the other. *Phoenix Bridge Co. v. Castleberry*, 131 Fed. 175.

Court's jurisdiction concurrent with that of court of common pleas unless matter is *res judicata*.—See this catch-line under § 208, where is treated the case of *Beatty v. National Surety Co.*, 132 S. C. 45, 128 S. E. 40, 43.

But the principle of comity will be respected. *Beatty v. National Surety Co.*, 132 S. C. 45, 128 S. E. 40, 43, note of which is placed under § 208.

See generally, *Jordan v. Moses*, 10 S. C. 431.

§ 221. Jurisdiction not to be collaterally impeached.—The jurisdiction assumed by any probate court in any case, so far as it depends on the place of residence or the location of the estate, shall not be contested in any suit or proceeding what ever, except in an appeal from the probate court in the original case, or when the want of jurisdiction appears on the record.

1932 Code, § 221; Civ. P. '22, § 179; Civ. P. '12, § 55; Civ. P. '02, § 49; 1870 (14) § 49.

See § 210 and the note thereto.

Jurisdictional defect must affirmatively appear of record to warrant collateral attack.—The effect of this section is to exempt the judgment of the probate court in so far as jurisdiction depends on residence of the intestate or the location of assets from an attack by a defendant debtor, except for want of juris-

diction appearing on the record. In *re Mayo's Estate*, 60 S. C. 401, 38 S. E. 634, 54 L. R. A. 660. See § 210 and note thereto; also § 230 and note.

Although the deceased was not a resident of the state nor owned property therein as set out in § 210, yet if these facts did not appear on the record in the granting of administration of his estate,

the jurisdiction of probate court to grant the administration cannot be attacked collaterally. *In re Mayo's Estate*, 60 S. C. 401, 38 S. E. 634.

Otherwise the court's jurisdiction is presumed regular. *Dunlap v. Savings Bank of Rock Hill*, 69 S. C. 270, 48 S. E. 49.

And a negative showing of defect will not warrant collateral attack.—In the case of *Hendrix v. Holden*, 58 S. C. 495, 36 S. E. 1010, the court makes a distinction between letters of administration that show affirmatively the want of jurisdiction, and where it only negatively appears; and they hold in that case that the granting of the letters of administration by the probate court must be presumed regular in all respects, when questioned in another proceeding, unless the defect appears affirmatively on the face of the record. Followed in *Dunlap v. Savings Bank of Rock Hill*, 69 S. C.

270, 48 S. E. 49, 50.

Therefore, where the record does not affirmatively show that the greater part of decedent's estate, if a nonresident, was not situate in the county in which letters of administration were granted (see § 210), such grant may not be collaterally attacked. *Dunlap v. Savings Bank of Rock Hill*, 69 S. C. 270, 48 S. E. 49, 50.

In the dissenting opinion of *Muldrow v. Jeffords*, 144 S. C. 509, 142 S. E. 602, it was said that as the record showed on its face that a will had not been contested in the probate court, the decree of a court of common pleas as to its validity should be declared void in a collateral proceeding for want of jurisdiction.

Cited in *Jordan v. Moses*, 10 S. C. 431; *Henson v. Wolfe*, 130 S. C. 273, 125 S. E. 293; *Beatty v. National Surety Co.*, 132 S. C. 45, 128 S. E. 40, 44; *Phoenix Bridge Co. v. Castleberry*, 131 Fed. 175.

§ 222. When minor may choose guardian—guardian interested—where appointed.—When, by law, a guardian is required to be appointed of a minor, who is interested as heir or legatee, or representative of such heir or legatee, in any estate which is in a course of settlement, such guardian shall be appointed by the probate court before which such estate is in course of settlement; but afterwards, if the minor shall reside in another county, and is of the age of fourteen years, he may choose and have a guardian appointed in the county where he shall reside; and in that case the powers of the former guardian shall cease, and to such proceedings he shall be made a party. In all other cases, guardians shall be appointed by the probate court of the county where the persons for whom the guardian shall be appointed shall reside.

1932 Code, § 222; Civ. P. '22, § 180; Civ. P. '12, § 56; Civ. P. '02, § 50; 1870 (14) § 50.

See § 8619.

§ 223. Authorized to permit sale and settle accounts of guardian.—The probate court by which a guardian shall be appointed shall have jurisdiction of the estate of the ward, and shall be alone authorized to permit the sale of such estate, and settle such guardian's accounts.

1932 Code, § 223; Civ. P. '22, § 181; Civ. P. '12, § 57; Civ. P. '02, § 51; 1870 (14) § 51.

As to appointment and removal of guardian, see § 209 and note thereto.

Court has general jurisdiction over estates of minors and of their guardians.—See this and the succeeding catchlines

under § 209, where *Williams v. Weeks*, 70 S. C. 1, 48 S. E. 619, and other cases pertinent to the provisions of the instant section, are treated.

§ 224. Judges may appoint times and places for holding courts.—Except as provided in section 205, the probate court in each county shall appoint such times and places for holding courts, or for hearing any special matter, as shall be judged most convenient for all persons interested, and shall give notice of such times and places to the parties interested.

1932 Code, § 224; Civ. P. '22, § 182; Civ. P. '12, § 58; Civ. P. '02, § 52; 1870 (14) § 52; 1873 (15) 496.

§ 225. Open at all times for certain business.—The probate court shall

be deemed open at all times for the transaction of ordinary business which may be necessary, when previous notice is not required to be given to the persons interested.

1932 Code, § 225; Civ. P. '22, § 183; Civ. P. '12, § 59; Civ. P. '02, § 53; 1870 (14) § 53.

§ 226. Adjournment of court—when by clerk.—A probate court may be adjourned as occasion may require; and when the judge is absent at the time for holding a court, the clerk may adjourn it.

1932 Code, § 226; Civ. P. '22, § 184; Civ. P. '12 § 60; Civ. P. '02, § 54; 1870 (14) § 54.

§ 227. Probate judge to file with county auditor descriptions of real estate—of estates—proviso.—The judge of probate shall file with the county auditor of his county within ten days after the receipt thereof a copy of the description of all real estate filed with him by any executor, executrix, administrator, administratrix, or trustee, together with the name or names of the party or parties filing the same, together with the name of the deceased person, to whom such real estate belonged: *provided*, that in all cases where real estate is located in more than one county the judge of probate shall certify to the auditor in any county where such deceased person may have had real estate at the time of his death.

1932 Code, § 227; 1923 (33) 117.

§ 228. Appellate jurisdiction of circuit court.—The circuit court shall have appellate jurisdiction of all matters originally within the jurisdiction of the probate court.

1932 Code, § 228; Civ. P. '22, § 185; Civ. P. '12, § 61; Civ. P. '02, § 55; 1870 (14) § 55.

As to the concurrent jurisdiction of circuit court, see catchline "And This Concurrent Jurisdiction Extends to an Action for Accounting of Proceeds of Sale," in note to § 211, wherein is treated the case of *Epperson v. Jackson*, 38 S. C. 157, 65 S. E. 217.

Circuit court generally has only appellate jurisdiction.—The theory of this section is that where a case originally within the jurisdiction of the court of probate is carried by appeal to the circuit court, the last named court can exercise appellate jurisdiction only. *Ex parte White*, 33 S. C. 442, 12 S. E. 5.

Except where an issue of fact or title to land is to be decided.—Where a case originally within the jurisdiction of the probate court has been heard there, and carried thence by appeal to the circuit court, the hearing in the circuit court is strictly on appeal except where an issue of fact or of title to land is to be decided, either party may apply to the circuit court for an order that such issue may be tried by a jury. *Ex parte White*, 33 S. C. 442, 12 S. E. 5. See, also, *Stewart v. Blease*, 4 S. C. 44; *Stark v. Hopson*, 22 S. C. 42.

In which case a new trial is granted.—If an issue of fact is involved in the probate of a will, the cause is to be tried anew in the circuit court, as though it

were an original cause in that court, and the parties are at liberty to raise new questions, never considered by the ordinary, or even made before him. *Myers v. O'Hanlon*, 12 Rich. Eq. 203, cited in *In re Solomon's Estate*, 74 S. C. 189, 54 S. E. 207, 208. See § 233 and the note thereto.

On appeal from the probate court on probate of a will to the circuit court the cause is to be tried anew, and must be regarded as a law case. *In re Solomon's Estate*, 74 S. C. 189, 54 S. E. 207.

And the circuit court can review all findings of probate court.—The circuit court has, under this section, the power to review all the findings of the probate court. *Ex parte Small*, 69 S. C. 43, 48 court. *Ex parte Small*, 69 S. C. 43, 48 S. C. 40, 62 S. E. 254.

And such findings of fact by probate court ought not to be disturbed unless clearly erroneous. *Gunning v. Ervin*, 13 S. C. 37; *Sartor v. Fidelity & Deposit Co.*, 160 S. C. 390, 158 S. E. 819.

And it may consider the evidence adduced in probate court.—The circuit court having, under the provisions of this section, the power to review all the findings of the probate court can consider the evidence given in the probate court as to fitness and personal qualifications of an applicant for administra-

tor of an estate. *Ex parte Small*, 69 S. C. 43, 48 S. E. 40.

An order of a probate court appointing an administrator of an estate is a final order and may be taken on appeal to the circuit court wherein all findings of the probate court may be reviewed. *Ex parte Small*, 69 S. C. 43, 48 S. E. 40.

But case cannot be sent back for purpose of taking omitted testimony.—An

order from the circuit court sending a case back to the probate court to take testimony on a certain question, which had been omitted at the original hearing, is erroneous as being without the appellate jurisdiction of the circuit court in such cases. *Ex parte White*, 33 S. C. 442, 12 S. E. 5, expressly overruling the case of *Twitty v. Houser*, 7 S. C. 153.

§ 229. Jurisdiction of Supreme Court in probate matters.—The Supreme Court shall have jurisdiction of all questions of law arising in the course of the proceedings of the circuit court, in probate matters, in the same manner as provided by law in other cases.

1932 Code, § 229; Civ. P. '22, § 186; Civ. P. '12, § 62; Civ. P. '02, § 56; 1870 (14) § 56.

As to general jurisdiction of Supreme Court, see § 26 and the note thereto.

Findings of fact by circuit court in chancery matters are not final.—In matters in chancery originating in the probate court, the findings of the circuit court as to question of fact are not final but are subject to be reviewed and reversed as in other appeals in chancery, if opposed to the clear weight of the testimony. *In re Solomon's Estate*, 74 S. C. 189, 54 S. E. 207.

But its findings of fact in matters other than chancery are not subject to review.—In matters other than matters in chancery originating in the probate court, such as probate of wills, the Supreme Court has no power to review finding of fact of the circuit court made by that court on appeal from the probate court. *In re Solomon's Estate*, 74 S. C. 189, 54 S. E. 207.

On appeal from the probate court to the circuit court on probate of a will, the cause must be regarded as a law case, the issue of will or no will being legal in its nature, and the circuit court's findings of fact are not reviewable by the Supreme Court. *Thames v. Rouse*, 82 S. C. 40, 62 S. E. 254.

If the question before the appellate court in a law case be a question of fact

the judgment below must be affirmed. *Guerin v. Hunt*, 118 S. C. 32, 110 S. E. 71, 74. See, also, *Black v. White*, 13 S. C. 37.

Where there is no conflict in the testimony or no evidence upon a material matter the question presented is one of law and is subject to review by the Supreme Court, but if the evidence is contradictory it is ordinarily one of fact and cannot be reviewed by the Supreme Court. *Guerin v. Hunt*, 118 S. C. 32, 110 S. E. 71.

But Supreme Court may refer questions to jury.—Issues of fact coming up to the Supreme Court on appeal in probate matters may be referred to a jury. *Shaw v. Cunningham*, 9 S. C. 271.

Improper remand of case by circuit court is denial of legal right.—An order of a circuit court remanding a cause in probate matter to the probate court, without hearing the appeal, for the purpose of obtaining omitted testimony denies the successful party below his legal right to have the appeal heard in the circuit court and such order is appealable in the Supreme Court. *Ex parte White*, 33 S. C. 442, 12 S. E. 5. See note to this case under § 228, catchline "But Case Cannot Be Sent Back for Purpose of Taking Omitted Testimony."

§ 230. Appeal to circuit court to be taken within 15 days.—Any person interested in any final order, sentence, or decree of any probate court, and considering himself injured thereby, may appeal therefrom to the circuit court in the same county, at the stated session next after such appeal. The grounds of appeal shall be filed in the office of the probate court, and a copy thereof served on the adverse party, within fifteen days after notice of the decision appealed from.

1932 Code, § 230; Civ. P. '22, § 187; Civ. P. '12, § 63; Civ. P. '02, § 57; 1870 (14) § 57; 1839 (11) 60 § 13.

As to jury trial on appeal from order disallowing claim, see catchline "But Jury Trial on All Questions of Fact Is Not Allowable," see note to § 233, wherein is treated the case of *Hughes v. Kirk-*

patrick, 37 S. C. 161, 15 S. E. 912.

This section must be construed with § 232. *Robertson v. Curlee*, 59 S. C. 454, 38 S. E. 116, 117.

Only parties to the action below can

appeal.—The parties to the cause of action below are the only ones entitled to an appeal from that decree. *Witte Bros. v. Clarke*, 17 S. C. 313.

Because only parties are affected by decree.—The language “any person interested in any final order, sentence or decree of any probate court, and considering himself injured thereby, may appeal therefrom,” must be regarded as referring only to persons who are parties to the proceedings in the court of probate, for no one can properly be said to be interested in any final order or decree made in a proceeding to which he is not a party, nor can he consider himself injured thereby; for nothing can be better established than the doctrine that judgments bind only parties and their privies. *Witte Bros v. Clarke*, 17 S. C. 313, 323.

No appeal having been taken from the finding of the probate court that a second appointee was decedent's son, a nephew, first appointed and later revoked, could not complain of the appointment, though there was no citation, for he was not an interested party within the provisions of this section. In *re Jones' Estate*, 102 S. C. 110, 86 S. E. 203.

“Final” Order means final as to all parties to the proceedings.—The “final” order here set out means final as to the rights of all parties to the proceedings. *Robertson v. Curlee*, 59 S. C. 454, 38 S. E. 116.

The denial of a motion that certain persons be made parties to the record is not a “final order” within the meaning of this section. *Robertson v. Curlee*, 59 S. C. 454, 38 S. E. 116.

The appointment of an administrator is a final order from which an appeal lies under this section. See *ex parte White*, 38 S. C. 41, 16 S. E. 286, 288; *ex parte Small*, 69 S. C. 43, 48 S. E. 40.

Entry of appeal to circuit court may not be delayed indefinitely.—In the light of the definite statutory provisions as to the time for perfecting appeals from other courts, no presumption is to be indulged that the legislature intended to leave the entry in the circuit court of an appeal from the probate court wholly indefinite as to time. *Fultz v. McKnight*, 125 S. C. 115, 118 S. E. 37. Cited with approval in *Boggs-Tate Co. v. Bishop*, 149 S. C. 69, 146 S. E. 677.

And copy of probate record must be filed in next stated session.—In the light of this and § 231 the time for filing in the circuit court a certified copy of the record of the proceedings appealed from is before “the stated session” of the circuit court “next after such appeal.” *Fultz v. McKnight*, 125 S. C. 115, 118 S. E. 37; *Ex parte Apeler*, 35 S. C. 417, 14 S. E. 931. Cited with approval in *Boggs-*

Tate Co. v Bishop, 149 S. C. 69, 146 S. E. 677.

Otherwise the appeal will be dismissed and decree affirmed.—Where respondents served notice of an appeal to the circuit court from a decree of the probate court admitting the will to probate, but failed to file a return before the session met after such appeal, as required by this and §§ 231 and 234, the appeal will be dismissed and the probate decree affirmed. *Fultz v. McKnight*, 125 S. C. 115, 118 S. E. 37. See, also, *Watson v. Pollitzer*, 72 S. C. 387, 51 S. E. 914. See § 235 and the note thereto.

Even before trial of merits.—An appeal from the probate court to the circuit court may be dismissed before the case is called on its merits, for failure of appellate to perfect appeal as required by this and § 231. *Boggs-Tate Co. v. Bishop*, 149 S. C. 69, 146 S. E. 677.

But next stated session need not be the one immediately following.—Appellant being allowed 15 days after notice of the probate decree to file notice of appeal, if such notice is received within less than 15 days of an approaching session of the circuit court, by deferring the service of notice of appeal to as late a day as possible within the limits of the 15-day period available, the next stated session need not be the one immediately following the filing of the probate decree. *Fultz v. McKnight*, 125 S. C. 115, 118 S. E. 37, 38. Cited with approval in *Boggs-Tate Co. v. Bishop*, 149 S. C. 69, 146 S. E. 677.

A decree refusing appeal because it was not taken in time is appealable. *Henderson v. Wyatt*, 8 S. C. 112.

Filing of return confers jurisdiction on circuit court.—Where an appellant causes certified copies of the pleadings, decree, notice, and grounds of appeal to be filed in the circuit court, as provided in this and following sections for an appeal from the probate to the circuit court, he has made such return as will give the court jurisdiction, though the probate judge omits to endorse on the copy, notice and ground of appeal, acceptance of service. *Davenport v. Davenport*, 61 S. C. 389, 39 S. E. 548.

But if appeal is withdrawn prior to filing return probate jurisdiction is not lost.—The jurisdiction of the probate court continues until the record shows that it is lost. Where the notice of appeal is revoked prior to the filing of the return as herein provided for, the probate court still has jurisdiction to revoke its grant of letters of administration. In *re Jones' Estate*, 102 S. C. 110, 86 S. E. 203.

Right of appeal generally precludes issuance of certiorari.—When a right of appeal is provided from an inferior

court, a writ of certiorari will not be allowed also, except, possibly, in very exceptional cases. *Ex parte Gregory*, 58 S. C. 114, 36 S. E. 433.

Certiorari will not lie to a judgment of the probate court declaring a person to be of unsound mind, but appeal is the proper remedy, even though appellant was not served with process in the probate court. *Ex parte Gregory*, 58 S. C. 114, 36 S. E. 433.

Issue of "will or no will" is practically a new trial.—In *Muldrow v. Jeffords*, 144 S. C. 509, 142 S. E. 602, 606, it

is said that § 8932 practically confers jurisdiction of the issue of "will or no will" upon the court of common pleas. The procedure for the determination of this issue contemplates a new trial and does not contain a single element of an appeal. The right of review is, however, secured by the provisions of the instant section.

Cited in *In re Mayo's Estate*, 60 S. C. 401, 38 S. E. 634, 54 L. R. A. 660; in *re Shier's Estate*, 35 S. C. 417, 14 S. E. 931; *Henson v. Wolfe*, 130 S. C. 273, 125 S. E. 293.

§ 231. Probate court make return on appeal to appellate court.—Within thirty (30) days after such grounds of appeal being filed in the office of the the probate court, as provided in section 230, the probate court shall make a return to the appellate court of the testimony, proceedings and judgment and file the same in the appellate court. Such return may be compelled by attachment. Upon the appeal being finally disposed of, all such papers included in the return shall be returned to the probate court.

1932 Code, § 231; Civ. P. '22, § 188; Civ. P. '12, § 64; Civ. P. '02, § 58; 1870 (14) § 60; 1939 (41) 111.

Editor's note.—The practitioner is referred to the note to the next foregoing section where is treated, among other things, the necessity of complying with the provisions of the instant section. The

authorities have almost always considered the two sections together.

See generally.—*Watson v. Pollitzer*, 72 S. C. 388, 51 S. E. 914.

§ 232. Proceedings stayed by appeal.—When an appeal, according to law, is taken from any sentence or decree of the probate court, all proceedings in pursuance of the order, sentence, or decree appealed from, shall cease until the judgment of the circuit or Supreme Court is had; but if the appellant in writing waives his appeal before the entry of such judgment, proceedings may be had in the probate court as if no appeal had been taken.

1932 Code, § 232; Civ. P. '22, § 189; Civ. P. '12, § 65; Civ. P. '02, § 59; 1870 (16) § 61.

Pending an appeal from its decree of "no will" probate court cannot appoint an administrator.—An appeal from an order or decree of the probate court shall act as a supersedeas, therefore during the pendency of an appeal from the probate court of a decree of no will, the probate court cannot grant letters of administration, as that would involve a determination of the question on appeal. In *re Seay's Estate*, 63 S. C. 130, 41 S. E. 17. See, also, *Wolfe v. Bank of Anderson*, 128 S. C. 174, 122 S. E. 592.

But action by administrator c. t. a. against judgment debtor not affected.—An action by an administrator cum testamento annexo against a judgment debtor of the estate during the pendency of an appeal from a probate judgment of

no will is not within the provisions of this section as being a proceeding in pursuance of the decree appealed from. See *Wolfe v. Bank of Anderson*, 128 S. C. 174, 122 S. E. 592.

And his execution on the judgment will not be enjoyed.—Pending appeal from probate decree declaring will invalid, a judgment debtor cannot enjoin an administrator cum testamento annexo from enforcing judgment by execution; as only proceedings in pursuance of decree rejecting the will is stayed under the provisions of this section. *Wolfe v. Bank of Anderson*, 128 S. C. 174, 122 S. E. 592.

Cited in *Robertson v. Curlee*, 59 S. C. 454, 38 S. E. 116 (see note to § 230).

§ 233. Circuit court proceed to trial and determination of questions.—When such return shall have been filed in the circuit court, such court shall proceed to the trial and determination of the question, according to the rules

of law; and if there shall be any question of fact or title to land to be decided, issue may be joined thereon under the direction of the court, and a trial thereof had by jury.

1932 Code, § 233; Civ. P. '22, § 190; Civ. P. '12, § 66; Civ. P. '02, § 60; 1870 (14) § 62; 1939 (41) 111.

"According to the rules of law" means the rules regulating the hearing of appeals.—When the circuit court takes a case on appeal from the probate court, it "shall proceed to the trial and determination of the question, according to the rules of law," that is according to the rules regulating the hearing of appeals. *Ex parte White*, 33 S. C. 442, 12 S. E. 5.

Conflict in testimony as to material fact warrants reference to jury.—Where there is serious conflict in the testimony on a question of a material fact in the probate proceedings, the circuit court may, on appeal, refer the issue to a jury as provided for in this section. *Ex parte Gantt*, 75 S. C. 364, 55 S. E. 892.

And this is true of issue of "void will".—On appeal from the probate court, in proceedings to prove a will in solemn form, where the issue was raised that the will was fraudulent and void, it is proper for the circuit court to try the issue *de novo* on issues framed by the circuit court on notice. *In re Huntley's Will*, 67 S. C. 55, 45 S. E. 132.

But jury trial on all questions of fact is not allowable.—The language in this section as to right of trial by jury being permissive and not imperative implies that, when any question of fact arises under an appeal from the court of probate, the court to which the appeal is addressed may frame an issue for trial by jury; but it does not imply that, whenever any question of fact arises upon such an appeal, either party has a right to demand that such question shall be tried by a jury. *Hughes v. Kirkpatrick*, 37 S. C. 161, 15 S. E. 912 (see note to § 230); see, also, *Meier v. Kornahrens*, 113 S. C. 270, 102 S. E. 285; *in re Shier's Estate*, 35 S. C. 417, 14 S. E. 931.

This section recognizes a right to jury trial of only "an issue of fact, in an action for the recovery of money only, or of specific real or personal property" as required to be so tried by § 584, and it was error for a circuit court, on motion of one of the parties to an appeal from the probate court, to grant an order framing and referring to a jury an issue as to whether or not there was a will, without notice to the opposite party, as required by cir. ct. rule 28. *In re Shier*, 35 S. C. 417, 14 S. E. 931. See, also, *Meier v. Kornahrens*, 113 S. C. 270, 102 S. E. 285; *Ex parte White*, 33 S. C. 442, 12 S. E. 5; *Rollin v. Whipple*, 17 S. C. 32; *Prater*

v. Whipple, 16 S. C. 40; *Lucken v. Wichman*, 5 S. C. 411; *Stewart v. Blease*, 4 S. C. 37; 185 S. C. 131, 193 S. E. 633.

And the granting thereof is discretionary with the court. *Meier v. Kornahrens*, 113 S. C. 270, 102 S. E. 285, 286; *Hughes v. Kirkpatrick*, 37 S. C. 161, 15 S. E. 912; *Ex parte Blizzard*, 185 S. C. 131, 193 S. E. 633.

Except where the right is given by statute.—It is not within the discretion of the court to refuse either party a jury trial where the appeal involves issues of fact as to the validity of a will, which right is given by a judicial construction of § 8934. *Meier v. Kornahrens*, 113 S. C. 270, 102 S. E. 285, 287; *Johnson v. Johnson*, 160 S. C. 158, 158 S. E. 264.

But even the statutory right may be waived.—Even where a jury trial may be had as a matter of right, it may be waived and is waived by failing to claim it within the time provided for in rule 28. *Meier v. Kornahrens*, 113 S. C. 270, 102 S. E. 285, 287.

If either party fails to serve the notice within the time required by the rule, the court may hold that he has waived his right to move for issues, and refuse, on that ground, to entertain his motion. But it does not follow that the court may not entertain such motions from either side after the lapse of the time specified in the rule, in the exercise of the discretion vested in it by § 495 of the code of civil procedure, or that the court may not, thereafter, of its own motion, or at the suggestion of either side, submit issues to a jury for its own enlightenment. Such has ever been the practice in equity cases. *Meier v. Kornahrens*, 113 S. C. 270, 102 S. E. 285, 287.

And when allowed issue is to be joined under direction of the court. *Meier v. Kornahrens*, 113 S. C. 270, 102 S. E. 285, 286.

Time for making motion for jury trial is fixed by circuit court rule 28.—There is no specific time fixed for the making of the motion for jury trial, but as most of the issues of fact arising under this and the foregoing sections are issues in causes of an equitable nature, by common consensus of the bench and bar, rule 28 of the circuit court, providing for 10 days' written notice "after issue is joined," of intention to move for jury trial, has been applied to the framing of issues on such appeals. *Meier v. Kornahrens*, 113 S. C. 270, 102 S. E. 285, 286.

Rule 28 was not originally intended to apply to the framing of issues on appeals from the probate court, but in the absence of any statutory provision, it has been applied and has served the purpose fairly well. *Id.*

The issues on appeal are made by the exceptions, or grounds of appeal, and they determine whether the issues will be of law or of fact. Therefore the practice has been for the appellant, who desires a trial by jury, to give notice thereof under rule 28 at the time of serving his exceptions, or at any time within ten days' thereafter, and for the

respondent, if he desires such a trial, to serve his notice of motion therefor within ten days after service of the exceptions upon him, and, of course, as provided in the rule, either party may, within four days after the service of his opponent's notice upon him, give notice that he will ask for additional issues; and we hold that to be the proper practice. *Meier v. Kornahrens*, 113 S. C. 270, 102 S. E. 285, 287.

Cited in *Watson v. Pollitzer*, 72 S. C. 387, 51 S. E. 914; *Davenport v. Davenport*, 61 S. C. 389, 39 S. E. 548.

§ 234. Appellant neglecting to enter appeal judgment affirmed with costs.

—If the person appealing from the proceedings of the probate court, as provided in this title, shall neglect to enter his appeal, the circuit court to which such appeal shall be taken, on motion, and producing attested copies of such appeal by the adverse party, shall affirm the proceedings appealed from, and may allow costs against the appellant.

1932 Code, § 234; Civ. P. '22, § 191; Civ. P. '12, § 67, § 67; Civ. P. '02, § 61; 1870 (14) § 64.

Editor's note.—The practitioner is referred to the four preceding sections and their respective notes. Special reference

is made to § 230 and note thereto.

See generally. *Watson v. Pollitzer*, 72 S. C. 388, 51 S. E. 914.

§ 235. Final decision to be certified to probate court.—The final decision and judgment in cases appealed, as herein before provided, shall be certified to the probate court by the circuit court or Supreme Court, as the case may be, and the same proceedings shall be had in the probate court as though such decision had been made in such probate court.

1932 Code, § 235; Civ. P. '22, § 192; Civ. P. '12, § 68; Civ. P. '02, § 62; 1870 (14) § 65.

Failure to certify decision is not ground for reversal by Supreme Court.

—The failure of the circuit court to certify to the probate court its affirmation of the judgment appealed therefrom is no ground for reversal of that judgment in the Supreme Court. *Watson v. Pollitzer*, 72 S. C. 387, 51 S. E. 914.

As certification may be made after ap-

peal to Supreme Court.—Circuit court may certify to the probate court its affirmation of the probate judgment after an appeal has been had from the circuit court to the Supreme Court. See *Watson v. Pollitzer*, 72 S. C. 387, 51 S. E. 914.

Cited in *In re Shier's Estate*, 35 S. C. 417, 14 S. E. 931.

§ 236. Probate judge no voice in determining appeal—when may practice law.—No judge of any probate court shall be admitted to have any voice in judging or determining any appeal from his decision, or be permitted to act as attorney or counsel thereon, or receive fees as counsel in any matter pending in the probate court of which he is judge: *provided*, it shall be lawful for judges of probate to practice law in other courts in such cases as are not cognizable in the courts of probate.

1932 Code, § 236; Civ. P. '22, § 193; Civ. P. '12, § 69; Civ. P. '02, § 63; 1870 (14) § 66.

See §§ 3640, et seq.

§ 237. Proceedings may be commenced by petition.—Proceedings in the court of probate may be commenced by petition to the judge of probate for the county to which the jurisdiction of the subject matter belongs, or by complaint, briefly setting forth the facts or grounds of the application. A

summons shall be issued to the defendants in such proceedings, wherein the manner of service, time for answering, and other proceedings relating to the trial (except trial by jury), shall conform as nearly as may be to the practice in the courts of common pleas as provided in this code of procedure.

1932 Code, § 237; Civ. P. '22, § 194; Civ. P. '12, § 70; Civ. P. '02, § 64; 1870 (14) § 67.

§ 238. Supreme Court to make rules—county commissioners to provide furniture, etc., for office.—The Supreme Court may, from time to time, make rules regulating the practice and conducting the business in the courts of probate, in all cases not expressly provided for by law; and the county commissioners of each county shall provide all books necessary for keeping the records of such court; also a seal and necessary office furniture: *provided*, said furniture shall not exceed in cost the sum of one hundred dollars.

1932 Code, § 238; Civ. P. '22, § 195; Civ. P. '12, § 71; Civ. P. '02, § 65; 1870 (14) § 68.

§ 239. May punish for contempt.—The judge may keep order in court, and punish any contempt of his authority in like manner as such contempt might be punished in the circuit or Supreme Court.

1932 Code, § 239; Civ. P. '22, § 196; Civ. P. '12, § 72; Civ. P. '02, § 66; 1870 (14) § 69.

§ 240. Enrollment of decrees.—Any party in whose favor an order or decree for the payment of money may be made by a court of probate, may cause such order or decree to be enrolled at any time within one year after making the same, and for that purpose shall prepare and deliver to the judge of probate a brief or abstract, setting forth the title of the proceedings wherein such order or decree was made, the parties thereto, and the date when the same was made; also the date of the said order and the names of the parties bound thereby, together with such other particulars as may be necessary to identify the said order with the proceedings, and to exhibit the grounds for making the same and the operation and effect thereof; and the judge of probate shall annex thereto the said order or decree, or an exact copy thereof, certified by him, together with the time when the same was made and entered; and shall endorse on the record the day of the month and year when the brief or abstract was lodged in his office, and shall deposit the same in a case in his office with the records pertaining to the cause. And no order or decree of any court of probate for the payment of money shall, as to third persons, without express notice, have any effect as a lien on the real estate of the person intended to be bound thereby but from the day when the said brief or abstract shall have been delivered to or lodged with the said judge of probate as aforesaid, and a transcript of the docket thereof in the index of money decrees hereinafter prescribed has been filed in the office of the clerk of the court of common pleas for the same county and duly entered by said clerk on the calendar of judgments kept in his office. Nor shall such order or decree rank as a judgment against the estate of any person deceased, unless such abstract was duly filed and indexed, and a transcript of the entry in the index filed with the clerk of the circuit court for the same county and duly docketed by the said clerk on the calendar of judgments of the court of common pleas before the death of such deceased person; except that the lien of decrees and orders for the

payment of money made prior to December 20, 1878, shall not be affected; and after the transcript of the docket in the index of money decrees has been duly entered upon the calendar of judgments kept in the office of the clerk of the court of common pleas, such order or decree shall have like force and effect as judgments of the courts of common pleas: *provided*, that such enrollment of any order or decree for the payment of money shall not deprive any party thereto of the right to appeal therefrom; but when notice of such appeal shall be duly given, execution upon the said order or decree, issued as herein provided, shall be lodged to bind only, and shall not be enforced until such appeal shall have been dismissed; and if such order or decree shall be reversed, set aside, or modified on appeal, the enrollment thereof shall be amended or wholly vacated accordingly.

1932 Code, § 240; Civ. P. 22, § 197; Civ. P. '12, § 73; Civ. P. '02, § 67; 1878 (16) 710.

Probate judge cannot arrest and imprison an administrator for failure to comply with the terms of a money decree. *Gilliam v. McJunkin*, 2 S. C. 442.

Judgment for claim against Executor is prima facie evidence against devisees. —*Brock v. Kirkpatrick*, 72 S. C. 491, 52 S. E. 592.

§ 241. To keep index of decrees enrolled.—Every judge of probate shall provide and keep in his office an index of money decrees, in which every enrolled order or decree for the payment of money shall be entered, with the names of every party or estate bound thereby, alphabetically arranged, together with the names of the parties plaintiff, and (besides the title of the package in which the order or decree is contained and the number in the package) shall exhibit the amount ordered to be paid, the costs (if any), date of enrollment, date of execution, and date of satisfaction, where satisfaction has been entered. Said book shall be of convenient size, of durable paper, and well bound, and the expense of providing the same shall be defrayed by the county commissioners of the respective counties.

1932 Code, § 241; Civ. P. '22, § 198; Civ. P. '12, § 74; Civ. P. '02, § 68; 1878 (16) 711.

See generally, *Brock v. Kirkpatrick*, 72 S. C. 491, 52 S. E. 592.

§ 242. Empowered to issue executions.—Judges of the probate court are authorized and empowered to issue executions against property, when such process is necessary to carry into effect any order, sentence, or decree of such court, or for costs accruing therein. And they may issue executions against property in their respective counties, to enforce decrees from the probate courts of other counties, upon a transcript of such decree, and certificate of enrollment of the same, being filed in the office of the probate court from which such execution is to issue, and also in the office of the clerk of the court of common pleas for the county in which it is to issue. But no execution shall be issued by any judge of probate to enforce the collection of money under any order or decree of a court of probate until an abstract or brief has been prepared and filed according to the direction of section 240 and the proper minute thereof has been entered in the index of money decrees, and the proper transcript of such minute has been filed in the office of the circuit court for the same county and entered upon the calendar of judgments of the court of common pleas kept in his office. And when any such execution has been duly returned satisfied to the office of the judge of probate from whence it issued it shall be the duty of the judge of such court of probate to have such satisfaction recorded upon the proper transcript in the office of the clerk of the circuit court and entered upon

the docket thereof on the calendar of judgments of the court of common pleas kept in said clerk's office. When no form of warrant or process is prescribed by statute or rules of court the probate judge shall frame one in conformity to the rules of law and the usual course of proceedings in this State. Any sheriff or constable in this State shall execute the orders or process of said court in the same manner as the orders or process of the circuit or Supreme Courts.

1932 Code, § 242; Civ. P. '22, § 199; Civ. P. '12, § 75; Civ. P. '02, § 69; 1870 (14) § 71; 1872 (15) 23; 1878 (16) 458.

See generally, *McKibben v. Salinas*, 41 S. C. 105, 19 S. E. 302, 303.

Cited in *Brock v. Kirkpatrick*, 72 S. C. 491, 52 S. E. 592.

§ 243. Duties and powers of probate court in relation to minors enlarged and defined.—Whenever a petition shall be presented to the probate court, supported by affidavits, either on knowledge or on information and belief, that any child within its jurisdiction under the age of eighteen years is destitute or homeless, or is a beggar, or whose home, by reason of cruelty, neglect or depravity on the part of its parents, or other person in whose care it may be, is an unfit place for such child, or that any child is being required to work contrary to law, or in an unreasonable degree, the conditions and circumstances of the parents or person with whom it resides being considered; or is incorrigibly mischievous or vicious, or is a persistent truant from school, or habitually associates with criminals or vicious or immoral persons, or is growing up in ignorance or idleness, or is in imminent danger of becoming vicious or criminal; or whenever a report is made to the probate court by an officer of the law, as hereinafter provided, that any child under the age of eighteen years is liable to arrest or has been arrested for a violation of law, the said probate court shall issue a summons to the child and to its parent or parents or person with whom it resides, or in case of a child under arrest, to the officer in whose custody he then is, also to show cause why the supervision, care or custody of the said child should not be assumed by that court. Such summons shall be returnable within three days from the date of service. The issuing of such summons shall not be a stay of any criminal proceedings which have been instituted against such child and which are referred to in said petition or report except as hereinafter provided. In case the child has parent or parents within the jurisdiction of the court with whom the child does not reside, but whose residence is known or can with reasonable diligence be ascertained, the said parent or parents shall be summoned to appear before the court before the final disposition of the case.

1932 Code, § 243; Civ. P. '22, § 201; Civ. P. '12, § 77; 1911 (27) 135, 136; 1912 (27) 762.

§ 244. May summon witnesses.—The probate court shall have the power to summon before it any witnesses which it may deem necessary to a proper investigation and determination of the allegations of the said petition or report.

1932 Code, § 244; Civ. P. '22, § 202; 1912 (27) 763.

§ 245. Report to circuit court.—Upon proof of the allegations of the petition the said court shall have power to order such parent or parents or person with whom the child resides to do and perform such duties in re-

gard to the support and control of the child as shall be lawful and right. In case it is found necessary to apply remedies beyond the constitutional powers of the probate court, the said court shall certify the fact to the court of common pleas, or to the court of general sessions, as the case may require, to act upon the same, and apply such remedies as may be lawful and right.

1932 Code, § 245; Civ. P. '22, § 203; 1912 (27) 763.

§ 246. May appoint custodian of minors.—If after due hearing the court shall assume the supervision, care or custody of the child, it shall require the parent or parents or persons with whom it resides, and in the discretion of the court, in addition to these or in lieu thereof, some suitable and proper person or persons to serve without compensation, and to be known as probation officer or officers, to look after said child and to report to the court for as long a period and as often as the court shall require, as to the treatment and conduct of the said child; and the child shall report to said probation officer or officers from time to time, as the court may prescribe; and said probation officer or officers shall at all times have the right and power to investigate the surroundings, conditions, treatment and conduct of the child, and report same to the court.

1932 Code, § 246; Civ. P. '22, § 204; 1912 (27) 764.

§ 247. May revoke and send to orphan asylum or reformatory.—If at any time the court shall find that the custody of the child should be taken from the parent or parents or person with whom it resides, it may bind over such child to some orphan asylum or other institution for the care of children, or to some responsible person or persons, in all cases to be first approved by the court after due investigation, who will agree in writing to care for the child in a humane manner and give it a reasonable amount of education, and to report to the court at least once a year as to the treatment and conduct of the child, or in the discretion of the court, the child, if colored, may be sent to the reformatory, now located in Lexington County; or if white, to the South Carolina Industrial School, now located in Florence County: *provided*, that no boy or girl under the age of twelve (12) years shall be confined in any of the reformatories or industrial schools in this State. *Provided*, that the judge of probate for Hampton County is hereby prohibited from committing or sending children to orphanages as now provided by law, unless he shall secure the unanimous written approval of the legislative delegation of Hampton County.

1932 Code, § 247; Civ. P. '22, § 205; 1912 (27) 764; 1926 (34) 1728; 1933 (38) 66.

§ 248. May remand for trial.—If it appear to the court that the child is incorrigibly criminal or has committed a crime which demands punishment rather than reformative discipline, the court shall remand it to the proper magistrate, municipal court or sessions court for trial and punishment.

1932 Code, § 248; Civ. P. '22, § 206; 1912 (27) 764.

§ 249. Form of arrest and incarceration.—Upon the arrest of any child less than eighteen years of age, the arrest of the said child shall be reported to the probate court by the officer making the arrest as speedily as possible for investigation and action under §§ 243 through 252. But if confinement be necessary before the case can be heard, the child shall not be incarcerated

in the same room with adult criminals, but in a separate room of detention, and where the county or municipal authorities have made or shall make suitable provision therefor, said room or rooms shall be outside the jail or guardhouse: *provided*, separate accommodations shall be provided for boys and girls and for white and colored.

1932 Code, § 249; Civ. P. '22, § 207; 1912 (27) 764.

§ 250. Penalty.—The neglect or refusal to obey the summons of the probate court, or any lawful order made by it as here authorized shall be punishable as now authorized by law for the violation of the orders and decrees of said court.

1932 Code, § 250; Civ. P. '22, § 208; 1912 (27) 765.

§ 251. Appeals.—All orders made in pursuance of §§ 243 through 252 by the probate court shall be subject to review on appeal by the petitioner, the child or its parents or the person with whom it resides, or in case the child is charged with a crime beyond the jurisdiction of a magistrate by the State, in which last case it shall be the duty of the probate court promptly to certify, to the solicitor of the circuit, at his request, the testimony in the case, together with his findings and orders thereon. All appeals shall be to the judge of the circuit at chambers, and shall be heard on the original papers. The appeal shall act as a stay of proceedings in the probate court until the issue shall be heard and determined by the judge of the circuit court. An appeal shall lie from the circuit court, but such appeal shall not act as a supersedeas unless the circuit judge shall so order, stating in the order that the issue raised is in serious doubt, and that if his decree is erroneous, its enforcement might work serious harm.

1932 Code, § 251; Civ. P. '22, § 209; 1912 (27) 765.

§ 252. Fees.—The costs and fees shall be the same as those in magistrate's courts for investigations, to be paid by the county in which the case is heard.

1932 Code, § 252; Civ. P. '22, § 210; 1912 (27) 765.

§ 253. Rights and authority of orphanage.—The said orphan asylum, and any orphanage, devoted to the relief of children who are destitute, abandoned or being raised in immoral and vicious surroundings, shall have full care and control over any child committed to it, as provided in section 247; subject always to the right of the courts to inquire into the propriety and sufficiency of the care and maintenance being provided for any such child, and to modify or to change the care and custody of any child, as the court may deem proper.

1932 Code, § 253; Civ. P. '22, § 211; Civ. P. '12, § 78; 1911 (27) 135, 136.

§ 254. Orphanage may entrust children to individual or family.—Any such orphanage to which a child has been committed, as provided in section 253 and section 247, shall have the right to entrust any child, for its care, maintenance, rearing, education, and adoption to the care and custody of any individual or family, which it may deem proper, upon such guarantees as may be required by such orphanage. But this right shall be subject to the supervision, investigation and control of the courts of common pleas

of said State of South Carolina, upon application made to such courts. 1932 Code, § 254; Civ. P. '22, § 212; Civ. P. '12, § 79; 1911 (27) 135, 136.

§ 255. Jurisdiction of probate court as to certain minors in counties between 85,000 and 100,000.

(1) **Minors—jurisdiction.**—The probate court of counties having a population of between 85,000 and 100,000 according to the census of 1920, shall have exclusive original jurisdiction of any case of a child less than 16 years of age and of all other persons involved with or contributing to the dependency or delinquency of any child, residing in or being at this time within the said county or any city therein.

(a) Who is delinquent or who violates any municipal or state law or ordinance or who is truânt, unruly, wayward, or misdirected, or who is disobedient to parents or beyond their control, or who is in danger of becoming so; or

(b) Who is neglected, or who engages in any occupation, calling or exhibition, or is found in any place where a child is forbidden by law to be, and for permitting which an adult may be punished by law, or who is in such condition or surroundings or under such improper or insufficient guardianship or control as to endanger the morals, health or general welfare of such child; or

(c) Who is dependent upon public support or who is destitute, homeless or abandoned, or whose custody is subject to controversy, or who is insane or feeble-minded or idiotic or epileptic or so far mentally deficient as to be unable to exercise proper control over his own affairs or whose mind is so deranged or impaired as to endanger the health, person or property of himself or others.

When jurisdiction has been obtained in the case of any child, unless a court order shall be issued to the contrary, or unless the child be committed to an institution supported and controlled by the State, it shall continue for the purpose of this section during the minority of the child. The duty shall be constant upon the court to give each subject in its jurisdiction such oversight and control in the premises as will conduce to the welfare of such child and to the best interest of the State.

(2) **Children's courts.**—There shall be established in each of said counties a separate part of the probate court for the hearing of cases coming within the provisions of this section. Such court shall be called the Children's Court of County.

The judge of the probate court of each of said counties is hereby appointed and authorized to act as judge of the children's court in the hearing of cases coming within the provisions of this section, in which case the child or children concerned therein reside in or at the time within such county, or any city therein. Proceedings in such cases may be initiated before such judge and in hearing such cases such judge shall comply with all the requirements and conform to the procedure provided in this section.

(3) **Meaning of terms.**—The term "court" when used in this section without modification, shall refer to the children's court to be established in each county as hereinabove provided. The term "judge" when used in this section, shall refer to the judge of the probate court acting as judge of the children's court, or special judge. The term "child" or "minor" when used herein shall mean any person less than 16 years of age.

(4) **Procedure of court—records—use of evidence—section to be liberally**

construed.—Children's cases are not to be heard according to the law of criminal procedure. Sessions of the court shall be held at such times and in such places within the county as the judge shall, from time to time, determine. In the hearing of any case coming within the provisions of this section the general public shall be excluded and only such persons admitted thereto as have a direct interest in the case. Sessions of the children's court shall not be held in conjunction with any other business of any other court, and children's cases shall not be heard at the same time as those against adults.

The court shall maintain a full and complete record of all cases brought before it, to be known as the children's record. All records may be withheld from indiscriminate public inspection in the discretion of the judge of the court, but such record shall be open to inspection by the parents, guardians, or other authorized representatives of the child concerned. No adjudication under the provisions of this section shall operate as a disqualification of any child for any public office, and no child shall be denominated a criminal by reason of such adjudication, nor shall such adjudication be denominated a conviction.

Any disposition of any child under this section or any evidence given in the proceedings of a children's court shall not be admitted in any subsequent, civil or criminal proceedings against the child.

This section shall be construed liberally and as remedial in character. The powers hereby conferred are intended to be general and for the purpose of effecting the beneficial purposes herein set forth. It is the intention of this section that in all proceedings under its provisions the court shall proceed upon the theory that a child under its jurisdiction is the ward of the State and is subject to the discipline and entitled to the protection which the court should give such child under the circumstances disclosed in the case and that as far as practicable the child shall be treated not as a criminal but as a child in need of aid, encouragement and guidance.

(5) Petition.—Any person having knowledge or information that a child is within the provisions of this section and subject to the jurisdiction of the children's court, may file with the court a petition verified by affidavit, stating the alleged facts which bring such child within said provision. The petition shall set forth the name and residence of the child and of the parents, or the name and residence of the person having the guardianship, custody, or supervision of such child, if the same is known or ascertained by the petitioner, or the petition shall state that they are unknown, if that be the fact.

(6) Investigations—appearance may be required—expenses.—Upon the filing of the petition or upon the taking of a child into custody, the court may forthwith or after an investigation by a probation officer or other person, cause to be issued a summons signed by the judge or the clerk of the court directed to the child, unless such child has been taken into custody, and to the parents, or in case there is no parent, to the person having the guardianship, custody or supervision of the child, or the person with whom the child may be, requiring them to appear with the child at the place and time stated in the summons to show cause why the child should not be dealt with according to the provisions of this section.

The judge may, in his discretion, authorize the payment of necessary

traveling expenses incurred by any witness or persons summoned or otherwise required to appear at the hearing of any case coming within the provisions of this section.

(7) Disposition of child pending hearing.—If it appears from the petition that the child is embraced within subdivision (a) of subsection one of this section, or is in such condition or surroundings that the welfare of the child requires that its custody be immediately assumed, the court may endorse or cause to be endorsed upon the summons a direction that the officer serving the same shall at once take such child into custody.

In the case of any child who has been taken into custody or pending the final disposition of any case, the child may be released in the custody of a parent or other person having charge of the child or in the custody of a probation officer or other person appointed by the court to be brought before the court at the times designated. Any child embraced in this section may be admitted to bail as provided by law. When not released as herein provided such child, pending the hearing of the case, shall be detained in such place of detention as is hereinafter provided for.

(8) Service of summons—procedure upon disobedience.—Service of summons shall be made personally by reading to and leaving with the person summoned a true copy thereof: *provided*, that if the court is satisfied that reasonable but unsuccessful effort has been made to serve the summons personally upon any of the parties named therein, or if it shall appear to the satisfaction of the court that it is impracticable to serve a summons personally upon any of them, the court may make an order providing for service of the summons by registered mail or by publication or otherwise in such manner as the judge shall determine. It shall be sufficient to confer jurisdiction if service is effected at any time before the time fixed in the summons for the return thereof, but the court, if requested by the child or a parent, or in case there is no parent, by the person having the guardianship, custody or supervision of the child, shall not proceed with the hearing earlier than three days after the service. Failure to serve a summons upon any person other than said child shall not impair the jurisdiction of the court to proceed in case arising under subdivision (2) subsection one of this section: *provided*, that for good cause shown the court shall have made an order dispensing with such service.

If the person summoned as herein provided shall fail without reasonable cause to appear and abide the order of the court or bring the child, he may be proceeded against as for contempt of court. In case the summons cannot be served or the party served fails to obey the same, and in any case when it shall be made to appear to the court that such a summons will be ineffectual, or that the welfare of the child requires that he shall be brought forthwith into the custody of the court, a warrant may be issued on the order of the court either against the parent or guardian or other person having custody of the child or with whom the child may be or against the child himself.

The sheriff or other lawful officer of the county in which the action is taken shall serve all papers as directed by the court, but the papers may be served by any person delegated by the court for that purpose.

(9) Hearing of causes—adjudication, orders, etc.—Upon return of the summons or other process or after any child has been taken into custody; at the time set for the hearing, the court shall proceed to hear the case in a

summary manner: *provided*, that the judge has been supplied with and has read a written report of the preliminary investigation made by the probation officer of the court.

The court may adjourn the hearing from time to time and inquire into the habits, surroundings, conditions, and tendencies of the child so as to enable the court to render such order or judgment as shall best conserve the welfare of the child and carry out the objects of this section. In all cases the nature of the proceedings shall be explained to the child and to the parents or the guardian or person having the custody or the supervision of the child. At any stage of the case the court may, in its discretion, appoint any suitable person to be the guardian ad litem of the child for the purposes of the proceeding.

At the discretion of the judge, he may appoint a woman to hear and decide individual or all cases of girls brought before the court.

The court, if satisfied that the child is in need of the care, protection, or discipline of the State, may so adjudicate and may find the child to be delinquent, neglected, or in need of more suitable guardianship. Thereupon the court may

(a) Place the child on probation subject to the conditions provided hereinafter; or

(b) Commit the child to the custody of a relative or other fit person of good moral character, subject, in the discretion of the court, to the supervision of a probation officer and the further orders of the court; or

(c) Commit the child to the custody of the state board of public welfare, to be placed by such board in a suitable family home and supervise therein; or

(d) Commit the child to a suitable institution maintained by the State or any subdivision thereof, or to any suitable private institution, society or association incorporated under the laws of the State and approved by the state board of public welfare authorized to care for children or to place them in suitable family homes; or

(e) Render such further judgment or make such further order of commitment as the court may be authorized by law to make in any given case.

(f) If a child of fourteen years of age be charged with a felony, for which the punishment as now fixed by law cannot be more than ten years in prison, his case shall be investigated by the probation officer and the judge of the juvenile court as provided in this section, unless it appears to the judge of the juvenile court that the case should be brought to the attention of the judge of the circuit court, in which case the child shall be held in custody or bound to the next term of the circuit court as now provided by law.

(10) Children not to be confined with adults—violation a misdemeanor—detention home.—No child coming within the provisions of this section shall be placed in any penal institution, jail, lock-up, or other places where adults convicted of crime are committed or are under arrest and charged with crime.

Any person placing a child or accepting a child for placement in such penal institution, jail, lock-up, or in any other place where adult criminals or adults charged with or arrested for a crime are confined shall be guilty of a misdemeanor.

Provisions shall be made for the temporary detention of such children

in a detention home to be conducted as an agency of the court for the purpose of this section, or the judge may arrange for the boarding of such children temporarily in a private home or homes in the custody of some fit person or persons subject to the supervision of the court, or the judge may arrange with any incorporated institution, society or association maintaining a suitable place of detention for children for the use thereof as a temporary detention home.

In case a detention home is established as an agency of the court it shall be furnished and carried on, so far as possible, as a family home in charge of a superintendent or matron who shall reside therein. The judge of the children's court may appoint a matron or superintendent or both, approved by the state board of public welfare, and other necessary employees for such home in the same manner as probation officers are appointed under this section, their salaries to be fixed by the county delegation on recommendation of the judge and paid in the same manner as the salaries of probation officers. The necessary expenses incurred in maintaining such detention home shall be a public charge.

In case the judge shall arrange for the boarding of children temporarily detained in private homes, a reasonable sum for the board of such children, while temporarily detained in such homes, shall be paid by the county in which such child shall reside or may be found.

In case the judge shall arrange with any incorporated institution, society or association for the use of a detention home maintained by such institution, society or association, he shall enter an order which shall be effectual for that purpose and a reasonable sum shall be appropriated by the county commissioners for the compensation of such institution, society or association for the care of children or found within the county who may be detained therein.

(11) Probation officers.—The judge of the juvenile court in each of the above counties shall appoint a suitable person as chief probation officer, who shall serve under his direction. The appointment of such probation officer shall be approved by the state board of public welfare.

The judge appointing any probation officer may discharge any probation officer for cause.

The salary of the chief probation officer of the county shall be \$1,800.00 per year, which salary shall be paid by warrants issued by the county supervisor from the general county funds: *provided*, that no person shall be paid a salary as probation officer in any county without a certificate of qualification from the state board of public welfare.

The state board of public welfare shall establish rules and regulations pursuant to which appointments hereunder shall be made to the end that such appointments shall be based upon merit only.

The appointment of a probation officer shall be in writing and one copy of the order of appointment shall be delivered to the officer so appointed and the other filed in the office of the state board of public welfare.

(12) Probation—terms—revocations.—When the court places any child or adult on probation as provided herein, it shall determine the conditions of probation which may be modified by the court at any time. A child shall remain on probation for such period as the court shall determine

during the minority of such child. An adult shall remain on probation for such period as the court shall determine, not to exceed five years. The conditions of probation shall be such as the court shall prescribe, and may include among other conditions, any or several of the following: that the probationer (a) shall indulge in no unlawful or injurious habits; (b) shall avoid places or persons of disreputable or harmful character; (c) shall report to the probation officer as directed by the court or probation officer; (d) shall permit the probation officer to visit him in a reasonable manner at his place of abode or elsewhere; (e) shall answer any reasonable inquiries on the part of the probation officer concerning his conduct or condition; (f) shall, if a child of compulsory school age, attend school regularly; (g) shall, if an adult or a child who does not attend school, work faithfully at suitable employment; (h) shall remain or reside within a specified place or locality; (i) shall pay a fine in one or several sums; (j) shall make restitution or reparation to the aggrieved parties for actual damages or losses caused by an offense upon such conditions as the court shall determine; and (k) shall make payment for the support of any lawful dependents as required by the court. Any person on probation may at any time be required to appear before the court, and in case of his failure to do so when properly notified by the probation officer, the court may issue a warrant for his arrest. In the case of a child on probation, if the court believes that the welfare of such child will thereby be promoted, the probation may be revoked at any time, and the court may make such other disposition of the child as it may have made at the time the child was placed on probation. An adult on probation who violates any of the conditions thereof may be arrested upon a warrant issued by the court and the court may impose any penalties which it might have imposed at the time the defendant was placed on probation.

(13) Duties of probation officers.—It shall be the duty of a probation officer to make such investigations before, during or after the trial or hearing of any case coming before the court as the court shall direct and shall report thereon in writing. The probation officer shall take charge of any child before or after the trial or hearing when so directed by the court. The probation officer shall furnish to each person released on probation under his supervision a written statement of the conditions of probation, and shall instruct the probationer and other persons responsible for the welfare of the probationer regarding same, and shall endorse all the conditions of probation. Such officer shall keep informed concerning the conduct and condition of each person on probation under his supervision by visiting, requiring of reports and in other ways and shall report upon the progress of each case under his supervision at least monthly to the court. Such officer shall use all suitable methods not inconsistent with the conditions imposed by the court to aid and encourage persons on probation and to bring about improvements in their conduct and condition.

Such officer shall keep detailed records of his work. He shall keep accurate and complete accounts of all moneys collected from persons under his supervision; he shall give receipts therefor, and shall make at least monthly returns thereof; such officer shall make such report to the state board of public welfare as it may from time to time require, and shall perform such other duties as the court under whose direction such officer

is serving shall direct. Every probation officer shall have all the powers of a peace officer within the jurisdiction of the court which he serves. With the approval or under the direction of the judge of the court in which a probation officer is serving, such officer is authorized and empowered to set as probation officer over any person on probation transferred to his supervision from any other court, and may act as parole officer over any person released from a correctional institution when requested to do so by the authorities thereof and when authorized so to act by the judge of the court in which such probation officer is serving.

(14) Support of children after commitment.—Whenever any child is committed by the court to the custody of an institution, association, society or person other than his parent or guardian, compensation for the care of such child, when approved by the order of the court, shall be a charge upon the county, but the court may at the issuance and service of an order to show cause on the parent or other person having the duty under the law to support such child adjudge that such parent or other person shall pay in such manner as the court may direct, such sum as will cover in the whole or in part the support of such child, and wilful failure to pay such sum may be punished as a contempt of court.

(15) Recognition of religious faiths.—In committing any child to an institution or other custodial agency other than one supported and controlled by the State or in placing the child under any guardianship other than that of its natural guardians, the court shall, as far as practicable, select as the custodial agency an institution, society or association governed by persons of like religious faith as the parents of such child or an individual holding the same religious belief.

(16) Modification of orders of court.—Any order or judgment made by the court in the case of any child shall be subject to such modification from time to time as the court may consider to be for the welfare of such child, except that a child committed to an institution supported and controlled by the State may be released or discharged only by the governing board or officer of such institution. Any parent or guardian, or if there be no parent or guardian the next friend of any child who has been or shall hereafter be committed by the court to the custody of an institution, other than an institution supported and controlled by the State, or to the custody of any association, society or person, or that institution, association, society or person has failed to act upon such application within a reasonable time. A copy of such petition shall at once be served by the court upon such institution, association, society, or person, whose duty it shall be to file a reply to the same within five days, if upon examination of the petition and reply the court is of the opinion that an investigation should be had; it may, upon due notice to all concerned, proceed to hear the facts and determine the question at issue, and may return such child to the custody of its parents or guardian or direct to such institution, association, society or person to make such other arrangements for the child's care and welfare as the circumstances of the case may require. Any child, while under the jurisdiction of the court, shall be subject to the visitation of the probation officer or other agent of the court authorized to visit such child.

(17) Appointment of guardian—custody of child.—Whenever in the course of proceeding instituted under this section it shall appear to the

court that the welfare of any child within the jurisdiction of the court will be promoted by the appointment of an individual as general guardian of its person, when such child is not committed to an institution or to any incorporated society or association, or by the appointment of an individual or corporation as general guardian of its property, the court shall have the jurisdiction to make such appointment, either upon the application of the child or of some relative or friend, or upon the court to be served upon the parent or parents of such child in such manner and for such time, prior to the hearing, as the court may deem reasonable. In any case arising under this section the court may determine as between parents or others whether the father or mother or what person shall have the custody and direction of said child, subject to the provisions of the preceding section.

(18) Physical examination of child—treatment of defectives.—The court, in its discretion, either before or after a hearing, may cause any child within its jurisdiction to be examined by one or more duly licensed physicians, who shall submit a written report thereon to the court. If it shall appear to the court that any child within the jurisdiction of the court is mentally defective, he may cause the child to be examined by two licensed physicians, and on the written statement of the two (2) examining physicians that it is their opinion that the child is mentally defective, feeble-minded, or epileptic, the court may commit such child to an institution authorized by law to receive and care for mentally defective, feeble-minded, or epileptic children, as the case may be. No child shall be committed to such institution unless the parent or parents or the guardian or custodian of such child, if such there be, are given an opportunity for a hearing. Whenever a child within the jurisdiction of the court and under the provisions of this section appears to the court to be in need of medical or surgical care a suitable order may be made for the treatment of such child in a hospital or otherwise, and the expense thereof, when approved by the court, shall be a charge upon the county or the appropriate subdivision thereof; but the court may adjudge that the person or persons having the duty under the law to support such child shall pay a part or all of the expenses of such treatment as provided in subsection fourteen (14) of this section.

(19) Neglect of child a misdemeanor—separation of baby from mother—penalties for violation—adoption of children—procedure in bastardy—abandonment — orphanages — abduction — furnishing tobacco — furnishing weapons—leaving child confined alone—failure to pay minor for work. A parent, guardian or other person having the custody of a child who omits to exercise reasonable diligence in the care, protection, or control of such child, causing it to be adjudged delinquent, neglected or in need of the care, protection, or discipline of the State as provided in this section, or who permits such child to associate with vicious, immoral, or criminal persons, or to beg or solicit alms, or to be an habitual truant from school, or to enter any house of prostitution or assignation, or any place where gambling is carried on or to enter any place which may be injurious to the morals, health or general welfare of such child, and any such person or any other person who knowingly or willfully is responsible for, encourages, aids, cause or connives at or who knowingly or willfully does any

act to produce, promote or contribute to the condition which caused such child to be adjudged delinquent, neglected or in need of the care, protection or discipline of the State, shall be guilty of a misdemeanor.

It shall be unlawful for any person to separate or aid in separating any child under six months of age from its mother for the purpose of placing said child in a foster home or institution, or removing it from the State for such purpose, unless the consent in writing for such separation shall have been obtained from the judge of the children's court and county health officer of the county in which the mother resides, or of the county in which the child was born; and it shall be unlawful for any mother to surrender her child for such purposes without first having obtained such consent.

Any person violating this section shall, upon conviction, be fined not exceeding five hundred (\$500.00) dollars, or one year's imprisonment, or both, in the discretion of the court.

Persons desiring to adopt a minor may begin proceedings before the judge of the children's court, the parents or guardian or anyone having charge of such child becomes party to the proceeding, and with consent of such, the judge may sanction such adoption if the party seeking it seems suitable, after investigation by probation officer. Petitioner shall give bond for property, if any, in case child is orphan. Child inherits as natural children, and name of child may be changed to that of petitioner if allowed by clerk. Order of adoption may be revoked at any time by judge for cause.

Warrants in bastardy shall be issued on voluntary complaint by mother or by county commissioners that child is likely to become a county ward. When issue of paternity is tried and found against defendant he shall be fined not more than ten (\$10.00) dollars, shall pay the woman two hundred (\$200.00) dollars, and give bond that the child shall not become a public charge, and shall stand charged with the maintenance of the child as the court may order. Action must be brought within three years after birth. If parents subsequently marry the child becomes legitimate as if born in lawful wedlock. The putative father of any illegitimate child may apply by petition in writing to the children's court of the county in which the father may reside, praying that such child may be declared legitimate. And if it shall appear that the petitioner is reputed the father of the child, the court may thereupon declare and pronounce the child legitimate; and the clerk shall record the deed. If any person shall wilfully abandon his family without providing adequate support for his wife, and the children which he may have begotten upon her, he shall be guilty of a misdemeanor.

If the fact of abandonment or any failure to provide adequate support for the wife and children shall be proved, or while living with such wife, neglect by the husband to provide for the adequate support of such wife or children shall be proved, then the fact that such husband neglects applying himself to some honest calling for the support of such wife or children and is found sauntering about endeavoring to maintain himself by gaming or other undue means or is a common frequenter of drinking houses, or is a known common drunkard, shall be presumptive evidence that such abandonment is wilful.

Upon any conviction for abandonment, any judge having jurisdiction thereof may, in his discretion, make such order as in his judgment shall best provide for the support as far as may be necessary, of the deserted wife or children, or both, from the property or labor of the defendant.

If any husband while living with his wife shall wilfully neglect to provide adequate support for such wife or children which he has begotten upon her, he shall be guilty of a misdemeanor.

Every indigent child which may be placed in any orphanage, children's home or child-placing institution in South Carolina, which shall be an institution existing under and by virtue of the laws of this State, shall be under the control of the authorities of such institution so long as under the rules and regulations of such institution the child is entitled to remain in the same. The authority of the institution shall be the same as that of a parent or guardian before the child was placed in the institution: *provided*, that such authority shall extend only to the person of such child.

It shall be unlawful for any person to entice or attempt to entice, persuade, harbor or conceal, or in any manner induce any indigent child to leave any of the institutions hereinbefore mentioned without the knowledge or consent of the authorities of such institution: *provided*, this section shall not interfere with the mother's right to her child in case she becomes able to sustain her child; and the county commissioners in the county in which she resides shall have authority to recommend to the institution concerning the child.

Any person or persons violating any of the provisions of this section shall be guilty of a misdemeanor, and, upon conviction, shall be confined or imprisoned, or both, in the discretion of the court.

Anyone who shall abduct or conspire to abduct, or induce any child under fourteen years of age to leave parents, uncle, aunt, either brother or sister, or a school at which it resides, or, if an orphan, to leave guardian, is guilty of a felony and may be imprisoned not more than fifteen years.

If any person shall sell, give away or otherwise dispose of directly or indirectly cigarettes or tobacco in the form of cigarettes or cut tobacco in any form or shape which may be used or intended to be used as a substitute for cigarettes to any minor under the age of eighteen years; or if any person shall aid, assist or abet any other person in selling such article to such minor, he shall be guilty of a misdemeanor, and, upon conviction, shall be punished by fine or imprisonment in the discretion of the court.

If any person shall aid or assist any minor child under eighteen years old in obtaining the possession of cigarettes, or tobacco in any form used as cigarettes, by whatever name it may be called, he shall be guilty of a misdemeanor, and, upon conviction, shall be fined or imprisoned in the discretion of the court.

It shall be the duty of every police officer, upon knowledge or information that any minor under eighteen years is or has been smoking any cigarettes, to inquire of any such minor the name of the person who sold or gave him such cigarettes or the substitute from which it was made, or who aided and abetted in effecting such gift or sale. Upon receiving this information from any such minor the officer shall forthwith cause a warrant to be issued for the person giving or selling or aiding and abetting in the giving and selling of such cigarettes or the substance out of which

they were made, and have such person dealt with as the law directs. Any such minor who shall fail or refuse to give to any officer upon inquiry the name of the person selling or giving him such cigarette or the substance out of which it was made, shall be guilty of a misdemeanor.

If any person shall knowingly sell, offer for sale, give, or in any way dispose of to a minor any pistol or pistol cartridge, brass knucks, bowie knife, dirk, loaded cane or sling shot, he shall be guilty of a misdemeanor. Any person being the parent or guardian of, or attending in loco parentis to any child under the age of twelve years who shall knowingly permit such child to have the possession or custody of, or use in any manner whatever any gun, pistol, or other dangerous firearm, whether such firearm be loaded or unloaded, or any person who shall knowingly furnish such child any firearm, shall be guilty of a misdemeanor, and, upon conviction, shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. If any person shall leave any child of the age of seven years or less locked or otherwise confined in any dwelling, building or enclosure, and go away from such dwelling, building or enclosure, without leaving some person of the age of discretion in charge of the same, so as to expose the child to danger by fire, the person so offending shall be guilty of a misdemeanor, and shall be punished at the discretion of the court.

Whenever any person, having a contract with any corporation, company, or person, for the manufacture or change of any raw material by the piece or pound, shall employ any minor to assist in the work upon the faith of and by color of such contract, with intent to cheat and defraud such minor, and, having secured the contract price, shall wilfully fail to pay the minor when he shall have performed his part of the contract work, whether done by the day or by the job, the person so offending shall be guilty of a misdemeanor, and, upon conviction, shall be fined not more than fifty dollars or imprisoned not more than thirty days.

(20) Appeals.—An appeal may be taken from any judgment or order of the juvenile court to the superior court having jurisdiction in the county by the parent or, in case there be no parent, by the guardian, custodian or next friend of any child, or by any adult described in the two preceding subsections of this section whose case has been heard by the juvenile court. Such appeal shall be taken in the manner provided for appeals to the superior court: *provided*, that written notice of such appeal be filed with the clerk of court within five days after the issuance of the judgment or order of such court.

(21) Pay of judge—probation officer.—The judge of the juvenile court shall be paid a reasonable compensation for his service, the amount to be determined by the county delegation and the amount thus determined by the county delegation shall be charged against the public funds of the county and such compensation shall be independent of, and in addition to, any compensation which may come to him as judge of the probate court. The county delegation shall also make such provision as is necessary for the salary of the chief probation officer and for the equipment and maintenance of the probation officer together with due provision for transportation of the chief probation officer over the county in the proper discharge of his or her duties. *Provided*, that the judge of probate of Spartanburg County, ex-officio judge of the juvenile court of the said county, shall not be paid any additional compensation for his services as judge of

the said court, but the compensation otherwise provided by law for him shall be deemed to cover his services in this capacity.

(22) Officials to cooperate—reports from institutions.—It is hereby made the duty of every state, county or municipal official or department to render such assistance and co-operation within his or its jurisdiction or power as shall further the objects of this section. All institutions or other agencies to which any person coming within the provisions of this section may be sent are hereby required to give such information concerning such child to the court or to any other officer appointed by it as authorized to seek the co-operation of all societies, organizations or individuals to the end that the court may be assisted in every way in the discharge of its duties.

(23) Procedure—forms.—The court shall have power to devise and publish rules to regulate the procedure in cases coming within the provisions of this section and for the conduct of all probation and other officers of the court in such cases. The court shall devise and cause to be printed for public use such forms for records and for various petitions, orders, processes, and other papers in the cases coming within this section as shall meet the requirements thereof, and all expenses incurred in complying with the provisions of this section shall be a public charge.

(24) Advisory board.—The judge of the juvenile court shall appoint no less than six and no more than twelve efficient, reputable citizens of both sexes to act upon what shall be known as the advisory board of the children's court. The members of this board shall serve for an indefinite period of time and without financial compensation. The duties of this board shall be: to advise and to co-operate with the court and probation officer in all matters appertaining to the moral, legal, physical, and spiritual welfare of all children within the county and the cities thereof; to visit all private and public institutions wherein children are placed or committed; and to report to the judge upon the same and to make such recommendations as they deem necessary. These reports to be made in writing and a copy of the same to be sent to the county delegation and to the state board of public welfare. This advisory board shall have the control and management of the detention home. This advisory board shall meet at least once a month with the judge of the juvenile court. There shall be a chairman, secretary and treasurer. The judge of the juvenile court shall act as honorary chairman. All proceedings of the advisory board shall be kept in writing.

1932 Code, § 255; 1923 (33) 207; 1925 (34) 231; 1927 (35) 227; 1934 (38) 1261; 1939 (41) 287.

State board of public welfare referred to herein abolished by 1939 A & J R 127.

§ 256. Children's court, Greenville County.—There is hereby established a children's court in Greenville County, South Carolina, which shall have jurisdiction concurrent with the circuit courts of any case of a child less than sixteen years of age, and of all other persons involved with or contributing to the dependency or delinquency of any child, residing in or being at the time within the said county, or any city therein.

(a) Who is delinquent, or who violates any municipal or state law or ordinance, or who is truant, unruly, wayward or misdirected, or who is disobedient to parents or beyond their control, or who is in danger of becoming so: or,

(b) Who is neglected or who engages in any occupation, calling or exhi-

bition, or is found in any place where a child is forbidden by law to be, and for permitting which an adult may be punished by law, or who is in such condition or surroundings, or under such improper or insufficient guardianship or control as to endanger the morals, health or general welfare of such child: or,

(c) Who is dependent upon public support, or who is destitute, homeless or abandoned, or whose custody is subject to controversy, or who is insane or feeble minded or idiotic or epileptic or so far mentally deficient as to be unable to exercise proper control over his own affairs, or whose mind is so deranged or impaired as to endanger the health, person or property of himself or others.

When jurisdiction has been obtained in the case of any child, unless a court order shall be issued to the contrary, or unless the child be committed to an institution supported and controlled by the State, it shall continue for the purpose of this section during the minority of the child. The duty shall be constant upon the court to give each subject in its jurisdiction such oversight and control in the premises as will conduce to the welfare of such child and to the best interest of the State.

(d) There shall be appointed by the delegation of Greenville County an advisory board of the children's court of Greenville County, which board shall consist of nine members, seven of whom shall be elected and appointed by the legislative delegation of Greenville County. The Senator from Greenville County and one member of the delegation of Greenville County chosen by the delegation shall serve as ex-officio members of the board of directors during their terms as members of the Legislature. The other seven members of the board shall be chosen from the citizens of Greenville County who do not hold any elective public office. These seven members shall serve for a period of five years each or until their successors are appointed. One member of the first board to be appointed under this section shall be elected to serve for one year; two, for two years; one, for three years; one, for four years; two, for five years. Thereafter as the term of each member expires, the succeeding appointment shall be for a term of five years.

The duties of said board shall be: to advise and to cooperate with the court and probation officer in all matters appertaining to the moral, legal, physical, and spiritual welfare of all children within the county and the cities thereof.

This advisory board shall meet at least once a month with the judge of the juvenile court. There shall be a chairman, secretary and treasurer. All proceedings of the advisory board shall be kept in writing.

(e) The children's court hereby established shall be held by a judge, who shall be appointed by the Governor, upon the recommendation of a majority of the advisory board of the court, and the judge shall hold his office for a term of one year and until his successor is duly appointed and qualified and whose compensation shall be such as the Greenville County delegation shall determine.

All provisions of section 255 not in conflict with the provisions of this section shall obtain and be applicable in the said children's court. All appeals from the children's court established under the provisions of this section shall be made to the circuit courts of Greenville County.

1932 Code, § 256; 1927 (35) 281; 1939 (41) 288.

CHAPTER 4-A

Courts of Domestic Relations

ARTICLE 1

Courts of Domestic Relations in Counties with City over 70,000

- 256-1. Short title.
- 256-2. Definitions.
- 256-3. Established.
- 256-4. Divisions of the court.
- 256-5, 256-6. Judge.
- 256-7. Rules and regulations.
- 256-8. Attendance of clerk and probation officer.
- 256-9. Clerk.
- 256-10. Duties of clerk of children's court.
- 256-11. Clerk of court.
- 256-12. Probation officer.
- 256-13. Duties of probation officer.
- 256-14. Oaths.
- 256-15. Receipts and disbursements.
- 256-16. Investigations.
- 256-17. Terms.
- 256-18. Court quarters, furniture, supplies, etc.
- 256-19. Attendance of children.
- 256-20. Inspection of records.
- 256-21. Court seal.
- 256-22. County and municipal authorities cooperate.
- 256-23. Enforce court orders and decrees.
- 256-24. Appeals.
- 256-25. Duties of county attorney.
- 256-26. Jurisdiction of children's court.
- 256-27. Institute proceedings with petition.
- 256-28. Judge direct summons.
- 256-29. Service of process.
- 256-30. Arrest of children.
- 256-31. Procedure.
- 256-32. Children testify without being under oath.
- 256-33. Hearings.
- 256-34. Arrests.
- 256-35. Adjourn hearings.
- 256-36. Effect of judgment, confession, etc.
- 256-37. Examine children.
- 256-38. Modify and vacate orders and judgments.
- 256-39. Judge visit institutions.
- 256-40. Concurrent jurisdiction with probate judge.
- 256-41. Construction.
- 256-42. Family court.
- 256-43. Powers.
- 256-44. Jurisdiction concurrent with circuit court.
- 256-45. Husband liable for support of wife and children.
- 256-46. When husband liable for support or guilty of non-support.
- 256-47. Petition for support of wife or child.
- 256-48. Petition.
- 256-49. Public officials cooperate.
- 256-50. Notice to respondent.
- 256-51. Compromise issues.
- 256-52. Issue summons when parties cannot agree.
- 256-53. Issuance and service of warrants.
- 256-54. Form of warrant.
- 256-55. Service of summons and warrant by petitioner.
- 256-56. Certificate of order of protection.
- 256-57. Service of summons and process.
- 256-58. Hear and determine issues.
- 256-59. Hearings.
- 256-60. Arrests.
- 256-61. Counsel.
- 256-62. Failure to support.
- 256-63. Place on probation.
- 256-64. Revoke probation.
- 256-65. Admit to bail.
- 256-66. Arrests when court not in session.
- 256-67. Duty of magistrates as to certain persons.
- 256-68. Probation officer visit persons in jail.
- 256-69. Give bond provide support.
- 256-70. New bond.
- 256-71. Default.
- 256-72. Court decide if default exist.
- 256-73. Use of funds forfeited or defaulted.
- 256-74. Relieve surety of liability.
- 256-75. Order of liability ceased.
- 256-76. Require new or additional security.
- 256-77. Effect of other laws.
- 256-78. Jurisdiction of other courts not affected.
- 256-79. Invalidity.

§ 256-1. Short title—applicable to counties with city over 70,000.—This article shall be known as the 'Domestic Relations Court Act' and may be so cited and shall apply to all counties in this State containing a city having

a population of over 70,000, according to the official United States census. 1936 (39) 1499; 1938 (40) 1539; 1941 (42) 52.

§ 256-2. Definitions.—Certain words as used in this article have the following meaning for the purposes thereof:

(1) Court means the “domestic relations court of the county of.....”
(2) Judge means the judge of the domestic relations court of the county.
(3) The words part, division, clerk, probation officer, employee, officer, shall be construed as if followed by the words “of the domestic relations court of the county.”

(4) Surety means a person or corporation executing an undertaking or depositing cash in lieu thereof.

(5) The person for whom support is asked shall be known as the petitioner.

(6) The person legally chargeable with the support of a wife or child shall be known as the respondent.

(7) Child, when pertaining to delinquent or neglected children, means a person actually or apparently under sixteen years of age.

(8) Adult, when pertaining to delinquent or neglected children, means a person sixteen years of age or older.

(9) Delinquent child means a child over seven and under sixteen years of age (a) who violates any law of the United States or of this State or any municipal ordinance, or who commits any act which if committed by an adult would be an offense punishable otherwise than by death or life imprisonment; (b) who is incorrigible, ungovernable or habitually disobedient and beyond the control of his parents, guardian, custodian or other lawful authority; (c) who is habitually truant; (d) who, without just cause and without the consent of his parent, guardian or other custodian, deserts his home or place of abode; (e) who engages in any occupation which is in violation of law; (f) who begs or who solicits alms or money in public places; (g) who associates with immoral or vicious persons; (h) who frequents any place the maintenance of which is in violation of law; (i) who habitually uses obscene or profane language; or (j) who so deports himself as wilfully to injure or endanger the morals or health of himself or others.

(10) Juvenile delinquency is the commission by a child over seven and under the age of sixteen years of any of the offenses enumerated in the foregoing definition of a delinquent child.

(11) Neglected child means a child under sixteen years of age (a) who is without proper guardianship; (b) who has been abandoned or deserted by either or both of its parents or by any other person or persons lawfully charged with its care and custody; (c) whose parent, guardian or person with whom the child lives, by reason of cruelty, mental incapacity, immorality or depravity is unfit properly to care for such child; (d) whose parent or guardian has been sentenced to imprisonment for crime; (e) who is under unlawful or improper supervision, care, custody or restraint by any person; (f) who wanders about without lawful occupation or restraint, or who is unlawfully kept out of school; (g) whose parent, guardian or custodian neglects or refuses, when able to do so, to provide necessary medical, surgical, institutional or hospital care for such child; (h) who is found in any place the maintenance of which is in violation of law; (i)

who is in such condition of want or suffering or is under such improper guardianship or control as to injure or endanger the morals or health of himself or others.

(12) Destitute child means a child who through no neglect on the part of his parent, guardian, or custodian is destitute or homeless, or in a state of want or suffering due to lack of food, clothing, shelter, or medical or surgical care.

(13) Physically handicapped child means a person under twenty-one years of age who, by reason of a physical defect or infirmity, whether congenital or acquired by accident, injury or disease, is or may be expected to be totally or partly incapacitated for education or for remunerative occupation, but shall not include the deaf and blind.

(14) The words place, placed, commitment, and committed include replace, replaced, recommitment and recommitted respectively.

1936 (39) 1499; 1937 (40) 91.

§ 256-3. Established—inferior to circuit court—powers — jurisdiction.—

There is hereby established in and for all counties in the State containing a city of over 70,000 population according to the official United States census, a court of domestic relations to be known as the 'Domestic Relations Court of the County of.....'.

1936 (39) 1499; 1938 (40) 1539; 1941 (42) 52.

§ 256-4. Divisions of the court.—The court shall comprise two divisions to be known as the "Children's Court" and the "Family Court", respectively.

1936 (39) 1499.

§ 256-5. Judge—appointment—practice law—salary.—The judge of such court shall be appointed by the concurrence of four of the following five officials, to wit: the resident judge of the the circuit in which such county lies, the circuit solicitor of said circuit, probate judge of the county, the recorder or judge of the police court of the city containing more than 70,000 population and the judge of the county court or other court in said county inferior to the circuit court. The appointment shall be in writing and signed by the appointing officials and such written appointment so signed shall be and constitute the warrant of the judge of the domestic relations court of said county, and the Governor shall forthwith issue a commission to him upon receipt of notice of said appointment. No person shall be eligible to appointment as judge unless such person shall have been admitted to practice as an attorney and counselor at law of the Supreme Court of the State of South Carolina at least ten years prior to the date of such appointment, and shall have resided in said county at least ten years. In making such appointments the said officials shall select persons who because of their character, personality, tact, patience and common sense are especially qualified for the work of the court. During his term of office he shall not engage directly or indirectly in any other business or profession but shall devote his entire time and capacity, so far as the public interest demands, to the duties of his office. During his term of office he shall not practice in any other court of the State, nor shall he hold any other public office, nor shall he act as referee or receiver. No judge, officer, or employee of the court shall demand nor receive for his own use any fees or perquisites of office. The

salary of the judge shall be \$3,000.00 per annum, payable monthly as county officers are paid.

1936 (39) 1499; 1941 (42) 52.

§ 256-6. Judge—term—removable—vacancy.—The judge shall hold office for a term of seven years, and until his successor has been appointed and qualified, and he shall be removable for cause by the concurrence of four of the five appointing officials after a full hearing at which he shall be fully informed as to any charge against him and shall be entitled to be present and have counsel, and to offer evidence. When a vacancy occurs in the office of judge it shall be filled by appointment in the manner of the original appointment, as provided in § 256-5, for a term of seven years.

1936 (39) 1499.

§ 256-7. Judge make certain rules and regulations.—It shall be the duty of the judge to make rules and regulations governing the following subjects:

1. Regarding practice and procedure in the court of his county;
2. Regarding probation;
3. Regarding the receipt and payment of funds for the support of wives or children.

4. Regarding the conduct and control of officers and employees. Such rules shall be printed within a reasonable time after their adoption and copies shall be available for the public and, insofar as the same are not in conflict with existing provisions of law, and of this article, shall have the force of law.

1936 (39) 1499.

§ 256-8. Attendance of clerk and probation officer—court records—investigations—subpoenas.—The judge shall prescribe the hours for the attendance of the clerk and probation officer. He shall cause to be established and supervised a system for keeping the records of the court and its various divisions. The judge shall on his own initiative or on complaint, cause to be investigated all matters pertaining to the court or to the officers or employees thereof, and shall take such steps as may be necessary or proper in respect thereto. He may take testimony under oath with regard to any matter concerning the court, and may issue or cause to be issued a subpoena requiring witnesses to appear and testify and to produce books and papers in regard to all matters relevant to such inquiry.

1936 (39) 1499.

§ 256-9. Clerk—probation officers — constables.—The judge shall have control over the officers of the court, which shall be a clerk, a probation officer, a deputy probation officer and a constable. Such officers shall be appointed by the judge, and shall hold office during his pleasure, and any vacancy shall be filled in like manner. The salary of the clerk shall be fixed by the judge at a figure not exceeding fifteen hundred (\$1500.00) dollars per annum, and shall be paid by the county treasurer in monthly installments. Before taking office, the clerk shall give a bond of five thousand (\$5,000.00) dollars, conditioned upon the faithful performance of his duties. The salary of the probation officer shall likewise be fixed by

the judge at a figure not exceeding eighteen hundred (\$1800.00) dollars per annum, and shall be paid by the county treasurer in monthly installments. Before taking office the probation officer shall give a bond of five thousand (\$5,000.00) dollars, conditioned upon the faithful performance of his duties. The salary of the deputy probation officer shall likewise be fixed by the judge at a figure not exceeding twelve hundred (\$1200.00) dollars per annum, and shall be paid by the county treasurer in monthly installments. Before taking office, the deputy probation officer shall give a bond of five thousand (\$5,000.00) dollars, conditioned upon the faithful performance of his duties. The salary of the constable shall likewise be fixed by the judge, at a figure not exceeding fourteen hundred and forty (\$1440.00) dollars per annum, which shall include his automobile expenses. Before taking office, the constable shall be commissioned by Governor, and shall give a bond of two thousand (\$2,000.00) dollars, conditioned upon the faithful performance of his duties. The constable shall have all rights, powers and authority, in connection with the service of summons and processes issued by said court and in connection with the arrest of any person or persons in the service of summons and processes by order of said court, now given by law to sheriffs and constables. The premiums on all of said bonds shall be paid by the county supervisor, as are the premiums on bonds required in the case of other county officers.

1936 (39) 1499; 1938 (40) 1539; 1940 (41) 1862.

§ 256-10. Duties of clerk of children's court.—The clerk of the children's court shall have the following duties, among others:

(1) **RECORDS.** He shall cause to be kept a complete and accurate record of all the proceedings in the various divisions of the court and of all money received and disbursed.

(2) **REPORTS.**—He shall report in writing to the judge each month the number, character and disposition of the cases coming before the court in its various divisions and handled, the amounts of money received and disbursed by the court for support, and such other information as the judge may require. He shall keep or cause to be kept such records of children as shall be perscribed or approved by the judge, and shall make to the judge such statistical and other reports concerning children as he shall deem to be necessary or as the judge shall require.

(3) **ANNUAL REPORT; BUDGET.** It shall be his duty to prepare and submit to the judge prior to January tenth of each year the annual report of the court for the preceding calendar year. It shall also be his duty on or before the tenth day of January to prepare and submit to the judge the tentative budget for the expenses of the court for the ensuing calendar year.

(4) **EXPENDITURE OF FUNDS.** He shall be responsible for seeing that no funds appropriated for the court are illegally or improperly expended.

(5) **SEAL.** He shall be the custodian of the court's records and official papers and of the official seal of the court, and shall affix it to certificates of the court's records and to such other papers as the judge may require.

(6) **ACT AS CLERK OF COURT.** He shall have all the powers of a clerk of court and shall act as such in the work of the court.

(7) **BONDS.**—He shall cause to be kept an accurate record of all bonds furnished, both for bail and for support, which shall include the names of sureties, of the person on whose behalf given, the date and the amount, and

such other information as may be required by the director of administration.

(8) **BUREAU OF INFORMATION.** He shall maintain a bureau of information for the public and shall promptly report to the judge the nature and circumstances of all complaints made relative to the court or its officers or employees.

1936 (39) 1499.

§ 256-11. Clerk of court—prepare papers—handle funds—report.—Petitions for support and complaints for non-support and petitions relating to a child and all legal process shall be prepared by the clerk of court and shall be filed by him. He shall have custody of all bonds and cash deposited, and when such funds are to be applied for the benefit of a petitioner he shall turn them over to the support bureau for that purpose. He shall report in writing to the judge at least once in each month the fines imposed and received. The clerk shall pay over the amount of all fines received by him to the county treasurer on or before the fifth day of each month.

1936 (39) 1499.

§ 256-12. Probation officer.—The judge shall appoint a probation officer who shall report to him at frequent intervals on the conduct of probation in the various divisions of the court. Subject to the direction of the judge, he shall have charge of the probation work of the court. He shall formulate uniform methods for the probation work of the court and develop processes in the technique of casework, including investigation, interviewing, use of records, analysis of information, diagnosis, plan of treatment, correlation of effort by individuals and agencies, and methods of influencing human behavior.

1936 (39) 1499.

§ 256-13. Duties of probation officer.—It shall be the duty of the probation officer, unless the court otherwise directs, to make a prompt and thorough investigation, before, during or after hearing, concerning the history, character and circumstances of any case assigned to him. His reports shall be submitted to the court and they shall include such facts as may aid the court in correcting conditions responsible for the appearance of the case in court and in planning for the future welfare of the parties involved. Every probation officer shall keep himself informed as to the conduct and condition of all probationers under his supervision and shall visit them as often as may be necessary, and shall report thereon to the court in such manner and at such times as the court shall require. He shall visit the petitioner and the home at such times as the rules of the court shall prescribe. It shall be the duty of each probation officer assigned to the work of supervision in the family court to secure the prompt payment by the persons under his supervision of such sums as have been ordered by the court to be paid for support, and to report promptly to the court any failure by the probationer to make such payments, or to comply in any important respect with the conditions of his probation. The probation officer shall keep accurate accounts of all moneys and other articles collected or taken from the persons under his supervision and shall

make a report of the same to the court. He shall keep an accurate record of all money received by him from his probationers in the family court, or on their behalf, and shall report this in detail each week to the court. He shall report promptly to the court any conduct of the probationer or other circumstances that in his judgment is in violation of the conditions of probation or that would lead the court to modify those conditions or revoke the probation. The probation officer shall be vested with the power and authority conferred by law upon constables.

1936 (39) 1499.

§ 256-14. Oaths — acknowledgments. — The judge and clerk shall have power to administer oaths and take acknowledgments.

1936 (39) 1499.

§ 256-15. Receipts and disbursements.—Each day at the close of the day the clerk shall deposit in a bank approved by the court all funds then on hand. He shall keep a careful and accurate record of all money received and paid out in accordance with the rules of the court. He shall cause to be given or sent to each person making payments to such bureau a receipt upon a printed form to be signed in the name of the court with his name signed thereto, with a statement of the amount of money received and from whom and on whose behalf. Each such receipt shall carry a serial number, which shall also appear upon a carbon copy on an identical form, on which the information filled in on the original shall appear. He shall cause to be promptly transmitted to the probation officer in charge of each case information with regard to all payments made relative thereto and shall report specifically to such officer all instances where required payments have not been made within a two weeks' period. No such carbon copy shall for any reason be destroyed. It shall be the duty of the judge at least once a month to carefully examine and check over these carbon copies and the records of all money received and paid out in said part.

1936 (39) 1499.

§ 256-16. Probation officer make investigations—supervise probationers.—It shall be the duty of the probation officer to interview petitioners for support, to obtain from them and from others, as far as possible, all information necessary to a constructive plan of treatment and the proper handling of their cases by the court, to obtain from the appropriate departments of government and from private agencies such information with regard to the previous records of such persons and their families as may be appropriate, and to visit such petitioners and their homes, as well as such members of their families as may be necessary. He shall promptly report to the court in writing the results of its investigations and without attempt to color the facts or influence the court's decision. He shall supervise persons placed on probation by the court and to see that the conditions of probation are carried out by the probationer, and to aid by counsel and advice, and in other ways, in maintaining the families under their care as social units, and to bring about harmonious relations in the home.

1936 (39) 1499.

§ 256-17. Terms of court—hours—probate judge act in absence of judge of children's court—vacation for judge.—The children's court shall be open and sessions of court shall be held every day in the year except Sundays and legal holidays. The family court shall also be open and sessions of court shall be held every day in the year except Sundays and legal holidays. In the absence of the judge, on vacation, or because of illness, the duties of the judge of the children's court shall be discharged by the judge of probate, in the probate court. The court shall be open and ready for the transaction of business on all such days at ten o'clock in the morning, and shall not close before two o'clock in the afternoon on week days, nor before one o'clock in the afternoon on Saturdays. The judge shall be in actual attendance thereon during such hours, except for a reasonable recess, and shall be entitled to a vacation of one month in each year to be taken at such time or times as he may determine, during which time he shall visit the various insitutions to which delinquent and neglected children have been committed.

1936 (39) 1499; 1937 (40) 91; 1939 (41) 98; 1940 (41) 1862; 1941 (42) 51.

§ 256-18. Court quarters, furniture, supplies, etc.—The court established by this article shall occupy and use such quarters as shall be assigned by the clerk of the court of common pleas and general sessions of the county in the court house for the court established by this article. All furniture, equipment, supplies and other property or service in the custody or use of or allotted to said courts shall be provided by the county supervisor. Until quarters shall have been assigned in the court house, as aforesaid, the judge, with the written approval of the Senator and a majority of the members of the House of the county, shall arrange to secure temporary quarters for the court as convenient to the court house as may be practicable, the expense to be defrayed from the contingent fund provided for the court. The stationery and printing of the court shall also be defrayed from such contingent fund.

1936 (39) 1499.

§ 256-19. Attendance of children at court.—So far as possible a waiting room shall be provided for the care of children brought to court by petitioners. Unless directed by the court, children shall not be permitted in the court room, except where the proceedings are in relation to the child.

1936 (39) 1499.

§ 256-20. Inspection of records.—The records of any case in the children's court, by order of the court, may be withheld from indiscriminate public inspection in the discretion of the judge, but such records shall be open to inspection by the parent, guardian, next friend or attorney of the child. Any duly authorized agency, association, society or institution to which a child is committed may cause an inspection of the record of investigation to be had, and may in the discretion of the court obtain a copy of the whole or a part of such record.

1936 (39) 1499.

§ 256-21. Seal.—The court shall have an official seal in such form as may be prescribed by the judge.

1936 (39) 1499.

§ 256-22. County and municipal authorities cooperate—institutions report on children—request other agencies cooperate.—It is hereby made the duty of every county and municipal officer and employee to render such assistance and co-operation as shall be within his jurisdictional power, to further the objects of this article. All institutions or other agencies to which any child shall be committed are hereby required to give to the court or its representative such information concerning such child as the court or a justice thereof may require. The court is authorized to seek the cooperation of all societies or organizations, public or private, having for their object the protection or aid of children, to the end that the court may be assisted in every reasonable way to give the children within its jurisdiction such care, protection and assistance as will best enhance their welfare.

1936 (39) 1499.

§ 256-23. Enforce court orders and decrees.—All of the provisions of the state law relating to civil and criminal contempts shall apply to this court, and the court and the judge thereof shall have all the power and authority of the circuit court, or a judge thereof, to enforce its orders and decrees by punishment for contempt, as in the equitable jurisdiction of the circuit courts of South Carolina.

1936 (39) 1499.

§ 256-24. Appeals.—An appeal may be taken to the court of common pleas of the county by any party to the proceeding from any final order or judgment of the court, by the service within five (5) days after the entry of said order or judgment, of written notice of appeal, containing the grounds of alleged error. All notices of or in connection with appeals shall be served upon the judge and upon the attorney for the county board of commissioners as well as upon the appellee or his attorney. In all proceedings in which the county is participating the attorney for the county board of commissioners shall conduct the appeal to final termination, but the consent or approval of the attorney for the county board of commissioners to other appeals shall not be necessary.

When notice of appeal is served as herein provided, the judge shall within ten (10) days make return to the court of common pleas of the county upon the appeal concisely setting forth the pertinent and material facts, the grounds of the decision appealed from, copies of all papers filed in the record, and a copy of such testimony as may have been taken, or a memorandum of evidence, if testimony was not taken in the matter. The return shall be verified on oath by the judge.

In family court cases the appeal shall not operate as a stay of proceedings in respect to the order and no stay shall be granted, unless the appellant deposits with the clerk of court from which the appeal is taken the sum of \$100.00 in cash, which may be applied to the support of the petitioner during said appeal, or unless he gives sufficient surety by a written undertaking approved by the judge of the court, that during the pendency of such appeal he will pay the amount directed to be paid to the family court for the support of the petitioner. Failure to make such payments automatically vacates such stay.

The court of common pleas may reverse or affirm wholly or partly, or

may modify the decisions brought up for review. If a new trial is ordered it shall be had in the domestic relations court. All appeals under this article shall have preference in the court of common pleas over all other civil actions and proceedings.

1936 (39) 1499.

§ 256-25. Duties of county attorney.—The county attorney shall act as counsel for the court, and, by direction of the court, shall represent either party to a controversy who has no counsel, in cases where the opposing party is represented by counsel, and shall take charge of all legal proceedings on behalf of the court where the court's action is under review.

1936 (39) 1499; 1940 (41) 1862.

§ 256-26. Jurisdiction of children's court.

(1) **Children.**—The children's court in each county shall have exclusive original jurisdiction within such county to hear and determine all cases or proceedings involving the hearing, trial, parole, probation, remand or commitment of children actually or apparently under the age of sixteen years, or who were under the age of sixteen years when the act or offense is alleged to have been committed, or the right of action in such case or proceeding accrued, who are, or who are alleged to be (a) delinquent, (b) physically handicapped, (c) material witnesses, (d) mental defectives, (e) neglected, and shall also have jurisdiction to appoint guardians of the person of such children and to grant orders for the adoption of such children. Such court shall also have jurisdiction in such proceedings to determine the question of the rightful custody of such children if their custody is subject to controversy and insofar as such custody or controversy relates to their immediate care. The court may refer to any magistrate having jurisdiction any delinquent child who it may conclude should be tried in the criminal courts.

(1-a) **Persons make parties—authority over.**—In furtherance of the complete disposition of cases under the jurisdiction of the children's court and for the protection of children to whom this article is applicable, and in connection with the removal of the case or cases of any delinquency or neglect found by the court to exist in any case, all or any of said purposes, the children's court shall have the power and authority to bring in and make parties to any proceedings pending in said court any person or persons (a) who are charged with or alleged to be causing or contributing to the delinquency or neglect of any child or children, actually or apparently under the age of sixteen (16) years in violation of law or of the provisions of this article, or (b) whose presence as a party to the proceedings may be found necessary to a complete determination of the issue therein, or the release or remedy which should be granted or decreed therein; and the children's court shall have the power to enjoin and restrain such person from causing or contributing to the delinquency or neglect of any such child or children, and shall have the power to punish the violation of any such injunction or restraining order under the provisions of sub-section 3 of this section.

(2) **Adults; liability for support of children.**—The children's court shall also have jurisdiction whenever the issues involving a delinquent or neglected child are before the court, to inquire into and determine the lia-

bility of any parent or other person who is charged with failure to provide for the maintenance of any such child, when such person is required by law to provide for its care and maintenance; and to inquire into and determine the liability of the parent of any child committed by the court, pursuant to any provision of law to a duly authorized association, agency, society, or institution, and the liability of any other person required by law to support or maintain any such child; and if judgment be rendered affirming the liability of any such parent or other person to pay for the maintenance, in whole or in part, of such child, the court may by order require of such parent or other person the weekly or monthly payment toward the maintenance or support of any such child such sum of money as the court shall deem fair and equitable, and may specify in the order the place where and the person, officer or agency to whom such payments shall be made; and if the sum paid shall be for the maintenance of a child committed by the court it shall be credited to the agency, association, society or institution having custody of the child, or to the city, or county having the burden of its care and maintenance. Proceedings under this subdivision may be instituted by a duly authorized agency, association, society or institution or by an interested party or on the court's own motion. The court may issue a summons or in a proper case a warrant or other process to secure or compel the attendance of any necessary person, and such order, when made, shall be enforceable and subject to execution as are orders and injunctions of courts of equity in this State.

(3) Enforce orders.—The children's court shall, except as herein otherwise provided, have exclusive original jurisdiction in all cases against persons charged with a failure to obey any order of the court made pursuant to the provisions of this section, and any violation of an order made pursuant to the provisions of this section shall be punishable as a contempt of court.

1936 (39) 1499; 1937 (40) 91; 1940 (41) 1862.

§ 256-27. Institute proceedings with petition—petitioners—title. — The parent or custodian of any child, an official of a child welfare board, any public official charged by law with the care of the poor, the recognized agents of any duly authorized agency, association, society or institution, or any person having knowledge or information of a nature which convinces such person that a child is neglected or delinquent, or that any child, by reason of its condition, environment or of its own acts is, in accordance with the provisions of this article, subject to the jurisdiction of the children's court, or any person who has suffered injury through the delinquency of such child or is concerned in its guardianship or adoption, may institute a proceeding respecting such child by filing with the court a petition, verified by affidavit, which petition shall state such facts as will bring the child within the jurisdiction of the court. The petition shall include the name and street address of the child and of its parents or other person or persons having the guardianship, custody, control or supervision of such child, or the person with whom it is domiciled, if the same be known to the petitioner, or shall set forth that they are unknown if that be the fact; and the petition shall conclude with a prayer to the court for such action or relief as the law provides. The title of the proceeding shall be "Domes-

tic Relations Court of the County of.....Children's Court,
In the matter of.....a child under the age of sixteen years.”
1936 (39) 1499.

§ 256-28. Judge direct summons—witnesses.—Upon the filing of a petition the judge may, either forthwith or after an investigation which he may direct to be made, cause a summons to be issued, which shall be signed by him or by the clerk of the court, requiring the child and its parent, guardian, custodian or other person or persons having control of such child, or with whom it is domiciled, to appear at the court at a time and place named to show cause why such child should not be dealt with according to law. The court may also issue a subpoena or in a proper case a warrant or other process to secure or compel the attendance of any person whose testimony or presence at a hearing or proceeding is deemed by the court to be necessary; and any person who willfully fails or refuses to obey any process of the court shall be guilty of a contempt of court, and, may be punished therefor as in the courts of equity in this State.

1936 (39) 1499.

§ 256-29. Service of summons, warrants and other process.—Service of a summons shall be made by delivery of a true copy thereof to the person summoned. If after reasonable effort personal service shall not have been made the court or a justice thereof at any stage of the proceedings may make an order providing for substituted service of the summons in the manner provided for substituted service in civil process in courts of record. The service of a summons must be made at least twenty-four hours before the time stated therein for such appearance; but if so requested by a parent, guardian, or other person having the custody or control of the child, the judge shall not proceed with the hearing or proceeding earlier than three days after such service. In case the summons cannot be served, or the person or persons served fail to obey the same, and in any case when it shall be made to appear to the court that a summons will be ineffectual, or that the welfare of a child requires that such child or its parent, guardian or other person having its custody or control, shall be brought forthwith into the custody of the court, a warrant may be issued by the court either against the child, the parent, guardian or other person having its custody or control. All papers, warrants or other process shall be served by any peace officer of the county in which the court is located, when such officer is directed so to do by the court or a justice thereof.

1936 (39) 1499.

§ 256-30. Arrest of children—duty of officers—duty of magistrates as to certain children—confinement.

(1) Arrest of children.—Whenever any child is arrested, with or without a warrant, it shall be the duty of the officer having such child in charge immediately to notify the parent, guardian or other person responsible for its custody or control, or the person with whom such child is domiciled, that such child has been taken into custody; and forthwith and with all convenient speed the officer shall directly and without his being first taken to the police station house take such child to the children's court located in the county in which the offense, if any, was committed,

if the court is in session, and if not in session then to the police station or county jail and the officer making arrest shall immediately make and file a petition as hereinbefore provided. But nothing herein contained shall be held to prohibit the acceptance of bail or recognizance as provided by law.

(2) Duty of magistrate as to certain children.—When a child alleged to be delinquent or neglected is brought before any magistrate or other court for hearing or trial, and it is found that such child is actually or apparently under the age of sixteen years, such magistrate or court shall immediately, by order transfer the case or proceeding to the children's court located in the county having jurisdiction of the case, and shall direct that the child shall forthwith be delivered to this court, if it be in session, and if it is not in session, then to the police station or county jail.

(3) Confinement of children.—Where a child is taken to the police station or the county jail, such child shall be kept separate and apart from adults confined therein.

1936 (39) 1499.

§ 256-31. Procedure when not prescribed.—Where the method of procedure in a case, action or proceeding in which the court has jurisdiction is not prescribed by this article, such procedure shall be the same as provided by law for other courts exercising like jurisdiction, or by the rules adopted by the court, and the court shall have such jurisdiction as may be necessary to enable it to carry out and enforce the provisions of this article.

1936 (39) 1499.

§ 256-32. Children testify without being under oath.—In taking the testimony of children the court may, in its discretion, dispense with the formality of placing them under oath.

1936 (39) 1499.

§ 256-33. Hearings.—All cases in which children are directly involved shall be heard separately and apart from the trial or hearing of cases against adults, except where adults and children are involved in the same case, which cases shall be heard as may be provided by the rules of the court. The court shall have power upon the hearing of any case involving any child, to exclude the general public from the room wherein the said hearing is held, admitting thereto only such persons as may have a direct interest in the case.

1936 (39) 1499.

§ 256-34. Arrests—discharge—release.—If it appears from the petition that the interests of justice require the immediate apprehension of a child the judge may endorse or cause to be endorsed upon the summons an order that the officer serving the same shall at once take such child into custody, or he may issue a warrant as provided by law. Any child in custody may be discharged by the court, or pending the final disposition of any case the child affected may be released on bail or paroled in the custody of a parent, guardian, probation officer or other person and the judge may direct that such child shall be brought before the court at a time specified.

1936 (39) 1499.

§ 256-35. Adjourn hearings—guardian ad litem—judgment.—Upon the return of the summons or other process or after any child has been taken into custody, and at the time set for the hearing, the court shall proceed to hear and determine the case. The court from time to time may adjourn the hearing and inquire into the habits, surroundings, conditions and tendencies of the child so as to enable the court to render such order or judgment as shall best conserve the welfare of the child and carry out the objects of this article. During such adjournments the child may be placed in the custody of a parent, guardian, relative or other fit person and under the supervision of a probation officer, if the court so directs. At any stage of a proceeding the judge may, in his discretion, appoint any suitable person to be the guardian ad litem of the child for the purposes of the proceeding.

The court, if satisfied by competent evidence, may adjudicate the child to be delinquent or neglected, and in such case shall render judgment as follows:

- (a) Suspend sentence during good behavior.
- (b) Place the child, if delinquent, on probation or, if neglected, under supervision to remain in his own home or in the custody of a relative or other fit person, subject, however, to the supervision of the probation officer and to the further orders of the court;
- (c) Commit the child to the care and custody of a suitable institution maintained by the State or any sub-division thereof, including the reformatories of South Carolina, or to the care and custody of a duly authorized association, agency, society, or institution, including any orphan home or any hospital or any private home approved by the court in the city or county of Charleston.
- (d) Impose a fine in a sum not to exceed two hundred dollars, or in the alternative to remand, commit or place on probation as herein provided;
- (e) Continue the proceeding and place the child in its own home or in the custody of a relative or other suitable person, or a duly authorized association, agency, society or institution, for a certain designated period subject to the orders of the court;
- (f) Discharge the child, if a neglected child, to the custody of such officer, board or department as may be authorized to receive children as public charges, who shall provide for such child as in the case of a destitute child or as otherwise authorized by law; or
- (g) Render such other and further judgment or make such other order or commitment as the court may be authorized by law to make.

A child may be placed and continued on probation for such time as the court or justice may deem proper, but such period shall not be longer than five years, nor shall it continue in any case beyond the twenty-first birthday of any child. Such probationary period, however, may extend beyond the time such child attains the age of sixteen years. In case of a violation of the probationary condition, or of the condition of a suspended sentence, the court may impose on the probationer any penalty or penalties which it might have imposed before placing him on probation, and in any case where the court shall have adjudged a child to be delinquent, or neglected, and shall have placed him on probation subject to the super-

vision of a probation officer, the court in the manner aforesaid may commit such child for a violation of the conditions of his probation at any time during such probationary period irrespective of his age at the time of such violation.

1936 (39) 1499; 1940 (41) 1862.

§ 256-36. Effect of judgment, confession, etc.—No adjudication under the provisions of this article shall operate as a disqualification of any child subsequently to hold office or as a forfeiture of any right or privilege or to receive any license granted by public authority; and no child shall be denominated a criminal by reason of such adjudication, nor shall such adjudication be denominated a conviction. Neither the fact that a child has been before the children's court for hearing nor any confession, admission or statement made by him to the court or to any officer thereof while he is under the age of sixteen years shall ever be admissible as evidence against him or his interest in any other court. Nothing in this section contained, however, shall be construed to prevent any court, in imposing sentence upon an adult after conviction, from receiving and considering the records and information of file in the children's court with reference to such adult when he was a child.

1936 (39) 1499.

§ 256-37. Examine children—medical and surgical care.—The court in its discretion, either before, during or after a hearing, may cause any child within its jurisdiction to be examined by a physician duly licensed as such by the State of South Carolina or by a psychologist or psychiatrist, appointed or designated for the purpose by the court. If it shall appear to the court that any child within its jurisdiction is mentally defective, the court may cause such child to be examined and if such child shall be found to be mentally defective, the court may commit such child. In the case of a physically handicapped child the court may issue an order for his (a) maintenance, (b) surgical, (c) medical or therapeutic treatment, (d) hospital care, (e) appliances and devices, (f) home teaching, (g) transportation, (h) education, (i) tuition, or (j) scholarships. Whenever a child within the jurisdiction of the court and under the provisions of this article appear to the court to be in need of medical or surgical care a suitable order may be made for the treatment of such child in its home, in a hospital or other suitable institution, and the court may, after a proper hearing, issue an order that the person or persons charged with the liability under the law to support such child, shall pay the expenses of such treatment in the manner provided elsewhere in this article for the support or partial support of children committed by the court.

1936 (39) 1499.

§ 256-38. Modify and vacate orders and judgments—grant new trial.

(1) **Authorized.**—Any order or judgment made by the court in the case of any child committed by virtue of any proceeding, may be vacated and set aside or modified, as provided by law. But no petition for revocation or modification affecting a juvenile delinquent shall be entertained by the court within thirty days after the date of his commitment.

(2) **New trials.**—In any juvenile delinquency proceeding the court may stay execution, set aside or arrest judgment, or grant a new trial or

hearing on any of the grounds, authorizing any court of criminal jurisdiction so to do. The court also may, in the exercise of its powers of protection over a neglected child, make such an order regardless of whether a motion therefor was made before or after final judgment or commitment. The court may entertain an application to that effect by a duly authorized agency, association, society, or institution, or by any interested person acting on behalf of the child, or may act on its own motion on giving proper notice to interested parties or to any agency, association, society or institution having custody of the child.

1936 (39) 1499.

§ 256-39. Judge visit institutions where delinquent children committed.

—At least once each year it shall be the duty of the judge to visit each institution to which a delinquent child shall have been committed by the court during the year.

1936 (39) 1499

§ 256-40. Concurrent jurisdiction with probate judge.—The court shall have all the duties, power, authority and jurisdiction now vested by law in the probate judge of the county, in respect of delinquent or neglected children, which shall be concurrent with that of the probate judge, who is hereby authorized to refer any case brought before him to the said court. Such jurisdiction shall include the power to commit to the reformatories of the State in proper cases.

1936 (39) 1499.

§ 256-41. Construction.—This article shall be construed to the end that the care, custody and discipline of the children brought before the court shall approximate as nearly as possible that which they should receive from their parents, and that as far as practicable they shall be treated not as criminals but as children in need of aid, encouragement and guidance.

1936 (39) 1499.

§ 256-42. Family court—jurisdiction.—The family court shall have

(1) Jurisdiction within the county to hear and determine all proceedings to compel the support of a wife, or child, or step-child; and

(2) In proceedings properly brought before the court for the support of a wife, or child, or step-child it shall have: jurisdiction for the protection, guardianship and disposition of neglected or dependent minors.

(3) Jurisdiction within the county in all cases or, proceedings against persons charged with failure to obey an order of the court made pursuant to authority conferred by law.

1936 (39) 1499; 1937 (40) 91.

§ 256-43. Powers.—In the exercise of its jurisdiction the court shall have power

(1) To order support of a wife or child or step-child or both, irrespective of whether they are likely to become a public charge.

(2) To include in the requirements of an order for support the providing of necessary shelter, food, clothing, care, medical attention, expenses

of confinement, the expense of educating his child, the payment of funeral expenses, and other proper and reasonable expenses.

(3) To require of persons legally chargeable with the support of a wife, or child, or step-child and who are possessed of sufficient means or who are able to earn such means, the payment weekly, or at other fixed periods, of a fair and reasonable sum for such support, or as a contribution towards such support, according to the means of the persons so chargeable; *provided, however*, that the amount that the court may require a respondent to pay for the support of the petitioner shall not exceed \$25.00 a week.

(4) To make all orders for support run until further order of the court, except that orders for support of a child shall run until the child is twenty-one years of age; or, where there are physical or mental disabilities of the child or other exceptional circumstances that warrant it, in the discretion of the court during any period and beyond the child's minority as such physical or mental disabilities may continue.

(5) To require the support of a wife who needs support where there are no children, even though there is no physical or mental disability.

(6) To make an order for support of a wife by the husband, even though she may have left the home, in cases where the husband's conduct or condition or his cruel or inhuman behavior made it unsafe, improper or undesirable for her to continue to live with him.

(7) To make an 'order of protection', in assistance or as a condition of an order for support, setting forth conditions of behavior to be observed for a specified time which shall be binding upon husbands or wives, or both, or upon parties to the proceeding as provided in subsection 7-A of this section, either during the pendency of the proceeding or in the final judgment or in furtherance thereof, or both.

Such orders may require either spouse, or any other party to the proceeding

(a) To stay away from the home or from the other or either spouse or children;

(b) To permit either spouse to visit the children at stated periods;

(c) To abstain from offensive conduct against the other spouse, or either of them, or against the children;

(d) To give proper attention to the care of the home;

(e) To refrain from acts of commission or omission that tend to make the home not a proper place for the other, or either spouse, or the children.

(7-A) In furtherance of the complete disposition of cases in the jurisdiction of the family court, to bring in and make parties to any proceeding pending in said court any person or persons (a) who are charged with or alleged to be interfering with the marital relationship between a husband and wife, in violation of law or of the rights of either party to the marriage, or (b) whose presence as a party to the proceeding may be found necessary to a complete determination of the issues therein, or the relief to which the parties thereto, or any of them, may be entitled; and shall have the power to enjoin and restrain such interference, and to punish violations of such injunctions or restraining orders under the provisions of subsections 12 and 18 of this section.

(8) To award the custody of the children, during the term of any order

of protection, to either spouse, or to an appropriate relative within the second degree. But nothing in this article contained shall vest in the family court the power to place out or board out any child or to commit a child to an institution or agency, except as provided in subsections 15 and 16 of this section.

(9) To determine the manner in which sums order paid for support shall be paid and applied.

(10) To require a person ordered to support another to give security by a written undertaking that he will pay the sums ordered by the court for such support, and upon the failure of any person to give such security by a written undertaking when required by order of the court, to punish such person under the provisions of subsection (18) of this section; and, when appropriate, to discharge any such undertaking.

(11) In lieu of requiring an undertaking, to suspend sentence and place on probation a person who has failed to support another as required by law, and to determine the conditions of such probation and require them to be observed; to revoke such suspension of sentence and probation, where circumstances warrant it, and to discharge a respondent from probation.

(12) To commit to jail as for contempt of court for a term not to exceed twelve months a person who fails to obey the lawful orders of the court. Such commitment shall not prevent the court from subsequently committing him for failure to thereafter comply with such orders.

(13) To release on probation prior to the expiration of the full term a person committed to jail for failure to obey an order of the court or upon conviction for non-support, where the court is satisfied that the best interests of the family and the community will be served thereby.

(14) To modify or vacate any order issued by the court.

(15) To order either before, during or after a hearing, a mental, physical and psychiatric examination of the petitioner or respondent.

(16) To commit for purposes of observation, in the manner provided by law for a probate judge, or as provided in section 6239, a person before the court who the court has reason to believe may be insane.

(17) To exclude the public from the court room in a proper case.

(18) To punish any person guilty of a contempt of court, as provided by law. The failure to pay into court alimony or maintenance and support ordered by the court to be so paid or the violation of any of the orders of the court, shall be deemed contempt of court within the meaning of this subdivision.

(19) To send process or other mandates in any matter in which it has jurisdiction into any county of the State for service or execution in like manner and with the same force and effect as similar process or mandates of the circuit courts as provided by law.

(20) To compel the attendance of witnesses.

(21) To make any order necessary to carry out and enforce the provisions of this article, and to hear and determine any questions of support, custody, separation or any other matter over which the family court has equitable jurisdiction, without the intervention of a jury.

(22) To remand for not more than five (5) days for purposes of investiga-

tion, to admit to bail, or to parole on his own recognizance or in the custody of counsel, a person charged with non-support.

1936 (39) 1499; 1937 (40) 91; 1939 (41) 98; 1940 (41) 1862.

§ 256-44. Matters jurisdiction concurrent with circuit court—procedure—appeals.—The court shall have all the power, authority and jurisdiction now by law vested in the circuit courts of the State in actions for separation, divorce from bed and board, and custody and adoption of children, and may hear and determine the validity of any marriage when its validity or invalidity shall be relevant and material to the consideration and decision of any case properly before it. Such jurisdiction shall be concurrent with that of the circuit courts. The proceedings shall follow those of the circuit court except that appeals shall be in the first instance to the court of common pleas of the county.

1936 (40) 1499; 1939 (41) 98.

§ 256-45. Husband liable for support of wife and children—liability of wife, grandparents and step-parents for support of children.

(1) **Liability husband support wife and children.**—A husband is hereby declared to be chargeable with the support of his wife and children, and if possessed of sufficient means or able to earn such means, may be required to pay for their support a fair and reasonable sum according to his means, as may be determined by the court.

(2) **Liability mother support child.**—Where the father of a child is dead or is incapable of supporting his child or cannot be found within the State, the mother of such child is hereby declared to be chargeable with its support and, if possessed of sufficient means or able to earn such means, may be required to pay for its support a fair and reasonable sum according to her means, as may be determined by the court.

(3) **Liability grandparents support child.**—Where the father of a child included in a petition for support is dead, or where the court, in its judgment, is unable to secure adequate support for such child from its parents, and the child's grandparents are of sufficient means to support it, said grandparents are hereby declared to be chargeable with the support of such grandchild and may be required to pay a fair and reasonable sum according to their means, as may be determined by the court.

(4) **Liability step-parent support stepchild.**—The step-parent of a child is declared legally chargeable with the support of a stepchild likely to become a public charge provided it is shown to the satisfaction of the court that such step-parent had knowledge of the child's existence at the time of said step-parent's marriage.

1937 (40) 91.

§ 256-46. When husband liable for support or guilty of non-support.—The family court shall have jurisdiction, and a husband may be required to furnish support or may be found guilty of non-support, as provided above, if, at the time of the filing of the petition for support:

(a) He is residing or domiciled in the county; or if the county is the matrimonial domicile of the parties;

(b) He is not residing or domiciled in the county but is found therein

at such time, *provided*, that the petitioner is so residing or domiciled at such time; or

(c) He is neither residing or domiciled nor found in the county but prior to such time and, while so residing or domiciled, he shall have failed to furnish such support or shall have abandoned his wife or child and thereafter shall have failed to furnish such support, provided that the petitioner is so residing or domiciled at such time.

1937 (40) 91.

§ 256-47. Petition for support of wife or child.—Notwithstanding the provisions of any other law, a wife or child or step-child may file with the court a petition that the court order the persons legally chargeable with their support to support said petitioner as required by law. Such petition shall be under oath and may be made on information and belief and may be filed on behalf of such wife or child or step-child by the parent or guardian of the child, or other person in loco parentis, or by any public official having a duty or responsibility relative thereto, or by the representative of an incorporated charitable or philanthropic society having a legitimate interest in the petitioner. It shall not be necessary as a condition precedent to the filing of such a petition for the petitioner to make a demand upon the respondent for support.

1936 (39) 1499.

§ 256-48. Petition.—The petition shall be in the name of the person for whom support is asked, and shall be in such form as may be prescribed by the court. The person for whom support is asked shall be known as the petitioner and the person legally chargeable with such support shall be known as the respondent. The terms complainant and defendant shall not be used.

1936 (39) 1499.

§ 256-49. Public officials cooperate—banks give information.—It shall be the duty of all public officials and employees, when so requested, to render such assistance and cooperation to the court as shall be within their power, to further the purposes of this article. Banks and other fiduciary institutions are hereby authorized and required to report to the court, when so requested, full information relative to any funds therein deposited by the petitioner or respondent.

1936 (39) 1499.

§ 256-50. Notice to respondent—interview.—Upon the receipt of an application for support the clerk of court, when so directed by the judge, shall mail or deliver to the respondent a written notice informing him of the fact that such application has been made and asking him to call at the court or arrange for an interview so that his side of the case may be fairly presented. His statements and other information with regard to him shall be recorded on a form to be known as the "respondent's statement" which shall become part of the case history. Such statements shall be inquired into by the probation officer. Care shall be taken not to disturb the respondent's relations with his employers.

1936 (39) 1499; 1937 (40) 91.

§ 256-51. Compromise issues—judge approve.—Except where the circumstances indicate it to be undersirable, in all cases where an application for support has been made, an effort shall be made by the judge to restore harmonious relations between the petitioner and the respondent and to adjust the issues raised by the application through conciliation and agreement. Where an agreement for the support of the petitioner is brought about it must be reduced to writing and submitted to the court for approval. The court where possible shall see both parties, and shall inquire of each whether the agreement, which he must state to them, is what they have agreed to. If it is, and the court shall approve it, the court without further hearing may thereupon enter an order for the support of the petitioner by the respondent in accordance with such agreement, which shall be binding upon the respondent, and shall in all respects be a valid order as though it had been made after process had been issued out of the court. The court record shall show that such order was made upon agreement.

1936 (39) 1499.

§ 256-52. Issue summons when parties cannot agree—refuse.—The court after receiving the petition, in cases where no agreement has been reached by the respondent and petitioner, shall in a proper case cause a summons to be issued, which shall be signed by the court or by the clerk of the court, requiring the respondent to appear at the court at a time and place named to show cause why the order for support prayed for by the petition shall not be made. Summons shall be in such form as may be prescribed by the court. A summons shall not be refused without giving the petitioner an opportunity to be heard by and present witnesses to the court.

1936 (39) 1499.

§ 256-53. Issuance and service of warrants.—When a petition is presented to the court and it shall appear

- (a) that the summons cannot be served; or
- (b) that the respondent has failed to obey the summons; or
- (c) that the respondent is likely to leave the jurisdiction; or
- (d) that in the opinion of the court a summons would be ineffectual; or
- (e) that the safety of the petitioner is endangered; or

(f) that a respondent on bail or on parole has failed to appear, the court may issue a warrant, in the form prescribed in section 256-54, directing that the respondent be arrested and brought before the court. Warrants and other process may be served by any peace officer, or by the probation officer. The court shall make rules relative to the service of warrants. Warrants issued by the court shall be valid throughout the State.

1936 (39) 1499.

§ 256-54. Form of warrant.—A warrant of arrest may be substantially in the following form, the blanks being filled in:

State of South Carolina, }
County of _____ } ss:

To any peace officer in the State of South Carolina:

A petition under oath having this day been laid before me showing that _____ is legally chargeable with the support of _____ and has failed to provide such support and praying this court to exercise its powers to compel such support.

You are, therefore, commanded forthwith to arrest the above-named _____ and bring him before this court at _____

Dated at _____, the _____ day of _____ 19____

Judge of Domestic Relations Court of the
County of _____

1936 (39) 1499.

§ 256-55. Service of summons and warrant by petitioner—arrest of respondent.—In no case shall the petitioner be permitted to serve either a summons or a warrant upon the respondent, unless the court itself shall grant such permission upon application of the petitioner. To facilitate the arrest of respondent, however, the clerk of the court may issue to the petitioner or to the representative of an incorporated charitable or philanthropic society having a legitimate interest in the family, a certificate setting forth that a warrant for the respondent has been issued by the court, and the presentation of such certificate by said petitioner or representative to any peace officer shall constitute authority for him to apprehend the respondent and take him to court. Such certificates shall expire ninety days from the date of issue but may be renewed from time to time by the clerk of the court.

1937 (40) 91.

§ 256-56. Certificate of order of protection—issuance—use arrest violators.—Similarly, the clerk of the court may issue to the petitioner or the respondent, as the case may be, a certificate stating that an 'order of protection' has made by the court relative to such person and setting forth its terms and requirements. The presentation by the petitioner or the respondent, as the case may be, of such certificate to any peace officer shall constitute authority for him to arrest the person charged with violating the terms of such order of protection and bring such person to the court and otherwise, as far as lies within his power, to aid in securing the protection such order was intended to afford.

1937 (40) 91.

§ 256-57. Service of summons and process.—Summons and process other than warrants may be served through the mails, but a default order shall not be entered or a warrant issued thereon for failure to obey a summons or process thus served except on proof that it was received by the respondent. Personal service of summons or other process shall be made by the delivery of a true copy thereof to the person summoned, or by leaving the same at his residence with a person of discretion. In all cases

service of summons must be made within a reasonable time before the time stated therein for such appearance, as may be provided by the rules of the court.

1936 (39) 1499.

§ 256-58. Hear and determine issues.—Upon the return of the summons, the court shall proceed to hear and determine the case. The respondent shall be informed of the contents of the petition and shall be given opportunity to be heard and to subpoena and present witnesses. If the court finds that the respondent is chargeable with the support of the petitioner and should be compelled to provide such support, the court shall make an order requiring such respondent to pay weekly, or at other fixed periods, a fair and reasonable sum for, or towards, the support of the petitioner, and to observe such conditions of behavior as the court may determine.

1936 (39) 1499.

§ 256-59. Hearings—rules—evidence—adjournment—temporary support.—Hearings shall be conducted in accordance with such rules as the court may adopt, and the court may consider and receive as evidence the result of any investigation had or made by the probation officer; *provided* that either party shall be entitled to examine the probation officer under oath thereon. The court may adjourn the hearing from time to time for proper cause. Where the petitioner's needs are so urgent as to require it, the court may make a temporary order for support pending a final determination.

1936 (39) 1499; 1937 (40) 91.

§ 256-60. Arrests.—When a respondent is brought before the court upon an arrest, the court shall proceed as upon the return of the summons as provided in sections 256-58 and 256-59, or in its discretion may forthwith proceed to try and determine the charge of non-support, and he may be admitted to bail, or released on parole, in the court's discretion, to such time or times as the court may fix for the hearing or hearings in the proceeding.

1936 (39) 1499; 1937 (40) 91.

§ 256-61. Counsel—witnesses—presumptions.—At the commencement of a hearing under the provisions of sections 256-58 and 256-59, the court shall inform the respondent of his right to the aid of counsel at every stage of the proceeding and before any further proceedings are had; and in the case of a trial shall also inform him of the charge against him. In any such hearing or trial wives and husbands shall be competent witnesses against each other; a husband or father shall, *prima facie*, be presumed to have sufficient means to support his wife and children; a dependent adult without means to maintain herself shall be presumed to be likely to become a public charge.

1936 (39) 1499.

§ 256-62. Failure to support.—Where a respondent shall neglect or refuse to obey an order for support made under the provisions of section 256-58,

or upon agreement signed by the respondent and approved by the court, and the court is satisfied thereof by competent proof, it may, with or without notice, issue a warrant to commit the respondent to jail until the order is obeyed or until the respondent is discharged by law, but in no event for a period exceeding twelve months.

1936 (39) 1499; 1937 (40) 91.

§ 256-63. Place on probation.—In the case of a respondent who shall have neglected or refused to obey an order for support as provided in sections 256-58 and 256-62 the court may suspend sentence or the execution of the warrant, as the case may be, and place him on probation under such conditions as the court may determine. No person, however, shall be placed on probation unless an order to that effect is made by the court.

1936 (39) 1499.

§ 256-64. Revoke probation—effect.—The court may at any time, where circumstances warrant it, revoke the probation of a respondent. Upon such revocation the respondent shall be brought to court and shall be dealt with by the court as if there had been no probation, and to that end with, or without a further hearing, the court may make any order that might have been made at the time of such probation.

1936 (39) 1499.

§ 256-65. Admit to bail—bond.—If the respondent be admitted to bail, the condition of the undertaking shall be for his future appearance according to the terms thereof, or in default of such appearance, that the surety will pay to the clerk of the court a specified sum as therein set forth. Instead of entering into such an undertaking a respondent may deposit money in an amount to be fixed by the court. If the respondent fails to appear in accordance with the terms of the undertaking, the court shall enter the fact of such non-appearance upon the record, and the undertaking for his appearance, or the money deposited in lieu thereof, shall be forfeited and upon order of the court the sum recovered shall be applied by the clerk of the court for the benefit of the petitioner. The court may, however, in its discretion remit such forfeiture.

1936 (39) 1499.

§ 256-66. Arrests when court not in session.—If a respondent is arrested under a warrant of the family court at a time when the family court is not in session, he shall be taken to the most accessible magistrate and arraigned before him. The production of the warrant shall be evidence of the filing of a proper information, and the magistrate shall thereupon hold the respondent, admit to, fix or accept bail, or parole him for trial before the family court. All subsequent proceedings shall be had in the family court.

1936 (39) 1499.

§ 256-67. Duty of magistrates as to certain persons.—Whenever a person is brought before a magistrate and, in the opinion of such magistrate, the person should properly be brought to the family court, the magistrate

shall thereupon transfer such case to the family court and direct that the persons involved be taken thereto.

1936 (39) 1499.

§ 256-68. Probation officer visit persons in jail—report.—Where a respondent has been committed to jail he shall be visited shortly after such commitment by the probation officer assigned for duty for the purpose of seeing whether he is then likely to obey the order of the court if released. A report in writing shall be made to the court by the probation officer, setting forth the nature of the interview thus had. The time of making the initial visit and subsequent visits to respondents in jail, which shall be made at reasonably frequent intervals, shall be at such times as the rules of the court may prescribe. Written reports shall be made of all such interviews. These shall be part of the case history.

1936 (39) 1499.

§ 256-69. Give bond provide support.—The court may require the respondent to given to the clerk a written undertaking with sufficient surety approved by the court that the respondent will abide by the order for support. The required amount of the principal of such undertaking shall not exceed the total payments for support required for three years and shall be stated in the order for support. The respondent may deposit such sum in cash with the clerk. The form of the undertaking and the form and manner of justification of the surety shall conform to the rules of the court.

1936 (39) 1499.

§ 256-70. New bond.—The court may at any time thereafter, before or after there has been a default, if all arrears have been paid in case there shall have been a default on such undertaking, accept a new undertaking in lieu of the original undertaking, and the court shall enter an order discharging such undertaking.

1936 (39) 1499.

§ 256-71. Default.—A default in the terms of the order shall constitute a breach of the undertaking. When there has been a default the court shall cause an affidavit to be drawn, verified and filed by any person familiar with the facts. The surety shall thereupon be personally served with notice of such default and shall be required to attend at the court on a day certain and show cause why judgment should not be entered on the undertaking and the amount thereof applied to the relief of the petitioner for the amount in default. If the surety appears and pays the amount in arrears the court may remit the forfeiture. Inability to serve the surety shall not be prejudicial to the renewal of proceedings against the respondent.

1936 (39) 1499.

§ 256-72. Court decide if default exist—effect of judgment.—If the surety contest the default the court shall hear and determine the issue. In the event that the court finds that a default has been suffered, it shall make an order specifying the amount in default and forfeiting the undertaking

or cash deposit to the extent of such default. A certified copy of such order shall be filed in the office of the clerk of the court of common pleas of the county with a certified copy of the undertaking and thereupon the said clerk shall docket the same in the book kept by him for the docketing of judgments, as if the same was a transcript of a judgment for the amount of such sum in default. The certified copy of the undertaking and of the order shall be the judgment record. Such judgment shall be in lien on all of the real estate, as in the case of other judgments entered therein, and collectible out of the real and personal property of the surety. An execution may be issued to collect the amount thereof in the same manner as upon a judgment recovered in any court of record. It shall be the duty of the attorney for the county board of commissioners to take the necessary proceedings to collect such judgment.

1936 (39) 1499.

§ 256-73. Use of funds forfeited or defaulted—death of respondent.

(1) **Funds forfeited or defaulted.**—All sums collected from the surety by judgment as well as forfeited cash deposits shall be applied by the clerk of court to the support of the petitioners for whose benefit the order for support was made. Subsequent defaults shall be proceeded upon in the same manner until the amount of the principal of the undertaking or the cash deposited has been recovered in full.

(2) **Payment on death of respondent.**—Where the respondent, or any one in his behalf, shall have deposited with the court monies as surety for compliance with the terms of the order of support and the respondent shall have died, the court may make an order directing the payment to the petitioner of all monies still in possession of the court in conformance with the other of support.

1936 (39) 1499.

§ 256-74. Relieve surety of liability.—A surety may at any time surrender a respondent to the court. The respondent shall thereupon be dealt with as provided in the order for support. If the arrears on the order for support with interest thereon are paid in full, the court may make an order discharging the surety of any further liability and directing the return of the balance of the cash on deposit to the person entitled thereto

1936 (39) 1499.

§ 256-75. Order of liability ceased.—Whenever the liability on an undertaking has ceased, the court shall make an order to that effect.

1936 (39) 1499.

§ 256-76. Require new or additional security.—After an undertaking has been given or cash has been deposited and it shall appear upon proof of affidavit either.

- (a) that a judgment entered upon default cannot be collected; or
- (b) that the liability of the surety has ceased; or
- (c) that the money deposited has been applied in full; or
- (d) that personal service cannot be effected upon the surety or the person depositing the cash; or
- (e) if for any reason the court shall find that there is not sufficient

security; the court may issue a warrant for the arrest of the respondent, and require him to give new or additional security. In default thereof the court may commit him under the original order in the manner hereinabove provided.

1936 (39) 1499.

§ 256-77. Effect of other laws.—All laws and parts of laws whether general, local or special, which are inconsistent with or in conflict with or repugnant to any provision of this article shall be deemed not to apply.

1936 (39) 1499.

§ 256-78. Jurisdiction of other courts not affected.—Nothing in this article contained shall be deemed to limit, abridge, or impair the jurisdiction of the circuit court, probate court or of any court of record.

1936 (39) 1499.

§ 256-79. Invalidity.—If any provision of this article is held by the courts to be invalid, such decision shall not affect the validity of the rest of the article.

1936 (39) 1499.

CHAPTER 5

Courts of Magistrates

257. Civil jurisdiction.

258 thru 260. Bail.

261. Concealed property.

262. Custody of property.

263. Claim of property by third person.

264. No jurisdiction in certain cases.

265. Answer of title.

266 thru 268. Undertaking by defendant.

269, 272. Issue of title to realty.

270. New action.

271. Costs.

273. Judgment and new trial.

274. Rules.

275. Waiver of jurisdiction.

§ 257. Civil jurisdiction.—Magistrates shall have civil jurisdiction in the following actions:

(1) In actions arising on contracts for the recovery of money only, if the sum claimed does not exceed one hundred dollars.

(2) An action for damages for injury to rights pertaining to the person, or personal or real property, if the damages claimed do not exceed one hundred dollars, and in cases of bastardy.

(3) An action for a penalty, fine, or forfeiture, where the amount claimed or forfeited does not exceed one hundred dollars.

(4) An action commenced by attachment of property, as now provided by statute, if the debt or damages claimed do not exceed one hundred dollars.

(5) An action upon bond conditioned for the payment of money, not exceeding one hundred dollars, though the penalty exceed that sum, the judgment to be given for the sum actually due. Where the payments are to be made by installments, an action may be brought for each installment as it becomes due.

(6) An action upon a surety bond taken by them, where the penalty

or amount claimed does not exceed one hundred dollars.

(7) An action upon a judgment rendered in a court of a magistrate or an inferior court, where such action is not prohibited by section 318.

(8) To take and enter judgment on the confession of a defendant, where the amount confessed shall not exceed one hundred dollars, in the manner prescribed by law.

(9) An action for damages, fraud in the sale, purchase, or exchange of personal property, if the damages claimed do not exceed one hundred dollars.

(10) In all matters between landlord and tenant, and the possession of land as provided in §§ 8804 thru 8825.

(11) An action to recover the possession of personal property claimed, the value of which, as stated in the affidavit of the plaintiff, his agent, or attorney, shall not exceed the sum of one hundred dollars.

The plaintiff in such action, at the time of issuing the summons, but not afterwards, may claim the immediate delivery of such property as hereinafter provided.

Before any process shall be issued in an action to recover the possession of personal property, the plaintiff, his agent, or attorney, shall make proof by affidavit, showing:

(a) That the plaintiff is the owner, or entitled to immediate possession, of the property claimed, particularly describing the same.

(b) That such property is wrongfully withheld or detained by the defendant.

(c) The cause of such detention or withholding thereof, according to the best knowledge, information, and belief of the person making the affidavit.

(c) That said personal property has not been taken for any tax, fine, or assessment, pursuant to statute, or seized by virtue of an execution or attachment against the property of said plaintiff; or, if so seized, that it is exempt from such seizure by statute.

(e) The actual value of said personal property.

(12) On receipt of such affidavit, and an undertaking, in writing, executed by one or more sufficient sureties, to be approved by the magistrate before whom such action is commenced, to the effect that they are bound in double the value of such property as stated in said affidavit, for the prosecution of the said action, and for the return of said property to the defendant, if return thereof be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against said plaintiff, the magistrate shall endorse upon said affidavit a direction to any constable of the county in which said magistrate shall reside, requiring said constable to take the property described therein from the defendant, and keep the same, to be disposed of according to law; and the said magistrate shall at the same time issue a summons, with a copy of the undertaking, directed to the defendant, and requiring him to appear before said magistrate at a time and place to be therein specified, and not more than twenty days from the date thereof, to answer the complaint of said plaintiff; and the said summons shall contain a notice to the defendant that, in case he shall fail to appear at the time and place therein mentioned, the plaintiff will have judgment for the possession of the property described in said

affidavit, with the costs and disbursements of said action.

(13) The constable to whom said affidavit, endorsement and summons shall be delivered, shall forthwith take the property described in said affidavit, if he can find the same, and shall keep the same in his custody. He shall, thereupon, without delay, serve upon said defendant a copy of such affidavit, notice and summons, by delivering the same to him personally, if he can be found in said county; if not found, to the agent of the defendant in whose possession said property shall be found; if neither can be found, by leaving such copies at the last or usual place of abode of the defendant, with some person of suitable age and discretion. And he shall forthwith make a return of his proceedings thereon, and the manner of serving the same, to the magistrate who issued the said summons.

(14) The defendant may at any time after such service, and at least two days before the return day of said summons, serve upon plaintiff, or upon the constable who made such service, a notice in writing that he excepts to the sureties in said bond or undertaking; and if he fail to do so, all objection thereto shall be waived. If such notice be served, the sureties shall justify, or the plaintiff give new sureties, on the return day of said summons, who shall then appear and justify, or said magistrate shall order said property delivered to defendant, and shall also render judgment for defendant's cost and disbursements.

(15) At any time before the return day of said summons, the said defendant may, if he has not excepted to plaintiff's sureties, require the return of said property to him upon giving to the plaintiff, and filing same with the magistrate, a written undertaking, with one or more sureties, who shall justify before said magistrate on the return day of said summons, to the effect that they are bound in double the value of said property, as stated in plaintiff's affidavit, for the delivery thereof to said plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may for any cause be recovered against said defendant; and if such return be not required before the return day of said summons, the property shall be delivered to said plaintiff.

See § 551-1 for bond give.

1932 Code, § 257; Civ. P. '22, § 213; Civ. P. '12, § 80; Civ. P. '02, § 71; 1870 (14); 1879 (17) 28; Con. Art. V. §§ 20, 21.

- I. In General.
- II. Subdivision (1).
- III. Subdivision (2).
- IV. Subdivision (3).
- V. Subdivision (4).
- VI. Subdivision (5).
- VII. Subdivision (11).
- VIII. Subdivision (12).
- IX. Subdivision (14).
- X. Subdivision (9 and 10).

Cross References.

As to jurisdiction to punish for assault and battery, see § 924. As to constitutional provision relating to jurisdiction, see Const. art. 5, § 21.

I. IN GENERAL.

Must appear on record that defendant is resident of county.—In order to give a magistrate jurisdiction it must appear on the record that the defendant is a resident of the county. Hall v. Sullivan,

70 S. C. 397, 50 S. E. 27; Ragin v. Northwestern R. Co., 108 S. C. 171, 93 S. E. 860.

But this jurisdictional defect may be waived where the defendant appears and answers on the merits.—The right to demur to the summons and complaint because it does not allege that the defendant is a resident of the county in which the magistrate has jurisdiction may be waived where the defendant appears in the magistrates court and answers on the merits. Baker v. Irvine, 62 S. C. 293, 40 S. E. 672.

And where defendant resides in another township there is no jurisdiction.—A magistrate has no right to try a claim and delivery action where the defendant resides in another township. Jones v. Brown, 57 S. C. 14, 35 S. E. 397. But see Wise v. Werts, 72 S. C. 132, 51

S. E. 547.

A requirement that an action should be brought before a magistrate in the county where the cause of action arose is unauthorized. *Baker v. Irvine*, 62 S. C. 293, 40 S. E. 672.

Necessarily includes corporations.—See above catchline under subdivision 2 and note thereto, analysis line, III.

Cited but not construed in *Stewart Jones Co. v. Shehan*, 127 S. C. 451, 121 S. E. 374.

II. SUBDIVISION (1).

Jurisdiction determined by amount claimed.—The jurisdiction under this section, is determined by the amount claimed by the plaintiff and not the amount actually due. *Brunson v. Furtick*, 72 S. C. 579, 52 S. E. 424, 5 Ann. Cas. 307; *Haygood v. Boney*, 43 S. C. 63, 20 S. E. 803.

But the plaintiff cannot put a fictitious value on property in order to confer jurisdiction.—A party cannot put a fictitious value on property in order to confer jurisdiction though he can forego a part of his claim for money. *Stroy v. Nicpee*, 105 S. C. 265, 89 S. E. 666.

Reduction of claim to bring it within magistrate's jurisdiction.—It is no objection to the jurisdiction of a magistrate that the plaintiff reduced his demand to bring it within the jurisdiction of the magistrate; but where, in so reducing his claim, the plaintiff leaves out an item which he could have included in the cause of action, he cannot afterwards sue thereon. *Catawba Mills v. Hood*, 42 S. C. 203, 20 S. E. 91.

Following the general rule stated above it has been held that a party in a magistrate's court may claim and sue for less than due on note, so as to give a magistrate jurisdiction. *Brunson v. Furtick*, 72 S. C. 579, 52 S. E. 424, 5 Ann. Cas. 307.

Effect of counterclaim.—As just stated general rule is that the jurisdiction is determined by the amount claimed by the plaintiff without reference to any defense or plea set up by the defendant.

And the court in *Corley v. Evans*, 69 S. C. 520, 48 S. E. 459, 460, stated: "In setting up a counterclaim, the defendant becomes the actor, relying on a new cause of action. In the absence of statutory regulation, when a suit is pending in a magistrate's court on a cause of action within that jurisdiction, it seems clear that the defendant cannot oust the jurisdiction by bringing a cross-suit for an amount beyond the jurisdiction of the magistrate. This condition of the law may seem in some cases to result in hardship; or an insolvent, holding a claim under \$100, may recover judgment in a magistrate's court, and under-

take to enforce it while owing a large sum to the defendant; but such an attempt may be met by the reducing his defendant's counterclaim to an amount within the jurisdiction of the magistrate (*Haygood v. Boney*, 43 S. C. 63, 20 S. E. 803); and, it may be, relief could be obtained in a separate proceeding." See, also, *Dupre v. Gilland*, 156 S. C. 109, 152 S. E. 873, discussing the foregoing principles in relation to the civil court of Florence, treated under § 103.

Deprivation of jurisdiction by counterclaim exceeding \$100.—A magistrate is deprived of jurisdiction by a counterclaim for an amount exceeding \$100. *Haygood v. Boney*, 43 S. C. 63, 20 S. E. 803; *Corley v. Evans*, 69 S. C. 520, 48 S. E. 459.

III. SUBDIVISION (2).

Jurisdiction is concurrent with that of court of common pleas.—*State v. Fillebrown*, 2 S. C. 404; *Rhoades v. Railroad*, 6 S. C. 385.

Jurisdiction does not embrace actions for damages more than \$100.—Jurisdiction of magistrates does not embrace actions for damages claimed above one hundred dollars. *Stegall v. Bolt*, 11 S. C. 522. Nor for damages indefinite in amount given by statute. *State v. Weeks*, 14 S. C. 400.

Action by a landlord against constable for funds applicable to rent in his hand.—An action by a landlord against a constable for proceeds of a crop in his hands applicable to rent is an action for damages for injury to rights pertaining to personal property within the meaning of this section. *Sullivan v. Ellison*, 20 S. C. 481.

Necessarily includes corporations.—This subdivision necessarily includes corporations. And magistrates may have jurisdiction even in a suit against a foreign corporation. *Dennis v. Atlantic Coast Line R. Co.*, 86 S. C. 258, 68 S. E. 465.

If the defendant is a domestic corporation the suit may be brought in any county where it maintains an agent and transacts its corporate business. *Dennis v. Atlantic Coast Line R. Co.*, 86 S. C. 258, 68 S. E. 465.

IV. SUBDIVISION (3).

Includes defendants appearing before or subject to the process of magistrate.—This section gives magistrates jurisdiction in such cases against all defendants subject to the process of the court or who may voluntarily appear therein. *Best v. Seaboard Airline Ry.*, 72 S. C. 479, 52 S. E. 223, cited in *Dennis v. Atlantic Coast Line Railway*, 86 S. C. 258, 68 S. E. 465.

And applies to a foreign corporation.—A magistrate has jurisdiction of an ac-

tion against a foreign corporation having property in the state to recover a penalty by due service of process. *Best v. Seaboard Airline Ry.*, 72 S. C. 479, 52 S. E. 223.

Right to object to jurisdiction may be waived.—Where the defendant in an action for a penalty residing in another county appeared and contested the case upon its merits the right to object to the jurisdiction of the magistrate to try such case was waived. *Jenkins v. Atlantic Coast Line R. Co.*, 84 S. C. 343, 66 S. E. 409. See, also, the authority therein cited; and see *Best v. Seaboard Airline Ry.*, 72 S. C. 479, 52 S. E. 223.

Penalties required to be recovered in a court of record cannot be recovered hereunder.—A forfeiture of twenty dollars under a statute which provides for its recovery in a court of record cannot be recovered hereunder. *State v. Weeks*, 14 S. C. 400.

V. SUBDIVISION (4).

Nor was such right affected by constitution of 1895.—The jurisdiction of magistrates to issue writs of attachment against the property of a non-resident was not affected by the constitution of 1895. *Bird v. Sullivan*, 58 S. C. 50, 36 S. E. 494.

Subdivision includes cases where defendant is a non-resident.—Under this subdivision a magistrate has jurisdiction, in an action by attachment against a non-resident, to at least render a judgment in rem. *Bird v. Sullivan*, 58 S. C. 50, 36 S. E. 494; *Burckhalter v. Jones*, 58 S. C. 89, 36 S. E. 495.

A non-resident defendant, by appearing on the day of trial, and contesting the case on the merits by denying the allegations of the complaint, gives the magistrate jurisdiction to render a judgment in personam. *Bird v. Sullivan*, 58 S. C. 50, 36 S. E. 494.

VI. SUBDIVISION (5).

Applied in *Cavender v. Ward*, 28 S. C. 470, 6 S. E. 302.

Cited but not construed in *Hagood v. Blythe*, 37 Fed. 249.

VII. SUBDIVISION (11)

Section not in conflict with constitution limiting actions ex delicto.—This provision allowing such action for recovery of property less in value than one hundred dollars is not in conflict with the constitution, which limits jurisdiction in actions "ex delicto" where damages do not exceed one hundred dollars. *Dillard v. Samuels*, 25 S. C. 318.

If the plaintiff does not claim immediate delivery, as authorized by the second sentence of this subdivision, then he must make the proof by affidavit as required in the latter part of the section. *Dillard v. Samuels*, 25 S. C. 318, 321.

Not necessary to allege in summons

that plaintiff is entitled to possession.—It is not necessary to allege in the summons that the plaintiff is entitled to the possession of the property; it is sufficient to allege that the defendant is in unlawful possession of the property belonging to the plaintiff. *Dillard v. Samuels*, 25 S. C. 318.

No jurisdiction where the alleged value of chattels is \$100 and damages also claimed.—A magistrate has no jurisdiction where the chattels are alleged to be of the value of \$100 and damages are claimed in addition. *Reynolds v. Phillips*, 72 S. C. 32, 51 S. E. 523.

Affidavit must state that value of property does not exceed \$100.—The affidavit must state that the value of the property does not exceed one hundred dollars. *Williams v. Irby*, 16 S. C. 371. But whether such statement is necessary in the circuit court on appeal has not been decided. *Id.* See, also, *Wright v. Lee*, 108 S. C. 357, 94 S. E. 873.

Variance between affidavit and pleadings may be amended. *Ehrhardt v. Bree-land*, 57 S. C. 142, 35 S. E. 537.

Affidavits to show demand may be heard on appeal to circuit court.—On appeal circuit court may hear affidavits to show demand before action of claim and delivery. *Burton v. Laurens Cotton Mills*, 64 S. C. 224, 41 S. E. 975.

Cited but not construed in *Kelley v. Kennemore*, 47 S. C. 256, 25 S. E. 134.

VIII. SUBDIVISION (12).

Refers exclusively to actions of claim and delivery.—This section is manifestly applicable to actions of claim and delivery only. *Kelley v. Kennemore*, 47 S. C. 256, 25 S. E. 134; *Hasten Furniture Co. v. Southern Ry.*, 82 S. C. 238, 64 S. E. 223.

Sufficiency of summons.—A summons which required the defendant to appear on the twentieth day from the service of the summons exclusive of the day of service at 10 o'clock A. M., was insufficient to give the justice jurisdiction to render a judgment at the time fixed in the summons. *Adkins v. Moore*, 43 S. C. 173, 20 S. E. 985.

Summons is defective if it names a day for trial more than twenty days after its date.—The summons is fatally defective if it names a day for trial more than twenty days after its date. *Simmons v. Cochran*, 29 S. C. 31, 6 S. E. 859. This case was distinguished in *State v. Smith*, 38 S. C. 270, 16 S. E. 997; reaffirmed in *Kelley v. Kennemore*, 47 S. C. 356, 25 S. E. 134.

Immaterial whether summons is addressed to defendant or officer.—It is immaterial whether the summons is addressed to the defendant or officer. *Bell v. Pruitt*, 51 S. C. 344, 29 S. E. 5.

Approval of surety by magistrate.—Where, upon delivery of undertaking in claim and delivery proceeding in magistrate's court, magistrate directed his constable to take property described in affidavit, such direction amounted to an approval of the surety by the magistrate. *Marshall Bros. Furniture Co. v. Drawdy*, 184 S. C. 492, 193 S. E. 49.

Plaintiff need not execute undertaking given by him in claim and delivery proceeding in magistrate's court. *Ibid.*

IX. SUBDIVISION (14).

Waiver of any irregularity or defect

in undertaking by not excepting.—The objection that the magistrate did not endorse his approval on an undertaking is waived by not excepting thereto. *Cromer v. Watson*, 59 S. C. 488, 38 S. E. 126.

X. SUBDIVISION (9 AND 10).

In ejectment proceeding before magistrate, against tenant holding over, subdivision 9, referring to actions brought for damages for fraud in the sale, purchase, or exchange of personalty has no application. 194 S. C. 469, 10 S. E. (2d) 3.

§ 258. Qualification of bail.—The qualification of bail must be as follows:

(1) Each of them must be a resident, and householder or freeholder within the State.

(2) They must each be worth the amount specified in the order of arrest, exclusive of property exempt from execution; but the judge or a magistrate, on justification, may allow more than two bail to justify severally in amounts less than that expressed in the order, if the whole justification be equivalent to that of two sufficient bail.

1932 Code, § 258; Civ. P. '22, § 214; Civ. P. '12, § 81; Civ. P. '02, § 72; 1870 (14) § 75.

§ 259. Justification of bail.—For the purpose of justification, each of the bail shall attend before the judge or magistrate at the time and place mentioned in the notice, and may be examined on oath, on the part of the plaintiff, touching his sufficiency, in such manner as the judge or magistrate, in his discretion, may think proper. The examination shall be reduced to writing, and subscribed by the bail, if required by the plaintiff.

1932 Code, § 259; Civ. P. '22, § 215; Civ. P. '12, § 82; Civ. P. '02, § 73; 1870 (14) § 76.

§ 260. Allowance of bail.—If the judge or magistrate find the bail sufficient he shall annex the examination to the undertaking, endorse his allowance thereon, and cause them to be filed with the clerk; and the sheriff shall, thereupon, be exonerated from liability.

1932 Code, § 260; Civ. P. '22, § 216; Civ. P. '12, § 83; Civ. P. '02, § 74; 1870 (14) § 77.

§ 261. Property—how taken when concealed in building or enclosure.—If the property, or any part thereof, be concealed in a building or enclosure, the constable shall publicly demand its delivery. If it be not delivered, he shall cause the building or enclosure to be broken upon, and take the property into his possession; and, if necessary, he may call to his aid the power of his county.

1932 Code, § 261; Civ. P. '22, § 217; Civ. P. '12, § 84; Civ. P. '02, § 75; 1870 (14) 78.

§ 262. Property—how kept.—When a constable shall have taken property, as in this chapter provided, he shall keep it in a secure place, and deliver it to the party entitled thereto, upon receiving his lawful fee for taking, and his necessary expenses for keeping the same.

1932 Code, § 262; Civ. P. '22, § 218; Civ. P. '12, § 85; Civ. P. '02, § 76; 1870 (14) 79.

§ 263. Claim of property by third person—trial—judgment—execution—defendant absent.—If the property taken be claimed by any other person than the defendant or his agent, and such person shall make affidavit to his title thereto, and right to the possession thereof, stating the grounds of such right and title, and serve the same upon the constable, the constables shall not be bound to keep the property or deliver it to the plaintiff, unless the plaintiff on demand of him or his agent, shall indemnify the constable against such claim, by an undertaking, executed by two sufficient sureties, accompanied by their affidavits, that they are each worth double the value of the property as specified in the affidavit of the plaintiff, and are freeholders and householders of the county. And no claim to such property, by any other person than the defendant or his agent, shall be valid against the constable, unless made as aforesaid; and notwithstanding such claim, when so made, he may retain the property a reasonable time to demand such indemnity.

The actions so commenced shall be tried in all respects as other actions are tried in the magistrates' courts.

The judgment for the plaintiff may be for the possession, or for the recovery of the possession, or the value thereof, in case a delivery cannot be had, and of damages for the detention. If the property have been delivered to the plaintiff, and the defendant claim a return thereof judgment for the defendant may be for a return of the property, or the value thereof, in case a return cannot be had, and damages for taking and withholding the same. An execution shall be issued thereon and if the judgment before the delivery of the possession of personal property, it shall require the officer to deliver the possession of the same, particularly describing it, to the party entitled thereto, and may, at the same time, require the officer to satisfy any costs or damages recovered by the same judgment out of the personal property of the party against whom it was rendered, to be specified therein, if a delivery thereof cannot be had. The execution shall be returnable within sixty days after its receipt by the officer to the magistrate who issued the same.

In all actions for the recovery of the possession of personal property, as herein provided, if the property shall not have been delivered to plaintiff, or the defendant by answer shall claim a return thereof, the magistrate or jury shall assess the value thereof, and the injury sustained by the prevailing party by reason of the taking or detention thereof, and the magistrate shall render judgment accordingly, with costs and disbursements.

If it shall appear by the return of a constable that he has taken the property described in the plaintiff's affidavit, and that defendant cannot be found, and has no last place of abode in said county, or that no agent of defendant could be found, on whom service could be made, the magistrate may proceed with the cause in the same manner as though there had been a personal service.

For the endorsement on said affidavit the magistrate shall receive an additional fee of twenty-five cents, which shall be included in the costs of the suit.

1932 Code, § 263; Civ. P. '22, § 219; Civ. P. '12, § 86; Civ. P. '02, § 77; 1870 (14) § 80.

Judgment failing to declare value of property awarded void.—A judgment in a claim and delivery proceedings before a magistrate which merely awarded the plaintiff the property in dispute without declaring the value of the property as provided for under this section is void. *Yarborough v. Dickerson*, 132 S. C. 168, 129 S. E. 136. See, also, *Wilkins v. Williams*, 128 S. C. 509, 122 S. E. 503.

Judgment may be given for value though the demand is for property.—Judgment may be given for the value of the property though the demand is only for its recovery and damages for its detention. *Joplin v. Carrier*, 11 S. C. 327.

But not in a case where party is entitled to general damages.—A judgment for the value of the property so demanded cannot be given in a case where the party is entitled to general damages. *Joplin v. Carrier*, 11 S. C. 327.

But plaintiff on appeal may elect to treat action as one for damages.—Where there are proper allegations the plaintiff may on appeal, in the circuit court, elect to treat the action as one for damages. *Williams v. Irby*, 16 S. C. 371.

Defendant cannot defeat action by showing title in third party.—In a claim and delivery proceeding the defendant cannot defeat the action by showing title in a third party. *Rogers v. Felder*, 98 S. C. 178, 82 S. E. 436.

New trial is the remedy where verdict is not in proper form.—Where the verdict is not in proper form, the trial justice cannot change it; new trial is the remedy. *Dubose v. Armstrong*, 29 S. C. 290, 6 S. E. 934.

Verdict is sufficient if it fixes right of defendant to return of property.—A verdict in an action of claim and delivery fixing the right of the plaintiff to have the property, or the value thereof, and the right of the defendant to deliver the property rather than pay the value if he so choose, is in full compliance with this section. *Bossard v. Vaughan*, 68 S. C. 96, 46 S. E. 523.

Verdict may be referred to the pleadings for a particular description of the property.—A verdict in claim and delivery may be referred to the pleadings for a more particular description of the property. *Bossard v. Vaughan*, 68 S. C. 96, 46 S. E. 523.

§ 264. No jurisdiction in certain cases.—But no magistrate shall have cognizance of a civil action:

(1) In which the State is a party, excepting for penalties and not exceeding one hundred dollars.

(2) Nor where the title to real property shall come in question.

(3) Nor of a civil action for an assault, battery, false imprisonment, libel, slander, malicious prosecution, criminal conversation, or seduction, where the damages claimed exceed one hundred dollars.

1932 Code, § 264; Civ. P. '22, § 220; Civ. P. '12, § 87; Civ. P. '02, § 78; 1870 (14) § 81; 1873 (15) 496.

Subdivision 2 does not apply to criminal cases.—It has been held that a magistrate had jurisdiction of a complaint for criminal trespass where the damages are less than \$20, though the defendant set up as his defense that the prosecutors had not title but that the title was in his wife. *State v. Holcomb*, 63 S. C. 22, 40 S. E. 1017.

Failure to follow prescribed procedure by defendant.—Where a railroad company sued in the magistrate's court for damages to the plaintiff's land by fire, did not follow the procedure prescribed by this and the four following sections, it is precluded from questioning the plaintiff's title to the land, and the magistrate has jurisdiction notwithstanding the constitution of 1895, article V, § 21. *Barnes v. Charleston & W. C. R. R. Co.*, 106 S. C. 227, 90 S. E. 1017.

Proceeding to eject tenant not included.—A proceeding before a trial

justice to eject a tenant who claims title in himself is not an action involving the title to land, but a summary proceeding, and the said justice has jurisdiction. *State v. Fickling*, 10 S. C. 301, cited with approval in *State v. Marshall*, 24 S. C. 507, also in *Swygert v. Goodwin*, 32 S. C. 146, 10 S. E. 933.

Mere denial of landlord's title will not oust jurisdiction.—The mere attempt to deny a landlord's title, or the assertion of a superior title will not oust the magistrate of jurisdiction in a summary proceeding. *Stewart-Jones Co. v. Shehan*, 127 S. C. 451, 121 S. E. 374. See, also, *Swygert v. Goodwin*, 32 S. C. 146, 10 S. E. 933.

As to answer of title, see section 265 and note thereto.

Magistrate may allow plaintiff to discontinue after dismissing complaint.—A magistrate, in whose court plaintiff sued for trespass for cutting timber, after dis-

missing complaint on motion of defendant on an answer of title to real property pursuant to this section, has discretion to allow plaintiff to discontinue. *Thomas v. Shea*, 111 S. C. 416, 98 S. E. 145.

Motion for discontinuance after defense of "title to real property" within discretion of magistrate.—See above catchline under section 265.

§ 265. Answer of title.—In every action brought in a court of magistrate where the title to real property shall come in question, the defendant may, either with or without other matter of defense, set forth in his answer any matter showing that such title will come in question. Such answer shall be in writing, signed by the defendant or his attorney, and delivered to the magistrate. The magistrate shall thereupon countersign the same and deliver it to the plaintiff.

1932 Code, § 265; Civ. P. '22, § 221; Civ. P. '12, § 88; Civ. P. '02, 79; 1870 (14) § 82.

Section does not apply to criminal cases.—This section does not apply to a criminal case where the title to real estate is an issue. *State v. Richardson*, 98 S. C. 147, 82 S. E. 353; *State v. Holcomb*, 63 S. E. 22, 40 S. E. 1017. See § 264 and note thereto.

Motion for discontinuance after defense of title to real property within discretion of magistrate.—A magistrate before whom an action is brought for trespass for cutting timber, where a defense is interposed of "title to real property" had the right in his discretion to grant an order allowing plaintiff to discontinue the suit. *Thomas v. Shea*, 111 S. C. 416, 98 S. E. 145.

Issue of title unless raised under this and the following section cannot be raised on appeal.—A tenant not raising

the issue of title in ejectment proceedings before a magistrate by methods prescribed under this and the following section cannot raise such question on appeal. *Bamberg Banking Co. v. Matthews*, 132 S. C. 130, 128 S. E. 718.

Where tenant did not deny execution of lease, and offered no evidence of duress and fraud in ejectment proceedings before magistrate, relation of landlord and tenant, which was preliminary question of fact for magistrate to determine, when question of title was raised by defendant, was established, and, as tenant cannot dispute landlord's title, issue of title could not arise, so as to defeat magistrate's jurisdiction. *Bamberg Banking Co. v. Matthews*, 132 S. C. 130, 128 S. E. 718. See also, *Burch v. Muldrow*, 141 S. C. 29, 139 S. E. 208.

§ 266. Written undertaking by defendant.—At the time of answering the defendant shall deliver to the magistrate a written undertaking, executed by at least one sufficient surety, and approved by the magistrate, to the effect that if the plaintiff shall, within twenty days thereafter, deposit with the magistrate a summons and complaint in an action in the circuit court for the same cause, the defendant will, within twenty days after such deposit, give an admission in writing to the service thereof.

Where the defendant was arrested in the action before the magistrate the undertaking shall further provide that he will at all times, render himself amenable to the process of the court during the pending of the action, and to such as may be issued to enforce the judgment therein. In case of failure to comply with the undertaking, the surety shall be liable not exceeding one hundred dollars.

1932 Code, § 266; Civ. P. '22, § 222; Civ. P. '12, § 89; Civ. P. '02, § 80; 1870 (14) § 83.

Issue of title unless raised under this section cannot be raised on appeal.—Bam-

berg Banking Co. v. Matthews, 132 S. C. 130, 128 S. E. 718.

§ 267. Suit discontinued on undertaking of defendant.—Upon the delivery of the undertaking to the magistrate the action before him shall be discontinued, and each party shall pay his own costs. The costs so paid by either party shall be allowed to him if he recover costs in the action,

to be brought for the same cause in the circuit court. If no such action be brought within thirty days after the delivery of the undertaking, the defendant's costs before the magistrate may be recovered of the plaintiff.

1932 Code, § 267; Civ. P. '22, § 223; Civ. P. '12, § 90; Civ. P. '02, § 81; 1870 (14) § 84.

§ 268. If undertaking not given.—If the undertaking be not delivered to the magistrate he shall have jurisdiction of the cause, and shall proceed therein; and the defendant shall be precluded, in his defense, from drawing the title in question.

1932 Code, § 268; Civ. P. '22, § 224; Civ. P. '12, § 91; Civ. P. '02, § 82; 1870 (14) § 85.

§ 269. If plaintiff's showing develop issue of title to real property.—If, however, it appear on the trial, from the plaintiff's own showing, that the title to real property is in question, and such title shall be disputed by the defendant, the magistrate shall dismiss the action and render judgment against the plaintiff for the costs.

1932 Code, § 269; Civ. P. '22, § 225; Civ. P. '12, § 92; Civ. P. '02, § 83; 1870 (14) 86.

§ 270. New action.—When a suit before a magistrate shall be discontinued by the delivery of an answer and undertaking, as provided in sections 265, 266 and 267, the plaintiff may prosecute an action for the same cause in the circuit court, and shall complain for the same cause of action only on which he relied before the magistrate, and the answer of the defendant shall set up the same defense only which he made before the magistrate.

1932 Code, § 270; Civ. P. '22, § 226; Civ. P. '12, § 93; Civ. P. '02, § 84; 1870 (14) § 87.

Proceeding in circuit court must be based on same cause of action.—Where in a suit for wilfully cutting and removing timber the defendant sets up title in himself and tenders proper undertaking, and the magistrate endorses on summons "this action is discontinued," ac-

tion brought in the circuit court must be on the same cause of action. Notice of the plaintiff that the case is withdrawn and discontinued, served after an order of the magistrate is not binding on the defendant. *High v. Wingo*, 84 S. C. 246, 66 S. E. 185.

§ 271. Costs.—If the judgment in the circuit court be for the plaintiff, he shall recover costs; if it be for the defendant, he shall recover costs, except that upon a verdict he shall pay costs to the plaintiff, unless the judge certify that the title to real property came in question on the trial.

1932 Code, § 271; Civ. P. '22, § 227; Civ. P. '12, § 94; Civ. P. '02, § 85; 1870 (14) § 88.

§ 272. Answer of title as to one cause of action.—If, in an action before a magistrate, the plaintiff have several causes of action, to one of which the defense of title to real property shall be interposed, and, as to such cause, the defendant shall deliver an answer and undertaking, as provided in sections 265 and 266, the magistrate shall discontinue the proceedings as to that cause, and the plaintiff may commence another action therefor in the circuit court. As to the other causes of action, the magistrate may continue his proceedings.

1932 Code, § 272; Civ. P. '22, § 228; Civ. P. '12, § 95; Civ. P. '02, § 86; 1870 (14) § 89.

§ 273. Docketing judgments — transcript — operation — sale — setting aside judgment—new trial.—A magistrate, on the demand of a party in whose favor he shall have rendered a judgment, shall give a transcript

thereof, which may be filed and docketed in the office of the circuit court of the county where the judgment was rendered. The time of the receipt of the transcript by the clerk shall be noted thereon and entered in the abstract of judgments, and from that time the judgment shall be a judgment of the circuit court, but no sale shall be made under any execution issued upon such judgment in the circuit court until the time for appealing from the judgment in the magistrate's court has expired, nor pending such appeal. If the judgment is set aside in the magistrate's court, it shall have the effect of setting aside the judgment filed and docketed in the circuit court. The filing and docketing such transcript in the circuit court shall not affect the right of the magistrate to grant a new trial. A certified transcript of such judgment may be filed and docketed in the clerk's office of any other county, and with like effect, in every respect, as in the county where the judgment was rendered.

1932 Code, § 273; Civ. P. '22, § 229; Civ. P. '12, § 96; Civ. P. '02, § 87; 1870 (14) § 90; 1887 (19) 831.

Transcript of valid judgment only can be filed.—Before a transcript can be filed in the clerk's office there must be a valid judgment of the trial justice and if such judgment is a nullity then no transcript of it can impart vitality to it. *Barron v. Dent*, 17 S. C. 75.

As to judgment constituting a lien after it is filed, see § 743 and note there-to.

And transcript must show everything necessary to jurisdiction.—The transcript must show everything necessary to give jurisdiction to the trial justice to make the judgment valid. *Benson v. Carrier*, 28 S. C. 119, 5 S. E. 272, citing *Barron v. Dent*, 17 S. C. 75.

Though a showing of the filing of summons, pleadings and proceedings immaterial.—This section requires a filing of the transcript of the judgment and not of the summons, pleadings, and proceedings, which, while the basis of, are not the judgment per se and such matter need not be shown. *Love v. Dorman*, 91 S. C. 384, 74 S. E. 829.

There is no limit of time within which the transcript must be filed. *Rhoad v. Patrick*, 37 S. C. 517, 16 S. E. 536.

An execution is to be issued on the transcript filed.—Where such transcript of the justice's judgment has been filed an execution is to be issued thereon and may be enforced without circuit court's leave at any time within ten years. *Amick v. Amick*, 59 S. C. 70, 37 S. E. 39.

Justice has no power to vacate a judgment after filing of transcript.—A trial

justice has no power to vacate a judgment for fraud obtained in his court especially after a transcript had been filed in the circuit court. *Brown v. Buttz*, 15 S. C. 488.

Signature of transcript proper when signed by authorized clerk of justice.—Where a trial justice was authorized to appoint a clerk, a transcript of a judgment which was rendered by the said justice is properly signed when signed by his clerk. *Brown v. Buttz*, 15 S. C. 488.

A judgment so filed cannot be attacked collaterally.—Such judgment as filed is of the nature of a judgment of a court of record and general jurisdiction, and cannot be attacked collaterally but only by direct proceeding. *Love v. Dorman*, 91 S. C. 384, 74 S. E. 829. See, also, *O'Rourke v. Atlantic Paint Co.*, 91 S. C. 399, 74 S. E. 930; such judgments are entitled to all presumptions attaching to judgments of the circuit court. *Long v. Cumings*, 91 S. C. 521, 75 S. E. 134; when such transcript is filed the judgment becomes the judgment of the court of common pleas. *Rhoad v. Patrick*, 37 S. C. 517, 16 S. E. 536; of the circuit court. *Lawrence v. Isear*, 27 S. C. 244, 3 S. E. 222.

Section inconsistent with subdivisions 17 and 18 of next section.—It was said in the dissenting opinion in the case of *Lawrence v. Isear*, 27 S. C. 244, 3 S. E. 222, that this is inconsistent with subdivisions 17 and 18 of section 274.

§ 274. Rules.

(1) **Pleadings.**—The following rules shall be observed in the courts of magistrates:

- (1) The pleadings in the courts are: 1. The complaint by the plaintiff.
2. The answer by the defendant.

(2) The pleadings may be oral or in writing; if oral, the substance of them shall be entered by the magistrate in his docket; if in writing, they shall be filed by him, and a reference to them shall be made in the docket.

(3) The complaint shall state, in a plain and direct manner, the facts constituting the cause of action.

(4) The answer may contain a denial of the complaint, or any part thereof, and also a notice, in a plain and direct manner, of any facts constituting a defense or counterclaim.

(5) Pleadings are not required to be in any particular form, but must be such as to enable a person of common understanding to know what is intended.

(6) Either party may demur to a pleading of his adversary, or to any part thereof, when it is not sufficiently explicit to enable him to understand it, or it contains no cause of action or defense, although it be taken as true.

(7) If the court deem the objection well founded, it shall order the pleadings to be amended; and, if the party refuse to amend, the defective pleading shall be disregarded.

(8) **Proof of service and no answer—liquidated and unlimited demand — proof of claim.**—In any action on contract where a defendant does not appear and answer, the plaintiff may file proof of the service of the summons and complaint, or of the summons, on one or more of the defendants, and that no answer or demurrer has been served upon him. When the action is for the recovery of money only, judgment may be given for the plaintiff by default, if the demand be liquidated, and if unliquidated, and the plaintiff itemize his account and append thereto an affidavit that it is true and correct and no part of the sum sued for has been paid by discount or otherwise, and a copy be served with the summons on the defendant, and the defendant shall neither answer or demur, the plaintiff shall have judgment for the sum sued for, as in the case of liquidated demands. In all other cases where the defendant fails to appear and answer, the plaintiff cannot recover without proving his case.

1887 (19) 833.

(9) **Action or defense founded upon an account.** — In an action or defense founded upon an account, or an instrument for the payment of money only, it shall be sufficient for a party to deliver the account or instrument to the court, and to state that there is due to him thereon, from the adverse party, a specified sum, which he claims to recover or set off.

1870 (14) 423, § 91.

(10) **Variance.**—A variance between the proof on the trial and the allegations in a pleading shall be disregarded, as immaterial, unless the court shall be satisfied that the adverse party has been misled to his prejudice thereby.

(11) **Amendment of pleadings.**—The pleadings may be amended at any time before the trial, or during the trial, or upon appeal, when, by such amendment, substantial justice will be promoted. If the amendment be made after the joining of the issue, and it be made to appear to the satisfaction of the court, by oath, that an adjournment is necessary to the adverse party, in consequence of such amendment, an adjournment shall be granted. The court may also in its discretion, require as a condition of an

amendment, the payment of costs to the adverse party.

(12) Issuance of magistrates' executions — sales thereunder. — Execution may be issued on a judgment heretofore or hereafter rendered in magistrates' courts at any time after the rendering of such judgment, and within three years after the rendition thereof, and shall be returnable sixty days from date of the same, but no sale thereunder shall be made until after the time for appealing has expired, nor pending such appeal: *provided*, that in cases for the claim and delivery of personal property where bond for the property claimed has been properly given by either party, the status of such property shall not be changed until after the expiration of the time for appealing has expired, or until such appeal has terminated.

1887 (19) 832.

See § 744 for issuance of executions.

(13) Issuance of execution to sheriff. — If the judgment be docketed with the clerk of the circuit court, the execution shall be issued by him to the sheriff of the county, and have the same effect, and be executed in the same manner, as other executions and judgments of the circuit court.

(14) Refusing exhibit of account or statement of nature. — The court may, at the joining of the issue, require either party, at the request of the other, at that or some other specified time, to exhibit his account, or state the nature thereof as far as may be in his power, and, in case of his default, preclude him from giving evidence of such parts thereof as shall not have been so exhibited or stated.

(15) Forms of action, parties, evidence, commencement of action and service on corporations. — The provisions of this code of procedure, respecting forms of actions, parties to actions, the rules of evidence, the times of commencing actions, and the service of process upon corporations, shall apply to these courts.

The defendant may, on the return of process, and before answering, make an offer in writing to allow judgment to be taken against him for an amount, to be stated in such offer, with costs. The plaintiff shall thereupon, and before any other proceeding shall be had in the action, determine whether he will accept or reject such offer. If he accept the offer, and give notice thereof in writing, the magistrate shall file the offer and the acceptance thereof, and render judgment accordingly. If notice of acceptance be not given, and if the plaintiff fail to obtain judgment for a greater amount, exclusive of costs, than has been specified in the offer, he shall not recover costs, but shall pay to the defendant his costs accruing subsequent to the offer.

(16) Time for serving complaint—when and how shortened. — When twenty-five or more dollars is demanded, the complaint shall be served on the defendant not less than twenty days; and where less than that sum is demanded, not less than five days before the day therein fixed for trial: *provided*, that if the plaintiff shall make out that he is apprehensive of losing his debt by such delay, and the magistrate considers that there is good reason therefor (the grounds of such apprehension being set out in an affidavit and served with a copy of the complaint), he may make such process returnable in such time as the justice of the case may require.

1891 (20) 1113.

(17) **New trials.**—Any magistrate court of this State shall have power to grant a new trial in any case tried in the said courts for reasons for which new trials have usually been granted in the courts of law of this State. The granting of a new trial shall in no wise affect the right and duty of such magistrate to change the venue of said case, as provided in subdivision 19 of this section.

1876 (16) 60; 1908 (25) 1032.

(18) **Time for motion for new trial.**—No motion for a new trial shall be heard unless made within five days from the rendering of the judgment: *provided*, that the right of appeal from the judgment shall exist for five days after the refusal of a motion for a new trial.

(19) **Change of venue.**—Magistrates shall have the power to change the venue in all cases, civil and criminal, pending before them: *provided*, that in counties where they have separate and exclusive territorial jurisdiction the change of venue shall be to another magistrate's district in the same county. Whenever either party in a civil case, or the prosecutor or accused in a criminal case, which is to be tried before a magistrate, shall file with the magistrate issuing the paper an affidavit to the effect that he does not believe he can obtain a fair trial before the magistrate, the papers shall be turned over to the nearest magistrate not disqualified from hearing said cause in the county, who shall proceed to try the case as if he had issued the papers: *provided*, such affidavit shall set forth the grounds of such belief, and in civil cases two days' notice of the application for change of venue shall be given to the adverse party. One such transfer only shall be allowed each party in any case.

1932 Code, § 274; Civ. P. '22 § 230; Civ. P. '12, § 97; Civ. P. '02, § 88; 1887 (19) 787; 1896 (22) 13.

I. In general.

II. Rule (2).

III. Rule (4).

IV. Rule (5).

V. Rule (6).

VI. Rule (7).

VII. Rule (8).

VIII. Rule (9).

IX. Rule (11).

X. Rule (12).

XI. Rule (13).

XII. Rule (15).

XIII. Rule (16).

XIV. Rule (17).

XV. Rule (18).

XVI. Rule (19).

I. IN GENERAL.

Section must be read in connection with preceding section.—This section must be read in connection with the preceding section, in such a manner as to give full effect to both. *Lawrence v. Isear*, 27 S. C. 244, 3 S. E. 222.

II. RULE (2).

A natural inference that all the proceedings may be oral.—The inference would be natural that all of the proceedings (notices, etc.) in such courts may also be oral in the absence of any statutory provisions to the contrary. *Mitchell v. Bates*, 57 S. C. 44, 35 S. E. 420.

The defendant may plead orally to a written complaint. *Williams v. Irby*, 15 S. C. 458.

Written pleadings must allege, or magistrate must enter in his docket, facts essential to jurisdiction; and statement by magistrate in his return to court of common pleas that plaintiff at the time of application for writ of ejectment

against tenant holding over, satisfied him that due demand had been made for possession of the premises and refused, is not sufficient as being an entry in the magistrate's docket. *Sessions v. Johnson*, 185 S. C. 177, 193 S. E. 635.

III. RULE (4).

Notice of the interposition of a counterclaim must be given. *Williams v. Irby*, 15 S. C. 458.

As to effect of counterclaim on jurisdiction of court of limited jurisdiction, see § 257, analysis line II.

A demand originating in contract cannot be pleaded as a counterclaim in an action for the recovery of a specific chattel. *Williams v. Irby*, 15 S. C. 458.

Killing of horse interposed as counterclaim to action for wages.—In an action to recover the balance due a farm laborer for services, a counterclaim may be based on the allegation that he killed a horse while working it. *Haygood v. Boney*, 43 S. C. 63, 20 S. E. 803.

IV. RULE (5).

Not necessary for a summons to show residence of defendant in county.—It is not necessary for a summons in a civil case before a magistrate to show the residence of the defendant in the county. It is sufficient if the record shows it. *Hall v. Sullivan*, 70 S. C. 397, 50 S. E. 27. See, also, *Jenkins v. Southern R. R.*, 73 S. C. 292, 53 S. E. 481; *Brunson v. Furtick*, 72 S. C. 579, 52 S. E. 424, 5 Ann. Cas. 307.

Illustration as to the sufficiency of the complaint.—Where the complaint clearly showed that the plaintiff was suing for the per diem penalty for delay in transportation of freight as provided for by statute such complaint was sufficient. *Farrell v. Atlantic Coast Line R. Co.*, 82 S. C. 410, 64 S. E. 226.

Cited but not construed in *Benson v. Carrier*, 28 S. C. 119, 5 S. E. 272; *Dillard v. Samuels*, 25 S. C. 318; *Riggs v. Wilson*, 30 S. C. 172, 8 S. E. 848.

V. RULE (6).

Technical rules of procedure are not applicable in magistrate's courts.—Technical rules of procedure are not applicable in magistrate's courts and make little difference in what form objections are raised, provided they are made in due time. *Darby v. S. Ry. Co.*, 108 S. C. 145, 93 S. E. 716.

Cited but not construed in *Holladay v. Hodge*, 84 S. C. 91, 65 S. E. 952; *Lookout Mt. Medicine Co. v. Hare*, 56 S. C. 456, 35 S. E. 130.

VI. RULE (7).

Strickness in granting leave to amend not applied in magistrate's court. *Lookout Mt. Medicine Co. v. Hare*, 56 S. C. 456, 35 S. E. 130.

And order may grant leave to amend as the plaintiff may advise.—Order granting leave to amend may grant the plaintiff leave to amend as he may advise. *Lookout Mt. Medicine Co. v. Hare*, 56 S. C. 456, 35 S. E. 130.

Cited but not construed in *Holladay v. Hodges*, 84 S. C. 91, 65 S. E. 952.

VII. RULE (8).

See § 586 and the note thereto.

The last clause of this subdivision applies to cases of default. *Barron v. Dent*, 17 S. C. 75.

Endorsement showing hearing not sufficient to show defendant appeared and defended.—The fact that there were endorsements upon the summons that there was a hearing and examination of witnesses is not sufficient to show that the defendant appeared and defended. *Barron v. Dent*, 17 S. C. 75.

Nor can such showing be made by parol testimony.—Where it appears by endorsements on the summons that there was a hearing and examination of wit-

nesses, it cannot be shown by parol testimony that the defendant appeared and defended. *Barron v. Dent*, 17 S. C. 75.

Question as to the necessity of a summons in a magistrate's court.—There is no express requirement for a summons in a magistrate's court except in § 257. See *Hasten Furniture Co. v. Southern Ry.*, 82 S. C. 238, 64 S. E. 223.

VIII. RULE (9).

This subdivision does not nullify the last clause of the preceding subdivision, and does not apply to default cases. *Barron v. Dent*, 17 S. C. 75.

IX. RULE (11).

Cross reference.—As to amendments after demurrer, see § 493 and note thereto. As to amendments by the court, see § 494, and note thereto.

Discretion should be exercised in the promotion of justice.—Under this subdivision the magistrate should exercise discretion to the end that no prejudice shall result to the litigants by allowing amendments to the pleading. *Holladay v. Hodge*, 84 S. C. 91, 65 S. E. 952.

Statute does not require service of amended pleadings on adverse party.—The statute does not require that the pleadings be served on the adverse party after amendment. *Holladay v. Hodge*, 84 S. C. 91, 65 S. E. 952.

Summons may be amended to conform to proof.—It is not error for a magistrate to permit a summons to be amended by changing the name of the corporation defendant to the firm name to conform to the proof. *Pierce v. Varn Byrd & Co.*, 76 S. C. 359, 57 S. E. 184.

And the sheriff's return may be amended.—Return of a sheriff on summons in attachment may be shown to be incorrect and an amendment allowed. *Sanders v. Landreth Seed Co.*, 91 S. C. 26, 74 S. E. 120.

Applied as to amendment during trial. *Harby v. Wells*, 52 S. C. 156, 29 S. E. 563; *Lookout Mt. Medicine Co. v. Hare*, 56 S. C. 456, 35 S. E. 130.

X. RULE (12).

As to claim and delivery of personal property, see §§ 552 et seq. and notes there placed.

Mere entry of judgment does not create a lien.—The mere entry of a judgment does not create a lien on personal property unless there is execution and levy thereunder as required by this subdivision and § 744. *State v. McCary*, 120 S. C. 361, 113 S. E. 275. See § 273 and the note thereto.

Liability of justice for damages resulting from issue of execution.—In issuing an execution the trial justice acts judicially and is not liable in damages therefor unless it was done wilfully or

corruptly. *McCall v. Cohen*, 16 S. C. 445; cited with approval in *Abrams v. Carlisle*, 18 S. C. 242.

Issuance of execution before expiration of period for appeal.—The question whether a trial justice has the right to have his execution executed within the time allowed for appeal or motion for new trial, was raised but not decided in *Abrams v. Carlisle*, 18 S. C. 242, 245, but the court did say that it would be better practice for him to consider the case still pending until such time had expired.

XI. RULE (13).

As to docketing judgments, see § 273, and note thereto.

Cited but not construed in *Amick v. Amick*, 59 S. C. 70, 37 S. E. 39; *Bragg v. Thompson*, 19 S. C. 572; *Rhoad v. Patrick*, 37 S. C. 517, 16 S. E. 536.

XII. RULE (15).

Liability of plaintiff for costs if he recover less than defendant's offer.—The plaintiff is liable for all costs of the case subsequent to the defendant's offer if he refuses to accept such offer and recovers less. *Williford v. Gadsden*, 27 S. C. 87, 2 S. E. 858.

A magistrate has power to appoint a guardian ad litem.—Under this section and § 401 a magistrate has power to appoint a guardian ad litem in a suit in his court. *Wideman v. Patton*, 64 S. C. 408, 42 S. E. 190.

Right of cross examination of witnesses.—This section makes applicable in a magistrate court, the general principle giving a litigant the right to cross-examine his opponent's witnesses. See *Dillard v. Samuels*, 25 S. C. 318, 322.

Cited but not construed in *Kelley v. Kennemore*, 47 S. C. 256, 25 S. E. 134; *Darby v. Southern Ry. Co.*, 108 S. C. 145, 93 S. E. 716.

XIII. RULE (16).

In general.—In the absence of fraud or gross imposition, the law vests the trial justice with the responsibility of deciding if these requirements as set out by the proviso are met. *Cothran v. Knight*, 47 S. C. 243, 25 S. E. 142.

Summons requiring appearance on twentieth day void.—A summons requiring appearance on the twentieth day is void. *Adkins v. Moore*, 43 S. C. 173, 20 S. E. 985; *Paul v. So. Ky. Co.*, 50 S. C. 23, 27 S. E. 526. Cited also, in *Kelley v. Kennemore*, 47 S. C. 256, 25 S. E. 134.

But summons to appear on twenty-first day is sufficient.—A summons requiring the defendant to appear on the twenty-first day after the service thereof exclusive of the day of service is sufficient. *Wideman v. Pruitt*, 52 S. C. 84, 29 S. E. 405.

In a case where the defendant appeared and objected to the jurisdiction of his person such objection being overruled the defendant withdrew from the case and did nothing to waive his twenty day notice, a summons to appear in 15 days was illegal, and the judgment thereon was voidable for lack of jurisdiction. *Able v. Hall*, 101 S. C. 24, 85 S. E. 165.

As to computation of time, see §§ 821, 822, and their respective notes.

Waiver of the twenty day notice.—The defendant may waive the twenty days' notice, and if he goes to trial on less notice without objection, he is bound by the judgment. *Benson v. Carrier*, 28 S. C. 119, 5 S. E. 272; *Cavender v. Ward*, 28 S. C. 470, 6 S. E. 302.

Waiver of defect in summons by appearing and pleading.—A defect in the summons is waived by the appearance and pleading to the merits. *Williams v. Garvin*, 51 S. C. 399, 29 S. E. 1; *Rosamond v. Earle*, 46 S. C. 9, 24 S. E. 44; *Bird v. Sullivan*, 58 S. C. 50, 36 S. E. 494.

Objections as to the jurisdiction of the court may be waived by appearing without objecting to such jurisdiction. *Grant v. Clinton Cotton Mills*, 56 S. C. 554, 35 S. E. 193.

Omission of name of trial justice on summons cured by written acceptance.—If the omission of the name of the trial justice on the original summons was an irregularity of procedure, it was cured by the written acceptance of the defendant. *Benson v. Carrier*, 28 S. C. 119, 5 S. E. 272.

A special appearance entered for the purpose of objecting to the jurisdiction of the magistrate precludes the consideration of any other questions. *Wideman v. Pruitt*, 52 S. C. 84, 29 S. E. 405.

Dating is not requisite to the validity of a summons.—Because a summons in a justice's court is not dated is not ground for reversal, unless it gives no notice to the defendant of the day of trial in the magistrate's court. *Butler Bros. v. Welch*, 76 S. C. 130, 56 S. E. 668, the defendant in such case being unable to show that he was misled by such omission.

The summons under this proviso may be made returnable on the same day it is served. *Cothran v. Knight*, 47 S. C. 243, 25 S. E. 142.

Summons alone does not give jurisdiction.—It is not the summons alone which gives jurisdiction to a trial justice. *Benson v. Carrier*, 28 S. C. 119, 5 S. E. 272.

Defendant should be given twenty days after summons to answer complaint.—Where a magistrate on a motion

made on the day of trial to make the paper served more definite as a complaint, held that the paper served was only a summons, and then permitted the plaintiff to file a complaint, he should have given the defendant twenty days in which to answer the complaint. *Hasten Furniture Co. v. Southern Ry.*, 82 S. C. 238, 64 S. E. 223.

Where time for answer is shortened some fact must be stated to show that the debt would otherwise be lost. *Moore v. Southern Ry.*, 76 S. C. 335, 56 S. E. 971.

Service of summons upon one member of partnership.—Service of a summons of a justice against a firm or one member thereof and a judgment following such service binds the partnership property and that of the individual served. *Pierce v. Varn Byrd & Co.*, 76 S. C. 359, 57 S. E. 184; *Hasten Furniture Co. v. Southern Ry.*, 82 S. C. 238, 64 S. E. 233. See § 438 and the note thereto.

Cited but not construed in *Kelley v. Kennemore*, 47 S. C. 256, 25 S. E. 134; *State v. Platt*, 154 S. C. 1, 151 S. E. 206; *McDonald v. Floyd*, 91 S. C. 118, 73 S. C. 769.

XIV. RULE (17).

For full treatment of the subject of granting new trials by circuit courts, see § 34 and the note thereto.

Appeal from order granting a new trial lies.—An appeal lies to the circuit court from an order of a magistrate granting a new trial. *Redfearn v. Douglass*, 35 S. C. 569, 15 S. E. 244; cited in *Speer v. Meschine*, 46 S. C. 505, 24 S. E. 329.

The state has no right to appeal from an order granting a new trial in a case where the order is based in part upon evidentiary facts. *State v. Lynn*, 120 S. C. 258, 113 S. E. 74.

As to statutory provisions for an appeal from a magistrate court in criminal cases, see § 1024 of the criminal code and note thereto.

But reasons for granting a new trial cannot be questioned on appeal after retrial.—On the failure of a party to appeal from the order of the trial justice granting a new trial he cannot on appeal, after retrial, question the sufficiency of the reasons for granting the new trial. *Speer v. Meschine*, 46 S. C. 505, 24 S. E. 329.

Motion for a new trial is not a condition precedent to an appeal. *Minnick v. Fort*, 13 S. C. 215.

A new trial will not be granted where irrelevant testimony is received, over an objection, which could not have affected the verdict in any manner. *Riggs v. Wilson*, 30 S. C. 172, 8 S. E. 848.

Subdivision said to be inconsistent

with § 273.—It was said in the dissenting opinion in the case of *Lawrence v. Isear*, 27 S. C. 244, 3 S. E. 222, that this subdivision and subdivision 18 are inconsistent with § 273.

Cited but not construed in *O'Rourke v. Atlantic Paint Co.*, 91 S. C. 399, 74 S. E. 930.

XV. RULE (18).

Notice of motion must be given within five days.—The notice of a motion for a new trial must be given within five days. *Doty v. Duvall*, 19 S. C. 143.

But hearing of a motion for a new trial may be after such period.—The hearing of the motion for a new trial need not be within five days after judgment. *Whetstone v. Livingstone*, 54 S. C. 539, 32 S. E. 561.

It will be seen that the limitation is that the motion for a new trial must be made and is not that the motion must be decided within five days from judgment. *Speer v. Meschine*, 46 S. C. 505, 24 S. E. 229.

Motion may be made on a legal holiday.—The motion for a new trial as provided for under this subdivision may be made on a legal holiday. *Mitchell v. Bates*, 57 S. C. 44, 35 S. E. 420.

When the time on notice of appeal begins to run.—Where a magistrate does not render judgment on the day the case is tried but reserves the decision, a party's time to appeal or move for a new trial does not begin until he has notice of trial. *O'Rourke v. Atlantic Paint Co.*, 91 S. C. 399, 74 S. E. 930.

New trial cannot be granted by magistrate after docketing of judgment in circuit court.—After the judgment has been docketed in the clerk's office of the circuit court the trial justice has no jurisdiction to grant a motion for a new trial even if the motion is heard within five days from the rendering of the judgment. *Lawrence v. Isear*, 27 S. C. 244, 3 S. E. 222.

XVI. RULE (19).

Cross reference.—As to power of circuit courts to change venue in civil and criminal cases, see § 35 and the note thereto. As to change of place of trial, see § 426 and note thereto.

Duty is mandatory only after strict compliance with section.—There must be a strict compliance with all of the requirements of the subdivision before it becomes the mandatory duty of the magistrate to change the venue. *State v. Conkle*, 64 S. C. 371, 42 S. E. 173; *Bacot v. Deas*, 67 S. C. 245, 45 S. E. 171; *Witte v. Cave*, 73 S. C. 15, 52 S. E. 736; cited in *Mayes v. Evans*, 80 S. C. 362, 61 S. E. 216, 657.

But where a party files a sufficient

affidavit a grant of change of venue is mandatory.—Where a party files a sufficient affidavit as provided for by this section, a grant of change of venue is mandatory. *State v. Conkle*, 64 S. C. 371, 42 S. E. 173; cited in *Bacot v. Deas*, 67 S. C. 245, 45 S. E. 171; *Brown v. Kolb*, 92 S. C. 309, 75 S. E. 529. And it is reversible error of law to proceed with the trial. *Witte v. Cave*, 73 S. C. 15, 52 S. E. 736, and cases therein cited.

A motion for a change of venue must be made before day of trial.—A motion to transfer a cause from one magistrate to another should be made before the day appointed for the trial unless based upon facts discovered later. *McNair v. Tucker*, 24 S. C. 105; cited with approval in *Mayes v. Evans*, 80 S. C. 362, 61 S. E. 216, 657.

But may be made after a mistrial. *Sanders v. Hayes*, 128 S. C. 181, 122 S. E. 572.

Two days' notice is necessary except where the facts are discovered too late to give such notice.—The two day notice as provided for under this section, is necessary for a motion for a change of venue before a magistrate unless the facts stated in the affidavit show that the applicant became aware of the facts at the time when he could not have given the two days' notice. *Mayes v. Evans*, 80 S. C. 362, 61 S. E. 216, 657.

The party must make the affidavit himself.—*Cromer v. Watson*, 59 S. C. 488, 38 S. E. 126, 128.

The affidavit must state reasons why a fair trial cannot be had.—The affidavit as prescribed by this section for a change of venue in a magistrate's court must state the reasons why a fair trial cannot be had. *Bacot v. Deas*, 67 S. C. 245, 45 S. E. 171. Cited with approval in *Mayes v. Evans*, 80 S. C. 362, 61 S. E. 216, 657.

And it should state facts not opinions.—The affidavit should state facts tending to show that a fair trial cannot be obtained before the magistrate. It is not sufficient to state the mere opinion of the affiant. *Witte v. Cave*, 73 S. C. 15, 52 S. E. 736; *State v. Conkle*, 64 S. C. 371, 42 S. E. 173; *Bacot v. Deas*, 67 S. C. 245, 45 S. E. 171; cited in *Mayes v. Evans*, 80 S. C. 362, 61 S. E. 216.

Such facts as should be stated in the affidavit provided for by this section as would constitute a basis for an indictment for perjury. *Witte v. Cave*, 73 S. C. 15, 52 S. E. 736, cited in *Mayes v. Evans*, 80 S. C. 362, 61 S. E. 216, 657; *Brown v. Kolb*, 92 S. C. 309, 75 S. E. 529.

Statement of magistrate that applicant had no case does not warrant a change of venue.—An affidavit which

stated that the magistrate had said in the presence of the parties that the party so moving for a change of venue did not have a case is not sufficient to warrant a change of venue. *Mayes v. Evans*, 80 S. C. 362, 61 S. E. 216, 657.

Affidavits cannot be amended at hearing.—An affidavit for a change of venue or an action tried before a magistrate cannot be amended at the hearing. *Bacot v. Deas*, 67 S. C. 245, 45 S. E. 171.

Affidavit must contain such statements as would form basis of perjury indictment if false; and must be stated with such definiteness and certainty that the court can determine their sufficiency; and if facts are stated on information and belief the sources of information and the grounds of belief must be stated with particularity and certainty. *Startex Mills v. Comer*, 184 S. C. 126, 191 S. E. 903.

Statements as to action of magistrate in other similar causes not sufficient to show prejudice against tenant in ejectment action. *Ibid.*

Statement of recorder that he will willingly for city and accused to voluntarily compromise case in which accused was charged with petit larceny, if accused would pay city fine of \$15, does not show such prejudice as to require change of venue. *City of Sumter v. Owens*, 181 S. C. 540, 188 S. E. 192.

Affidavit that ill feeling existed between magistrate and defendant, growing out of the dissatisfaction of defendant with the manner in which magistrate as a practicing attorney handled legal matters for defendant and defendant's withdrawal of such matters from magistrate's hands, was sufficient to entitle defendant to change of venue. *Browning Mfg. Co., Inc. v. Brunson*, 187 S. C. 278, 197 S. E. 311.

Where magistrate issues warrant for an offense beyond his jurisdiction to try, accused may either demand a preliminary hearing before that magistrate or may demand a removal of the hearing to the next magistrate. *Clemmons v. Nicholson*, 188 S. C. 124, 198 S. E. 180.

But magistrate abused his discretion in transferring warrant to another magistrate for preliminary hearing in absence of affidavit for removal being filed by accused. *Ibid.*

But where neither state nor accused objected and both prosecutor and accused appeared before the other magistrate, second magistrate's discharge of accused ended the case, as respects accused's grounds for malicious prosecution action, since second magistrate's decision was not void but was at most only voidable. *Ibid.*

§ 275. Waiver of jurisdiction in actions in magistrates' courts, brought in wrong county.—When any civil action cognizable by magistrates shall be brought in the wrong county, the mere failure of the defendant to appear shall not be deemed a waiver of any objection such defendant may have to the jurisdiction of the magistrate: *provided*, that nothing herein contained shall be construed to prevent any positive action of such defendant from which an intention to waive the jurisdictional objection might be inferred from operating as such waiver.

1932 Code, § 275; Civ. P. '22, § 231; 1919 (31) 51.

CHAPTER 6

The Civil and Criminal Court of Charleston

276. Established—territorial jurisdiction.

277. Jurisdiction.

278. Judge.

279. Magistrates.

280. Time call docket.

281. Jury commissioners—drawing of jurors.

282. Prosecution of criminal cases.

283. Contempt.

284. Clerk—stenographer.

285. Pay of jurors—sheriff's fee—docket fee.

286. Appeals—testimony—notice.

287. Entry of judgments, execution and transcript.

288. Procedure.

288-1. Transfer of causes.

§ 276. Established—territorial jurisdiction.—A court inferior to the circuit courts, and to be known as "The Civil and Criminal Court of Charleston", is hereby established for the city of Charleston, and the territory adjacent thereto in the county of Charleston, west of the Cooper River.

1932 Code, § 276; Civ. P. '22, § 232; Civ. C. '12, § 1421; Civ. P. '12, § 98; 1934 (38) 1581.

See Const. art. 5, § 1; art. 3, § 34 and, art. 8, § 1 and notes thereto.

This section is constitutional.—This section is constitutional as within the meaning of the term "inferior court" as

used in const. art. 5, § 1; *Grimball v. C. W. Parham Co.*, 96 S. C. 443, 81 S. E. 186; *City of Columbia v. Smith*, 105 S. C. 348, 89 S. E. 1028.

§ 277. Jurisdiction—trials—appeals.—The said civil and criminal court shall have such jurisdiction as heretofore provided for by law for the judicial magistrate's court in said city and county, and in all civil actions heretofore cognizable within the said territorial limits, wherein the amount sued for or the value of the property claimed, exclusive of costs, does not exceed one thousand five hundred dollars; but such jurisdiction shall not extend to cases where the title to real estate is in question, nor to cases in chancery, and shall be concurrent with the courts of common pleas therein, in matters within the jurisdiction of the courts herein established. The civil and criminal court of Charleston shall have jurisdiction concurrent with the court of general sessions to try all criminal cases arising in the territorial jurisdiction of said civil and criminal court of Charleston, except cases of murder, manslaughter, rape or attempt to rape, arson, common law burglary, bribery or perjury, and except in other cases in which the maximum sentence may be for a longer term of imprisonment than ten years, and the judge of the civil and criminal

court of Charleston shall have power and authority to impose sentences in such cases, upon guilty pleas or convictions, as provided by law. When the grand jury in the court of general sessions for Charleston County shall have returned a true bill upon the indictment in any case within the jurisdiction of the civil and criminal court of Charleston, as prescribed and limited in this section, the presiding judge of said court of general sessions may, upon motion of the solicitor of the circuit, make an order transferring any such case to the civil and criminal court of Charleston for trial; and the clerk of the court of general sessions shall immediately deliver the indictment and other papers in such case, including all appearance recognizance filed therein, which shall thenceforth be returnable to and enforceable in said civil and criminal court of Charleston, together with a certified copy of such order, to the judge of the civil and criminal court of Charleston, who shall forthwith enter the same upon a "Criminal Docket" to be provided by the county supervisor for such purpose, and shall safely keep such papers. The cases shall be tried at such time as the judge of the civil and criminal court of Charleston shall direct, and in trials of such cases by jury, said jury shall consist of six (6) jurors, drawn as provided by law for civil cases in said court in which the amount sued for exceeds one hundred (\$100.00) dollars and the defendant, when charged with misdemeanor, shall be entitled to peremptory challenges not exceeding three, and the State three, and in the trial of cases of felony, the accused shall be entitled to peremptory challenges not exceeding six, and the State three. Said court may receive guilty pleas and impose sentences upon waivers of indictment and presentment in the case of misdemeanors within its jurisdiction, as above defined, in all cases under section 1022-1 in which the circuit judge resident or presiding in Charleston County is authorized to receive such pleas and impose sentences thereon, and in the same manner and under the same procedure as provided in said section 1022-1. Upon the termination of the case, he shall return all of the papers therein to the clerk of the court of general sessions, who shall make a record in the sessions journal of said court, and in all other records of said court of general sessions, showing the name of each defendant, the defendant's plea or the verdict of the jury or other order of the court, and the final judgment, including a copy of the sentence, if any. The said clerk of the court of general sessions shall file the papers in the records of his office as a permanent part of said records, as if the cases were tried and the final judgment rendered in said court of general sessions; and the clerk of said court of general sessions shall issue to the proper officers copies of all sentences imposed and of all commitments ordered in the civil and criminal court of Charleston, as shown upon and by the indictment and papers filed in the said court by the judge of the civil and criminal court of Charleston.

Appeals in cases tried in the civil and criminal court of Charleston upon indictments returned by the grand jury in the court of general sessions for Charleston County shall be direct to the Supreme Court of the State, in the manner now provided by law for appeals from the courts of general sessions to the Supreme Court.

1932 Code, § 277; Civ. P. '22, § 233; Civ. P. '12, § 1422; Civ. C. '12, § 99; 1911 (27) 16; 1912 (27) 585; 1934 (38) 1581; 1940 (41) 1642; 1941 (42) 82.

Procedure in cases involving over \$100.—Where the amount involved exceeds \$100.00 the rules of procedure applicable in the court of common pleas apply. *Steinberg v. S. C. Power Co.*, 165 S. C. 367, 163 S. E. 881.

Ejectment.—The civil and criminal court of Charleston is without jurisdiction to try action in ejectment. *Ex parte Wingate*, 166 S. C. 440, 165 S. E. 176.

(Note: The above cases decided prior to 1934 amendment.)

§ 278. Judge—oath—term—election—vacancy—salary—practice of law.—

The presiding judge of said civil and criminal court shall be an attorney-at-law, resident within said territory, and shall be by the Governor commissioned as such, subscribe the oath of office therefor, and shall hold his office for a term of four years, and until his successor, who shall be elected in the same manner as is now provided by law for the election of a probate judge in the county of Charleston, has been elected and qualified. In the absence or disability of the recorder he is authorized to preside over the recorder's court for the city of Charleston: *provided*, that in case of the disability, or inability from any cause, death or resignation of the judge of said court, the recorder of the city of Charleston shall temporarily fill the place, until the Governor shall fill the vacancy as provided by law for vacancies in a county office. He shall receive as compensation for his services the sum of three thousand six hundred (\$3,600.00) dollars per annum, from the time of the issuance of his commission, to be paid by the county treasurer of said county of Charleston as the judicial magistrate and all other magistrates therein have heretofore and are now paid, and he is prohibited from practicing as an attorney in said court, or any other court inferior to the circuit court, except the probate court.

1932 Code, § 278; Civ. P. '12, § 234; Civ. C. '12, § 1423; Civ. P. '12, § 100; 1911 (27) 16; 1912 (27) 585; 1913 (28) 6; 1918 (30) 755; 1934 (38) 1581; 1939 (41) 415.

Constitution does not prescribe uniformity of jurisdiction for this court.—The constitution does not prescribe a uniformity of jurisdiction for a court such as is created under this section, but only prescribes certain cases to

which its jurisdiction shall not extend. *City of Columbia v. Smith*, 105 S. C. 348, 89 S. E. 1028.

Cited but not construed in *Grimball v. C. W. Parham Co.*, 96 S. C. 443, 81 S. E. 86.

§ 279. Pleadings and practice—duties and powers of magistrate.—All sum-

mons and other process for said the civil and criminal court of Charleston shall be issued exclusively by one of the ministerial magistrates in said territorial jurisdiction, except in cases wherein the amount sued for or the value of the property claimed exceeds one hundred dollars, wherein the practice, pleadings, forms and modes of procedure of force in the courts of common pleas shall be, and they are hereby, made applicable to and to be followed in said civil and criminal court of Charleston. The jurisdiction, powers and duties of the said ministerial magistrates being hereby and in no way increased or diminished, but they are to perform the same to said the civil and criminal court of Charleston as they heretofore did to the judicial magistrates court, and in lieu and stead thereof, the jurisdiction of the magistrates in that portion of the territorial jurisdiction of said court lying outside of the city of Charleston shall not be changed or affected by the provisions of this act, either as to civil or criminal cases.

1932 Code, § 279; Civ. P. '22, § 235; Civ. C. '12, § 1424; Civ. P. '12, § 101; 1911 (27) 16; 1934 (38) 1581.

See § 277 and note thereto.

§ 280. Time call docket—jury trials—drawing of jurors—penalties juror fail serve.—On the first day of each week preceding the week in which jury trials are to be held, the docket shall be called, at which time any party in any civil cause who shall desire a jury trial, shall at that time make demand for the same; the jury to consist of six persons to be empanelled as follows. The clerk shall write, or cause the names of the jurors serving to be written each on a separate paper or ballot, which shall be white and plain, and shall resemble each other as much as possible, and shall be so folded that the name written thereon shall not be visible on the outside, and the clerk shall place each of the said ballots, or separate papers, in a separate small opaque capsule, or container, which capsules, or containers, shall be uniform in size, shape and color; whenever a jury panel is to be drawn in any civil case, or when jurors shall be drawn in any criminal case, said capsules, or containers, shall be placed in a small rotating drum, cylindrical in shape, and having a handle at the end thereof and resting on such supports that it can be turned by means of the said handle, the said drums, capsules, and other equipment, to be furnished by the county supervisor and approved by the judge of the court and, when the said containers or capsules shall have been placed in the said drum, it shall be completely closed and securely fastened and rotated by means of the said handle for a sufficient length of time necessary for a complete mixing of the containers or capsules, and the clerk shall draw twelve (12) jurors therefrom, or, in criminal cases, the required number of jurors, one by one, in the presence of the court; the names of the jurors so drawn to be returned to the capsules and replaced in the drum when not actually engaged in service on a trial jury. The clerk of said court shall furnish to the parties, or their attorneys a list of the twelve (12) jurors so drawn and selected, from which list the parties, or their attorneys, shall alternately strike until there shall be but six (6) left, which shall constitute the jury to try the case. If any person summoned to attend upon said court shall neglect or refuse to appear, without sufficient legal excuse, he shall forfeit and pay to the said county a fine of five (\$5.00) dollars, for which judgment may be forthwith entered in said court against him, and execution issued therefor, together with the sum of five (\$5.00) dollars cost, for the officer of said court entering such judgment and levying such execution, and such judgment and execution shall be of the same force and effect as are all other judgments and executions for said court.

1932 Code, § 280; Civ. P. '22, § 236; Civ. C. '12, § 1425; Civ. P. '12, § 102; 1911 (27) 16; 1912 (27) 586; 1913 (28) 7; 1939 (41) 415.

See § 276 and note thereto.

Method of drawing jury unlike that of any other court.—The civil and criminal court of Charleston is unique in that in no other court in the state is the jury drawn in the manner herein provided. *City of Columbia v. Smith*, 105

S. C. 348, 89 S. E. 1028. But the method of drawing and impaneling the jury under this section is a mere incident of the court. Id.

Cited but not construed in *Grimball v. C. W. Parham Co.*, 96 S. C. 443, 81 S. E. 186.

§ 281. Jury commissioners—jury list—jury box—tales box—drawing of jurors.—The county auditor, the county treasurer, and the judge of the said civil and criminal court shall constitute the jury commissioners of said court, to serve without compensation, *provided*, that in case any of said jury commissioners shall for any reason be unable to serve, the sheriff of

Charleston County, or the county superintendent of education of said county, or the assistant county superintendent of education of said county, shall act in his place or stead. They shall during the month of June next succeeding every general election for state officers prepare a list of not less than two thousand five hundred of the qualified electors residing within the jurisdiction of the court, now or hereafter qualified by law to act as jurors, and shall cause the names on the jury list to be written, each one on a separate paper, or ballot, which shall be white and plain, and shall resemble each other as much as possible, and shall be so folded that the name written thereon shall not be visible on the outside, and shall place each of said ballots, or separate papers, in a separate small opaque capsule, or container, which shall be uniform in size, shape and color; the said capsules or containers shall be placed, with the said list, in a strong and substantial box, without apertures or openings when closed (to be known as the "Jury Box"), which box and capsules shall be furnished to the jury commissioners by the county supervisor of their county for that purpose, and which shall be approved by the judge of the said court. The said jury box shall be kept securely locked with three separate and strong locks, to be approved by the judge of the said court, each lock being different and distinct from the other two and requiring one key peculiar to itself in order to be unlocked; the key to one of the said three locks to be kept by the county auditor himself; the key to another of the three locks to be kept by the county treasurer himself; and the key to the third of the three locks to be kept by the other jury commissioner himself, so that no two of them shall keep a similiar key, or keys, to the same lock, and so that all three of them must be present, together, at the same time and place in order to lock or unlock and open the said jury box. It shall be the duty of the county treasurer to keep said jury box in his custody. Should the judge of said court approve, the county supervisor may purchase and supply a drum or container which is designated to constitute the jury box as well. At the time of placing the ballots and capsules in the jury box, the jury commissioners shall place in a special apartment in the said jury box (which special apartment shall be known as the "Tales Box"), the names of not less than one hundred (100), nor more than eight hundred (800) of such of the persons whose names appear on the said list as residing within five miles of the court house, from which tales box shall be drawn jurors to supply deficiencies arising from any cause or emergency during the sitting of the court. The names of persons placed in said tales box shall be also placed in the said jury box. The jury commissioners, immediately after such petit jurors are drawn, or, in the case of the drawing of jurors from the tales box, immediately after the same have been drawn, shall certify to the clerk of said court the list of jurors so drawn and said clerk shall issue his writ of venire facias for said petit jurors requiring their attendance on the first day of the week for which they have been drawn, or, if drawn from the the tales box, on such day as the court may direct; the said writ of venire facias shall be forthwith delivered to the sheriff of the county. Not less than ten (10), nor more than twenty (20) days before the first day of each week in which jury trials are to be held and only after five days' advertisement by placing notice in two public places in the jurisdiction

of the court, one of which shall be in the county court house, the jury commissioners of the said court shall publicly and indiscriminately proceed to draw twenty (20) persons to serve as jurors for such week only, in the following manner: all of the containers or capsules containing ballots or separate papers shall be taken by the jury commissioners from the jury box, or, in the case of the drawing of jurors to supply deficiencies arising from any cause or emergency during the sitting of the court, from the tales box, and the same shall be placed in a drum, cylindrical in shape, and having a handle at the end thereof, and resting upon such supports that it can be turned by means of the said handle, the said drum and other equipment to be furnished by the county supervisor and approved by the judge of the court; and when the said containers or capsules shall have been placed in the said drum, it shall be completely closed and securely fastened and rotated by means of the said handle for a sufficient length of time necessary for a complete mixing of the containers or capsules, and the required number of jurors shall then be drawn, one by one, and the containers or capsules opened and checked by the commissioners to see whether the person so drawn has already been drawn during the calendar year, and the list of the required number of jurors so drawn and found not to have already been drawn in such calendar year shall be made by one of the commissioners and duly certified by the commissioners to the clerk of the said court; and after the said jurors shall have been drawn, the containers or capsules remaining in the drum shall be returned to the jury box, or to the tales box, as the case may be, and duly locked therein. Whenever it shall be necessary to supply any deficiencies in the number of jurors duly drawn, whether caused by challenge or otherwise, it shall be the duty of the county auditor, the county treasurer, and the judge of the said court to draw from the said tales box such number of fit and competent persons to serve as jurors as the court shall deem necessary to fill such deficiency, in which case venire shall be served and returned, and jurors required to attend on such days as the court shall direct, and, *provided, further*, that in cases in which jury trials may be held in said civil and criminal court during the period in which the courts of common pleas and general sessions for Charleston County are in session, as provided in section 288, jury panels for such trials may be drawn not less than three (3) days before such trial, and without advertisement thereof, where one day's notice of the time of drawing is given to the parties or their counsel.

When ordered by the judge of the said civil and criminal court of Charleston, twenty-five (25) persons instead of twenty (20) persons shall be drawn to serve as jurors for the week designated in each such order.

1932 Code, § 281; Civ. P. '22, § 237; Civ. C. '12, § 1426; Civ. P. '12, § 103; 1911 (27) 16; 1912 (27) 587; 1934 (38) 1581; 1935 (39) 284; 1939 (41) 415; 1940 (41) 1684.

§ 282. Prosecution of criminal cases.—In all criminal cases the prosecution may be represented by any reputable attorney at law, employed by the prosecution, or the solicitor of the circuit may be required to attend and be in charge thereof, in the discretion of the presiding judge, or of his own volition.

1932 Code, § 282; Civ. P. '22, § 238; Civ. C. '12, § 1427; Civ. P. '12, § 104; 1911 (27) 19.

§ 283. May punish for contempt.—The said civil and criminal court shall have full power and authority to punish for contempt any contempts of its authority, and for such contempt may impose punishment by fine not exceeding fifty dollars, and imprisonment not exceeding forty-eight hours, either or both.

1932 Code, § 283; Civ. P. '22, § 239; Civ. C. '12, § 1428; Civ. P. '12, § 105; 1911 (27) 19; 1912 (27) 588.

§ 284. Clerk—stenographer.—The judge of said court shall have the authority to appoint a clerk of said court, who shall hold the term of office for two years from date of appointment; and the judge shall also appoint a stenographer of said court who shall take the testimony in all cases tried therein, both civil and criminal; the said clerk shall be invested with the same powers and duties as are now or which hereafter may be devolved upon magistrate's constables. He shall give bond and qualify as a constable of said court; and shall receive as compensation for his services in all capacities herein mentioned, the sum of one hundred and twenty-five (\$125.00) dollars per month, to be paid in the same manner as was paid the salary of the clerk of court to the judicial magistrate. The duties of said clerk shall be the same as those heretofore performed by the clerk of the judicial magistrate, and to preserve order in the court, and to call to his aid a person or persons to preserve order therein, who shall be compensated by him out of the fees and salary herein and hereinafter provided for; and such person or persons, when so called, shall have the like power of the magistrate's constables. The stenographer shall receive as compensation the sum of seventy-five (\$75.00) dollars per month, and may call to his aid a person or persons to perform for him the duties of stenographer of said court at any time and such person or persons shall be compensated by him.

1932 Code, § 284; Civ. P. '22, § 240; Civ. C. '12, § 1429; Civ. P. '12, § 106; 1911 (27) 20; 1913 (27) 8; 1934 (38) 1581; 1939 (41) 415.

§ 285. Pay of jurors—sheriff's fee summon prior—docket fee.—Jurors shall receive two dollars and fifty cents (\$2.50) per day, to be paid by the county treasurer on the order of the judge and clerk of said court. The sheriff shall be entitled to fifty cents (.50) for each juror summoned. In civil cases and special proceedings, where the amount involved is less than one hundred dollars, there shall be paid in advance to the said clerk, the sum of fifty cents, and in all larger amounts the sum of one dollar, as a docketing fee, and in lieu of all other costs in said court whatsoever.

1932 Code, § 285; Civ. P. '22, § 241; Civ. C. '12, § 1430; Civ. P. '12, § 107; 1911 (27) 20; 1912 (27) 588; 1934 (38) 1581; 1939 (41) 415.

§ 286. Appeals—testimony—notice.—In all cases in which appeals are taken, it shall be the duty of the regular or acting stenographer of the court, as the case may be, to furnish to the judge of said court, within ten (10) days from the service and filing of notice of appeal, a transcript of the testimony and proceedings in such case.

1932 Code, § 286; Civ. P. '22, § 242; Civ. C. '12, § 1431; Civ. P. '12, § 108; 1911 (27) 20; 1912 (27) 589; 1934 (38) 1581; 1939 (41) 415; 1940 (41) 1795.

§ 287. Entry of judgments, execution and transcript.—All judgments shall be entered, execution issued thereon, or transcript thereof be made, as now provided by law for the judgment rendered in said judicial magistrate's court.

1932 Code, § 287; Civ. P. '22, § 243; Civ. C. '12, § 1432; Civ. P. '12, § 109; 1911 (27) 21.

§ 288. Rules of practice and procedure—terms—trial of cases—place hold court—supplies—docket.—The rules of practice, pleadings, forms and modes of procedure now applicable to and heretofore governing the said judicial magistrate's court shall be applicable to and govern the said civil and criminal court, except as herein otherwise provided for. Except during weeks set aside for jury trials, the said court shall be held on every day of the week except Monday, Saturday, Sunday and public holidays, and may be held on any secular day. The week commencing with the first Monday in every month, and the next two weeks shall be set aside for jury trials; *provided*, that there shall be no jury trials of civil cases during the months of February, April, July, August and November. Any case pending in said court which is not set for trial when the docket is sounded, or is not tried when reached for trial, shall be placed at the foot of the docket, unless its trial be prevented by reason of the fact that counsel for a party is necessarily engaged in the trial of a case in a circuit court of this State, or in the federal court, or in an appellate court. The place for holding such court shall be provided by the county commissioners of Charleston County, and may be the place at which the civil and criminal court has heretofore been held, and all books, dockets and other stationery necessary for the business of said court shall likewise be provided by said county commissioners. It shall be the duty of the clerk to revise and bring to date the docket or calendar of said court immediately after the end of each monthly jury trial term.

1932 Code, § 288; Civ. P. '22, § 244; Civ. C. '12, § 1433; Civ. P. '12, § 110; 1911 (27) 21; 1912 (27) 589; 1913 (28) 8; 1934 (38) 1581; 1939 (41) 415; 1940 (41) 1796; 1941 (42) 82.

§ 288-1. Transfer of causes.—Any case now pending in the court of common pleas for Charleston County, coming within the jurisdiction of said civil and criminal court of Charleston, as hereinbefore amended, or which by amendment of the demand therein by consent of the parties shall then be within the jurisdiction of said court, may, by order of the resident or presiding judge of the ninth judicial circuit, on consent of counsel for all the parties thereto, be transferred to said the civil and criminal court of Charleston, by the filing of a copy of the record of said suit, authenticated by the clerk of said court of common pleas, within twenty (20) days after the date of such order.

1934 (38) 1581.

CHAPTER 7

The City Court and the Police Court of Charleston

289, 290. Recorder.

291. Jurisdiction.

292 thru 296, 303. Jury.

297. Rules of practice.

298. Writs and processes.

299. Jurisdiction.

300. Appeal.

301. Transfer of judgments.

302, 303. Clerk and sheriff.

304. Fees.

305 thru 311. Police court.

§ 289. Court held by recorder of Charleston—salary.—The court heretofore established and called the city court of Charleston shall be held by the recorder of the city of Charleston; and the city council shall fix and provide such compensation for the recorder as may be fit and proper, and proportioned to the importance of his station, which compensation shall not be increased or diminished during his continuance in office, to be paid by the city.

1932 Code, § 289; Civ. P. '22, § 245; Civ. C. '12, § 3874; Civ. C. '02, § 2777; G. S. 2125; R. S. 2257; 1801 (7) 300; 1820 (7) 322; 1903 (24) 89.

§ 290. Recorder—appointment—term—sessions.—The said recorder shall be appointed by the city council of Charleston, and hold his commission during good behavior; and he shall sit at such times as may be fixed by the ordinances of the city council of Charleston from time to time.

1932 Code, § 290; Civ. P. '22, § 246; Civ. C. '12, § 3875; Civ. C. '02, § 2778; G. S. 2126; R. S. 2258; 1783 (7) 99; 1856 (12) 488.

See section 932, which provides that testimony of witnesses in magistrate and recorder court be taken in writing.

Recorder's authority is derived from city council.—Under this section the re-

recorder's authority is not derived directly from the State, but from the city council, and his commission need not be issued by the State. *Eggleston v. City Council*, 1 Mill 45.

§ 291. Jurisdiction.—The jurisdiction of the city court of Charleston shall be limited to the trial of causes arising under the ordinances of the city council of Charleston.

1932 Code, § 291; Civ. P. '22, § 247; Civ. C. '12, § 3876; Civ. C. '02, § 2779; G. S. 2127; R. S. 2259; 1856 (12) 488; 1896 (22) 14.

Editor's note.—It was held in the case of *McKenzie v. Ramsay*, 1 Bail, 457, that the jurisdiction of the city court of Charleston extends to actions against executors and administrators, in their administrative capacity. This case was decided under the act of 1801, by which the court was created and given concurrent jurisdiction with the court of common pleas, to a limited amount. See *Bartlett v. Brisbane*, 2 Rich. 489. The act declared that "all issues, controversies, and litigations in said court, of which the value shall exceed the sum allowed by law for the jurisdiction of a single magistrate, shall be tried by a jury. See *City Council v. Stelges*, 10 Rich. 438, for a case applying this last mentioned provision. See also *Bartlett v. Brisbane*, 2 Rich. 489; *Cohen v. Wig-*

fall, 8 Rich. 237, decided under the statute of 1801.

City court of Charleston is an inferior court.—In view of this section the city court of Charleston is an inferior court. *City Council of Charleston v. Weller*, 34 S. C. 357, 13 S. E. 628. See *City Council v. Ashley Phosphate Co.*, 33 S. C. 25, 11 S. E. 386.

But section does not limit jurisdictional amount.—It is to be noted that the jurisdictional amount of the city court of Charleston is not limited under this section. It has been held that such amount is not to exceed one hundred dollars. *City Council v. Ashley Phosphate Co.*, 33 S. C. 25, 11 S. E. 386.

This decision was rendered in accordance with the terms of the constitution of 1868, which provided, in § 15,

that the court of common pleas should have exclusive jurisdiction in all civil actions not cognizable before justices of the peace, and in § 22, that such justices were to have jurisdiction in matters involving not over \$100. Attention is called to the early case of *Thomas v. Watts*, 1 McCord 288, decided before the constitution of 1868, in which it was held that the jurisdiction of the court extended to claims amounting to \$500.—Ed. note.

Court has jurisdiction where the cause of action arises within the city.—Any person may institute an action against any inhabitant of the city of Charleston to the extent of the jurisdiction conferred where the cause of action arises in the city. *Green v. Smith*, 1 McC. 324.

Where the defendant resides in Charleston and orders goods to be sent to her there, the contract will be considered as arising in Charleston, so as to give the court jurisdiction. *Green v. Smith*, 1 McC. 324.

Though the defendant resides without the city.—Where the city council sues for the penalty for retailing without a license, this court has jurisdiction of the case, if the offense is committed within the city, whether the defendant resides in the city or not. *City Council v. King*, 4 McC. 487.

Under this section jurisdiction may be exercised over persons not resident in the city who violate municipal ordinances. *City Council v. Pepper*, 1 Rich. 364.

Under this section the court has no inherent jurisdiction over persons not resident in the city. *Gildersleeve v. Alexander*, 2 Speer 298; *Whiting v. Pritchard*, 1 Rich. 304.

Jurisdiction exists where parties reside within the city.—Where the defendant drawer of a note has moved

from New Orleans, the situs of the note, to Charleston, the indorsee of the note, also residing in Charleston, may sue in the city court. *Moore v. Brown*, 3 McC. 9.

An incorporated insurance company, having its office and doing business in the city of Charleston, is subject to the jurisdiction of the city court, and may be sued therein. *Cromwell v. Charleston Ins. & Trust Co.*, 2 Rich. 512.

Though cause of action arose outside of city.—The court, under this section, has jurisdiction of an action charging the administrator with a devastavit, if all the parties live in Charleston, and the proceedings are carried on there, though it is not shown that the waste was committed there. *Thomas v. Dyott*, 1 McCord, 76.

The court said in the early case of *Brown v. Overstreet*, 4 McC. 79, that where one of two partners resides out of the state, the city court of Charleston is not deprived of jurisdiction to try a case against the partnership in the person of the remaining partner. The court basing its opinion upon the statute of 1792.

Jurisdiction under ordinances extends to imprisonment.—Under this section the city court of Charleston, under the authority of an ordinance of that city, may give judgment for the amount of a license tax and penalty, or imprisonment for thirty days, in case of non-payment. *Charleston v. Oliver*, 16 S. C. 47.

No jurisdiction in cases of attachment.—Under this section this court has no jurisdiction in cases of attachment. *Tolman v. Thompson*, 2 McC. 43; *Roddy v. Aitken*, *Dud.* 232.

See generally, *Information v. Oliver*, 21 S. C. 318.

§ 292. Jury.—All issues, controversies and litigations in the said court, if demanded by either party, shall be tried by a jury composed of six persons, according to the regulations and forms prescribed by law in cases of trial by jury, and as hereinafter provided.

1932 Code, § 292; Civ. P. '22, § 248; Civ. C. '12, § 3877; 1903 (24) 89.

§ 293. Jury commissioners for recorder's court of city of Charleston—preparation of jury box.—The mayor and the clerk of city council of Charleston are hereby declared to be the jury commissioners for the recorder's court for the city of Charleston, and shall within the first ten days of each year prepare and place in a box, to be known as the jury box, the names of five hundred citizens residing within the corporate limits of said city eligible to do jury duty and of good moral character, and shall lock and keep said jury box convenient for the drawing of a jury, as hereinafter specified. If the number of names in the box be reduced to

less than two hundred names, then the box shall be refilled to the full number in the same manner as herein provided: *provided*, that no venire facias shall at any time issue for more than eighteen jurors to serve at one court, from whom a jury (or two juries, if the recorder shall regard more than one jury necessary for the proper dispatch of the business before the court), shall be empanelled; and in case of non-attendance of the jurors so drawn and summoned, their places may be supplied by talesmen, drawn in the usual mode; but no person shall be liable to serve twice until all the names in the said jury box shall be drawn out.

1932 Code, § 293; Civ. P. '22, § 249; Civ. C. '12, § 3878; 1903 (24) 89; 1917 (30) 146.

§ 294. Drawing of jury.—In all criminal cases in said recorder's court, in which a jury may be demanded by either the city or the defendant, a jury shall be selected in the following manner: the clerk or acting clerk of recorder's court shall draw out of the jury box, referred to in section 293, eighteen ballots, each containing the name of an eligible juror, and list the said eighteen names in duplicate, delivering one copy of same to the attorney for the city, if he be present; if not, to the chief of police, or some officer designated by said chief, and one copy to the defendant, or his attorney.

1932 Code, § 294; Civ. P. '22, § 250; 1917 (30) 147.

§ 295. Selection of jury—challenges.—The said clerk shall place the eighteen ballots, so drawn out, in some box or hat, and said clerk shall shake them together, and then the said clerk shall draw out one, and the person so drawn out shall be one of the jury, unless challenged by either party; and so proceed until he shall have drawn six, who shall not have been challenged; neither party being allowed more than six challenges; but, if the first twelve drawn shall be challenged and parties do not agree to a choice, the last six shall be the jury, and when any of the six jurors, so drawn, cannot be had or are disqualified by law to act in such case, and the parties do not supply the vacancy by agreement, the said clerk shall proceed to draw out of said jury box ballots for three times the number thus deficient, which shall be disposed of and be drawn as above provided.

1932 Code, § 295; Civ. P. '22, § 251; 1917 (30) 147.

§ 296. Qualifications of jurors.—All persons possessing the qualifications prescribed for jurors by the laws of the State, and usually residing in the city, or who have resided therein for four months before their being sworn, and there being at the time of being drawn and summoned, shall be liable to serve as jurors in the said court, saving and reserving to all persons all lawful excuse and exemptions as in other courts.

1932 Code, § 296; Civ. P. '22, § 252; Civ. C. '12, § 3879; 1903 (24) 89.

§ 297. City council and recorder to prescribe rules of practice, etc.—It shall be lawful for the city council and the said recorder to prescribe, and from time to time to regulate, the practice of the said court, and of the attorneys therein, conformably to this chapter, and as nearly as may be to the forms and rules used in the circuit courts of this State, and the

proceedings shall be the same substantially as in like cases; except in cases for the violation of ordinances, when imprisonment is imposed in addition to or in the alternative of a fine, in which case the prosecution shall be in the form of an information on the official oath of the corporation counsel.

1932 Code, § 297; Civ. P. '22, § 253; Civ. C. '12, § 3880; 1903 (24) 89.

Information sufficient to support conviction.—Under this section an information stating that "Charles Inglesby, corporation counsel for the city of Charleston comes into court here, and upon his

oath of office gives the court to understand" is sufficient to a conviction imposing imprisonment. *In re Jager*, 29 S. C. 438, 7 S. E. 605. See *In re Oliver*, 21 S. C. 322.

§ 298. Writs and processes shall be issued by clerk.—All writs and processes shall be issued by the clerk of the said court, and shall be made returnable to the first day of the term next succeeding the issuing of the same.

1932 Code, § 298; Civ. P. '22, § 254; Civ. C. '12, § 3881; 1903 (24) 89.

Every process must show jurisdiction.—Under this section every process issued must show the jurisdiction. *City Council v. Truchelut*, 1 N. & McC. 227.

Process in the city court of Charleston may bear test before the accrual of the cause of action. *City Council v. Schmidt*, 11 Rich. 343.

§ 299. Jurisdiction.—The said court is invested with power and authority to grant rules, to hear and determine motions for new trials, in arrest of judgment, and all questions of law arising out of causes within its jurisdiction; to issue subpoenas for the attendance of witnesses, to grant commissions for the examination of witnesses, to issue executions of fieri facias against the real and personal property of defendants, to issue writs of *capias ad respondendum*, to punish for contempt, and also all other the usual process, according to the known and approved rules of the common law and of the acts of the Assembly in such cases provided; the recorder shall have the same powers in the discharge of his duties as the judges of the court of sessions and common pleas in like cases; but it is hereby declared and provided that no process or writ issuing out of the said court shall extend or be of force for service or execution out of the limits of the said city, except commissions to examine witnesses; and all writs shall be served and returned ten days before the sitting of the court aforesaid.

1932 Code, § 299; Civ. P. '22, § 255; Civ. C. '12, § 3882; 1903 (24) 89.

Cross reference.—As to power of circuit courts to grant motion for new trials, see § 34 and the note thereto. As to power of magistrates to grant new trials, see § 274, subd. 17 and the note thereto. See § 291 and the note thereto.

See § 1039-3 for powers of recorders in cities over 60,000 to suspend sentences.

The clerk of the city court of Charleston has authority to issue commissions for the examination of witnesses. *Haviland v. Simons*, 4 Rich. 338.

§ 300. Appeal.—All parties shall have the same right of appeal to the Supreme Court from the decisions of the said city court, in the same form which is now or may be lawful for parties in the circuit courts in like cases, and the Supreme Court shall hear and determine such appeals in the same manner as appeals from the circuit court of Charleston County.

1932 Code, § 300; Civ. P. '22, § 256; Civ. C. '12, § 3883; 1903 (24) 89.

See § 291, and note thereto.

Decisions of city court appealable to

Supreme Court.—While as a general rule, under § 794, appeals from the de-

cisions of an inferior court are to the circuit court, the provisions of this section do not conflict, but are an exception, to the end that appeals from the city court of Charleston are to be heard and determined by the Supreme Court. City Council of Charleston v. Weller, 34 S. C. 357, 13 S. E. 628.

Which Tribunal Is Imperatively Required to hear such appeals.—Under this section jurisdiction is not only expressly conferred upon the Supreme

Court, but it is imperatively required to exercise such jurisdiction. City Council of Charleston v. Weller, 34 S. C. 357, 13 S. E. 628.

And circuit court may not entertain these appeals.—Under this section the right of appeal to the Supreme Court is exclusive and appeal may not be had to the Circuit Court. City Council of Charleston v. Weller, 34 S. C. 357, 13 S. E. 628.

§ 301. Judgments—transfer.—All judgments in the office of the clerk of the said city court, and all executions, writs and processes in the office of the sheriff of the city of Charleston, other than judgments, executions and processes arising under the ordinances of the city council of Charleston, shall be transferred, respectively, to the offices of the clerk of the circuit court and of the sheriff of the county of Charleston, which causes, judgments, executions, writs and processes shall be of like validity and force as if the same had originated or been sued out of the circuit court for the said county.

1932 Code, § 301; Civ. P. '22, § 257; Civ. C. '12, § 3884; 1903 (24) 89.

See Generally. City Council v. Weller, 34 S. C. 357, 13 S. E. 628.

§ 302. Clerk and sheriff to have same powers as those of circuit court.—The clerk and sheriff of the said city court of Charleston shall have the same powers and authority in all cases within the jurisdiction of the said court as the clerks and sheriffs of the circuit courts.

1932 Code, § 302; Civ. P. '22, § 258; Civ. C. '12, § 3885; 1903 (24) 89.

§ 303. Draw jury in recorder's absence.—In case of the sickness or absence from the State of the recorder, they shall have power, and are hereby authorized and required to draw juries for the succeeding term.

1932 Code, § 303; Civ. P. '22, § 259; Civ. C. '12, § 3886; 1903 (24) 89.

§ 304. Fees.—The charges and fees of the several officers of the city court shall be the same as in the circuit court in like cases.

1932 Code, § 304; Civ. P. '22, § 260; Civ. C. '12, § 3887; 1903 (24) 89.

§ 305. Police court established.—There shall be established a court in the city of Charleston known as the police court of the city of Charleston, which shall be held by the recorder of the city of Charleston. The said recorder, and any magistrate holding the police court of the city of Charleston, in the case of absence, sickness or other disability of such recorder, is invested with jurisdiction to hear and determine all cases of a criminal nature occurring within the limits of the city of Charleston, which are not within the exclusive jurisdiction of the court of general sessions: that is to say, any such officer holding the police court shall have jurisdiction of all offenses committed within the limits of the city of Charleston on arrest by the police or municipal authorities, which may be subject to the penalties of fine or forfeiture not exceeding one hundred dollars, or imprisonment, with or without hard labor, not exceeding thirty days, and may

impose any sentence within these limits singly or in the alternative.

1932 Code, § 305; Civ. P. '22, § 261; Civ. C. '12, § 3888; 1903 (24) 89.

§ 306. Examination of persons arrested in police court.—Upon the sworn information of any member of the police force or municipal officer, any such officer holding the said police court as aforesaid, shall proceed to the examination of any charge against any person arrested and brought before him, and upon the same appearing not to be within the jurisdiction of the said police court, he shall refer the same to a ministerial magistrate as such for examination, to be by such ministerial magistrate referred to the civil and criminal court of Charleston, or court of general sessions, as may be proper.

1932 Code, § 306; Civ. P. '22, § 262; Civ. C. '12, § 3889; Civ. C. '02, § 2781; 1897 (22) 412; 1903 (24) 89; 1911 (27) 21.

§ 307. Forfeiture of deposit in police court.—Upon any charge made as above against any person released on deposit and not appearing when called, any such officer holding the said police court shall order the said deposits forfeited.

1932 Code, § 307; Civ. P. '22, § 263; Civ. C. '12, § 3890; Civ. C. '02, § 2782; 1903 (24) 89.

§ 308. Jury may be demanded in police court.—In the trial of any case in the said police court, upon the demand for a jury, the same shall be summoned and empanelled in the said police court, in accordance with the law for empanelling juries in magistrates' courts.

1932 Code, § 308; Civ. P. '22, § 264; Civ. C. '12, § 3891; Civ. C. '02, § 2783; 1903 (24) 89.

§ 309. Stenographer transcribe testimony in police court.—In taking of testimony and preparation of the record in cases of appeal from the said police court, the transcript of the notes of the testimony taken of the trial by a sworn stenographer shall be held to be equivalent to the testimony signed by the witnesses, and the recorder is hereby authorized and empowered to appoint a suitable person as official stenographer of said police court, who, after being duly sworn, shall take all testimony before said police court.

1932 Code, § 309; Civ. P. '22, § 265; Civ. C. '12, § 3892; Civ. C. '02, § 2784; 1903 (24) 89.

§ 310. Police officer.—It shall be the duty of one of the officers of the police force to be in constant attendance on said court, and to take proper measures for the safe keeping of the prisoners and for carrying into effect the orders of said court.

1932 Code, § 310; Civ. P. '22, § 266; Civ. C. '12, § 3893; Civ. C. '02, § 2785; 1903 (24) 89.

§ 311. Recorder not to appear in any cause heard by him.—The said recorder shall not be permitted to plead in a superior court in any cause which has been argued before or adjudged by him. The recorder is hereby clothed with all the powers, duties and jurisdiction of a judicial magistrate, except that he shall not receive any additional compensation, and

shall not have the authority of a magistrate to appoint a constable. In case of the sickness or other unavoidable absence of the recorder, the police court shall be held by one of the aldermen of the city of Charleston, or by one of the magistrates for Charleston County, as may be designated by the mayor.

1932 Code, § 311; Civ. P. '22, § 267; Civ. C. '12, § 3894; 1903 (24) 89.

CHAPTER 8

Attorneys, Solicitors and Counsellors

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| 312. Practicing without license. | 320. Graduates of South Carolina law schools. |
| 313. License granted by Supreme Court. | 321. Oath and roll. |
| 314. Law examiners. | 322, 323. Removal or suspension. |
| 315. Examination. | 324. Speculating. |
| 316. Qualifications. | 325. Limit of argument. |
| 317. Compensation of board. | 326. Appearance by citizen. |
| 318. Rules. | 327 thru 333. Disbarment procedure. |
| 319. Attorneys from other States. | |

§ 312. Penalty practice unless admitted and sworn.—No person whatsoever shall practice or solicit the cause of any other person in any court of this State unless he has been admitted and sworn as an attorney, under a penalty of five hundred dollars for every cause he shall so solicit, one-half to the State and the other half to him or them that will sue for the same.

1932 Code, § 312; Civ. P. '22, § 268; Civ. C. '12, § 3908; Civ. C. '02, § 2811; G. S. 2159; R. S. 2287; 1721 (7) 173.

As to removal or suspension of attorneys, see § 322 et seq. and notes there placed.

Practicing law defined.—In re Duncan, 64 S. C. 461, 42 S. E. 433, 83 S. C. 186, 65 S. E. 210, 24 L. R. A., N. S. 750, 18 Ann. Cas. 657.

Claim adjuster of insurance company

appearing in Workman's Compensation case before single commissioner, is engaged in the practice of law, even though on a salary and such appearances constitute but a small part of his employment. State v. Wells, 191 S. C. 468, 5 S. E. (2d) 181.

§ 313. License to be granted only by Supreme Court. — No original license to practice as an attorney, solicitor or counsellor shall be granted except by the Supreme Court.

1932 Code, § 313; Civ. P. '22, § 269; Civ. C. '12, § 3909; Civ. C. '02, § 2812; G. S. 2161; R. S. 2288; 1878 (16) 472.

§ 314. Supreme Court appoint law examiners to examine applicants.—All applications for admission to the bar in the State shall be made by petition to the Supreme Court. A state board of law examiners is hereby created to consist of three members of the bar, of at least ten years standing, who shall hold office for the term of three years. Said appointment shall be made as follows: the Supreme Court shall appoint three law examiners, who must be actually engaged in the practice of law. Said examiners shall hold office for one, two and three years, respectively, to be designated by the justices of the Supreme Court. After the first appointment the Supreme Court shall annually appoint a member of said board

in the place of the examiner whose term shall expire. Members of said board shall be eligible to reappointment for the term of three years. In case of any vacancy in said board by reason of death, resignation or otherwise, the Supreme Court shall fill said vacancy by the appointment of a member of said board to serve until the expiration of the term for which the person so dying or resigning had been appointed. Not more than one member of said board shall be appointed from any one congressional district.

1932 Code, § 314; Civ. P. '22, § 270; Civ. C. '12, § 3910; 1910 (26) 750.

§ 315. Examination—report—oath.—All applications for admission to the bar shall be referred by the Supreme Court to the state board of law examiners, who shall examine the applicant, touching his qualifications for admission to the bar. The said board shall report their proceedings in the examination of applicants to the Supreme Court, with any recommendations said board may desire to make. If the Supreme Court shall then find the applicant to be qualified to discharge the duties of an attorney, and to be of good moral character and worthy to be admitted, they shall pass an order admitting him to practice in the courts of this State, on his taking and subscribing the oath required by section 26, article III of the Constitution, and the oath respecting dueling.

1932 Code, § 315; Civ. P. '22, § 271; Civ. C. '12, § 3911; 1910 (26) 750.

§ 316. Qualifications.—Every applicant for admission must present to the board of examiners satisfactory proof, in writing, by examination, or otherwise, as the board may direct, that he has had a preliminary, general education, equivalent to that of a graduate of a high school of this State, and must also present such proof as the board directs that he has studied law in a law school in any part of the United States, or in the office, under the direction of a member of the bar of this State, for a period of two years, during at least thirty-six weeks in each year: *provided*, that if the applicant produces satisfactory proof to the board that he has studied law in a law school in any part of the United States, or in the office, or under direction of a member of the bar of this State for a period of two years, during at least thirty-six weeks in each year, such applicant shall be eligible to admission to practice law in this State upon standing a satisfactory examination before said board. And each application shall be accompanied by an application fee of five dollars to be paid to the clerk, and should the applicant be admitted to practice he shall pay an additional fee of five dollars as an admission fee, to be paid to the state treasurer: *provided, further*, that women shall be allowed to practice law within the State of South Carolina under the same rules, regulations and conditions prescribed for the men of the said State.

1932 Code, § 316; Civ. P. '22, § 272; Civ. C. '12, § 3912; 1910 (26) 750; 1918 (30) 779.

§ 317. Compensation of board.—Each member of the board of law examiners shall receive as compensation for his service the sum of one hundred and fifty dollars per annum, to be paid as the salaries of other state officers are paid. No other or further charges or fees shall be de-

manded of or collected from a person upon his admission to practice than the fees mentioned in section 316.

1932 Code, § 317; Civ. P. '22, § 273; Civ. C. '12, § 3913; 1910 (26) 750.

§ 318. Rules.—The justices of the Supreme Court shall have the power to pass such rules as may be necessary to carry into effect the provisions of this chapter, and from time to time amend said rules as occasion may require. The said board of examiners may also make rules for their conduct and government, not inconsistent with the provisions of law, subject to the approval of the Supreme Court.

1932 Code, § 318; Civ. P. '22, § 274; Civ. C. '12, § 3914; 1910 (26) 750.

§ 319. Attorneys from other States.—Members of the bar of any State, district or territory of the United States, who, for five years after admission, have been engaged as practitioners, judges or teachers of law, shall be admitted without examination on proof of good moral character, after becoming actual residents of this State. Members of the bar of any other State, district or territory of the United States, who may be employed as counsel in any case pending before any of the courts of this State, may be admitted for all the purposes of the case in which they are so employed by the court before which said case is pending, without examination. Nothing herein contained shall be construed to deprive courts of this State of the power, as at present existing, of disbaring or otherwise punishing members of the bar.

1932 Code, § 319; Civ. P. '22, § 275; Civ. C. '12, § 3915; 1910 (26) 750.

See also section 323 and notes thereto.

§ 320. Graduates of law schools in South Carolina excepted.—The provisions of sections 314 to 319, inclusive, shall not apply to graduates of the law department of the University of South Carolina, or to the graduates of the law department of any other college or university in this State which is a member of the Association of American Law Schools, but such graduates, upon the production of diplomas of graduation and satisfactory evidence of good moral character, shall be admitted as heretofore.

1932 Code, § 320; Civ. P. '22, § 276; Civ. C. '12, § 3916; 1910 (26) 750; 1925 (34) 69.

§ 321. Oath—roll.—The oaths required to be taken by this chapter shall be administered in open court, and the name of the person taking the same entered in a roll or book kept for that purpose, and a certificate of said oaths shall be filed in court.

1932 Code, § 321; Civ. P. '22, § 277; Civ. C. '12, § 3917; Civ. C. '02, § 2814; G. S. 2162; R. S. 2290; 1868 (14) 96.

§ 322. Removal or suspension.—Attorneys, solicitors, and counsellors may be removed or suspended, and, also, in aggravated cases, imprisoned, not exceeding twenty-four hours, by the several courts in which they have been admitted to practice, if, in the presence of such court, they are guilty of any disorderly conduct causing an interruption of business or amounting to an open and direct contempt to the court, his authority or person; but, subject to such removal, they shall hold their office for life.

1932 Code, § 322; Civ. P. '22, § 278; Civ. C. '12, § 3918; Civ. C. '02, § 2815; G. S. 2163; R. S. 2291; 1868 (14) 97.

Punishment as for contempt.—The power given in this section, and § 323, is to punish for a criminal contempt, sentence for which must be rendered in open court. *State v. Nathans*, 49 S. C. 199, 27 S. E. 52, 62.

And judge may not suspend or disbar at chambers.—This section, and § 323, confer no power on a judge at chambers to suspend or disbar an attorney. *State v. Nathans*, 49 S. C. 199, 27 S. E. 52, 62.

Since the court and not the judge is given power.—It is the court, and not the judge, under this section, that is

given the power to remove or suspend an attorney. *State v. Nathans*, 49 S. C. 199, 27 S. E. 52, 62.

Whether or not the circuit court, as a court of record, has the inherent power to suspend or disbar attorneys, was suggested in the above cited case, but not decided. *Id.*

See generally, as to disbarment of attorneys, *In re Duncan*, 64 S. C. 461, 42 S. E. 433, 83 S. C. 186, 65 S. E. 210, and *State v. Jennings*, 161 S. C. 263, 159 S. E. 627. See, also, the next succeeding section and the note thereto.

§ 323. Cause of removal—entitled to be heard.—Any attorney, solicitor, or counsellor may be removed or suspended who shall be guilty of any deceit, malpractice, or misbehavior; but not until a copy of the charges against him shall have been delivered to him by the clerk of the court in which the proceedings shall be had, and an opportunity shall have been given him of being heard in his defense.

1932 Code, § 323; Civ. P. '22, § 279; Civ. C. '12, § 3919; Civ. C. '02, § 2816; G. S. 2164; R. S. 2292; 1868 (14) 97.

See next forgoing section and note thereto.

Section does not affect court's common law power.—While this section provides that an attorney may be removed or suspended who shall be guilty of any deceit, malpractice, or misdemeanor, the statute neither limits the power of courts to disbar or suspend for misconduct not falling within its terms, nor deprives the courts of the power to inflict a less punishment for a misconduct not grave enough to warrant suspension or disbarment. *State v. Jennings*, 161 S. C. 263, 159 S. E. 627; *Ex parte Gadsden*, 89 S. C. 352, 71 S. E. 952.

The last clause of § 319 further supports the above conclusion. *State v. Jennings*, 161 S. C. 263, 159 S. E. 627.

Suspension or disbarment is for the purpose of removing unfit persons from the profession.—Generally stated, the purpose of suspension or disbarment is the removal of unfit persons from the profession. The primary purpose is not punishment, but protection of the courts and the public from contamination with one who has proved himself unworthy. *State v. Jennings* 161 S. C. 263, 159 S. E. 627.

But such proceedings should be timely instituted.—Courts generally regard with disfavor disbarment proceedings after a great lapse of time, and properly so; though, of course, the statute of limitations has never been held to apply to a disbarment proceeding. *State v. Jennings*, 161 S. C. 263, 159 S. E. 627.

And to warrant suspension or disbarment a bad or fraudulent motive should be made to appear.—The terms "misconduct" or "gross misconduct" with

reference to a member of the bar, have gained by judicial interpretation a well defined meaning. In those cases that have been passed on by the Supreme Court, it has been held that the acts charged against an attorney to warrant his disbarment or suspension must be of such a character as to show that their commission was with a bad or fraudulent motive, and they must be supported by a clear preponderance of the evidence. The conduct must be so gross as to show a want of integrity, moral turpitude, depravity of character, or dishonesty. There should be "a clear conviction of moral fraud." *State v. Jennings*, 161 S. C. 263, 159 S. E. 627.

Where an attorney is engaged in the business of making investments for his clients, and the evidence shows that such clients looked to him personally for the payment of interest on such funds, and not to the security on which their loans were made, then the fact that such attorney made all the investments in his own name, handled such funds as his own, and instituted and defended suits, in his name, pertaining to such moneys, do not warrant the disbarment or suspension of such attorney, although such conduct and practice on the part of the attorney merits the severe censure and reprimand of the court. *State v. Jennings*, 161 S. C. 263, 159 S. E. 627.

But where an attorney who is guardian of the estate of an infant mismanages the property of his ward, violates his trust by purchasing at sales conducted by himself as guardian, with the result that the estate of the ward is completely wiped out, such conduct on the part of the attorney warrants disbar-

ment. *State v. Jennings*, 161 S. C. 263, 159 S. E. 627.

Judgment in such cases rests in discretion of the court.—It is entirely within the discretion of the court, as the result of such investigation, what punishment shall be imposed. Complete disbarment, suspension or terms and conditions are matters solely for the judgment of the investigating tribunal. *State v. Jennings* 161 S. C. 263, 159 S. E. 627, citing 6 C. J. p. 612.

As an officer of the court, an attorney is at all times subject to its control. His admission to practice carries with it the imprimatur of the court and is *prima facie* a certificate of good moral character. In a proceeding for disbarment the court undertakes to ascertain

"whether the lawyer accused is no longer worthy to bear the court's imprimatur." *State v. Jennings*, 161 S. C. 263, 159 S. E. 627.

In *State v. Jennings*, 161 S. C. 263, 159 S. E. 627, the rights of a third party were involved and the court in fixing the punishment of the attorney sought to be disbarred, said that the appeal of such injured party should not be ignored. The judgment of the court was that the attorney be disbarred. A proviso was, however, attached which suspended the judgment of the court upon compliance with named terms and conditions.

See generally. *State v. Holding*, 1 McC. 379; *Hynmen v. Washintgon*, 2 McC. 493; *Watson v. Bank*, 5 S. C. 159.

§ 324. Penalty for speculating.—If any attorney, solicitor, or counsellor shall enter into any speculating practices, by purchasing or procuring to be purchased, any note or other demand for the purpose of putting the same in suit, when otherwise the owner or holder thereof would not sue the same such attorney, solicitor or counsellor shall pay a fine of one hundred dollars, and shall thereafter be incapable of practicing as such in any court, until restored by the Supreme Court.

1932 Code, § 324; Civ. P. '22, § 280; Civ. C. '12, § 3920; Civ. C. '02, § 2817; G. S. 2165; R. S. 2293; 1868 (14) 97.

See generally, *Cooke v. Pool*, 25 S. C. 593.

§ 325. Not to argue longer than two hours.—No attorney, solicitor, or counsellor shall be allowed to occupy more than two hours of the time of the court in the argument of any cause, unless he shall first obtain the special permission of the court to do so.

1932 Code, § 325; Civ. P. '22, § 281; Civ. C. '12, § 3921; Civ. C. '02, § 2818; G. S. 2166; R. S. 2294; 1868 (14) 97.

Time at court's discretion in criminal cases.—This section leaves the court discretionary power to fix a shorter time limit in criminal cases. *State v. Blackstone*, 113 S. C. 528, 101 S. E. 845.

And this is true of motions made in the conduct of the trial of civil cases.—

Davis v. A. C. L. R. Co., 150 S. C. 130, 147 S. E. 834.

But it is error to limit argument to one hour in murder case. *State v. Cash*, 138 S. C. 167, 136 S. E. 222.

See generally. *State v. Jones*, 29 S. C. 201, 7 S. E. 296.

§ 326. Citizens may appear in person or for others without reward.—This chapter shall not be construed so as to prevent a citizen from prosecuting or defending his own course, if he so desires, or the cause of another, with leave of the court first had and obtained: *provided*, that he declare on oath, if required, that he neither has nor will accept or take any fee, gratuity, or reward, on account of such prosecution or defense, or for any other matter relating to the said cause.

1932 Code, § 326; Civ. P. '22, § 282; Civ. C. '12, § 3922; Civ. C. '02, § 2819; G. S. 2167; R. S. 2295; 1721 (7) 173; 1868 (14) 97.

Not applicable to corporations. *State v. Wells*, 191 S. C. 468, 5 S. E. (2d) 181.

§ 327. Disbarment procedure.—The permanent committee on grievances of the South Carolina Bar Association is hereby constituted a commission of inquiry with full power and authority to investigate as to the existence of any probable cause against any member of the bar of South Carolina as to conduct contrary to law.

1932 Code, § 327; Civ. P. '22, § 283; 1914 (28) 588.

§ 328. Committee may cite such member of bar to appear before it.—The said committee is hereby authorized and empowered, if any sworn complaint shall be preferred in writing before it, and filed with its chairman, against any member of the bar of South Carolina for misconduct as an attorney at law, to cite such member of the bar to appear before it at such convenient place in the State as may be designated by the chairman of the committee to show cause why he should not be presented to the Supreme Court on such charges for disbarment or suspension: *provided*, that the committee shall only investigate such complaints as in the opinion of a majority of the committee deserve consideration.

1932 Code, § 328; Civ. P. '22, § 284; 1914 (28) 589.

See *State v. Jennings*, 161. S. C. 263, 159 S. E. 627.

§ 329. Committee may make investigation of its own motion.—The said committee, without the filing of any written complaint with its chairman may, of its own motion upon a vote of a majority of the committee, enter into the investigation of any misconduct of any member of the bar with the same procedure as if a written complaint had been filed.

1932 Code, § 329; Civ. P. '22, § 285; 1914 (28) 589.

§ 330. Powers of committee.—The said committee is hereby authorized and empowered in the investigation of such matters as shall come before it to summon all necessary witnesses for such investigation, being hereby granted the authority to issue requisite process therefor, and that said witness shall be paid the same per diem and mileage as is allowed all witnesses in the courts of common pleas in this State, the same to be paid by the county authorities of the county from which the complaint arises, upon the certificate of the chairman of the said grievance committee; and that the same right of pay for witnesses shall exist in case of any trial of such matter before the Supreme Court, hereinafter referred to, upon the certificate of the clerk of the Supreme Court; that said committee in such investigation and leading up thereto, shall have the power to require the production of all papers and documents, and the power to punish witnesses for contempt, or any contempt from any person that may arise during said investigation before the said committee; that said committee is also authorized through its presiding member to swear all witnesses with the oath usually administered in the courts of justice in this State.

1932 Code, § 330; Civ. P. '22, § 286; 1914 (28) 589.

§ 331. Majority of committee must be present.—Before any of such charges as aforesaid can be investigated by said committee a majority of said committee, as appointed by the South Carolina Bar Association, must be present, and if the chairman thereof be absent the other members of

the committee are authorized and empowered to select a temporary chairman.

1932 Code, § 331; Civ. P. '22, § 287; 1914 (28) 589.

§ 332. Complainants and respondents may have counsel.—At such hearings as aforesaid authorized, the complainants shall be allowed, if they so desire, to have counsel present and so shall the respondents, with the right to either side to produce witnesses to be sworn and heard according to such rules and regulations as may be adopted by the said committee.

1932 Code, § 332; Civ. P. '22, § 288; 1914 (28) 590.

§ 333. When committee to turn over records to clerk of Supreme Court.—If said committee, or a majority of those sitting in said investigation, conclude that a reasonable probability exists for the charges made, they shall turn over to the clerk of the Supreme Court of South Carolina the record in the case for such action as said court shall take thereon according to law and the existing laws of this State as to the regulation of the conduct of the members of the bar of the State of South Carolina, and that said court shall notify the attorney general and the solicitor of the circuit from which the case arises so that they shall appear before the court as the representatives of the State.

1932 Code, § 333; Civ. P. '22, § 289; 1914 (28) 590.

CHAPTER 9

General Provisions Respecting the Administration of Justice

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| 334. Disqualification of judge. | 341. Affirmation according to profession. |
| 335. Rights not affected by race or color. | 342 thru 344. Deposits in court. |
| 336. Prosecution by federal appointees. | 345. Effect on process of failure of court to sit. |
| 337. Seals of common pleas court. | 346. Transcripts of federal judgments. |
| 338. Court attendants exempt from arrest. | 347 thru 349. Deposits in lieu of bond. |
| 339. Contempt. | 350. Payment of small sums to minors. |
| 340. Breach of peace within court's hearing. | 351. Time limit for filing reports by referees and masters. |

§ 334. When judge disqualified.—No judge or other judicial officer shall preside on the trial of any cause where he may be connected with either of the parties, by consanguinity or affinity, within the sixth degree.

1932 Code, § 334; Civ. P. '22, § 290; Civ. C. '12, § 3923; Civ. C. '02, § 2820.

Section not affected by Const., Art. 5, § 6.—This section is not affected by Const., Art. 5, § 6, which provides that "no judge shall preside at the trial of any cause in the event of which he may be interested, or when either of the parties shall be connected with him, by affinity or consanguinity, within such degree as may be prescribed by law." Ex parte Kreps, 61 S. C. 29, 39 S. E. 181.

Second cousins are within sixth degree.—State v. Byrd, 72 S. C. 104, 51 S. E. 542.

Must be alleged that relationship exists at time of trial.—Under this section a magistrate is not shown to be disqualified by an affidavit making out his marriage to defendant's niece seven years before the trial where no proof was offered that such relationship still existed. Ehrhardt v. Breeland, 57 S. C. 142, 35 S. E. 537.

Judgment rendered by disqualified judge voidable.—A judgment rendered by a judge disqualified under this section is merely voidable. Ex parte Hilton,

64 S. C. 201, 41 S. E. 978, 92 Am. St. Rep. 800; *Jeffers v. Jeffers*, 89 S. C. 244, 71 S. E. 810.

Under the common law a judge was not disqualified by reason of his relationship to the party interested, but might refuse to sit, and a judgment rendered by him in such a case was not void but only voidable. Under the common law a party might also waive objection to the disqualification of a judge. See *Jeffers v. Jeffers* for a more complete discussion.—Ed. Note.

If an order grants a new trial upon the sole ground that the trial judge was connected with the deceased within six degrees, but the judge under § 6717, subd. 6, proves to be not within the sixth degree but within the seventh, then the order for new trial should be reversed. *State v. Browning*, 116 S. C. 252, 108 S. E. 105.

Due diligence to ascertain judge's disqualification necessary for new trial.—Where it does not sufficiently appear that the petitioner could not by due diligence have ascertained the fact of such disqualification under this section before or during the trial, or before decision is rendered a motion for a new trial will be overruled. *Jeffers v. Jeffers*, 89 S. C. 244, 71 S. E. 810.

And same "due diligence" said to be required under this section as necessary in disqualifying juror.—In the case of *Jeffers v. Jeffers*, 89 S. C. 244, 71 S. E. 810, it was said that the same diligence required in ascertaining before trial a juror's disqualification because of relationship is required of a party in ascertaining a judge's disqualification under this section.

See the provision of § 639, as to when objections to jurors must be made.

But judge's knowledge of own disqualification may be grounds for new trial.—In the case of *Jeffers v. Jeffers*, 89 S. C. 244, 71 S. E. 810, it was said that "If the appellant in addition to showing the disqualification of the probate judge, and that he (the appellant) did not have knowledge of such fact, before the de-

cree was rendered, had also shown that the probate judge knew at that time of his relationship to one of the parties to the action, then it might with good reason be contended that there should be a new trial."

Objection under this section may be waived.—A right existing under this section, where the court otherwise has jurisdiction of the subject matter, is in the nature of a plea to the jurisdiction of the person, and may be waived. *Ex parte Hilton*, 64 S. C. 201, 41 S. E. 978. See *Jeffers v. Jeffers*, 89 S. C. 244, 71 S. E. 810.

See the provision of § 441, for jurisdiction of the person acquired by his voluntary appearance.

And if known to exist is waived unless made before judge's oral decision.—Where the facts are known to the party, an attempt under this section to recuse a judge must be made before issue joined and before the trial is commenced, and will not be allowed where the judge has delivered an oral opinion and has but to formulate his decision in writing. *Ex parte Hilton*, 64 S. C. 201, 41 S. E. 978.

Such neglect of a party to raise objection where he is aware of the relationship, will be construed as a waiver. *Id.*

Judge not disqualified.—Under the provisions of this section where it appeared that one once removed from the common ancestor was the father of a daughter who intermarried, and was the mother of one who thereafter became a party to the action, the judge, who was four times removed from the common ancestor, was not disqualified because of the relationship. *Ex parte Kreps*, 61 S. C. 29, 39 S. E. 181.

For provisions as to reckoning the degrees of kindred, see § 8906.

See generally, *Town of Clinton v. Leake*, 71 S. C. 22, 50 S. E. 541; as to disqualification of members of executive committee at primary election contest, *Hyde v. Boykin*, 113 S. C. 64, 101 S. E. 41.

§ 335. Rights in court not affected by race or color.—Wherever authority has heretofore been conferred by law upon any free white person or persons to institute any suit or proceedings, or to prefer any information or complaint in any matter, civil, penal, or criminal, the same rights shall be enjoyed by, and the same remedies applicable to, all persons whatsoever, regardless of race or color subject to the same conditions, and none others.

1932 Code, § 335; Civ. P. '22, § 291; Civ. C. '12, § 3924; Civ. C. '02, § 2821; G. S. 2168; R. S. 2297; 1870 (14) 338.

§ 336. Persons appointed by United States may prosecute in behalf of United States.—It shall and may be lawful for all and every person or persons authorized and appointed by the United States for that purpose, in

their name, and in their behalf, to commence and to prosecute to final decree, judgment, and execution, any action or actions, for the recovery from individuals of debts due, and effects belonging to, the United States: *provided*, that all and every such action shall be conducted in the same manner, and subject to the same rules and regulations, as when commenced by one citizen of this State against another citizen thereof, and that the defendant or defendants be allowed the same privileges and advantages as he, she, or they would be entitled to if sued by a citizen of this State.

1932 Code, § 336; Civ. P. '22, § 292; Civ. C. '12, § 3925; Civ. C. '02, § 2822; G. S. 2169; R. S. 2298; 1785 (4) 667.

§ 337. Seals of courts of common pleas.—The courts of common pleas shall, at the expense of the State, have a seal for each county, of an impression similar to that of the court of common pleas in Charleston County, and uniform with that seal; except that each seal shall in the legend have the name of the court in which it is used. The said seals shall always be affixed to such proceedings of the said respective courts as may require the same.

1932 Code, § 337; Civ. P. '22, § 293; Civ. C. '12, § 3926; Civ. C. '02, § 2823; G. S. 2170; R. S. 2299; 1792, V. 211.

§ 338. Attendants at courts exempt from arrest.—All persons necessarily going to, and attending on, or returning from, the courts of record of this State (allowing thirty miles per day for the traveling of such persons), shall be free from arrest, except on criminal process for treason, felony, or breach of the peace.

1932 Code, § 338; Civ. P. '22, § 294; Civ. C. '12, § 3927; Civ. C. '02, § 2824; G. S. 2171; R. S. 2300, 1785 (7) 219; 1798 (7) 286; 1819 (11) 41.

Exemption from arrest is court's privilege.—Exemption from arrest is the privilege of the court, and not of the party; and indulgence will not be extended to him further than necessary and expedient. *Hunter v. Cleveland*, 1 Brev. 167.

And one court will not allow arrest by its process of a witness of another court.—*Vincent v. Watson*, 1 Rich. 194.

The privilege is limited to exemption of the person from arrest, and does not invalidate service of process at same time. *Sadler v. Ray*, 5 Rich. 523.

§ 339. Penalty for contempt of court—offenders to be heard.—In case any person shall commit any misbehavior or contempt in any court of judicature in this State, by word or gesture, it shall and may be lawful for the judges of every such court to set a fine on such offender, in any sum not exceeding fifty dollars, for the use of this State, and may commit the offender till payment; but if any person shall in the presence and during the sitting of the court, strike or use any violence therein, such person shall be fined at the discretion of the said court, and shall be committed till payment: *provided*, that no citizen of this State shall be sent to jail for any contempt of court, or supposed contempt of court, committed during the sitting of the court, and in disturbance of the court, until he be brought before the court, and there be heard by himself or counsel, or shall stand mute.

1932 Code, § 339; Civ. P. '22, § 295; Civ. C. '12, § 3928; Civ. C. '02, § 2825; G. S. 2172; R. S. 2301; 1731 (3) 283; 1811 (5) 642.

Proceedings by rule is proper in cases of contempt.—*State v. Hunt*, 4 Strob. 322.

In cases here mentioned it need not be on oath.—*State v. Blackwell*, 10 S. C. 35.

Decision thereon is appealable.—State v. Hunt, 4 Strob. 322.

Sentence of 90 days in county jail is justified for juror discussing case on which he was serving. State v. Babb, 161 S. C. 305, 159 S. E. 633.

See generally, as to magistrate courts, Lining v. Bentham, 2 Bay 1; State v. Johnson, 2 Bay 385; State v. Applegate, 2 McC. 110; Edmundson v. Frean, 2 Hill,

410; as to circuit courts, State v. Blackwell, 10 S. C. 35; In re Corbin, 8 S. C. 390; Lott v. Sandifer, 2 Mill 167; Johnson v. Wideman, Dud. 70; State v. Hunt, 4 Strob. 322; as to attorneys, In re Corbin, 8 S. C. 390; State v. Hunt, 4 Strob. 322; as to witnesses, Lott v. Sandifer, 2 Mill 167; Johnson v. Wideman, Dud. 70; as to others, State v. Blackwell, 10 S. C. 35.

§ 340. Breach of peace within hearing of court.—When any affray shall happen during the sitting of any court within this State, and within the hearing or to the disturbance of the court, the court shall order the sheriff, or other lawful officer, to take the affrayers, or other disturbers of the peace, or those guilty of contempt, and bring the offender or offenders before the court, and the court shall make such order or orders thereon as is or may be consistent with law, justice, and good order.

1932 Code, § 340; Civ. P. '22, § 296; Civ. C. '12, § 3929; Civ. C. '02, § 2826; G. S. 2173; R. S. 2302; 1811 (5) 642.

§ 341. Witness, juror, or party, may affirm, according to his profession.—Any juror, witness, or party to any proceeding, in any and all courts of this State, may make solemn and conscientious affirmation and declaration, according to the form of his religious belief or profession, as to any matter or thing whereof an oath is required; and such affirmation and declaration shall be held as valid and effectual as if such person had taken an oath on the Holy Evangelists.

1932 Code, § 341; Civ. P. '22, § 297; Civ. C. '12, § 3930; Civ. C. '02, § 2827; G. S. 2174; R. S. 2303; 1721 (3) 281.

§ 342. Moneys paid into court to be deposited.—All moneys except fines and penalties paid under sentence in criminal cases, which shall be paid into the circuit or probate courts of the State, or received by the officers thereof in causes pending therein, shall be immediately deposited in some incorporated state bank or national bank within the circuit, of good credit and standing; or if there be no such bank within the circuit, then in such bank nearest to the place of holding the circuit, in the name and to the credit of the court.

1932 Code, § 342; Civ. P. '22, § 298; Civ. C. '12, § 3931; Civ. C. '02, § 2828; G. S. 2175; R. S. 2304; 1868 (14) 16.

§ 343. How money deposited to be drawn—proviso.—No money deposited as aforesaid shall be drawn from said banks, except by order of the judge of said courts, respectively, in term or in vacation, to be signed by such judge, and to be entered and certified of record by the clerk; and every such order shall state the cause in or on account of which it is drawn: *provided*, that money paid into court to be immediately paid out need not be so deposited, but shall be paid upon order of the court.

1932 Code, § 343; Civ. P. '22, § 299; Civ. C. '12, § 3932; Civ. C. '02, § 2829; G. S. 2176; R. S. 2305; 1868 (14) 16.

§ 344. Clerk to obey order of court to deposit—penalty.—If any clerk of such courts, or other officers thereof, having received such moneys as aforesaid, shall refuse or neglect to obey the order of such court, for de-

positing the same as aforesaid, such clerk or other officer shall be forthwith proceeded against by attachment for contempt.

1932 Code, § 344; Civ. P. '22, § 300; Civ. C. '12, § 3933; Civ. C. '02, § 2830; G. S. 2177; R. S. 2306; 1868 (14) 16.

§ 345. Effect on writs, etc., of failure of court to sit as required by law.—

No process pending in any court shall be discontinued for or by reason of the failure to hold the court upon the day appointed by law; but in such case, all suits, process, matters and things depending shall be made to the next succeeding court in course in the same manner as if such succeeding court had been the same court to which such process stood continued, or such returns or appearances should have been made; and recognizances, bonds and obligations for appearances, and all returns shall be of the same force and validity for the appearance of any person or persons at such succeeding court, and all summons for witnesses as effectual as if the succeeding court had been expressly mentioned therein; and all causes depending on the docket, and undetermined at any adjournment to the court in course, shall stand continued in the same order to such court as fully as if such causes were called over and continued by order of court.

1932 Code, § 345; Civ. P. '22, § 301; Civ. C. '12, § 3934; Civ. C. '02, § 2831; G. S. 2178; R. S. 2307; 1785 (7) 218.

§ 346. Transcripts of United States courts' decrees and judgments filed in clerk's office, etc.—

Transcripts of any judgments or decrees rendered in a circuit or district court of the United States within this State, or of any other federal court which, by act of Congress, may create a lien, may be filed in the office of the clerk of court of any county within this State, and when so filed, shall be entered by the clerk of the court upon the book of abstracts of judgments and duly indexed in the same manner as provided by law in reference to judgments rendered by the courts of this State; and when so entered upon the book of abstracts of judgments and duly indexed, such judgment shall constitute a lien upon the real estate of the judgment debtor to the same extent, and with the same effect, as provided by law in reference to judgments and decrees rendered by the courts of this State.

1932 Code, § 346; Civ. P. '22, § 302; Civ. C. '12, § 3935; Civ. C. '02, § 2832; 1894 (22) 718; 1928 (35) 1214.

§ 347. Money may be deposited with officer of courts in lieu of bond.—

Whenever in any civil or criminal proceedings in any of the courts of this State a bond, recognizance or undertaking is authorized or required to be given, it shall and may be lawful for the party or parties authorized or required to give the same to deposit in lieu thereof a sum of money, in lawful money of the United States of America, equal in amount to the bond, recognizance or undertaking so required or authorized to be given; and such sum of money, when deposited as in this section provided, shall be held and taken as equivalent in all respects to the giving of such bond, recognizance or undertaking.

1932 Code, 347; Civ. P. '22, § 303; Civ. C. '12, § 3936; Civ. C. '02, § 2833; 1897 (22) 424.

Section to be strictly construed.—One purpose of this section is to relieve a plaintiff in attachment proceedings of the absolute requirement to enter into written undertaking with proper surety as provided for in § 530, but one may be relieved from such condition precedent only by strictly pursuing the terms of this section. *McDaniel v. Patterson*, 159 S. C. 378, 157 S. E. 72.

See § 530 as to the security required

on obtaining an attachment, and the note thereto.

Thus a check is not "lawful money of the United States."—The prevailing conception of the phrase "lawful money of the United States," as used in this section, is money in circulation by sanction of the laws of the United States, and a check is not such lawful money. *McDaniel v. Patterson*, 159 S. C. 378, 157 S. E. 72.

§ 348. To whom a deposit in lieu of bond must be paid.—Whenever such bond, recognizance or undertaking is required or authorized to be given in any civil or criminal proceedings in the courts of common pleas or general sessions of this State, the said sum of money deposited in lieu thereof shall be paid to the clerk of the court of common pleas and general sessions in which said proceeding is pending; and whenever such bond, recognizance or undertaking is authorized or required to be given in the Supreme Court of this State, the said sum of money shall be paid to the clerk of the Supreme Court; and whenever such bond, recognizance or undertaking is authorized or required to be given in any civil proceeding in the probate courts of this State, the said sum of money shall be paid to the judge of the court of probate for the county in which the said proceeding is pending; and whenever such bond, recognizance or undertaking is authorized or required to be given in any civil or criminal proceeding in a magistrate's court or other court of inferior jurisdiction, such sum of money shall be paid to the clerk of the court of common pleas and general sessions for the county in which such magistrate's court or other court of inferior jurisdiction shall be.

1932 Code, § 348; Civ. P. '22, § 304; Civ. C. '12, § 3937; Civ. C. '02, § 2834; 1897 (22) 424.

§ 349. Money deposited in lieu of bond.

(1) **Receipt.**—Whenever any sum of money is so deposited in lieu of a bond, recognizance or undertaking, the party depositing the same shall be entitled to a receipt therefor, stating that the same has been deposited, and is held for the same purpose as would have been specified and conditioned in the bond, recognizance or undertaking in lieu whereof the said sum of money is so deposited.

(2) **When pay back.**—The party or parties so depositing a sum of money in lieu of a bond, recognizance, or undertaking shall be entitled upon application to the respective courts wherein such deposits have been made, and subject to the order of which such funds are held, to receive back the same whenever the purposes for which the same have been received and deposited have been accomplished and the parties are entitled to repayment thereof.

1932 Code, § 349; Civ. P. '22, § 305; Civ. C. '12, § 3938; Civ. C. '02, § 2835; 1897 (22) 424.

§ 350. Courts may order payment of money to minors, etc.—In cases where a minor becomes entitled to a sum of money not exceeding two hundred dollars in the settlement of estates, or under the judgment, order or decree of any court, and such minor has no general or testamentary guardian to whom such sum may be paid, and whose estate, however

derived, is, in the judgment of the court in which the settlement is made, or the judgment, order or decree is rendered, too small to warrant the expense of the appointment of a guardian, it shall and may be lawful for such court, or the judge thereof, to make an order for the same to be paid to the minor, or the father or mother of such minor, or if the father and mother be dead, to some other person for the benefit of such minor as to such court or judge may seem best.

1932 Code, § 350; Civ. P. '22, § 306; Civ. C. '12, § 3939; Civ. C. '02, § 2836; 1900 (23) 348; 1901 (28) 635; 1910 (26) 683; 1933 (38) 269.

§ 351. Time prescribed within which masters and referees must file reports—penalty—extension.—In all cases referred to masters and referees by the courts of common pleas, as now provided by law, the masters or referees shall make and file with the clerks of the courts of common pleas of their respective counties their reports within sixty days from the time the action shall be finally submitted to them, and in default thereof they shall not be entitled to any fees: *provided*, that nothing herein contained shall prevent parties to said action or their attorneys from extending the time by mutual consent in writing.

1932 Code, § 351; Civ. P. '22, § 307; Civ. C. '12, § 3940; Civ. C. '02, § 2837; 1893 (21) 399.

PART 2

Civil Actions

- TITLE 3. General Provisions, § 352.
- TITLE 4. Time of Commencing Civil Actions, § 355-1.
- TITLE 4-A. Actions for Services against Counties over 85,000, § 396-1.
- TITLE 5. Parties to Civil Actions, § 397.
- TITLE 6. Place of Trial of Civil Actions, § 420.
- TITLE 7. Manner of Commencing Civil Actions, § 427.
- TITLE 8. Pleadings in Civil Actions, § 454.
- TITLE 9. Provisional Remedies in Civil Actions, § 499.
- TITLE 10. Trial and Judgment in Civil Actions, § 585.
- TITLE 11. Witnesses and Evidence, § 665.
- TITLE 12. Executions and Proceedings Supplementary to Execution, § 737.
- TITLE 13. Costs in Civil Actions, § 756.
- TITLE 14. Appeals in Civil Actions, § 771.
- TITLE 15. Miscellaneous Provisions Respecting Civil Actions, § 810.
- TITLE 16. Actions in Particular Cases and Extraordinary Remedies, § 826.
- TITLE 17. Proceedings for Relief of Persons Arrested in Civil Actions, § 851.
- TITLE 18. Remedies Relating to Real Property, § 870.
- TITLE 19. Definitions and General Principles, § 897.

TITLE 3

General Provisions

CHAPTER 10

General Provisions

352. Form of action.

353. Designation of parties.

354. Action on judgment.

355. Feigned issues.

§ 352. One form of action established.—There shall be in this State but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a civil action.

1932 Code, § 352; Civ. P. '22, § 308; Civ. P. '12, § 114; Civ. P. '02, § 89; 1870 (14) § 92.

For statutory definition of term "action," see § 2 of the Code.

In general.—In the early case of *Southern Porcelain Mfg. Co. v. Thew*, 5 S. C. 5, it is said that an action does not lie under the Code of Procedure unless a cause of action exists which would

have maintained an action at law or a bill in equity before its adoption.

Such rights must be enforced or protected by the same form of action.—Whether legal or equitable, such rights must alike be enforced or protected by the same form of action. *Chapman v.*

Lipscomb, 18 S. C. 222; Scaife v. Thompson, 15 S. C. 337; Parker v. Jacobs, 14 S. C. 112.

No change is made between legal and equitable causes of action.—Sullivan v. Sullivan, 20 S. C. 509; Chapman v. Lipscomb, 18 S. C. 222.

But while causes of action are distinct from remedies, they are enforceable by the one form of remedy.—Emory v. Hazard Powder Co., 22 S. C. 476.

Section 374 construed with instant section.—In ascertaining the true meaning of the term "actions" as used in § 374, it has been said that that section must be construed with the present section. See Walsh v. Evans, 112 S. C. 131, 99 S. E. 546. See note of this case under § 374, analysis line III, B, 3, a.

Tort action by wife against husband.—This section furnishes a basis for the holding that a wife may maintain an action in tort against her husband for willfully beating her. Prosser v. Prosser, 114 S. C. 45, 102 S. E. 787. Such a suit is a thing in action, which is a property right. *Id.*

A proceeding by the sinking fund

commissioners to escheat an estate as that of an intestate leaving no heirs is not an action within the meaning of that term as used in this section. In *re Percival's Estate*, 108 S. C. 39, 93 S. E. 243.

Separate action for disputed property rights not determined in former action.—Under this section and §§ 427, 454, 750, 751, 752, a third person claiming property rights which have not been passed upon in the original action under which the execution is issued should not be deprived either of his day in court or of the right of trial in the form prescribed by law for a regular judicial procedure. *Palmetto Bank & Trust Co. v. McCown-Clark Co.*, 143 S. C. 98, 141 S. E. 155.

Defendant is required to plead all his defenses, legal or equitable, in same action. *Frederick v. Chapman*, 144 S. C. 137, 142 S. E. 247.

Vexatious or unnecessary action is not permitted. *Ex parte Fant*, 147 S. C. 167, 145 S. E. 34.

An equitable defense can be set up in a law case. *Bell v. Mackey*, 191 S. C. 105, 3 S. E. (2d) 816.

§ 353. Parties how designated.—In such action the party complaining shall be known as the plaintiff, and the adverse party as the defendant.

1932 Code, § 353; Civ. P. '22, § 309; Civ. P. '12, § 115; Civ. P. '02, § 90; 1870 (14) § 93.

§ 354. Action on judgment.—No action shall be brought upon a judgment rendered in any court in this State, except a court of magistrate, between the same parties, without leave of the court, or a judge thereof, at chambers, for good cause shown, or notice to the adverse party; and no action on a judgment rendered by a magistrate shall be brought in the same county within five years after its rendition, except in case of his death, resignation, incapacity to act, or removal from the county, or that the process was not personally served on the defendant, or on all the defendants, or in case of the death of some of the parties, or where the docket or record of such judgment is or shall have been lost or destroyed.

1932 Code, § 354; Civ. P. '22, § 310; Civ. P. '12, § 116; Civ. P. '02, § 91; 1870 (14) § 94; 1912 (27) 536.

Section applies to judgment by consent.—An action may be brought upon a judgment or a decree in equity, whether it be by consent or not, though leave of the court is necessary under this section. *Green v. Rembert*, 108 S. C. 203, 93 S. E. 769.

Suit to enforce judgment is not an "action on judgment."—A suit to en-

force a judgment against land in possession of devisees of a judgment debtor is not an action "on the judgment" within the meaning of this section, and therefore leave of the court to commence such a suit is not necessary. *Brock v. Kirkpatrick*, 60 S. C. 322, 38 S. E. 779, 85 Am. St. Rep. 847.

§ 355. Feigned issues not allowed.—Feigned issues shall not be allowed, and, instead thereof, or when a question of fact, not put in issue by the pleadings, is to be tried by a jury, an order for the trial may be made

stating distinctly and plainly the question of fact to be tried; and such order shall be the only authority necessary for a trial.

1932 Code, § 355; Civ. P. '22, § 311; Civ. P. '12, § 117; Civ. P. '02, § 92; 1870 (14) § 95.

TITLE 4

Time of Commencing Civil Actions

CHAPTER 11. General Provisions, § 355-1.

CHAPTER 12. Actions for the Recovery of Real Property, § 371.

CHAPTER 13. Actions Other than for Recovery of Realty, § 386.

CHAPTER 11

General Provisions

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| 355-1. Effect of title. | 362. Reversal of judgment. |
| 356. Time for commencing actions. | 363. Injunction staying action. |
| 357. When action commenced. | 366, 367. When title not applicable. |
| 358. Defendant out of State. | 368. New promises. |
| 359, 364 thru 365. Persons under disability. | 369. Liability of partners after dissolution. |
| 360. Death of person entitled. | 370. Part payment or acknowledgment. |
| 361. Aliens. | |

§ 355-1. Limitation not to apply when action commenced or right of action accrued.—The provisions of this title shall not extend to actions already commenced, or to cases where the right of action has already accrued; but the statutes then in force shall be applicable to such cases, according to the subject of the action and without regard to the form.

1932 Code, § 355A; Civ. P. '22, § 312; Civ. P. '12, § 118; Civ. P. '02, § 93; 1870 (14) § 96.

See § 903.

Statute in force when cause of action accrues and not when commenced governs limitation.—An amendment to the statute of limitations reducing the period from 20 to 10 years must be read in connection with this section, and if the right of action had already accrued when the amendment was adopted the statute in force at that time is applicable. *Rehkopf v. Kuhland*, 30 S. C. 234, 9 S. E. 99. See also, *Young v. McNeill*, 78 S. C. 143, 59 S. E. 986; *Cheatham v. Evans*, 160 Fed. 802; *Heyward v. Farmers' Min. Co.*, 42 S. C. 138, 19 S. E. 963, 20 S. E. 64, 46 Am. St. Rep. 702, 28 L. R. A. 42; *Lyles v. Roach*, 30 S. C. 291, 9 S. E. 334.

There are only three exceptions to the operation of the statute of limitation.—

(1) Where the action was already commenced. (2) Where the right of action had already accrued. (3) Where a different limitation is prescribed by statute. See *Glover v. Floyd*, 76 S. C. 292, 57 S. E. 25; *Stoddard v. Owings*, 42 S. C. 88, 20 S. E. 25.

See generally, *Colvin v. Phillips*, 25 S. C. 228; *State v. Pinckney*, 22 S. C. 484; *Nichols v. Briggs*, 18 S. C. 473; *Bolt v. Dawkins*, 16 S. C. 198, 210; *Bratton v. Guy*, 12 S. C. 42; *Hayes v. Clinkscoles*, 9 S. C. 441, 450; *Shand v. Gage*, 9 S. C. 187, 188; as to general discussion of term "right of action," see *Stoddard v. Owings*, 42 S. C. 88, 20 S. E. 25.

§ 356. Time for commencing actions, etc.— Civil actions can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued, except where, in special cases; a different limitation is prescribed by statute, and in the cases mentioned in section 355-1. But the objection that the action was not commenced within the time limited can only be taken by answer.

1932 Code, § 356; Civ. P. '22, § 313; Civ. P. '12, § 119; Civ. P. '02, § 94; 1870 (14) § 97.

As to limitations of specific actions, see §§ 386 et seq. and the notes thereto.

Editor's note.—Most of the cases wherein this section has been cited deal primarily with one or more of §§ 386 et seq., embraced in ch. 3 of this Title, providing for the limitations of particular actions. In most instances the Editor has deemed it more expedient to place the treatment of such decided cases under those last mentioned sections. The practitioner is therefore referred to those sections and the notes there found.

Answer is exclusive mode of raising question of limitation.—This section prescribes the exclusive method of objecting that the action was not commenced within the time limited. *Fulmore v. Fulmore*, 115 S. C. 213, 105 S. E. 285. See, also, *Sutton v. Clark*, 59 S. C. 440, 38 S. E. 150, 155, 82 Am. St. Rep. 848; *Coney v. Timmons*, 16 S. C. 378; *Cureton v. Westfield*, 22 S. C. 583, *Karres v. Pappas*, 194 S. C. 512, 10 S. E. (2d) 15. But the reasons actuating the defendant to plead such limitation should not be stated in answer, and if contained therein, should be stricken out as irrelevant. *Nichols v. Briggs*, 18 S. C. 473.

Where there is failure to object by answer as herein prescribed, the defendant is precluded from raising that objection at trial. *Jones v. Massey*, 9 S. C. 376. But it seems that such failure to object by answer does not preclude the defendant from setting up other defenses. *Cohrs v. Fraser*, 5 S. C. 351, 355.

And a demurrer is unavailable.—Under this section a demurrer is insufficient to raise the question of limitation. *Guerard v. Jenkins*, 80 S. C. 223, 61 S. E. 258; *Fulmore v. Fulmore*, 115 S. C. 213, 105; 105 S. E. 285, *Town of Cheraw v. Turnage*, 184 S. C. 76, 191 S. E. 831.

But it applies to plaintiff only where defendant files strict counterclaim.—The provision in this section that "the objection that the action was not commenced within the time limited can only be taken by answer," applies to a plaintiff only when called upon to answer or reply to a strict counterclaim or set-off asserted as a cross action against the plaintiff. It does not apply to the case where the defendant has no cross claim against the plaintiff, but files a plea which is in the nature of a counterclaim

and which is tested by the rules governing counterclaims. *Bank of Columbia v. Gadsden*, 56 S. C. 313, 33 S. E. 575, 576.

Burden is on him who raises limitation.—Under this section, where the sale of a decedent's land, sold to pay debts, is set aside for want of proper notice, and the purchaser presents a note of decedent which the heirs claim is barred by limitations, the burden of proving that fact is on the heirs. *Moore v. Smith*, 29 S. C. 254, 7 S. E. 485, and the authorities there cited.

Time of accrual of action is always primary inquiry.—When the question arises as to whether an action is barred by the statute of limitations, then in view of this section, the primary and practical inquiry is, when did the cause of action accrue? *McCrary v. Jones*, 44 S. C. 406, 22 S. E. 414, 415.

The answer to this inquiry necessarily depends upon the facts and circumstances of each particular case. The practitioner is referred to the cases treated in the notes to §§ 386 et seq.—Ed. Note.

The cause of action in favor of an indorser against a prior accommodation indorser, for money paid in satisfaction of a note after default, accrues when the payment is made, and not at the time his liability attaches. *McCrary v. Jones*, 44 S. C. 406, 22 S. E. 414.

Statute of limitations not applicable to action for specific performance. *Poston v. Ingraham*, 76 S. C. 167, 56 S. E. 780; *Miller v. Saxton*, 75 S. C. 237, 55 S. E. 310.

The statute cannot avail unless so pleaded. *Jones v. Boykin*, 70 S. C. 309, 49 S. E. 877; *Foggeth v. Gaffney*, 33 S. C. 303, 12 S. E. 260.

Adverse possession may be shown under general denial. *Lloyd v. Rawl*, 63 S. C. 219, 41 S. E. 312.

Presumption after lapse of twenty years. *Young v. McNeill*, 78 S. C. 143, 59 S. E. 986.

Quoted in *Jennings v. Peay*, 51 S. C. 327, 28 S. E. 949, 950.

Cited in *Jackson v. Plyler*, 38 S. C. 496, 17 S. E. 255, 257, 37 Am. St. Rep. 782; *Lyles v. Lyles*, 71 S. C. 391, 51 S. E. 113, 116; *Park v. Brooks*, 38 S. C. 300, 17 S. E. 22, 24.

See generally, as to laches, *Shute v. Shute*, 82 S. C. 264, 64 S. E. 145; *Jones v. Haile Gold Min. Co.*, 79 S. C. 47, 50, 60 S. E. 35; *Miller v. Saxton*, 75 S. C.

237, 55 S. E. 310; *Brock v. Kirkpatrick*, 72 S. C. 491, 52 S. E. 592; *Robertson v. Blair*, 56 S. C. 96, 34 S. E. 11, 76 Am. St. Rep. 543.

§ 357. When action deemed commenced.—An action is commenced as to each defendant when the summons is served on him, or on a co-defendant, who is a joint contractor, or otherwise united in interest with him. An attempt to commence an action is deemed equivalent to the commencement thereof, within the meaning of this title, when the summons is delivered with the intent that it shall be actually served, to the sheriff or other officer of the county in which the defendant or one of them usually or last resided; or, if a corporation be defendant, to the sheriff or other officer of the county in which such corporation was established by law, or where its general business was transacted, or where it kept an office for the transaction of business.

1932 Code, § 357; Civ. P. '22, § 340; Civ. P. '12, § 146; Civ. P. '02, § 120; 1870 (14) § 122.

Cross reference.—As to time when jurisdiction of action is acquired, see § 441 and the note thereto. As to manner of commencing civil actions, see § 427 and the note thereto. As to requisites of summons, see § 428 and the note thereto. As to definition of term "action," see § 2, and the note thereto. As to manner of service of summons, see §§ 433 et seq., and the notes there placed.

Action commenced when summons is issued in good faith.—Under this section an action is commenced on the day of issuing the summons, where the same issued in good faith, and was afterwards regularly returned as served on all the defendants, though one of the defendants was not actually served. *Montague v. Stelts*, 37 S. C. 200, 15 S. E. 968, 34 Am. St. Rep. 736. See, also, *State v. Cohen*, 13 S. C. 198, 201.

Service on one legatee commencement of action as to other legatees. *Beacham v. Ross*, 187 S. C. 399, 197 S. E. 369.

And service is evidenced by sheriff's certificate.—The only evidence of service of the summons is by certificate of the sheriff, if served by him. *State v. Cohen*, 13 S. C. 198, 201.

Or by affidavit of person executing summons.—If the summons is served by a person other than the sheriff, the evidence of service may be by affidavit of such person, or the written admission of the defendant. *State v. Cohen*, 13 S. C. 198, 201.

Compliance gives court jurisdiction of defendant's person.—This section prescribes a method (service of summons) whereby the court may acquire jurisdiction of defendant's person. *Stephens v. Ringling*, 102 S. C. 333, 86 S. E. 683.

As to voluntary appearance by defendant, and the effect thereof, see § 441 and the note thereto.

Lodging of summons for service has

limited application.—It has been said that it is doubtful whether the portion of this section pertaining to the lodging of the summons for service being equivalent to a commencement of the action applies except in cases involving the statute of limitations. *Jordan v. Wilson*, 69 S. C. 256, 48 S. E. 224.

And does not constitute actual commencement of action.—The delivery to or a lodging of the summons with the sheriff is merely deemed equivalent to the commencement of the action, and is not actually a commencement of the action. *Norris v. Hartford Fire Ins. Co.*, 55 S. C. 450, 33 S. E. 566, 567, 74 Am. St. Rep. 765.

Where parties to a contract made in this state use the words "commencement of an action," such words so far as knowledge or notice of such action is concerned, are deemed to mean commencement by service upon the defendant. *Norris v. Hartford Fire Ins. Co.*, 55 S. C. 450, 33 S. E. 566, 74 Am. St. Rep. 765, involving an insurance policy which provided that it should be void if, with the knowledge of the insured, foreclosure proceedings should be commenced against the property of insured.

Injunction may be granted before summons is served or lodged for service.—This section does not prohibit a circuit judge from granting a temporary injunction without notice, and before summons is served or lodged for service, to be served with the summons or other papers. *Jordan v. Wilson*, 69 S. C. 256, 48 S. E. 224.

The provisions of this section have been construed from a practical and common sense standpoint, in cases involving the granting of injunctions. Section 567 provides that an injunction may be granted "at the time of commencing the action." A strict construction of the

instant section would preclude the granting of a temporary injunction until the summons is actually served or at least lodged for service. But it is not reasonable to suppose that it is the legislative intent that the preliminary injunction should be signed simultaneously with the service of summons or a lodging thereof for service. On the contrary, the pertinent provisions of the two statutes, above cited, would seem to indicate that such injunction might be granted on presentation to a judge, of the summons and a proper complaint or proofs, a reasonable time before service, with a view that such order may be served along with the summons, as was held in the Jordan case, treated above. If this were not true then the evil which

the injunction is designed to prevent might be aggravated. This feature might possibly be avoided by lodging the summons for service and then immediately make application for injunction, a practice which has been adopted by some lawyers. But the Supreme Court of this state (Jordan v. Wilson, *supra*) has said that it is doubtful if this portion of the instant section applies except in cases where the statute of limitations is involved.—Ed. Note.

Cited in *Ex parte Ware Furniture Co.*, 49 S. C. 20, 27 S. E. 9, 11; *Columbia Water Power Co. v. Columbia Land & Inv. Co.*, 47 S. C. 117, 25 S. E. 48; *Cureton v. Dargan*, 12 S. C. 122.

See generally, *Morgan v. Morgan*, 45 S. C. 323, 23 S. E. 64.

§ 358. Exemption—defendant out of State.—If, when the cause of action shall accrue against any person, he shall be out of the State, such action may be commenced within the terms herein respectively limited after the return of such person into this State; and, if, after such cause of action shall have accrued, such person shall depart from and reside out of this State, or remain continuously absent therefrom for the space of one year or more, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action.

1932 Code, § 358; Civ. P. '22, § 341; Civ. P. '12, § 147; Civ. P. '02, § 121; 1870 (14) § 123.

Residents temporarily without and non-residents within State embraced in section.—This section applies not only to a resident of the state who has gone abroad temporarily, and then returns, but also to one who has never been a resident and who comes for the first time within its limits. *Burrows v. French*, 34 S. C. 165, 13 S. E. 355, 27 Am. St. Rep. 811, basing the ruling upon the construction of the word "return." *Id.*

But the section applies only to the absentee.—The provisions of this section relate only to the absentee, and have no reference whatever to any other person who may be liable to suit, even upon the same cause of action, accruing at the same time. *Arthur v. Screven*, 39 S. C. 77, 17 S. E. 640, 643.

Otherwise, if two persons should sign a joint and several promissory note, and one of them should leave the state, and never return, the other could never plead the statute of limitations to an action brought for the breach of the contract evidenced by the note. This, certainly, could not have been the intention of the legislature, and in our judgment the language used in this section does not require, but on the contrary forbids, such a construction. *Arthur v. Screven*, 39 S. C. 77, 17 S. E. 640, 643.

In an action to foreclose a mortgage, a defendant who claimed title through an execution sale could plead the bar of the statute of limitations, though the mortgagor was unable to do so by reason of absence from the state. *Arthur v. Screven*, 39 S. C. 77, 17 S. E. 640.

"Against" whom action has accrued or shall accrue.—Under this section a party who removed from the state after a cause of action had accrued in his favor was not entitled to deduct the time of his absence from the state from the time limited for the commencement of the action, since the statute affords no protection to a person in whose favor a cause of action has accrued. *Maccaw v. Crawley*, 59 S. C. 342, 37 S. E. 934.

The reason underlying this section is very obvious: Where a person against whom it is desired to bring an action leaves the state, and places himself beyond the reach of the process of the courts of this state, it is nothing but right to deprive him of the right to claim the benefit of the time during which he is out of the state, when he could not be reached by the process of the court, and could not be sued. *Maccaw v. Crawley*, 59 S. C. 342, 37 S. E. 934, 937.

And the question of required absence is for the jury.—The question whether or not a person is absent from the state,

within the meaning of this section is a question of fact for the jury. *Latimer v. Trowbridge*, 52 S. C. 193, 29 S. E. 634, 636, 68 Am. St. Rep. 893.

Which if exists, bars plea of limitations.—If the jury finds that the defendant was absent from the state within the meaning of this section, the plaintiff is then protected from the defendant's plea of the statute of limitations. *Latimer v. Trowbridge*, 52 S. C. 193, 29 S. E. 634, 637, 68 Am. St. Rep. 893. Such a finding would also protect the plaintiff from a plea of payment by lapse of time. *Id.*

Section applies to revival of decree in former suit.—This section applies to one who was a party to a suit, and was absent from the state over one year prior to a proceeding to revive the decree therein. *Morgan v. Morgan*, 45 S. C. 323, 23 S. E. 64.

Creditor is given full statutory period of limitation.—The provision in this section pertaining to the absence of a person after the accrual of the cause of action shows that the legislature intended that a creditor should have the full period fixed by the particular statute of limitation applicable to the case, while his debtor is within reach of the process of the court, to bring his action, except where his temporary absence was for a period less than one year. *Burrows v. French*, 34 S. C. 165, 13 S. E. 355, 356, 27 Am. St. Rep. 811. See, also, *Latimer v. Trowbridge*, 52 S. C. 193, 29 S. E. 634, 68 Am. St. Rep. 893.

Applied as to absence from state suspending operation of statute of limitations. *Ewbank v. Ewbank*, 64 S. C. 434, 42 S. E. 194; *Cauthen v. Cauthen*, 70 S. C. 167, 49 S. E. 321.

§ 359. Exemption as to persons under disability.—If a person entitled to bring an action mentioned in §§ 386 thru 396, except for a penalty or forfeiture, or against a sheriff or other officer for an escape, be, at the time the cause of action accrued, either: (1) within the age of twenty-one years; or (2) insane; or (3) imprisoned on a criminal or civil charge, or in execution under the sentence of a criminal court for a less term than his natural life—the time of such disability is not a part of the time limited for the commencement of the action; except that the period within which the action must be brought cannot be extended more than five years by any such disability, except infancy; nor can it be so extended, in any case, longer than one year after the disability ceases: *provided*, that the omission of the words, "or insane," herein since the adoption of the Code of Laws of South Carolina, 1912, shall not prejudice the interest of any insane person.

1932 Code, § 359; Civ. P. '22, § 342; Civ. P. '12, § 148; Civ. P. '02, § 122; 1870 (14) § 124; 1918 (30).

General consideration.—The section refers to other disabilities as well as to infancy, and contains certain provisions applicable to them, but not to infancy; and is admittedly confusing in its terms. *Frady v. Ivester*, 118 S. C. 195, 110 S. E. 135, 142. (Dissenting opinion.)

Exclusion of time of disability applies to all classes of disability.—The clause in this section reading, "the time of such disability is not a part of the time limited for the commencement of the action," applies to all the three classes of cases dealt with in this section. If the section had ended with the clause quoted above, the necessary result would be that, practically, the statute of limitation would not commence to run against a person laboring under either of these three classes of disability until such disability was removed. *Fricks v. Lewis*, 26 S. C. 237, 1 S. E. 884, 887.

But there is an exception to the gen-

eral declaration mentioned in the foregoing paragraph, at least so far as two classes of disability are concerned. This exception is in the words which declare that the time within which the action must be brought cannot be extended more than five years by disability arising from insanity or imprisonment. *Fricks v. Lewis*, 26 S. C. 237, 1 S. E. 884, 888.

And this is true as to prohibition against extension beyond one year after disability ceases.—The clause near the end of the section, providing that in no case shall the time be extended for a larger period than one year after the disability ceases, applies to all the three classes of disability referred to in this section. *Fricks v. Lewis*, 26 S. C. 237, 1 S. E. 884, 888.

Operation of statute of limitations against infant.—In *Fricks v. Lewis*, 26 S. C. 237, 1 S. E. 884, the contention was

made that in cases of infancy, the statute of limitations does not commence to run until after the infant attains his majority. But the court held that the section could not be so construed.

In the dissenting opinion in *Frady v. Ivester*, 118 S. C. 195, 110 S. E. 135, 142, it is said that the result of the decision in the case of *Fricks v. Lewis*, 26 S. C. 237, 1 S. E. 884, is that, if an infant attained majority within the period of limitation, and more than one year has elapsed between the date of majority and the termination of the period, the infant is entitled to no additional time, and the action is barred at the expiration of the original period. *Accord*, *Monteith v. Harby*, 193 S. C. 349, 8 S. E. (2d) 629.

Under this section a beneficiary of a trust-estate, who at the age of 13 joined in the execution of a discharge of the trustee, cannot, five years after attaining her majority, maintain an action against the estate of the trustee for an alleged balance due from the trust-estate, the limitation for such actions be-

ing six years. *Anderson v. Simms*, 29 S. C. 347, 7 S. E. 289, 13 Am. St. Rep. 711.

"Action" as used herein as to commencement of action by infant within one year after attaining his majority, is not limited merely to proceeding commenced by service of summons. *Lyerly v. Yeadon*, 183 S. C. 256, 190 S. E. 737.

Hence proceeding in partition suit by infant defendants on attaining their majority to set aside sale decreed therein which was not commenced within six years after cause of action accrued or within one year after disability of youngest defendant was removed, was barred by limitations. *Ibid*.

Infant mortgagor.—Where mortgage was executed during minority of mortgagor, who with full knowledge of here rights acquiesced therein for 11 years after attaining majority, in action to foreclose mortgage defense of infancy is barred by the statute of limitations and by laches. *Jones v. Godwin*, 187 S. C. 510, 198 S. E. 36.

§ 360. Death of person entitled before limitation expires.—If a person entitled to bring an action die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced by his representatives, after the expiration of that time and within one year from his death. If a person against whom an action may be brought die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced against his executors or administrators after the expiration of that time, and within one year after the issuing of letters testamentary or of administration.

1932 Code, § 360; Civ. P. '22, § 343; Civ. P. '12, § 149; Civ. P. '02, § 123; 1870 (14) § 125.

Statutory prohibition as to suits against executors.—Where the statutory period has not expired before administration, under the statute protecting an administrator or executor from suit for nine months (now 12 months), that time must be added to the statutory period. *Cleveland v. Mills*, 9 S. C. 430, 435; *Hayes v. Clinkscales*, 9 S. C. 441, 450; *Moore v. Smith*, 29 S. C. 254, 7 S. E. 485.

As to statutory prohibition against commencement of suits against executor or administrator until twelve months after testator's or intestate's death, see § 418, and the note thereto.

Plea of limitation available if suit not commenced within period specified.—It must appear that the action was not commenced within one year after letters testamentary or of administration were granted, otherwise the plea of statute of limitations will not avail. *Foggeth v. Gaffney*, 33 S. C. 303, 12 S. E. 260.

Statute must have begun to run during lifetime of decedent.—This section only applies to cases where the statute commenced to run in the lifetime of decedent, and the statutory period expired before administration. *Strain v. Babb*, 30 S. C. 342, 9 S. E. 271, 14 Am. St. Rep. 905. See also, *Gaston v. Gaston*, 80 S. C. 157, 61 S. E. 393; *Foggeth v. Gaffney*, 33 S. C. 303, 312, 12 S. E. 260.

Illustration where death occurs before statute runs.—Under this section and § 418 an action on a promissory note not under seal is not barred by limitations, where before the six years has run the maker dies, and after the six years has run, but within one year after the granting of letters of administration, the action is begun. *Gaston v. Gaston*, 80 S. C. 157, 61 S. E. 393, 394.

See generally, *Huff v. Watkins*, 20 S. C. 477; *Allen v. Union Oil Co.*, 59 S. C. 571, 38 S. E. 274.

§ 361. Suits by aliens.—When a person shall be an alien subject, or citizen of a country at war with the United States, the time of the continuance of the war shall not be a part of the period limited for the commencement of the action.

1932 Code, § 361; Civ. P. '22, § 344; Civ. P. '12, § 150; Civ. P. '02, § 124; 1870 (14) § 126.

§ 362. Where judgment reversed.—If an action shall be commenced within the time prescribed therefor, and a judgment therein be reversed on appeal, the plaintiff, or, if he die and the cause of action survive, his heirs or representatives may commence a new action within one year after the reversal.

1932 Code, § 362; Civ. P. '22, § 345; Civ. P. '12, § 151; Civ. P. '02, § 125; 1870 (14) § 127.

§ 363. Stay of action by injunction, etc.—When the commencement of an action shall be stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition shall not be part of the time limited for the commencement of the action.

1932 Code, § 363; Civ. P. '22, § 346; Civ. P. '12, § 152; Civ. P. '02, § 126; 1870 (14) § 128.

§ 364. Disability must exist when right accrued. — No person shall avail himself of a disability, unless it existed when his right of action accrued.

1932 Code, § 364; Civ. P. '22, § 347; Civ. P. '12, § 153; Civ. P. '02, § 127; 1870 (14) § 129.

See generally, *Maccaw v. Crawley*, 59 Brev. 286; *Adamson v. Smith*, 2 Mills S. C. 342, 37 S. E. 934; *Shubrick v. Const. Reports* 269; *Faysoux v. Prather*, *Adams*, 20 S. C. 49; *Fewell v. Collins*, 3 1 N. & McC. 296.

§ 365. Two or more disabilities.—Where two or more disabilities shall co-exist at the time the right of action accrues, the limitation shall not attach until they all be removed.

1932 Code, § 365; Civ. P. '22, § 348; Civ. P. '12, § 154; Civ. P. '02, § 128; 1870 (14) § 130.

§ 366. When title not to apply.—This title shall not affect actions to enforce the payment of bills, notes, or other evidences of debt, issued by moneyed corporations, or issued or put in circulation as money.

1932 Code, § 366; Civ. P. '22, § 349; Civ. P. '12, § 155; Civ. P. '02, § 129; 1870 (14) § 131.

Word "moneyed" is used in generic sense.—The word "moneyed" used in this and the section immediately following, is not technical, and it is generic rather than specific. *Grice v. Anderson*, 109 S. C. 388, 96 S. E. 222, 224.

And carries with it the meaning of wealth.—Neither the Constitution nor the statutes, so far as can be ascertained, have defined "moneyed corporation," or have used it, save in this section, and the section immediately following. Resort must be had therefore to the English dictionary to ascertain the meaning of the word "moneyed." "Money," in its restricted sense, means a piece of metal

stamped and issued by the state as a medium of exchange; in its wider sense, the word means "wealth." *Grice v. Anderson*, 109 S. C. 388, 96 S. E. 222, 224, citing Webster's Dictionary.

Moneyed corporation illustrated.—A corporation organized with intention to accumulate wealth is a "moneyed corporation." *Grice v. Anderson*, 109 S. C. 388, 96 S. E. 222, 224.

If a corporation makes it a business to lend money, to borrow money, to deal in negotiable paper, bonds, stocks and other securities, it is a moneyed corporation. *Grice v. Anderson*, 109 S. C. 388, 96 S. E. 222, 224, citing *Platt v. Wilmot*, 193 U. S. 602, 24 S. Ct. 542, 48 L. Ed. 809.

§ 367. Exemptions.—This title shall not affect action against directors or stockholders of a moneyed corporation, or banking associations, to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within six years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached, or the liability was created, unless otherwise provided in the law under which such corporation is organized.

1932 Code, § 367; Civ. P. '22, § 350; Civ. P. '12, § 156; Civ. P. '02, § 130; 1870 (14) § 132.

See the note to the next foregoing section.

Section construed with Art. 9, § 18, of Constitution.—This section manifestly must be construed with art. 9, § 18, of the State Constitution, since they both relate to the same subject matter. *Grice v. Anderson*, 109 S. C. 388, 96 S. E. 222, 224.

Section governs limitation of actions against stockholders. — This section seems to govern the period of limitation within which the liability of stockholders of an insolvent bank may be enforced by creditors. *Parker v. Carolina Sav. Bank*, 53 S. C. 583, 31 S. E. 673, 69 Am. St. Rep. 888, basing its decision upon the fact that the two year limitation provided for in the general corporation act is not applicable to bank. See § 7677.

It is apparent that this section was enacted primarily to preserve to creditors of corporations their actions

against stockholders of all corporations wherein a liability of stockholders was created by law, until the discovery by the creditor of the facts upon which the liability was created. *Grice v. Anderson*, 109 S. C. 388, 96 S. E. 222, 224.

The qualifying words were not so much "moneyed corporations," but first, corporations where the stockholder was made liable by law to creditors of the corporation, and, second, such corporations of a moneyed character as distinguished from those corporations not organized for profit. *Grice v. Anderson*, 109 S. C. 388, 96 S. E. 222, 224.

"Aggrieved party" defined.—The "aggrieved party" in suit by receiver of stockholders' liability of closed state bank is not the receiver but the depositors; hence complaint alleging that bank was closed more than six years previously was not demurrable as showing that depositors discovered the facts at time of closure. *Nettles v. Walcott*, 25 Fed. Supp. 35.

§ 368. New promises must be in writing. — No acknowledgment or promise shall be sufficient evidence of a new or continuing contract, whereby to take the case out of the operation of this title, unless the same be contained in some writing signed by the party to be charged thereby; but payment of any part of principal or interest is equivalent to a promise in writing.

1932 Code, § 368; Civ. P. '22, § 351; Civ. P. '12, § 157; Civ. P. '02, § 131; 1870 (14) § 133.

Prior law required no writing.—Prior to the adoption of this section it was well settled that the new promise or acknowledgment need not be in writing. *Park v. Brooks*, 38 S. C. 300, 17 S. E. 22, 24.

Object of the section.—It is very clear that it was the intention of the legislature, in adopting this section, to declare in absolute terms that no verbal promise or acknowledgment shall revive or continue a contract otherwise subject to the statute of limitations. *Park v. Brooks*, 38 S. C. 300, 17 S. E. 22; *Hill v. Perrin*, 21 S. C. 356, 358.

The acknowledgment must recognize an existing debt.—In *Manchester v. Braedner*, 107 N. Y. 346, 14 N. E. 405, 1

Am. St. Rep. 829, 831, cited with approval in *Suber v. Richards*, 61 S. C. 393, 39 S. E. 540, 542, the court said: "It seems to be the general doctrine that the writing, in order to constitute an acknowledgment, must recognize an existing debt."

The rule laid down in *Lockhart v. Eaves*, Dud. 321, and approved in *Robbins v. Farley*, 2 Strob. 348, 352, is that acknowledgment of promises to obviate the statute of limitations are not sufficient unless they specify or plainly refer to some particular cause of action. *Suber v. Richards*, 61 S. C. 393, 39 S. E. 540, 542.

The identity of which is question for jury.—The identity of the debt, which a

debtor promises in writing to pay, with the debt sued for, is a matter properly left to the jury. *Hill v. Hill*, 51 S. C. 134, 28 S. E. 309.

And writing must manifest debtor's intention to pay.—The writing relied upon as an acknowledgment must contain nothing that is inconsistent with an intention on the part of the debtor to pay the debt. *Manchester v. Braedner*, 107 N. Y. 346, 14 N. E. 405, 1 Am. St. Rep. 829, 831, approved in *Suber v. Richards*, 61 S. C. 393, 39 S. E. 540, 542.

And it must be unequivocal.—A statement in a letter by the maker of a note that "I hope we can agree on a settlement of the note soon," does not constitute an acknowledgment or new promise, within the provisions of the statute of limitations. *Millwee v. Jay*, 47 S. C. 430, 25 S. E. 298.

In *Park v. Brooks*, 38 S. C. 300, 17 S. E. 22, it is indicated that this requirement applies only to a promise made after a discharge in bankruptcy, in which case, in order to sustain an action, the new promise must be "distinct, positive and unequivocal." But it is said that this is not the rule in relation to promises to take a case out of the operation of the statute of limitations.

But parol evidence is admissible to interpret instrument.—Oral evidence may be resorted to, as in other cases of written instruments, in aid of the interpretation. Consistent with this rule, it has been held that oral evidence is admissible to identify the debt and its amount, or to fix the date of the writing relied upon as an acknowledgment, when these circumstances are omitted. *Suber v. Richards*, 61 S. C. 393, 39 S. E. 540, 542.

Under this section a parol promise not to plead the statute of limitations cannot operate as a waiver, or as an agreement, nor can it serve as an estoppel. *Hill v. Perrin*, 21 S. C. 356.

In an action by executors on a note barred by limitations on its face, evidence that a credit on the note was in the handwriting of the intestate was admissible as tending to show an understanding that payment should be credited on the note, thus tolling the statute of limitations. *Hopper v. Hopper*, 61 S. C. 124, 39 S. E. 366.

Evidential value of part payments of principal or interest applies only for purposes of limitations.—The provision in this section as to payment of part of principal or interest being equivalent to a promise in writing, is to be construed as applicable for the purposes of limitation only and does not render such a payment a written promise under the statute of frauds. *Millwee v. Jay*, 47 S. C. 430, 25 S. E. 298.

And has no application to doctrine of payment from lapse of time.—This section apparently does not apply, except by analogy, to the doctrine of payment from the lapse of time. See *Latimer v. Trowbridge*, 52 S. C. 193, 29 S. E. 634, 636, 68 Am. St. Rep. 893.

The next succeeding section, however, expressly gives the right to plead the presumption of payment from lapse of time.—Ed. Note.

Part payments serve as consideration for the promise.—If such payments are made on the debt before the statutory period has expired, it is called a "legal" consideration of such promise to pay; but, if made after the statutory period has expired, such payment is called a "moral" consideration for the promise to pay. *Jacobs v. Gilreath*, 41 S. C. 143, 19 S. E. 308, 310.

And may be made after expiration of limitation period.—The part payment of either principal or interest, to have the effect mentioned in this section, need not have been made before the original statutory period had expired. *Park v. Brooks*, 38 S. C. 300, 17 S. E. 22, 24.

But they must be affirmatively pleaded.—The two cases of *Fleming v. Fleming*, 33 S. C. 505, 508, 12 S. E. 257, 26 Am. St. Rep. 694, and *Park v. Brooks*, 38 S. C. 300, 17 S. E. 22, have settled the rule in this state to be that, where payments of principal or interest on a debt are relied upon as promises to pay, to avoid the bar of the statutes the same must be complained upon as such. *Jacobs v. Gilreath*, 41 S. C. 143, 19 S. E. 308, 309.

Partial payment on note tolls statute.—Under this section proof of a partial payment on a note is sufficient to toll the statute of limitation. *Park v. Brooks*, 38 S. C. 300, 17 S. E. 22. But payment after death of debtor does not arrest the statute. *Divine v. Miller*, 70 S. C. 225, 49 S. E. 479, 106 Am. St. Rep. 743.

Part payment by payee to assignee renders payee liable.—Under this section a payment by the payee of a note, to an assignee thereof, with knowledge of the assignment, renders the payee liable to pay the amount due on the note to such assignee as on a new promise. *McBrayer v. Mills*, 62 S. C. 36, 39 S. E. 788.

Application of payments made without specific instructions.—Where a creditor holds several claims against a debtor or who makes payments generally without any instructions as to application, the creditor may apply the payment to a debt already barred, thus tolling the statute. *Hopper v. Hopper*, 61 S. C. 124, 39 S. E. 366.

Illustrations of writings held to be an acknowledgment.—The cases illustrating

what instruments may and may not be considered acknowledgments so as to cause this section to operate are legion. It would be impossible to set out in a work of this kind every form of writing which has received judicial construction on the question of sufficient compliance with all of the requisites which go to make up an acknowledgment. The cases given below will serve as illustration of the general rules which we have discussed.—Ed. Note.

Letters of debtor admitting maturity of note.—Letters by a debtor, acknowledging that a note is due, but not expressing any intent not to pay it, are a sufficient written acknowledgment of a continuing contract, within the meaning of this section, to remove the bar of limitations, though they express an expectation to pay from the proceeds of sale of certain property, but do not contain an unconditional promise to pay. *Hill v. Hill*, 51 S. C. 134, 28 S. E. 309.

Letters may constitute a written acknowledgment of a debt due an estate, though addressed to the administrators as individuals, or though addressed to only one of two administrators. *Hill v. Hill*, 51 S. C. 134, 28 S. E. 309.

Indorsements made on note.—Indorsements of interest payments, made on a note given for a firm debt by one of the partners after the note had been filed in dissolution proceedings as a claim against the firm, transferring to the note entries of interest payments made on the firm ledger, are sufficient to toll the statute of limitation. *Bulcken v. Rhode*, 81 S. C. 503, 62 S. E. 786, 787.

Under this section an indorsement on a sealed note, of a payment, with a statement signed by the payor that he made the payment as heir of the maker of the note, arrests the running of the statute. *Cook v. Jennings*, 40 S. C. 204, 18 S. E. 640. See, also, the authorities there cited. And see *Walker v. Cassels*, 70 S. C. 271, 49 S. E. 862.

A promise by an administrator to pay decedent's debt is said to bind only his personal estate. *Divine v. Miller*, 70 S. C. 225, 49 S. E. 479, 106 Am. St. Rep. 743.

Ledger entries by bookkeeper.—The entries of the bookkeeper upon a ledger, by the direction of the copartnership, cannot be construed as a writing signed by the party to be charged thereby. *Bulcken v. Rhode*, 81 S. C. 503, 62 S. E. 786, 787. This is for the reason that there is no actual signing by the party to be charged, and no attempt or intention to deliver such writing to the creditor. *Id.*

A written acknowledgment of a firm debt by two of the partners, made after action brought to dissolve the firm, and presentation of the claim to a master, and objection made that it was barred by limitations, was insufficient to toll the statute, under this section. *Bulcken v. Rhode*, 81 S. C. 503, 62 S. E. 786.

Cited, as to inapplicability of section as to time of commencing actions against stockholders on a liability created by law. *Grice v. Anderson*, 109 S. C. 388, 96 S. E. 222, 224; *Gregory v. Perry*, 71 S. C. 246, 50 S. E. 787.

See generally, *Eastes v. Wood*, 21 S. C. 600; *Black v. White*, 13 S. C. 37; *Lanier v. Tolleson*, 20 S. C. 57.

§ 369. Partners only liable for their own acts after dissolution of partnership.—No acknowledgment, payment or part payment or renewal of any debt or obligation of a firm, made after notice of the dissolution of the copartnership, shall have any force or effect to bind any member of the firm or continue his liability to pay said copartnership debt, other than the person by whom such acknowledgment, payment or part payment or renewal shall be made, or in any wise affect their right to plead the statute of limitations or the presumption of payment from lapse of time.

1932 Code, § 369; Civ. P. '22, § 352; Civ. P. '12, § 158; Civ. P. '02, § 131a; 1900 (23) 349.

Part payments by one of several joint contractors do not bind the others and deprive them of the protection herein given. *Smith v. Townsend*, 9 Rich. 44; *Smith v. Caldwell*, 15 Rich. 365, 374;

Shubrick v. Adams, 20 S. C. 49.

Cited in *Deer Island Lumber Co. v. Virginia-Carolina Chemical Co.*, 111 S. C. 299, 97 S. E. 833; *Walters v. Kraft*, 23 S. C. 578.

§ 370. Suits on causes saved from bar of statute by part payment, etc.—All actions upon causes of action which would be barred by the statute of limitations but for part payment or a written acknowledgment, shall be brought on the original cause of action, and the part payment or written

acknowledgment shall be evidenced, to prevent the bar of the statute of limitations.

1932 Code, § 370; Civ. P. '22, § 353; Civ. P. '12, § 159; Civ. P. '02, § 131b; 1900 (23) 345.

Section simplifies former procedure.—

The object underlying this section was a change from the cumbersome practice of alleging the part payment or acknowledgment as a new promise, to the simpler form of an action upon the original instrument, leaving the fact of part payment or acknowledgment as evidence to prevent the bar of the statute. *Butts v. Georgetown Mut. Building & Loan Ass'n*, 142 S. C. 353, 140 S. E. 700, 701. For prior law, see *Fleming v. Fleming*, 33 S. C. 505, 12 S. E. 257, 26 Am. St. Rep. 694. See, also, *Colvin v. Phillips*, 25 S. C. 228.

Requirement of suing on original cause of action is mandatory.—Drafts on treasurer of benefit association made basis of suit after statute of limitations had run against original cause of action, if construed as written acknowledgment of the original indebtedness tolling the statute (the question was

not decided), held insufficient to warrant recovery, in view of this section, requiring suit to be brought on the original cause of action. *Kline v. Independent Order of Odd Fellows*, 138 S. C. 221, 136 S. E. 216.

The evidential value of the fact of part payment or acknowledgment, provided for in this section, is not taken as evidence against one who has not produced it. *Butts v. Georgetown Mut. Bldg., etc., Ass'n*, 142 S. C. 353, 140 S. E. 700, 701, holding that payments before or after maturity of a note by the maker does not toll the statute as to indorsers.

Allegation of a payment on a day certain is an allegation of a new promise.—*McBrayer v. Mills*, 62 S. C. 36, 39 S. E. 788.

Cited as not having retroactive operation, *Colvin v. Phillips*, 25 S. C. 228.

CHAPTER 12

Actions for the Recovery of Real Property

- 371. When State will not sue.
- 372. Grantee from State.
- 373. Limit for action by State or grantees.
- 374 and 375. When seizing within ten years necessary.

- 376. Action after entry.
- 377. Possession.
- 378 thru 382. Adverse possession.
- 383. Descent cast.
- 384. Persons under disability.
- 385. No action after forty years.

§ 371. When State will not sue.—The State will not sue any person for or in respect to any real property, or the issues or profits thereof, by reason of the right or title of the State to the same unless:

- (1) Such right or title shall have accrued within twenty years before any action or other proceeding for the same shall be commenced; or unless
- (2) The State, or those from whom it claims, shall have received the rents and profits of such real property, or of some part thereof, within the space of twenty years.

1932 Code, § 371; Civ. P. '22, § 314; Civ. P. '12, § 120; Civ. P. '02, § 95; 1870 (14) § 98; 1873 (15) 496.

In general.—Prior to the adoption of this section in 1870 the doctrine of nullum tempus prevailed in this state, *State v. Pacific Guano Co.*, 22 S. C. 50, the effect of the section on the doctrine remains to be construed. *Glover v. Floyd*, 76 S. C. 292, 296, 57 S. E. 25; *State v. Pinckney*, 22 S. C. 484; *State v. P. G. Co.*, 22 S. C. 50.

"Land" connotes the title thereto.—There is no such thing as "land," in contemplation of law, apart from the title to it. All the provisions of the code of procedure touching suits about land devolve about the title to the land. *Gibbs v. Hunter*, 99 S. C. 410, 83 S. E. 606, 607.

Presumption as to state ownership of land.—There is a presumption that the

State at one time owned all lands. *Trustees v. Columbia*, 108 S. C. 244, 93 S. E. 934, 936. And in an action to recover lands, the state may rest on this presumption until the defendant proves a divestment of her title. *Id.*

City may not plead statute against state seeking to recover its property.—Where a city holds and enjoys the use of real estate actually belonging to the State, the State may sue to recover such

property and in such action the municipal corporation cannot defend on the ground that the plaintiff's action has not accrued within the last 20 years. *Trustees v. Columbia*, 108 S. C. 244, 93 S. E. 934.

Cited as not having retrospective operation, *State v. Pinckney*, 22 S. C. 484; *Heyward v. Farmers' Min. Co.*, 42 S. C. 138, 19 S. E. 963, 20 S. E. 64, 46 Am. St. Rep. 702, 28 L. R. A. 42.

§ 372. When action cannot be brought by grantee from State.—No action shall be brought for or in respect to real property by any person claiming by virtue of letters patent or grants from the State, unless the same might have been commenced by the State as herein specified, in case such patent or grant had not been issued or made.

1932 Code, § 372; Civ. P. '22, § 315; Civ. P. '12, § 121; Civ. P. '02, § 96; 1870 (14) § 99.

§ 373. When action by State or their grantees to be brought within ten years.—When letters patent or grants of real property shall have been issued or made by the State, and the same shall be declared void by the determination of a competent court, rendered upon an allegation of a fraudulent suggestion, or concealment, or forfeiture, or mistake, or ignorance of a material fact, or wrongful detaining, or defective title, in such case an action for the recovery of the premises so conveyed may be brought either by the State, or by any subsequent patentee or grantee of the premises, his heirs or assigns, within ten years after such determination was made, but not after that period.

1932 Code, § 373; Civ. P. '22, § 316; Civ. P. '12, § 122; Civ. P. '02, § 97; 1870 (14) § 100; 1873 (15) 496.

§ 374. Seizin within ten years—when necessary—plaintiff limited to two actions.—(1) No action for the recovery of real property, or for the recovery of the possession thereof, shall be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the premises in question within ten years before the commencement of such action: *provided*, no action to recover possession of real property shall be brought against a party in possession under claim of title through a deed or deeds in which a defective renunciation of inheritance occurred, or in which no renunciation of inheritance was made where one should have been executed, where said right of action would not exist, except by reason of an ancestor's defective renunciation of inheritance or failure to execute a renunciation of inheritance, unless said action is commenced prior to January 1, 1914.

(2) The plaintiff in all actions for recovery of real property, or the recovery of the possession thereof, is hereby limited to two actions for the same, and no more; *provided*, that the costs of the first action be first paid, and the second action be brought within two years from the rendition of the verdict or judgment in the first action, or from the granting of a nonsuit or discontinuance therein.

1932 Code, § 374; Civ. P. '22, § 317; Civ. P. '12, § 123; Civ. P. '02, § 98; 1879 (22) 76; 1913 (27) 36.

- I. General considerations.
- II. Subdivision (1).
- III. Subdivision (2).
 - A. Common law principles.
 - B. The statutory requisites.
 - 1. In general.
 - 2. Conditions enumerated and necessity of compliance.
 - a. Generally.
 - b. Payment of costs.
 - c. The two year limitation.
 - 3. Actions for recovery of real estate.
 - a. General principles.
 - b. Illustrations.

I. GENERAL CONSIDERATIONS.

History of section.—For a full discussion of the historical origin and growth of this section the practitioner is referred to *Columbia Water-Power Co. v. Columbia Land, etc., Co.*, 42 S. C. 488, 20 S. E. 378; *Carr v. Mouzon*, 93 S. C. 161, 163, 76 S. E. 201, Ann Cas. 1914C, 731.

Applies only in actions for recovery of real property.—This section applies only to actions for the recovery of real property, and a plea filed hereunder will not serve as a plea of the statute of limitations in an action other than for the recovery of real property. See *Williams v. Halford*, 73 S. C. 119, 53, S. E. 88, 90.

Just what actions may and may not be considered actions for the recovery of real property within the meaning of either of the sub-sections composing this section, has been the source of much litigation in this state. The treatment of this subject has been placed under analysis line, III, B. 3, to which reference is here made.—Ed. note.

II. SUBDIVISIONS (1).

Editor's note.—The phraseology of this section has been a fruitful field for much litigation in this state. Almost every clause contained in this section has been construed at least one time by the Supreme Court of this state. Most of the decided cases have arisen under subdivision (2) of this section. Therefore, the major annotations will be found under the next analysis line. It will be noted that in both of the subdivisions the phrase "action for the recovery of real property" is used. This phrase has been construed in many cases, but since most of the cases bear chiefly upon subdivision (2), the cases construing the phrase quoted above have been discussed under analysis line, III, B. 3, a. Reference is here made to that treatment.

Adverse possession for statutory period confers good title.—Adverse possession for ten years confers good title which may be asserted affirmatively. *Duren v. Kee*, 50 S. C. 444, 27 S. E. 875,

and the authorities therein cited. See also *Columbia, etc., R. Co. v. Laurens Cotton Mills*, 82 S. C. 24, 61 S. E. 1089, 62 S. E. 1119; *Southern Ry. v. Howell*, 79 S. C. 281, 286, 60 S. E. 677; *Southern Ry. v. Gossett*, 79 S. C. 372, 60 S. E. 956; *Williams v. Halford*, 73 S. C. 119, 53 S. E. 88; *Harman v. Southern Ry.*, 72 S. C. 228, 51 S. E. 689; *Epperson v. Stansill*, 64 S. C. 485, 42 S. E. 426; *Kolb v. Jones*, 62 S. C. 193, 40 S. E. 168; *Cave v. Anderson*, 50 S. C. 293, 27 S. E. 693; *Busby v. Florida Cent., etc., R. Co.*, 45 S. C. 312, 23 S. E. 50; *Harrelson v. Sarvis*, 39 S. C. 14, 17 S. E. 368.

But tacking of periods of limitations is not permitted.—This section has been so construed that possession hereunder, to be adverse, must have been continued by the same person for 10 years, and the possession of one cannot be united or tacked to that of those under whom he claims. *Garrett v. Weinberg*, 48 S. C. 28, 26 S. E. 3.

Death does not toll statute.—In *Fraday v. Ivester*, 129 S. C. 536, 125 S. E. 134, it is held that the death of a person against whom the ten year limitation in this section had been running for almost eight years did not toll the statute, though title passed to a person under disability.

Action under will after 50 years.—Child and grandchildren of testator's daughter whose ancestors had not been in possession for more than 50 years could not recover property from successors of daughter's grantees, where devise either created fee conditional or tenancy in testator's daughter and daughter's children at time will took effect. *McQuage v. Calhoun*, 178 S. C. 345, 183 S. E. 164.

III SUBDIVISION (2).

A. Common Law Principles.

Common law did not limit number of actions.—At common law there was no limit to the number of actions of ejectment which a plaintiff might bring for the recovery of the same real property, and, as each was based upon the fiction of a different lease, entry, and ouster, they were not within the principles of *res judicata*, because the parties were not the same, and the cause of action was different. *Carr v. Mouzon*, 93 S. C. 161, 76 S. E. 201, 202, Ann. Cas. 1914C, 731. See, also, *Columbia Water-Power Co. v. Columbia Land & Inv. Co.*, 42 S. C. 488, 20 S. E. 378, for a full discussion of the common law. And see *Walsh v. Evans*, 112 S. C. 131, 99 S. E. 546; *Tompkins v. Augusta & K. R. Co.*, 30 S. C. 479, 9 S. E. 521.

Section constitutes exception to doctrine of res judicata.—See this catch line under analysis line, III, B. 1, treating the case of *Williams v. Wannamaker*,

122 S. C. 368, 115 S. E. 637.

Section radically changes the common law procedure.—When this section was adopted, radical changes had been made in legal procedure. The technical pleadings of the common law and feigned issues had been abolished. John Doe and Richard Roe could no longer sue and defend; but actions (with few exceptions) had to be prosecuted and defended by the real parties in interest. The action for "recovery of real property" had been substituted for the common-law action of ejectment. This section must be construed in the light of these changes. Carr v. Mouzon, 93 S. C. 161, 76 S. E. 201, 202, Ann. Cas. 1914C, 731.

See generally, Geiger v. Kaigler, 15 S. C. 271; Turnbull v. Ross, 141 Fed. 649.

B. The Statutory Requisites.

1. In General.

Section "limits" party to two actions.—This section was enacted not to give two actions to a person who might sue to recover real property, but to "limit" such a person to two actions. Walsh v. Evans, 112 S. C. 131, 99 S. E. 546, 547; Tompkins v. Augusta & K. R. Co., 30 S. C. 479, 9 S. E. 521.

This section relates to the individual bringing an action, and to the class of property sought to be recovered in that action, and is clearly a restriction on what otherwise would be the right of that individual in reference to his legal status as to that property. In the absence of the statute, he could bring as many actions as he chose for the recovery of the same real estate. Logan v. Jones, 155 S. C. 258, 152 S. E. 518, 519.

Which means the bringing of the same action twice.—This section authorizes plaintiff in ejectment to bring the same action twice, and does not mean that plaintiff's right is limited to the bringing of two different actions to recover the same amount or actions based on different facts. Carr v. Mouzon, 93 S. C. 161, 76 S. E. 201, Ann. Cas. 1914C, 731.

And relieves defendant from continued attacks on his title.—This section was enacted, not only to limit the right of a person to two actions for the recovery of real estate, but it was intended also to protect a person in possession of, and claiming title to, real estate. Such person has a right sometime to be relieved of continued attacks on his title by the same person, or those claiming under him. It is a statute of repose, and should be so construed. Logan v. Jones, 155 S. C. 258, 152 S. E. 518, 520, and the authorities therein cited.

If an action is not instituted within the two year period after the discontinuance or verdict in the first action, the title to the land is determined to be in the de-

fendant. Dyson v. Leek, 5 Strob. 141; Binda v. Benbow, 11 Rich. 24.

Section does not apply to defenses.—This section forbids the bringing of more than two actions, but does not apply to a defense. Dent v. Bolar, 125 S. C. 63, 118 S. E. 26.

Section constitutes exception to doctrine of res judicata.—Under the general doctrine of res judicata a party would be prohibited from instituting a second action against the same defendant upon the same cause of action. In other words, the general rule is that the first action is res judicata of the second, where the same parties and the same issues are involved. This section, however, constitutes an exception to the doctrine of res judicata, and by this statute a second action, which otherwise would be prohibited, is expressly permitted. See Williams v. Wannamaker, 122 S. C. 368, 115 S. E. 637.

And the judgment in first action is not res judicata of second.—Where a second action in ejectment is brought after payment of costs of the first and within the time specified, the judgment in the first action is not res judicata of the second. Carr v. Mouzon, 93 S. C. 161, 76 S. E. 201, Ann. Cas. 1914C, 731, and the authorities therein discussed.

Provided the action falls within this section.—In order for the statutory exception to apply, the case in question must of course fall within this section. See Williams v. Wannamaker, 122 S. C. 368, 115 S. E. 637, wherein it is held that a judgment in partition is not within this section, and is therefore a complete bar to a second action for the same cause between the same parties.

For illustrations of cases held within, and those held to be without, this section, the practitioner is referred to analysis line, "Illustrations," III, B, 3, b.

2. Conditions Enumerated and Necessity of Compliance.

a. Generally.

Conditions precedent to institution of second action.—Before a second action can be brought for the recovery of real property, two conditions must be complied with: (1) The costs of the previous action must "be first paid;" and (2) the second action must be brought within two years from the termination of the first action, either by the "rendition of the verdict or judgment in the first action" or "the granting of a non-suit or discontinuance therein." If either or both of these conditions be not first complied with, then there is no authority for the bringing of a second action, and it must, therefore, necessarily fail. Columbia Water-Power Co. v. Columbia Land & Inv. Co., 42 S. C. 488, 20 S. E. 378, 380. See, also, Logan v. Jones, 155 S.

C. 258, 152 S. E. 518; *Stewart-Jones Co. v. Hankins*, 155 S. C. 234, 152 S. E. 430, 431.

Compliance with named conditions is mandatory.—Subdivision 2 of this section was not intended only as a benefit to the defendant but it fixes a condition precedent to the privilege accorded to the plaintiff. *Peterman v. Pope*, 74 S. C. 296, 54 S. E. 569.

And may not be waived by defendant.—The defendant does not waive plaintiff's failure to comply with this section by failing to have the costs regularly taxed, or by failing to claim or demand payment of the costs, or by going to trial, knowing that the costs had not been paid. *Columbia Water-Power Co. v. Columbia Land & Inv. Co.*, 42 S. C. 488, 20 S. E. 378, 381. See, also, *Stewart-Jones Co. v. Hankins*, 155 S. C. 234, 152 S. E. 430.

Nor dispensed with by court order.—A provision in an order of discontinuance that the plaintiff desires to let his action fall "for the purpose of bringing a new action," does not and cannot dispense with the requirements of this section. *Columbia Water-Power Co. v. Columbia Land & Inv. Co.*, 42 S. C. 488, 20 S. E. 378, 382.

b. Payment of Costs.

Compliance with requirements should be affirmatively alleged.—It is the duty of plaintiff to allege in his complaint the performance of the requirement as to the payment of the cost of the first action in order to show his right to maintain the second action. *Peterman v. Pope*, 74 S. C. 296, 54 S. E. 569, 570.

Otherwise it is assumed that there are unpaid costs.—The contention has been made that until the costs of the previous action have been paid, it cannot be assumed that there were any such costs. But this position is said to be untenable. See *Columbia Water-Power Co. v. Columbia Land & Inv. Co.*, 42 S. C. 488, 20 S. E. 378, 382.

And if not alleged then defendant may show noncompliance.—If the plaintiff does not affirmatively show payment of costs, as he should do, then the defendant may be permitted to amend his answer before trial so as to allege such nonpayment. *Peterman v. Pope*, 74 S. C. 296, 54 S. E. 569.

And plaintiff's defective pleading is not waived by filing answer.—If this be a defect appearing on the face of the complaint, the objection is not waived by answer without stating the objection, but may be urged on the trial, if the defendant give five days' notice in writing to the opposite party of the grounds of such objection. *Peterman v. Pope*, 74 S. C. 296, 54 S. E. 569, 570.

Costs for witnesses may be paid directly to witnesses.—In a suit for posses-

sion of land the prevailing party taxed costs for his witnesses individually on the subpoena tickets and their affidavits of attendance. The losing party paid the costs as taxed by the clerk, but did not pay them to the defendant or to the clerk, but directly to the witnesses themselves, taking their individual receipts, and filing the same with the clerk of court. In the second action, based upon the same cause of action the prevailing party could not allege that the losing party had not paid the costs, as required by this section, before bringing such second action, though the prevailing party had previously paid the witnesses part of their fees. *Mitchell v. Barrs*, 64 S. C. 197, 41 S. E. 962, and the authorities therein discussed.

Payment under court order without objection, estops plaintiff to deny existence of costs.—Where plaintiff, on the second trial, under an order of court, and without objection, pays into court the amount stated by the clerk to be due for the costs of the first trial, he is estopped to claim on appeal that, as the costs were never taxed, there never had been any legal costs. *Columbia Water-Power Co. v. Columbia Land & Inv. Co.*, 42 S. C. 488, 20 S. E. 378.

c. The Two Year Limitation

The word "or" is used disjunctively.—The word "or" used in this subdivision is used in the disjunctive sense. *Love v. Turner*, 84 S. C. 178, 65 S. E. 1043.

And limitation commences at verdict or judgment.—Under subd. 2 of this section, the two year period begins to run either from the verdict "or" judgment. The word "or" is used in the disjunctive sense. *Love v. Turner*, 84 S. C. 178, 65 S. E. 1043.

Or at granting of order of discontinuance.—Where a first action is discontinued on plaintiff's motion, the time within which a second action may be brought begins to run from the granting of the order allowing the discontinuance. *Columbia Water-Power Co. v. Columbia Land & Inv. Co.*, 42 S. C. 488, 20 S. E. 378.

Or at granting of nonsuit.—Under this section the two years begin to run from the date of the granting the nonsuit in the first action, and not from the date of discontinuance of appeal or order dismissing the appeal. *Richardson v. Riley*, 67 S. C. 53, 45 S. E. 104, approving *Trimmier v. Trail*, 2 Bailey 480, wherein the court said: "When an appeal from an order of nonsuit has been dismissed or abandoned, the order of nonsuit, and not the dismissal of the appeal, is to be regarded as the legal termination of the suit, and the pendency of the appeal cannot be pleaded in abatement to a new action for the same cause brought

in the interval between the order of nonsuit and the dismissal of the appeal."

And judgment need not be entered on verdict.—It is unnecessary and immaterial whether a judgment is entered on the verdict in the first action. *Love v. Turner*, 84 S. C. 178, 65 S. E. 1043, holding also that where the agreed "case" prepared for appeal stated "the jury found for the defendant and judgment was entered accordingly," and the Supreme Court "affirmed the judgment," the parties are estopped, in a subsequent case, to deny that a judgment was entered on the verdict. See, also, *Columbia Water-Power Co. v. Columbia Land & Inv. Co.*, 42 S. C. 488, 20 S. E. 378, where the first action was discontinued on motion.

On this point it is well for the practitioner to bear in mind that the English cases and the early South Carolina cases, to the contrary (decided prior to the adoption of the code of civil procedure), are not applicable. See *Columbia Water-Power Co. v. Columbia Land & Inv. Co.*, 42 S. C. 488, 20 S. E. 378, 381.

Which may not always be done.—It sometimes happens that in actions for the recovery of real estate a verdict is returned upon which no judgment could be entered. See *Love v. Turner*, 84 S. C. 178, 65 S. E. 1043, 1044, and the illustration there given. See, also, *Columbia Water-Power Co. v. Columbia Land & Inv. Co.*, 42 S. C. 488, 20 S. E. 378, 380, wherein the court said: "It is somewhat difficult to understand how any judgment could be entered upon an order of discontinuance, especially when it is granted on the motion of the plaintiff."

Statute not suspended by appeal.—An appeal does not suspend the running of the limitation in this section. This is shown by the use of the words "verdict," "nonsuit" and "discontinuance," which as used herein apply to the terminations of actions only in the circuit court, and not in the Supreme Court. *Love v. Turner*, 84 S. C. 178, 65 S. E. 1043, 1044.

3. Actions for Recovery of Real Estate.

a. General Principles

The word "action" defined.—The word "action" is used in this section in the sense that it is defined in section 2 and in section 352 of this code, namely, an "ordinary proceeding, by which a party prosecutes another party for the enforcement of a right." *Walsh v. Evans*, 112 S. C. 131, 99 S. E. 546. See, also, *Columbia Water-Power Co. v. Columbia Land & Inv. Co.*, 47 S. C. 117, 25 S. E. 48, 51.

Under this section the dismissal of a second action for failure to pay the costs of the first action precludes the plaintiff from bringing another action for the re-

covery of the land. In other words, such proceeding, though dismissed, constitutes the second action referred to in this section. *Columbia Water-Power Co. v. Columbia Land & Inv. Co.*, 47 S. C. 117, 25 S. E. 48, 50.

Character of action is determined by pleadings.—The determination of the question whether a particular proceeding is an action for the recovery of real property, within the meaning of this section, is fixed by the events which the pleaders have recited, the one to enforce a right and the other to resist such enforcement, or to set up another right. It makes no difference what terminology the pleaders may chance to give to the proceeding. See *Walsh v. Evans*, 112 S. C. 131, 99 S. E. 546. The issues that arise out of the pleadings are controlling. *Id.* In *Elmore v. Davis*, 49 S. C. 1, 26 S. E. 898, it is said that the character of the action is to be determined by the plaintiff's complaint. And in *Southern Cotton Oil Co. v. Shelton*, 220 Fed. 247, it is held that whether or not an action is within this section must be determined by the essential nature of the complaint, in view of the facts alleged and the prayer for relief. To the same effect is *Hall v. Boatwright*, 58 S. C. 544, 36 S. E. 1001, 79 Am. St. Rep. 864. But the complaint may not, in every case, be the source of information by which to determine the character of the action. It must be remembered that it is the issue, as made up by the pleadings, which governs the character of the action. It makes no difference by whom the issue is made. See *Walsh v. Evans*, *supra*, wherein the defendant's answer tendered the issue.

And the addition of new parties does not change character of suit.—Where two actions for the recovery of the same real estate against the same defendant have been brought and dismissed, a third action cannot be brought and sustained by the same parties merely by adding other parties as plaintiffs. *Logan v. Jones*, 155 S. C. 258, 152 S. E. 518. The result that would follow if such procedure were permitted, is clearly stated by the court, in the following language:

"If (such procedure were permitted) then a party may bring his action for the recovery of real estate, and dismiss and pay costs, bring his second within two years, dismiss and pay costs, add some other party, real or fictitious, and bring another action despite the fact that he has had two actions dismissed, and so on ad infinitum. The statute would be a nullity because it could be evaded by merely adding new parties as plaintiffs." (Parenthesis supplied.)

The question whether or not the newly added parties plaintiff could bring an

action against the defendant for any alleged interest they might have, if they did not claim title through the parties who brought the first two actions, and therefore barred from a third, or from the same common source, was raised but was not decided in *Logan v. Jones*, 155 S. C. 258, 152 S. E. 518, 520.

Possession of land is essentially involved.—An action “for recovery of real property” presupposes that the defendant therein is in possession of the land in dispute, and it is predicated upon his refusal to surrender the possession thereof to the plaintiff. Therefore a second action for the same land must be for the same cause. *Carr v. Mouzon*, 93 S. C. 161, 76 S. E. 201, 203, Ann. Cas. 1914C, 731.

And “recovery” thereof must be sought.—Under this subdivision, both the first and the second action must be to “recover” the land in question, in order to bar the institution of a third suit. *Foster v. Foster*, 81 S. C. 307, 62 S. E. 320, 321.

Though this need not be sole relief.—This section, in view of section 487, which permits the joinder of several causes of action, legal or equitable, or both, in the same suit, is not limited in its application to actions in which the sole relief sought is the recovery of real estate or possession thereof, but applies as well to actions in which two causes are joined. *Southern Cotton Oil v. Shelton* (S. C.), 220 Fed. 247.

b. Illustrations.

Enjoining appropriation of land.—An action to enjoin a railroad company from appropriating land for its road, and for damages for such appropriation, is not an action “for the recovery of real property, or the recovery of the possession thereof,” within the meaning of this section. *Tompkins v. Augusta & K. R. Co.*, 30 S. C. 479, 9 S. E. 521.

Section applies to suits by trustee.—This section applies to suits brought by a trustee for an infant cestui que trust. *Benbow v. Levi*, 50 S. C. 120, 27 S. E. 655.

But it does not apply to suit brought to ascertain if land is subject to trust deed.—A suit, brought by a trustee, to determine whether land then in possession of defendant in such action is subject to the trust deed, is not an action for the recovery of real estate within the meaning of this section. *Martin v. Ragsdale*, 71 S. C. 67, 50 S. E. 671.

Partition suit is not action to “recover” land.—This section does not preclude a suit to “partition” land, because

more than two years before bringing the suit the plaintiff discontinued an action brought to “recover” the land. *Foster v. Foster*, 81 S. C. 307, 62 S. E. 320, 321. See, also, *Elmore v. Davis*, 49 S. C. 1, 26 S. E. 898.

A complaint, which purports to seek partition, does not state a cause of action in partition where it is alleged that the whole title is in other parties to the action than the defendant in possession. Such allegations in effect demand recovery against the defendant in possession and really constitute an action of ejectment, so that if two actions for the recovery of the same land have previously been instituted, then the present action, though styled a partition suit, must fail. *Mitchum v. Shaw*, 98 S. C. 175, 82 S. E. 401.

Where two actions for recovery of land were discontinued, a subsequent action against the same defendant in possession by the same plaintiffs for partition, though defendant has no interest in the land, is in effect an action for the recovery of the land and is not maintainable under this section. *Mitchum v. Shaw*, 98 S. C. 175, 82 S. E. 401.

Unless the issue as to superiority of title is involved.—But a partition suit involving the issue of whether defendant's title is paramount to that of plaintiff, is an “action for recovery of real property” within the meaning of this section. *Walsh v. Evans*, 112 S. C. 131, 99 S. E. 546, holding that two such partition suits previously instituted, bar the plaintiff's right to institute another suit seeking to recover possession of the property. The *Foster* case and the *Elmore* case, cited *supra*, are discussed and distinguished.

There are forms of action by which the title to real property may be brought in issue and determined, as, for instance, an action for damages for trespass in the nature of common-law action of trespass quare clausum fregit, an action for rents and profits, and actions for foreclosure of mortgage or partition in which a defendant sets up an independent legal title in himself, but none of these are actions “for recovery of real property,” and therefore they do not fall within the provisions of this section. *Carr v. Mouzon*, 93 S. C. 161, 76 S. E. 201, 203, Ann. Cas. 1914C, 731, citing *Tompkins v. Railroad Co.*, 30 S. C. 479, 9 S. E. 521; *Elmore v. Davis*, 49 S. C. 1, 26 S. E. 898; *Foster v. Foster*, 81 S. C. 307, 311, 62 S. E. 320. See, also, *Frederick v. Chapman*, 144 S. C. 137, 142 S. E. 247, 249.

§ 375. Seizin within ten years—when necessary in action or defense founded on title, etc.—No cause of action, or defense to an action, founded

upon a title to real property, or to rents or services out of the same, shall be effectual, unless it appear that the person prosecuting the action or making the defense, or under whose title the action is prosecuted or the defense is made, or the ancestor, predecessor, or grantor of such person, was seized or possessed of the premises in question within ten years before the committing of the act in respect to which such action is prosecuted or defense made.

1932 Code, § 375; Civ. P. '22, § 318; Civ. P. '12, § 124; Civ. P. '02, § 99; 1870 (14) § 102; 1873 (15) 496.

See § 377 and the note thereto.

C. 322, 330, 51 S. E. 101.

See generally, *Love v. Turner*, 71 S.

§ 376. Action after entry, or right of entry.—No entry upon real estate shall be deemed sufficient or valid as a claim, unless an action be commenced thereupon within one year after the making of such entry, and within ten years from the time when the right to make such entry descended or accrued.

1932 Code, § 376; Civ. P. '22, § 319; Civ. P. '12, § 125; Civ. P. '02, § 100; 1870 (14) § 103; 1873 (15) 496.

§ 377. Possession—when presumed—occupation when deemed under legal title.—In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the premises shall be presumed to have been possessed thereof within the time required by law; and the occupation of such premises by any other person shall be deemed to have been under and in subordination to the legal title, unless it appear that such premises have been held and possessed adversely to such legal title for ten years before the commencement of such action.

1932 Code, § 377; Civ. P. '22, § 320; Civ. P. '12, § 126; Civ. P. '02, § 101; 1870 (14) § 104; 1873 (15) 496.

Prior law provided for 20 year limitation.—Prior to 1873 when this section was adopted, a twenty year limitation applied to the cases herein mentioned, instead of the ten year limitation now provided for. See *Sudduth v. Sumeral*, 61 S. C. 276, 39 S. E. 534, 536, 85 Am. St. Rep. 883.

An adverse possession commencing prior to the insertion in this section of the ten year limitation provision, must have continued for the full 20 year period before it could ripen into a right. *Hodge v. Hodge*, 56 S. C. 263, 34 S. E. 517, 523; *Lyles v. Roach*, 30 S. C. 291, 9 S. E. 334; *Rehkopf v. Kuhland*, 30 S. C. 234, 9 S. E. 99.

Proof of legal title raises presumption of possession for 10 years.—This section has been construed several times to mean that, where a person proves legal title to real property, the person so proving the legal title is presumed to have been in possession of the premises for 10 years. *Love v. Turner*, 71 S. C. 322, 51 S. E. 101; *Dickson v. Epps*, 104 S. C. 381, 89 S. E. 354; *Atlantic Coast Line R. Co. v. Baker*, 143 S. C. 445, 141 S. E.

688, 697; *Moseley v. Hankinson*, 25 S. C. 519, 524.

And allegation of the fee is equivalent to allegation of possession.—The allegation of ownership in fee simple carries with it the allegation of possession, for the possession is presumed to follow the legal title. *Shute v. Shute*, 79 S. C. 420, 60 S. E. 961, 963; *Stokes v. Murray*, 102 S. C. 395, 87 S. E. 71.

And burden is then on opposite party to show adverse possession.—In an action to recover land, where plaintiffs have proved a good legal title in themselves from their ancestor, thus raising the presumption mentioned in this section, the burden is on the defendant to show that his possession was adverse. *Stokes v. Murray*, 102 S. C. 395, 87 S. E. 71. See, also, *Dickson v. Epps*, 104 S. C. 381, 89 S. E. 354.

But actual occupancy is unnecessary to create presumption.—In *Haithcock v. Haithcock*, 123 S. C. 61, 115 S. E. 727, 730, the Supreme Court approved a charge to the jury which stated the law to be that the presumption mentioned in this section was effective if the party

shows title, even though he may never have seen the land in question.

And it is only destroyed by adverse occupancy for 10 years.—The presumption stated in this section holds good unless and until someone else goes on the land and occupies it adversely for 10 years. *Haithcock v. Haithcock*, 123 S. C. 61, 115 S. E. 727, 730; *Love v. Turner*, 71 S. C. 322, 51 S. E. 101, 104. Adverse possession gives no right until the expiration of 10 years. *Ellen v. Ellen*, 16 S. C. 132, and therefore a deed given by a claimant within the 10 year period can convey no title. *Id.*

Which means 10 consecutive years.—The period of limitation mentioned in this section must be continuous, and the taking of several separate possessions is not permitted to make up the required 10 year period. See *Hodge v. Hodge*, 56 S. C. 263, 34 S. E. 517, 523; *Haithcock v. Haithcock*, 123 S. C. 61, 115 S. E. 727, 730.

The possession must be continuous—not a possession now and a possession some other time—not a sporadic possession, but the continuous possession for 10 years in order to ripen such a possession into a title. *Haithcock v. Haithcock*, 123 S. C. 61, 115 S. E. 727, 730.

The possession of a landlord through successive tenants is deemed continuous. *Mahoney v. Southern Ry.*, 82 S. C. 215, 64 S. E. 228.

But possession of the heir may be tacked to that of ancestor.—*Bardin v. Commercial Ins. & Trust Co.*, 82 S. C. 358, 64 S. E. 165; *Powers v. Smith*, 80 S. C. 110, 61 S. E. 222; *Brucke v. Hubbard*, 74 S. C. 144, 54 S. E. 249; *Epperson v. Stansill*, 64 S. C. 485, 42 S. E. 426.

Although the grantee of a disseisor cannot unite his possession with that of the disseisor.—*Epperson v. Stansill*, 64 S. C. 485, 42 S. E. 426, 427, citing *Pegues v. Warley*, 14 S. C. 180; *Ellen v. Ellen*, 16 S. C. 132; *Burnett v. Crawford*, 50 S. C. 161, 27 S. E. 645.

The distinction between the two situations just referred to is that when possession is cast by operation of law from ancestor to heir in possession, there is no break in the continuity of possession, whereas, in the case of disseisor and grantee, there is a new entry and a break in the continuity of possession. *Epperson v. Stansill*, 64 S. C. 485, 42 S. E. 426.

Nor may the possession of successive purchasers be united.—*Pegues v. Warley*, 14 S. C. 180.

Possession denotes existence of a group of facts.—Holmes in his common law, page 214, has made a luminous statement in regard to the term "possession," which was regarded with approval in

Dickson v. Epps, 104 S. C. 381, 89 S. E. 354, 355.

"The word 'possession' denotes a group of facts. Hence when we say of a man that he has possession, we affirm directly that all the facts of a certain group are true of him, and we convey indirectly or by implication that the law will give him the advantage of the situation."

And such facts alone may be testified to.—A witness in a suit which is being defended on the ground of adverse possession may relate acts of possession or ownership, but the witness cannot say who has been in possession. *Dickson v. Epps*, 104 S. C. 381, 89 S. E. 354.

And to be "adverse" it must evidence ownership of land.—"Adverse possession" means such possession as evidences or shows to the jury the right of the claim to the ownership of the land. *Haithcock v. Haithcock*, 123 S. C. 61, 115 S. E. 727, 730. And a mere trespass is insufficient. See *Carr v. Mouzon*, 86 S. C. 461, 68 S. E. 661, post this note.

The giving of a deed or mortgage by one in possession of land is ordinarily evidence of assertion of title. *Carr v. Mouzon*, 86 S. C. 461, 68 S. E. 661.

In an action of trespass *quare clausum fregit*, the defendant may justify his entry on plaintiff's actual possession by showing title in himself. *Lyles v. Fellers*, 138 S. C. 31, 136 S. E. 13. But this may not be done by showing title in a third person with whom the defendant is unconnected. *Id.*

There can be no adverse claim against any cotenants unless the claim is adverse to all the cotenants. *Scaife v. Thomson*, 15 S. C. 337. See, also, *Green v. Cannady*, 71 S. C. 317, 51 S. E. 92.

The minority of one tenant in common will protect the entire property held in common from the operation of the statute of limitations in favor of an adverse claimant in possession. *Garrett v. Weinberg*, 48 S. C. 28, 26 S. E. 3.

Mere possession for 10 years by purchaser from a mortgagor of part of mortgaged lands, after the condition is broken, is no bar to a foreclosure against the mortgagor and the purchaser. *Norton v. Lewis*, 3 S. C. 25, reaffirming *Wright v. Eaves*, 5 Rich. Eq. 81. See, also, *Lynch v. Hancock*, 14 S. C. 66; *Clark v. Smith*, 13 S. C. 585. But as to purchaser against a judgment, see *Goldsmith v. Jacobs*, 14 S. C. 624.

As to possession under color of title, and actual occupancy of part of a tract of land, see the section immediately following and the note thereto.

So as to ripen into good title.—In view of this section, and the four sections immediately following, an occupancy which is a mere trespass without claim of title cannot ripen into a good title

however long continued. *Carr v. Mouzon*, 86 S. C. 461, 68 S. E. 661.

A person who has been in adverse possession of land for the statutory period has a good and valid title by virtue of such adverse possession, which may be affirmatively asserted against one not protected by some disability. The statute of limitations has a double aspect; besides offering a shield of defense, it may, under certain circumstances, give title capable of being asserted actively. *Lyles v. Fellers*, 138 S. C. 31, 136 S. E. 13, 16, and the authorities there cited.

A person going into possession of land under contract to purchase it, cannot acquire title against the vendor until the payment of the purchase money. *Blackwell v. Ryan*, 21 S. C. 112.

But title will not ripen as against State.—*Kolb v. Jones*, 62 S. C. 193, 40 S. E. 168. Unless the state has actually or presumptively parted with title. *Epperson v. Stansill*, 64 S. C. 485, 42 S. E. 426.

Or to rebut the statutory presumption.—In an action by tenants in common for 20 years in the face of notorious and exclusive possession, the use and exercise of authority incident to exclusive and adverse ownership is sufficient to rebut the presumption that the possession was subordinate to the legal title, and is sufficient to establish the presumption of a grant. *Powers v. Smith*, 80 S. C. 110, 61 S. E. 222.

But possession under legal title once commenced is presumed to continue.—Where a person's possession commenced under a legal title, so that he and others were co-tenants, the continuance of the possession was, under this section, presumptively under the legal title. *Sibley v. Sibley*, 88 S. C. 184, 70 S. E. 615, Ann. Cas. 1912C, 1170.

Where, under a deed from tenant in common purporting to convey the entire fee, the grantee goes into possession after recording the deed, and holds the lands adversely as his own, it amounts to an ouster of the other tenants in common, and gives such holder, after 10 years, title by adverse possession against the tenants in common. *Sudduth v. Sumner*, 61 S. C. 276, 39 S. E. 534, 85 Am. St. Rep. 883.

But actual notice of ownership is not necessary.—Under an instruction in a suit for partition, in which defendants set up exclusive title to the premises, the fact that a tenant is not bound to give actual notice to his co-tenant of ouster, but he may do so by conduct, and that holding exclusively, adversely, and openly are the highest acts in the power of a disseisor to indicate his intention, and that the law presumes possession unexplained to be adverse, is

sufficient. *Powers v. Smith*, 80 S. C. 110, 61 S. E. 222.

And the possession must be hostile.—In order to constitute an adverse possession there must be a hostile holding, a holding claiming the land as the holder's own, a claiming that he has a right to hold it against the world. *Haithcock v. Haithcock*, 123 S. C. 61, 115 S. E. 727, 730.

Which presupposes a trespass.—Adverse possession necessarily presupposes a trespass upon the rights of the lawful owner. *Moseley v. Hankinson*, 25 S. C. 519, 524. Hence, purchasers of the interest of a life tenant cannot be regarded as trespassers upon the rights of remaindermen until the life estate terminates. *Id.* See also, *Sutton v. Clark*, 59 S. C. 440, 38 S. E. 154, 82 Am. St. Rep. 848; *Massey v. Duren*, 3 S. C. 34.

Where a woman, married before the constitution of 1868, did not have the right to the possession of her land acquired before that time until the death of her husband, the statute did not commence to run against her until her husband's death. *Garret v. Weinberg*, 48 S. C. 29, 26 S. E. 3. See also, *Rawles v. Johns*, 54 S. C. 394, 32 S. E. 451; *Boykin v. Ancrum*, 28 S. C. 486, 6 S. E. 305, 13 Am. St. Rep. 698; *Moseley v. Hankinson*, 25 S. C. 519; *Covar v. Cantelou*, 25 S. C. 35; *Banister v. Bull*, 16 S. C. 220; *Bell v. Tabbird*, Rich. Eq. 361; *Joyce v. Gunnels*, 2 Rich. Eq. 259.

But the occasional intrusion of a trespasser will not interrupt the continuity of adverse possession. *Love v. Turner*, 78 S. C. 513, 59 S. E. 529. See, also, *Carr v. Mouzon*, 86 S. C. 461, 68 S. E. 661.

On an issue whether the possession of M., under whom plaintiff claimed, was adverse or permissive, it was proper to charge that permissive possession could not avail against a paper title. *Carr v. Mouzon*, 86 S. C. 461, 68 S. E. 661.

And the character thereof is a question for the jury.—The character of the possession is a question for the jury. *Cantey v. Platt*, 2 McCord, 260; *Hill v. Saunders*, 6 Rich. 62; *Abel v. Hutto*, 8 Rich. 42. Where one claims title to lands by adverse possession, the question whether such possession is, in fact, adverse is for the determination of the jury. *Harrington v. Wilkins*, 2 McCord, 289, approved in *Lyles v. Fellers*, 138 S. C. 31, 136 S. E. 13, 17; *Stokes v. Murray*, 95 S. C. 120, 78 S. E. 741.

Which question must be clearly shown.—Where the question is whether a party has acquired title to real estate by adverse possession for a period of 10 years, within the meaning of this section, such possession must be clearly proved and shown. *Stokes v. Murray*, 95 S. C. 120,

78 S. E. 741. See, also, *Ellen v. Ellen*, 16 S. C. 132.

A party defending under claim of adverse possession may show that he gave a mortgage and an option for the timber on the land, as evidence of the character of his possession. *Dickson v. Epps*, 104 S. C. 381, 89 S. E. 354.

Tax receipts evidencing payment of taxes are admissible to show claim of ownership of land, but they do not sustain such claim where the taxes are paid under contract with the real owner. *Ellen v. Ellen*, 16 S. C. 132.

A parol partition between tenants in common, and exclusive possession of one of the cotenants thereunder, is evidence of ouster from which adverse possession of the tenant who holds under such partition may begin against the others and ripen into a title. *Carr v. Mouzon*, 86 S. C. 461, 68 S. E. 661. See also, *Mole v. Folk*, 45 S. C. 265, 22 S. E. 882; *Stone v. Fitts*, 38 S. C. 393, 394, 17 S. E. 136, holding that proof of ouster is necessary to claim of adverse possession between cotenants. But proof of exclusive possession for the statutory period raises a presumption of ouster by a cotenant. *Powers v. Smith*, 80 S. C. 110, 61 S. E. 222.

And if relevant testimony on such issue exists a nonsuit is not permitted.—Where there is any competent relevant testimony to go to the jury, on the question of the statute of limitation or adverse possession, a nonsuit cannot be granted. *Stokes v. Murray*, 95 S. C. 120, 78 S. E. 741.

But nonsuit is proper where essential requirements are not proved.—Where the plaintiff in an action to recover real estate does not claim title from the same

source as defendant, and fails to show title in himself or in those from whom he claims, either by grant or length of possession sufficient to authorize the presumption of a grant, or adverse possession, he should be nonsuited. *Hodge v. Hodge*, 56 S. C. 263, 34 S. E. 517, giving a detailed discussion of what the plaintiff must show in order to recover in such an action.

Adverse possession and presumption of title will run against the legal title in a trustee and the right thereunder of beneficiaries. *Young v. McNeill*, 78 S. C. 143, 59 S. E. 986. See also, *Pope v. Patterson*, 78 S. C. 334, 58 S. E. 945; *Few v. Keller*, 63 S. C. 154, 41 S. E. 85; *Benbow v. Levi*, 50 S. C. 120, 27 S. E. 655; *Trustee v. Jennings*, 40 S. C. 168, 18 S. E. 257, 891, 42 Am. St. Rep. 854.

A remainderman is not affected by the adverse possession against a life tenant. *Mitchell v. Cleveland*, 76 S. C. 432, 57 S. E. 33; *Bolt v. Sullivan*, 173 S. C. 24, 174 S. E. 491.

A guardian cannot assert adverse possession against his ward. *Scaife v. Thomson*, 15 S. C. 337.

Adverse possession cannot give title to a town. *Crocker v. Collins*, 37 S. C. 327, 328, 15 S. E. 951, 34 Am. St. Rep. 752.

Adverse possession, begun in 1883, is controlled by this section, then in force. *Johnson v. Cobb*, 29 S. C. 372, 7 S. E. 601.

See generally, as to adverse possession, *Lloyd v. Rawl*, 63 S. C. 219, 41 S. E. 312—claiming title under common ancestor—disclaiming title, *Langston v. Cothran*, 78 S. C. 23, 58 S. E. 956.

For a recent general discussion of adverse possession see *Weston v. Morgan*, 162 S. C. 180, 160 S. E. 436.

§ 378. Occupation under written instrument, etc.—Whenever it shall appear that the occupant, or those under whom he claims, entered into the possession of premises under claim of title, exclusive of any other right, founding such claim upon a written instrument, as being a conveyance of the premises in question, or upon the decree or judgment of a competent court, and that there has been a continued occupation and possession of the premises included in such instrument, decree, or judgment, or of some part of such premises under such claim for ten years, the premises so included shall be deemed to have been held adversely; except that where the premises so included consist of a tract divided into lots, the possession of one lot shall not be deemed a possession of any other lot of the same tract.

1932 Code, § 378; Civ. P. '22, § 321; Civ. P. '12, § 127; Civ. P. '02, § 102; 1870 (14) § 105; 1873 (15) 496.

In general.—There is a material difference between proving a deed, as a part of a chain of title, and introducing a paper to show the extent of a party's possession. *Allen v. Johnson*, 2 McMul.

495; *Kennedy v. Kennedy*, 86 S. C. 483, 68 S. E. 664, 669.

Adverse possession may be founded on what we sometimes call a 'color of title,' as a deed of conveyance or a de-

cree of the court; or a party may enter upon land without any paper title at all. *Sudduth v. Sumeral*, 61 S. C. 276, 39 S. E. 534, 536, 85 Am. St. Rep. 883.

As to effect of occupancy of land not under paper title, see § 380, and the note thereto.

An action for damages for trespass to property of which plaintiff was in possession could not be defeated on ground that one deed dated in 1914 was not sufficient to prove plaintiff's title to the property, where deed showed that plaintiff was in lawful possession and no one offered to show a paramount title, and alleged trespass was against plaintiff's possession. *Macedonia Baptist Church v. City of Columbia*, 195 S. C. 60, 10 S. E. (2d) 350.

Named sources of color of title are exclusive.—Under this section it is clear that color of title may consist only of a written instrument, or a decree or judgment of a court. *Lyles v. Fellers*, 138 S. C. 31, 136 S. E. 13, 17.

A written agreement to submit a dispute as to the title to land to arbitration, which did not designate the arbitrators, and on which persons not shown to have been the arbitrators, indorsed a decision in favor of one of the parties, was a sufficient written instrument to constitute color of title under this section. *Fore v. Berry*, 94 S. C. 71, 78 S. E. 706, 707, Ann. Cas., 1915A, 955.

Where a railroad charter does not give the railroad company a presumptive grant of lands occupied, and specifically provides that where an agreement cannot be reached with the land owner the lands must be acquired by condemnation, then such charter provisions cannot be considered color of title upon which to base adverse possession of a right of way. *Willard v. Southern Ry. Co.*, 158 S. C. 522, 155 S. E. 833. See, also, *Atlantic Coast Line R. Co. v. Baker*, 143 S. C. 445, 141 S. E. 688, 702.

Purpose of color of title.—The object of color of title is not to pass title, but to define the extent of the claim, and extend the possession beyond the actual occupancy to the whole property described in the instrument. *Fore v. Berry*, 94 S. C. 71, 78 S. E. 706, 707, Ann. Cas., 1915A, 955.

There can be no constructive possession without color, of title. *Lyles v. Fellers*, 138 S. C. 31, 136 S. E. 13, 17, quoting from 1 Cyc. 1123.

The provisions of this section constitute a basis for the holding that an occupancy that is a mere trespass without claim of title, cannot ripen into a good title however long continued. *Carr v. Mouzon*, 86 S. C. 461, 68 S. E. 661. See note of this case under the next foregoing section, where is discussed the sub-

ject of the necessity that possession to be "adverse" must evidence ownership of the land.

Written instrument must identify land claimed.—The primary function of the written instrument required by this section as a condition to extending the benefit of constructive possession to a claimant under such instrument, is to indicate and define the extent of the claim, and to identify the land so claimed. *Fradv v. Ivester*, 129 S. C. 536, 125 S. E. 134, 136.

It is perfectly well settled that the instrument under which a party holds adversely by color of title must define the extent of the claim. *Garvin v. Garvin*, 40 S. C. 435, 19 S. E. 79. In other words, the writing must designate the particular piece of property upon which the writing is intended to operate so that it can be found. *Fore v. Berry*, 94 S. C. 71, 78 S. E. 706, 709, Ann. Cas., 1915A, 955.

Where possession is taken under written instrument which an occupant repudiates as a mortgage, and claims to be a conveyance, and where adverse possession is proved by evidence other than the instrument, the writing may be looked to, to define extent of claimant's possession, under this section. *Fradv v. Ivester*, 129 S. C. 536, 125 S. E. 134.

But no specific description is necessary.—No minute description of the land is necessary, and all that appears to be necessary is that there be such a designation that the land may be identified by the description. *Fore v. Berry*, 94 S. C. 71, 78 S. E. 706, 709, Ann. Cas. 1915A, 955, citing *Kirkland v. Way*, 3 Rich. 4, 45 Am. Dec. 752.

The fact that there is a variance of a few acres between the deed conveying a large tract of land and the lines marked on the ground is immaterial, and does not prevent such deed from being color of title. *Witcover v. Grant*, 93 S. C. 190, 76 S. E. 274.

A description as "a 300 acre tract of land in dispute between Willis Fore and E. B. Berry on January 4, 1886," was held sufficient. *Fore v. Berry*, 94 S. C. 71, 78 S. E. 706, 709, Ann. Cas. 1915A, 955.

But a description which only designates the number of acres in the land as "a 300 acre tract," is not a sufficient description. *Humbert v. Brisbane*, 25 S. C. 506, cited in *Fore v. Berry*, 94 S. C. 71, 78 S. E. 706, 709, Ann. Cas. 1915A, 955.

And if description is sufficient, parol evidence is admissible.—After a description is ascertained and determined to be sufficient, parol evidence may be resorted to, to identify the land. *Fore v. Berry*, 94 S. C. 71, 78 S. E. 706, 709, Ann.

Cas. 1915A, 955, and the authorities therein cited.

Occupancy of part of land under color of title extends to whole.—If one is in possession of a part of a tract of land, under what is in law called a color of title, that is, under a deed, or under a will, or under a decree of the court, or even holding it under a plat and survey, or having marked it out and fenced it, or something of that kind, if he is in possession of a small part of that land, that is, if he claims he holds under a color of title, his title may not be good, his deed may be defective, he may not have perfect legal title, still, if he holds under color of title and occupies a small part, a mere little corner of the land, that occupation would extend to the limits of his claim under his deed or plat, or deed or will under which he may hold. So a possession under color of title extends the possession to the limits of the claim under which one holds, if he holds under a color of title. *Haithcock v. Haithcock*, 123 S. C. 61, 115 S. E. 727, 730; *Witcover v. Grant*, 93 S. C. 190, 76 S. E. 274.

This section, when taken alone, leaves some doubt whether the continuous occupation "of some part of the premises" means a certain definite part of the land or any of several parts that the holder may happen to occupy at different times. This section is clarified when read with the next section following, and when so read, this section means that when the land is used for any of the purposes mentioned in the following section, though the use be not continuously of any particular part, the use will be regarded as adverse possession of the whole. *Mahoney v. Southern Ry.*, 82 S. C. 215, 64 S. E. 228, 230.

If a person goes into possession of a tract of land as a tenant in common with another, no length of such possession can give him a title by the statute of limitations against his co-tenant, for the very obvious reason that his possession cannot be adverse to his co-tenant until an ouster is established. But where a person goes into possession of land under a deed from a third person which purports on its face to convey to him an absolute and exclusive title to the entire interest in the land, and such deed is spread upon the public records, this is notice to the world that he is claiming the entire and exclusive interest in the land, and his possession may be adverse to all the world from the time of its commencement. *Sudduth v. Sumeral*, 61 S. C. 276, 39 S. E. 534, 539, 85 Am. St. Rep. 883. See, also, *Dickson v. Epps*, 104 S. C. 381, 89 S. E. 354.

Even though the deed is defective.—

Under this section an instruction that possession of a part of a tract of land under a claim made under an invalid deed would give possession of the whole, is correct. *Kennedy v. Kennedy*, 86 S. C. 483, 68 S. E. 664.

The words "as being a conveyance of the premises," used in this section show that the extent of the occupant's claim, founded on an instrument of writing is not dependent upon the validity of such instrument; otherwise there would have been no necessity for this section of the code. *Kennedy v. Kennedy*, 86 S. C. 483, 68 S. E. 664, 669. To the same effect is *Fraday v. Ivester*, 129 S. C. 536, 125 S. E. 134, 137.

But occupancy not under color of title is confined to portion actually occupied.

—But where a man holds land not under a written instrument, not under a color of title, then his holding is confined to what he actually has in possession, what he has actually under use or cultivation, and a man may acquire title without any paper or decree of court or will or deed or plat of any kind, but he only acquires in that case such as he has actually brought under his control, possession, and actual occupation. So where one holds land not under color of title, his possession is confined to such land as he has cleared up, or cultivated, in the usual manner, or improved, or which has been protected by a substantial enclosure, as required by § 379. *Haithcock v. Haithcock*, 123 S. C. 61, 115 S. E. 727, 730; *Lyles v. Fellers*, 138 S. C. 31, 136 S. E. 13, 17, and the authorities cited.

Occupancy for 10 years of one of two adjoining parcels of land included within the lines of a plat held as color of title, does not confer title by adverse possession against the owner of the other parcel. *Massey v. Duren*, 3 S. C. 34.

Where the plaintiff and defendant each claim property under color of title, but do not claim from a common source, it is immaterial which of the paper titles bears the earlier date. *Dickson v. Epps*, 104 S. C. 381, 89 S. E. 354, 356, holding that a paper title beginning in 1836 is of equal force and effect as the one under which the opposite party claimed, and beginning a century before.

Adverse possession against persons under disability.—Of course, such adverse possession cannot avail him against one laboring under any legal disability—such, for example, as infancy—until his possession continues for the prescribed time after the removal of such disability. *Sudduth v. Sumeral*, 61 S. C. 276, 39 S. E. 534, 539, 85 Am. St. Rep. 883. This view is sustained by the case of *Garrett v. Weinberg*, 48 S. C. 28, 26 S. E. 3.

See § 384 and the note thereto.

Evidential facts of ownership of land.

—The exercise of ownership of land upon which a party enters, and claims title thereto by virtue of this section, may be evidenced by such acts as (1) payment of taxes, (2) collection of rents, (3) making repairs and improvements, (4) advertising the land for sale under the description contained in the instrument under which entry was made, with the statement that the title was first class, and that such party would make a warranty deed to the purchaser. *Godfrey v. Burton Lumber Co.*, 88 S. C. 132, 70 S. E. 396, 397. See, also, *Carr v. Mouzon*, 86 S. C. 461, 68 S. E. 661.

Evidence that at the time a railroad company constructed a road, some of the trees were cut down and a right of way was cleared 50 feet from center of the track on each side, is not sufficient evidence to show an exclusive and notorious adverse possession, where there is also testimony showing that at that time a great part of land was already cleared and that for many years prior to institution of action of trespass to try title to real estate, the railroad and predecessors in interest exercised no acts of ownership over any part of the right of way except that occupied by the railroad track, side ditches, cuts, and fills. *Willard v. Southern Ry. Co.*, 158 S. C. 522, 155 S. E. 833, 834.

Method of overcoming presumption.

—Where there has been an entry under color of title and an occupancy of the land for the statutory period, then the presumption created by this section can only be overcome by showing adverse occupancy and possession for 10 years before the action to recover the property was commenced. *Dickson v. Epps*,

104 S. C. 381, 89 S. E. 354, 356.

See the next foregoing section and the note thereto.

The burden of proof of adverse possession is on him relying thereon.—*Lyles v. Fellers*, 138 S. C. 31, 136 S. E. 13, 17.

Death does not toll statute.—See this catchline under § 374, analysis line II, treating the case of *Frady v. Ivester*, 129 S. C. 536, 125 S. E. 134.

Adverse possession cannot ordinarily be claimed against one under whom defendant entered into possession. but this does not apply where there has been an adverse holding for a sufficient length of time to presume a grant. *Mitchell v. Allen*, 81 S. C. 340, 341, 61 S. E. 1087, 62 S. E. 399; *McCutchen v. McCutchen*, 77 S. C. 129, 57 S. E. 678, 12 L. R. A., N. S., 1140n.

Statute starts for devisees in possession when action accrues in favor of creditor.—Devisee's possession of devised lands under will in order to be adverse can only have starting point where right of action accrues in favor of creditor. *Brock v. Kirkpatrick*, 69 S. C. 231, 48 S. E. 72.

See generally, as to adverse possession by son entering under permission of father, *McCutchen v. McCutchen*, 77 S. C. 138, 57 S. E. 678, 12 L. R. A., N. S., 1140n.

As to adverse possession by agent against principal, *Crawford v. Crawford*, 77 S. C. 205, 57 S. E. 837.

As to presumption of ouster from twenty years' exclusive possession by co-tenant, see catchline "Or to Rebut the Statutory Presumption" under § 385, wherein is treated the case of *Powers v. Smith*, 80 S. C. 110, 111, 61 S. E. 222.

§ 379. Adverse possession under written instrument, etc.—For the purpose of constituting an adverse possession, by any person claiming a title founded upon a written instrument or a judgment or decree, land shall be deemed to have been possessed and occupied in the following cases:

- (1) Where it has been usually cultivated or improved.
- (2) Where it has been protected by a substantial enclosure.
- (3) Where, although not enclosed, it has been used for the supply of fuel or of fencing timber, for the purposes of husbandry, or the ordinary use of the occupant.
- (4) Where a known farm or a single lot has been partly improved, the portion of such farm or lot that may have been left not cleared or not enclosed, according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved and cultivated.

1932 Code, § 379; Civ. P. '22, § 322; Civ. P. '12, § 128; Civ. P. '02, § 103; 1870 (14) § 106.

Editor's note.—It is apparent that this section was intended to be read in con-

nection with the general rules set out in the next foregoing section. The practi-

tioner is therefore referred to that section and the note thereto.

Section applies only where claim is under color of title.—This section applies only where claim to land is made under color of title. And where there is no color of title, the claimant is confined to that portion of the land actually occupied, and protected by a substantial inclosure or usually cultivated and improved. *Walker v. Oswald*, 156 S. C. 424, 153 S. E. 286, citing *Witcover v. Grant*, 93 S. C. 190, 76 S. E. 274, 275.

Use in designated manner gives rise to constructive occupancy.—If a party claims land under color of title and also shows that such land has been used for the purposes mentioned in subd. 3 of this section (or where the case falls within either of the subdivisions), then such party is not limited to the land actually occupied, and an instruction to the contrary is erroneous. *Battle v. De Vane*, 140 S. C. 305, 138 S. E. 821, 825.

In *Haithcock v. Haithcock*, 123 S. C. 61, 115 S. E. 727, 731, the Supreme Court approved an instruction that where a known farm or a single lot, claim to which is made under color of title, has

been partly improved, the portion left not cleared or not inclosed, according to the usual course and custom of the adjoining county is deemed to have been occupied for the same length of time as the part improved and cultivated.

Occupancy need not be continuous in one particular place.—In view of this and the next foregoing section, it is not necessary that possession, and occupancy of a lot be continuous in one particular place for the statutory period. *Mahoney v. Southern Ry.*, 82 S. C. 215, 64 S. E. 228.

Supply of fuel and timber.—Under this section, possession is adverse and continuous where land, though not cultivated or inclosed, is continuously used for the supply of fuel and timber, the ordinary use for which the land is fitted. *Bardin v. Commercial Ins. & Trust Co.*, 82 S. C. 358, 64 S. E. 165.

See generally. *Carr v. Mouzon*, 86 S. C. 461, 68 S. E. 661.

Applied in *Fore v. Berry*, 94 S. C. 71, 78 S. E. 706, *Ann. Cas.* 1915 A, 955.

Cited in *Sudduth v. Sumeral*, 61 S. C. 276, 39 S. E. 534, 85 *Am. St. Rep.* 883.

§ 380 Premises actually occupied held adversely.—Where it shall appear that there has been an actual continued occupation of premises, under a claim of title, exclusive of any other right, but not founded upon a written instrument or a judgment or decree, the premises so actually occupied, and no other, shall be deemed to have been held adversely.

1932 Code, § 380; *Civ. P.* '22, § 323; *Civ. P.* '12, § 129; *Civ. P.* '02, § 104; 1870 (14) § 107.

See the two foregoing sections and their respective notes.

The following is a portion of an approved instruction, pertaining to this section: "If he claims without claiming under color of title, then he can only hold such part of the land as has been protected by a substantial enclosure, or such part of the land as has been usually cultivated or improved, in the usual way that such lands of that particular char-

acter are used in the community in which that land may lie." *Haithcock v. Haithcock*, 123 S. C. 61, 115 S. E. 727, 731.

See generally. *Carr v. Mouzon*, 86 S. C. 461, 68 S. E. 661.

Cited in *Sudduth v. Sumeral*, 61 S. C. 276, 39 S. E. 534, 85 *Am. St. Rep.* 883; *Witcover v. Grant*, 93 S. C. 190, 76 S. E. 274, 275.

§ 381. Adverse possession under claim of title not written.—For the purpose of constituting an adverse possession by a person claiming title not founded upon a written instrument or a judgment or decree, land shall be deemed to have been possessed in the following cases only:

(1) Where it has been protected by a substantial enclosure.

(2) Where it has been usually cultivated or improved.

1932 Code, § 381; *Civ. P.* '22, § 324; *Civ. P.* '12, § 130; *Civ. P.* '02, § 105; 1870 (14) § 108.

See §§ 378, 379 and the notes there placed.

This section does not apply where title is founded on a written instrument, and therefore, the party so claiming

title need not show inclosure and cultivation. *Farmers' & Merchants' Bank v. Rivers*, 107 S. C. 204, 92 S. E. 753.

See generally. *Carr v. Mouzon*, 86 S. C. 461, 68 S. E. 661.

Cited in *Sudduth v. Sumeral*, 61 S. C. 276, 39 S. E. 534, 85 Am. St. Rep. 883; *Haithcock v. Haithcock*, 123 S. C. 61, 115 S. E. 727, 731; *Witcover v. Grant*, 93 S. C. 190, 76 S. E. 274, 275; *Atlantic Coast Line R. Co. v. Baker*, 143 S. C. 445, 141 S. E. 688, 697.

§ 382. Relation of landlord and tenant, as affecting adverse possession.—Whenever the relation of landlord and tenant shall have existed between any persons, the possession of the tenant shall be deemed the possession of the landlord until the expiration of ten years from the termination of the tenancy; or, where there has been no written lease, until the expiration of ten years from the time of refusal to pay rent, notwithstanding that such tenant may have acquired another title, or may have claimed to hold adversely to his landlord. But such presumptions shall not be made after the periods herein limited.

1932 Code, § 382; Civ. P. '22, § 325; Civ. P. '12, § 131; Civ. P. '02, § 106; 1870 (14) § 109; 1873 (15) 496.

§ 383. Descent cast, effect of.—The right of a person to the possession of any real property shall not be impaired or affected by a descent being cast in consequence of the death of a person in possession of such property.

1932 Code, § 383; Civ. P. '22, § 326; Civ. P. '12, § 132; Civ. P. '02, § 107; 1870 (14) § 110.

§ 384. Persons under disability.—If a person entitled to commence any action for the recovery of real property, or make an entry or defense founded on the title to real property, or to rents or services out of the same, be, at the time such title shall first descend or accrue, either:

- (1) Within the age of twenty-one years; or,
- (2) Insane; or,
- (3) Imprisoned on a criminal or civil charge, or in execution upon conviction of a criminal offense for a term less than for life—

The time during which such disability shall continue, shall not be deemed any portion of the time in this chapter limited for the commencement of such action or the making of such entry or defense; but such action may be commenced, or entry or defense made, after the period of ten years, and within ten years after the disability shall cease, or after the death of the person entitled who shall die under such disability; but such action shall not be commenced, or entry or defense made, after that period.

1932 Code, § 384; Civ. P. '22, § 327; Civ. P. '12, § 133; Civ. P. '02, § 108; 1870 (14) § 111; 1873 (15) 496.

Cross reference.—As to the effect of minority of one co-tenant, see the catch-line "And to be 'adverse' it must evidence ownership of land" under § 385 wherein is treated the case of *Garrett v. Weinberg*, 48 S. C. 28, 26 S. E. 3, 13.

Editor's note.—As this section stood in 1870 it appears to have provided also for the disability of coverture. See *Stokes v. Murray*, 99 S. C. 221, 83 S. E. 33. As the section then stood, provision was also made whereby a party had 20 years within which to bring his suit. This was changed by an act passed in 1873. For a discussion of the changes which this section has undergone, the

practitioner is referred to *Cheatham v. Evans*, 160 Fed. 802, and, also, *Glover v. Floyd*, 76 S. C. 292, 57 S. E. 25.

Disability must exist when title first descends or accrues.—To prevent or arrest the running of the statute, the person entitled to commence an action to recover land must show a disability—as infancy—"at the time such title shall first descend or accrue." *Satcher v. Grice*, 53 S. C. 126, 31 S. E. 3, 4.

Section protects party only for 10 years after disability ceases.—This section does not protect a person from the operation of the statute of limitations after the expiration of the 10 year period

following the removal of disability. *Maccauw v. Crawley*, 59 S. C. 342, 37 S. E. 934, 937.

Instruction as to commencement of period.—Under this section it is error to charge that limitations will commence to run against a minor remainderman from the time of the alienation of the property by the life tenant. *Rice v. Bamberg*, 59 S. C. 498, 38 S. E. 209. As a further reason for its ruling the court held that limitations do not commence to run against a remainderman until the death of the life tenant.

Arrest of statute.—Under this section, the fact that plaintiff is a minor when the action is commenced does not arrest the statute, where it has already commenced to run against the one under whom the minor claims. *Satcher v. Grice*, 53 S. C. 126, 31 S. E. 3.

Effect of changes in statutes of limitations.—It may be mentioned at this place that according to the decisions of our courts, when a right of action or cause of action has accrued, the law is fixed, and that no change of the statutes

of limitation is wrought by any legislation afterwards fixing a different period. See *Glover v. Floyd*, 76 S. C. 292, 57 S. E. 25, 27, and the authorities there cited. In other words, an amendment changing a limitation does not affect a cause of action which has already accrued. *Id.*

Infants.—Proceeding in partition suit by infant defendants on attaining their majority to set aside sale decreed therein which was not commenced within six years after cause of action accrued or within one year after disability of youngest defendant was removed, is barred by limitations as against contention that proceeding to set aside sale was not an "action" within statute extending time for commencement of action by an infant after attaining his majority by one year only. *Lyerly v. Yeadon*, 183 S. C. 256, 190 S. E. 737.

See generally, as to minority, *Brucke v. Hubbard*, 74 S. C. 144, 54 S. E. 249; *Cheatham v. Evans*, 160 F. 802; *Cheatham v. Edgefield Mfg. Co.*, 131 F. 118.

Cited but not construed in *Duren v. Kee*, 26 S. C. 219, 2 S. E. 4, 8.

§ 385. After forty years, no action whatever allowed.—No action shall be commenced in any case for the recovery of real property, or for any interest therein, against a person in possession under claim of title by virtue of a written instrument, unless the person claiming, his ancestor or grantor, was actually in the possession of the same or a part thereof, within forty years from the commencement of such action. And the possession of a defendant, sole or connected, pursuant to the provisions of this section, shall be deemed valid against the world after the lapse of said period.

1932 Code, § 385; Civ. P. '22, § 328; Civ. P. '12, § 134; Civ. P. '02, § 109; 1873 (15) 496.

Editor's note.—This section does not seem to have been enacted until after 1873, as it does not appear in the revised statutes of 1873. See *Sutton v. Clark*, 59 S. C. 440, 38 S. E. 150, 155, 82 Am. St. Rep. 848.

Scope of section.—This section may be divided into two parts. The first relates to the commencement of the action, and shows under what circumstances the plaintiff will be barred of his right to recover the land. The second has reference to the rights of the defendant, and practically confers upon him a title in fee after he has held possession of the land under the circumstances and for the length of time therein mentioned. *Sutton v. Clark*, 59 S. C. 440, 38 S. E. 150, 155, 82 Am. St. Rep. 848.

The length of time necessary to bar the plaintiff's right to recovery and to confer title upon the defendant is the same in each case. *Sutton v. Clark*, 59 S. C. 440, 38 S. E. 150, 156, 82 Am. St. Rep. 848.

Possession for 40 years after accrual

of action is necessary.—This section does not apply unless the defendant has been in possession 40 years after the accrual of the cause of action. *Rowell v. Hyatt*, 108 S. C. 300, 94 S. E. 113, holding that the cause of action of remaindermen to recover possession from those claiming under an execution sale of the life estate does not accrue until the death of the life tenant. *Accord*, *Bolt et al. v. Sullivan*, 173 S. C. 24, 174 S. E. 491.

Tacking is permitted.—This section permits the tacking of the time a party has been in possession, with the time during which those under whom he claims held possession, so as to complete the statutory terms of adverse possession; and an instruction to this effect is sound. *Sutton v. Clark*, 59 S. C. 440, 38 S. E. 150, 156, 82 Am. St. Rep. 848, cited in *Mitchell v. Cleveland*, 76 S. C. 432, 57 S. E. 33, 38.

See § 383 and the note thereto.

Inapplicable to claim already barred.—Where the right of a minor heir to real property accrued in 1880, and the

minor became of age in 1885, but did not assert her claim to the property until 1899, this section had no application, since sufficient time had elapsed to bar her claim after the disability of infancy was removed. *Maccaw v. Crawley*, 59 S. C. 342, 37 S. E. 934.

See the next foregoing section and the note thereto.

Objection should be by answer.—Objection that an action was not instituted within the time presented by this section should be taken by answer. *Sutton v. Clark*, 59 S. C. 440, 38 S. E. 150, 156, 82 Am. St. Rep. 848.

This mode of making objections in cases involving the statute of limitations is expressly provided for in § 356. See the note to that section.—Ed. note.

A possession which "shall be deemed valid against the world" is tantamount to the fee, otherwise the last sentence in said section would be meaningless. *Sutton v. Clark*, 59 S. C. 440, 38 S. E. 150, 156, 82 Am. St. Rep. 848.

Proof of title by virtue of section.—In order to defeat the plaintiff's right

to recovery, the defendant is compelled to prove every fact that would have to be established to show that he had become the owner of the title by virtue of this section. *Sutton v. Clark*, 59 S. C. 440, 38 S. E. 150, 156, 82 Am. St. Rep. 848.

Interest of parties in land bought 55 years ago with mother's money, barred by ten-year statute, twenty years presumption of a grant, and by forty-year statute. *First Carolinas Joint Stock Land Bank v. Hudgens*, 171 S. C. 18, 171 S. E. 449.

Also, under will devising property to testator's daughter and "lawful heirs of her body," child and grandchildren of testator's daughter whose ancestors had not been in possession for more than 50 years could not recover property from successors of daughter's grantees, since devise either created fee conditional, or, if quoted words were words of purchase, created tenancy in testator's daughter and daughter's children at time will took effect. *McQuage et al v. Calhoun et al.*, 178 S. C. 341, 183 S. E. 164.

CHAPTER 13

Actions Other Than for Recovery of Realty

- 386. Limitation prescribed.
- 387. Twenty years.
- 388. Six years.
- 389. Three years.
- 390. Two years.
- 391. One year.

- 392. Action upon open account.
- 393. Action for penalties.
- 394. Action for other relief.
- 395. Contractual limitations.
- 396. Actions by State.

§ 386. Limitation prescribed.—The periods prescribed in section 356 for the commencement of actions other than for the recovery of real property shall be as follows:

1932 Code, § 386; Civ. P. '22, § 329; Civ. P. '12, § 135; Civ. P. '02, § 110; 1870 (14) § 112.

§ 387. Twenty years.—Within twenty years:

(1) An action upon a judgment or decree of any court of the United States, or any State or territory within the United States.

(2) An action upon a bond, or other contract in writing, secured by a mortgage of real property; an action upon a sealed instrument other than a sealed note and personal bond for the payment of money only, whereof the period of limitation shall be the same as prescribed in section 388.

1932 Code, § 387; Civ. P. '22, § 330; Civ. P. '12, § 136; Civ. P. '02, § 111; 1870 (14) § 113; 1880 (17) 415.

See notes to § 388 and to § 8864.

Requisites of action "on the judgment" or "decree."—In order for an action to be an action "on the decree," or "on the judgment" of a court, such action must

involve the issues and matters which were adjudicated by such decree or judgment. See *Du Pont v. Charleston Bridge Co.*, 65 S. C. 524, 44 S. E. 86, 90.

A suit by an heir to enforce the pay-

ment of an assessment which is in the form of a judgment of the probate court is "upon a judgment" within the meaning of this section and is not barred in less than 20 years. *McKibben v. Salinas*, 41 S. C. 105, 19 S. E. 302.

Section 8864 of the Civil Code prescribes, among other things, the length of time within which a judgment is to be considered a lien on the debtor's property. Provision is also made whereby the judgment may be revived after its active energy has expired. The period fixed by that section is now 20 years. It formerly was 10 years. The instant section, at the same time, provided a 20 year limitation within which to institute suit "upon a judgment." It was, therefore, then possible to enforce a judgment even though it had, by the lapse of time, lost its effectiveness as a lien and even though it was too late to revive the judgment. It was merely done by operating under the instant section, by way of a suit "upon the judgment." This was done in at least one case. *Rowland v. Shockley*, 43 S. C. 246, 21 S. E. 21. This is of course no longer possible since the two sections now provide the same period of limitation.—Ed. note.

There is a presumption of payment of the judgment after the lapse of 20 years.—See *Brantley v. Bittle*, 72 S. C. 179, 51 S. E. 561.

Unless judgment is revived by subsequent decree.—A decree ordering the sale of lands, and the application of proceeds to an existing judgment, revives such judgment. *Anderson v. Baughman*, 69 S. C. 38, 48 S. E. 38.

This section applies to the foreclosure of a mortgage.—*Jennings v. Peay*, 51 S. C. 327, 28 S. E. 949.

An instrument with all the requisites of a mortgage, except a seal, is not a mortgage within the meaning of this section. *Arthur v. Screven*, 39 S. C. 77, 17 S. E. 640, 643.

A mortgage which is invalid as a legal mortgage through insufficient attestation, but enforceable as an equitable mortgage is more than "a sealed note or personal bond for the payment of money only." It is a sealed instrument importing an obligation to pay money and a lien as between the obligor and obligee upon the land to secure payment. This being so, in a controversy between the obligor and obligee, the action falls under subd. 2 of this section. *Stelts v. Martin*, 90 S. C. 14, 72 S. E. 550, 551.

In *Lyles v. Lyles*, 71 S. C. 391, 51 S. E. 113, the court had under consideration § 8864 of the Civil Code, which among other things provides that the lien of a mortgage shall be ineffective after the lapse of 20 years from its maturity. The court, in order to leave the instant section in full force and effect, construed

that section so that under it the lien of a mortgage is good for 20 years after the note secured thereby becomes due, though the mortgage itself is more than 20 years old from the date of its execution.

In the dissenting opinion in *Lyles v. Lyles*, 71 S. C. 391, 51 S. E. 113, 117, it is said that a suit may be brought on a mortgage at any time within 20 years after its maturity, under this section, to recover the debt evidenced by it, but after 20 years from the date of the mortgage the debt cannot be enforced by foreclosure of the lien, unless kept alive in the manner provided in § 8864 of the Civil Code, because under that section the lien would then be gone.

Except where mortgage is cancelled and only bond for payment of money is left.—This section does not apply to a case where the legal holder of a bond secured by a real estate mortgage cancels and satisfies the mortgage of record, and leaves nothing but the bond, which is one for the payment of money only. The limitation in such case is expressly provided for in the next succeeding section. *Gable v. Rauch*, 50 S. C. 95, 27 S. E. 555, 560.

A note secured by a mortgage may be barred whereas the mortgage itself may not be barred.—*Nichols v. Briggs*, 18 S. C. 473, 484.

And a mortgage may be barred though the note which it secures need not necessarily be barred.—*McSween v. Windham*, 104 S. C. 508, 89 S. E. 500, 502.

It is true that in *Cleveland v. Cohrs*, 10 S. C. 224, the court recognized the theory that the mortgage is a mere security for the payment of the debt which it secures, and therefore follows the debt as a shadow follows the substance (a theory that is recognized in the courts of many states), but in *Nichols v. Briggs*, supra, it is said that the ruling that the note may be barred although the mortgage need not be barred, is not inconsistent with that theory.—Ed. note.

Applies to principals and sureties.—Subdivision (2) of this section applies to all of the obligors on bonds and instruments falling within its purview, principals as well as the sureties. *Strain v. Babb*, 30 S. C. 342, 9 S. E. 271, 273, 14 Am. St. Rep. 905.

Under subd. 2 of this section an action for damages for breach of administrator's bond may be maintained against his surety any time within 20 years after breach, though bond is more than 20 years old. *Beatty v. National Surety Co.*, 132 S. C. 45, 128 S. E. 40.

Application to bonds.—A bond may be such that the breach thereof sounds in money damages and the penalty may be for a specific amount, and yet the bond may not be for the payment of

money in the sense that that term is used in this section. *Strain v. Babb*, 30 S. C. 342, 9 S. E. 271, 273, 14 Am. St. Rep. 905.

The Supreme Court of our state has said that they cannot conceive why the General Assembly made the distinction between bonds that are for the payment of money only, and those that are not; but *ita lex scripta est*, and there is no alternative but to enforce the distinction in proper cases. *Strain v. Babb*, 30 S. C. 342, 9 S. E. 271, 273, 14 Am. St. Rep. 905.

A bond which is in the nature of a covenant—a contract under seal—by which the obligors thereto bind themselves under a specified penalty to answer for the neglect of duty, if any, on the part of the clerk of the court to the extent of such injury as any party might sustain by such neglect, not to exceed the penalty, is a bond other than for the payment of money, in the sense of this section. *Strain v. Babb*, 30 S. C. 342, 9 S. E. 271, 273, 14 Am. St. Rep. 905.

Applies to action on decrees for partition.—*Simms v. Kearse*, 42 S. C. 43, 20 S. E. 19; *McKibben v. Salinas*, 41 S. C. 105, 19 S. E. 302.

Effect of new promise or acknowledgment.—The debtor may acknowledge the existence of a debt and thus infuse new life into the instrument evidencing the

debt, and when this is done the 20 year period must begin from that time. *McSween v. Windham*, 124 S. C. 508, 89 S. E. 500, 502.

As to necessity that acknowledgment or new promise be in writing, see § 368 and the note thereto.

Action on bond secured by mortgage against distributees will lie, nine years after it became due, and though no claim was filed with administrator during the administration year. *Columbia Theological Seminary v. Arnette et al.*, 168 S. C. 272, 167 S. E. 465.

Where endorers indorsed note with knowledge that it was secured by real estate mortgage executed by maker, 20 year statute applies, and not 6 year statute, notwithstanding endorers were not parties to the mortgage. *Scovill et al v. Johnson et al.*, 190 S. C. 457, 3 S. E. (2d) 543.

Where there is doubt as to which of two statutes of limitations applies, must be resolved in favor of the longer period, limitation statutes not being favored by the courts. *Ibid.*

See generally, *Glover v. Floyd*, 76 S. C. 292, 57 S. E. 25; *Montague v. Priestner*, 82 S. C. 492, 64 S. E. 393; *Coleman v. Coleman*, 74 S. C. 567, 54 S. E. 758; *McQuage et al. v. Calhoun, et al.*, 178 S. C. 341, 183 S. E. 164.

§ 388. Six years.—Within six years;

(1) An action upon a contract, obligation, or liability, express or implied, excepting those provided for in section 387.

(2) An action upon a liability created by statute, other than a penalty or forfeiture.

(3) An action for trespass upon or damage to real property.

(4) An action for taking, detaining, or injuring any goods or chattels; including action for the specific recovery of personal property.

(5) An action for criminal conversation, or for any other injury to the person or rights of another, not arising on contract, and not hereinafter enumerated.

(6) Any action for relief on the ground of fraud, in cases which, heretofore, were solely cognizable by the court of chancery, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud.

(7) Actions may be brought in any of the courts of this State properly having jurisdiction thereof on any policies of insurance, either fire or life, whereby any person or property, resident or situate in this State, may be or may have been insured, or for or on account of any loss arising thereunder, within six years from the date of such loss, or from the accrual of the cause of action under said policy, any clause or condition in the said policies or limitations therein contained to the contrary notwithstanding.

1932 Code, § 388; Civ. P. '22, § 331; Civ. P. '12, § 137; Civ. P. '02, § 112; 1870 (14) § 114; 1891 (20) 1042.

- I. General Considerations.
- II. Subdivision (1).
- III. Subdivision (2).
- IV. Subdivision (4).
- V. Subdivision (6).
- VI. Subdivision (7).

I. GENERAL CONSIDERATIONS.

Section confers immunity from suit only.—This section confers no rights except simply that of immunity from suit, and therefore, until some action is brought against one who seeks to avail himself of the benefits of the statute, there is no room for its application. *Amaker v. New*, 33 S. C. 28, 11 S. E. 386, 387, 8 L. R. A. 687.

The statute of limitations is inert and inoperative until a right of action arises. *Suber v. Chandler*, 18 S. C. 526.

And does not destroy cause of action.—It must be remembered that the statute of limitations does not even purport to destroy or extinguish a cause of action, but simply to close the doors of the courts to a suitor who undertakes to bring his suit upon such cause of action after the lapse of the prescribed period. *Jackson v. Plyler*, 38 S. C. 496, 17 S. E. 255, 257, 37 Am. St. Rep. 782.

It has been held in *Wilson v. Kelly*, 16 S. C. 216, that while a holder of a note may have lost his right of action for the breach of the contract evidenced by the note, by reason of the lapse of the prescribed time, yet, if he can obtain payment in any other way than by resort to an action on such contract, he has the right so to do. See also, *Amaker v. New*, 33 S. C. 28, 11 S. E. 386, 8 L. R. A. 687.

The plea of the statute, as it is called (improperly, as I think, for such a plea must be directed to the cause of action set forth in the complaint), is not directed to the plaintiff's cause of action, but is interposed as a protection against an attack made by the plaintiff upon the defense set up by defendants. *Amaker v. New*, 33 S. C. 28, 11 S. E. 386, 387, 8 L. R. A. 687.

This section applies only to actions at law and has no applications to suits in equity. *Parrott v. Dickson*, 151 S. C. 114, 148 S. E. 704, 706, 63 A. L. R. 965; *Fanning v. Bogacki*, 111 S. C. 376, 98 S. E. 137; *Bell*, Probate Judge v. Mackey et al. 191 S. C. 105, 3 S. E. (2d) 816.

This section applies to and governs the limitations as to tort actions. *Newman v. Lemmon*, 149 S. C. 417, 147 S. E. 439, 440.

It is important to remember that § 418 prohibits suits against executors for the recovery of debts due by testator until 12 months after testator's death. It is consistently held that the effect of § 418 is to add 12 months to the period of limitation fixed by the general statute of limitation applicable to the case. See

Gaston v. Gaston, 80 S. C. 157, 61 S. E. 393; *Cleveland v. Mills*, 9 S. C. 430; *Moore v. Smith*, 29 S. C. 254, 7 S. E. 485. But the period of limitation is enlarged only where the action is for the recovery of a "debt." And a tort claim is not a "debt" within the meaning of § 418. *Newman v. Lemmon*, 149 S. C. 417, 147 S. E. 439. Therefore, a tort action must be instituted within the 6 year period prescribed in this section regardless of the death of the tortfeasor. Id.

As to what are "debts" within the meaning of § 418, the practitioner is referred to the note to that section.

Commencement of statute against bidder at judicial sale.—Before this section could run against right to compel purchaser of land sold under order of court in partition action even if the statute of limitations were applicable to such a case, the purchaser should notify clerk of court of his refusal to comply with terms of his bid. *Parrott v. Dickson*, 151 S. C. 114, 148 S. E. 704.

Amendment which introduces a new or different cause of action does not relate back to beginning of action so as to stop running of statute, even though arising out of same transaction. *Coral Gables v. Palmetto Brick Co.*, 183 S. C. 478, 191 S. E. 337. For amendment held not to change cause of action, see *Wilson v. Gregory*, 189 S. C. 62, 200 S. E. 358.

Applied as to note executed prior to statute, but maturing after the passage of the section. *Stoddard v. Owings*, 42 S. C. 88, 20 S. E. 25. See, also, *Jennings v. Peay*, 51 S. C. 327, 28 S. E. 949; as to accrual of cause of action to indorser on note. *McCrary v. Jones*, 44 S. C. 406, 22 S. E. 414.

Cited in *Charleston, etc., Ry. Co. v. Reynolds*, 69 S. C. 481, 48 S. E. 476, 488; *Williams v. Halford*, 73 S. C. 119, 53 S. E. 88, 90; *Carrol v. Green*, 92 U. S. 509, 23 L. Ed. 738.

II. SUBDIVISION (1).

Editor's note.—In 1870 this section provided that an action on a sealed note could be commenced within "20 years after the cause of action shall have accrued." By act in 1873 the period within which such actions could be brought was reduced to six years. See *Stoddard v. Owings*, 42 S. C. 88, 20 S. E. 25, applying the six year period to a note which had been executed before the six year statute had been adopted, but which matured after its adoption.

Agreement changing period of limitation is void.—In view of subd. (1) of this section and § 395 providing that no provision in any contract whereby it is agreed that either party shall be barred from bringing suit if not brought within a period less than the time prescribed by the statute of limitations shall be valid, suit may be brought against a

surety, after the expiration of the six months' period within which the bond, upon which action is brought, required it should be brought; the action falling within the six-year statute provided for in this section. *State Agricultural & Mechanical Soc. v. Taylor*, 104 S. C. 167, 88 S. E. 372. As to clause in contract not in conformity to statute of limitations declared void, see § 395 and the note thereto.

Part payment gives now life to agreement and constitutes implied "contracts."—An action based upon a note which after becoming barred by limitations, was given new life by part payment, is an action upon a "contract" which is "implied" from such payment, within the meaning of sub'd. (1) of this section and is barred within six years. *Park v. Brooks*, 38 S. C. 300, 17 S. E. 22, 24.

As to new promises and acknowledgment taking case from operation of statute of limitation, see § 368 and the note thereto. As to necessity of instituting suit on original cause of action, and the part payment as merely evidence in such action, see § 370 and the note thereto.

But part payments do not toll statute as to indorsers.—Under subd. (1) of this section payments before or after maturity of a note by the maker do not toll the statute as to the indorsers. *Butts v. Georgetown Mut., etc., Co.*, 142 S. C. 353, 140 S. E. 700; *Scoville et al. v. Johnson et al.*, 190 S. C. 457, 3 S. E. (2d) 543, disapproving statement to contrary in *Blackwood v. Spartanburg Commandery et al.*, 185 S. C. 56, 193 S. E. 195.

Payments to preacher were properly credited on back salary, as respects whether balance sued for was barred. *Brooks v. Central Baptist Church*, 185 S. C. 200, 193 S. E. 326.

Debtor has right to direct application of payment to any one of his debts, but should he give no direction, creditor may apply payment in such manner as pleases him, as regards running of statute of limitations. *Johnson v. Broome*, 175 S. C. 385, 179 S. E. 315.

Under equitable doctrine of retainer, note of legatee and devisee to intestate, barred by statute of limitations, could be set off against interest in personalty but not in realty. *McNamara v. Ayers*, 191 S. C. 228, 196 S. C. 545.

But 20-year presumption of payment statute will prevent operation of equitable doctrine of retainer, unless taken out of statute by part payment or consent in writing. *Ibid.*

Provision in note that indorsers waived any benefit which might accrue to them because of "any extension" of time granted to maker, does not contemplate enlarging the statute of limitations by the granting of many extensions over a period of sixteen years. *Tuten v. Bowen*

et al., 173 S. C. 256, 175 S. E. 510.

Where there is prior mortgage on land subsequently conveyed under general warranty deed, there is no breach of warranty until foreclosure suit is commenced, hence statute of limitations does not commence to run until right to possession has been destroyed through foreclosure sale. *Morris v. Lain*, 176 S. C. 310, 180 S. E. 206.

A trustee's relinquishment of beneficiary's business and turning over to her of her bank book and paid checks was a positive act manifesting a clear intention to terminate his trust, which started limitations to run on any claim against him. *Nesbitt v. Clark*, 187 S. C. 365, 197 S. E. 382.

Application on note of proceeds of sale of collateral by creditor, will not toll the statute, since payment is not voluntary on part of debtor. *Zaks v. Elliott et al. (Krupnick v. Peoples State Bank)*, 106 Fed. (2d) 425 (reversing 25 F. S. 857).

Provision in note by which maker promised to pay deficiency after sale of collateral could not operate as promise to pay made at time deficiency was determined, so as to toll the statute of limitations. *Ibid.*

Payment by one joint obligor does not deprive the other of the statute of limitations. *Ibid.*

Applicable to bond after cancellation of mortgage securing payment thereof.—This section applies to the case where the legal title holder of a bond secured by a mortgage cancels and satisfies the mortgage of record and leaves nothing but the bond which is one for the payment of money only, and an action thereon is barred within 6 years. *Newell v. Neal*, 50 S. C. 68, 27 S. E. 560. See also, *Gable v. Rauch*, 50 S. C. 95, 27 S. E. 555, 560, treated under the next foregoing section.

Action founded on an agreement in compromise settlement of note is within section. *McMakin v. Gowan*, 18 S. C. 502.

Section applies to counterclaims.—Under subd. (1) of this section a counterclaim for the conversion of property, where the tort is waived, and a recovery is sought on an implied contract, which shows that the cause of action had accrued more than six years prior to the institution of the action, is barred. *Lenhardt v. French*, 57 S. C. 493, 35 S. E. 761.

Collusive assignment to evade statute.—If a nonresident corporation, as payee of a note, cannot sue thereon in this state, by reason of the fact that such note is barred by the statute of limitations where it was executed, then a resident trustee to whom the note was assigned for the purposes of collection, cannot sue. *Hodges v. Lake Summit Co.*, 155 S. C. 436, 152 S. E. 658.

As to necessity that suit be instituted by real party in interest, see §§ 391, 397, 399 and the notes there placed.

Action by county treasurer against county for tax execution fees collected and paid into county treasury was an "action upon an obligation or liability, express or implied," subject to six-year limitation rather than 20-year limitation. *Gillespie v. Pickens County*, 197 S. C. 217, 14 S. E. (2d) 900.

III. SUBDIVISION (2).

A municipal tax is a liability created by statute and falls within subd. 2 of this section. *Milster v. City of Spartanburg*, 68 S. C. 26, 46 S. E. 539, 542.

Under statute authorizing highway department to construct a bridge and bill the railroad for part of the cost, cause of action arose when department completed the bridge, knowing that the railroad denied liability, and statute of limitations commenced then and not a year later, when department sent a bill for the cost. *State ex. rel. State Highway Department v. Piedmont & N. Ry. Co.*, 186 S. C. 49, 194 S. E. 631.

IV. SUBDIVISION (3).

Where lower riparian owner sued city for pollution of stream, which commenced more than six years previously, he was not barred by the statute of limitations, for it was a continuing nuisance, and he may recover for the last six years. *Conestee Mills v. City of Greenville*, 160 S. C. 10, 158 S. E. 113.

V. SUBDIVISION (4).

This subdivision seems to have been applied in an action to recover houses on land that was sold to the plaintiff by party in possession. *Dominick v. Farr*, 22 S. C. 585, the houses in this case being regarded as personalty.

VI. SUBDIVISION (6).

Statute begins to run upon acquisition of knowledge placing party on inquiry.

—Under subd. 6 of this section the six year period begins to run at the time of the acquisition of knowledge of such facts that are sufficient to put the party on inquiry which, if developed, will disclose the alleged fraud. *Tucker v. Weathersbee*, 98 S. C. 402, 82 S. E. 638, 640. See also, *Smith v. Linder*, 77 S. C. 535, 58 S. E. 610; *Tolle v. Johnson*, 61 S. C. 34, 39 S. E. 254; *Harrell v. Kea*, 37 S. C. 369, 16 S. E. 42; *McSween v. McCown*, 23 S. C. 342.

An action by heirs to set aside a deed of their ancestor as obtained by fraud will not lie unless commenced within six years after the ancestor had sufficient information to put him on inquiry as to the way in which the deed was obtained. *Brown v. Brown*, 44 S. C. 378, 22 S. E. 412.

If a right of action also then exists. *Suber v. Chandler*, 18 S. C. 526.

And actual or constructive knowledge of the fraud is sufficient. *Kibler v. McIlwain*, 16 S. C. 550.

Recordation of a deed will not, by itself, be sufficient notice to put a party on inquiry as to the existence of a fraudulent conveyance. *Tucker v. Weathersbee*, 98 S. C. 402, 82 S. E. 638, 640, citing *Means v. Feaster*, 4 S. C. 249. But notice of the recordation of a deed alleged to be fraudulent may be considered along with other facts and circumstances of which the contesting party has notice. *Id.*

But only a suspicion that there is something wrong about the transaction is not sufficient to place party on inquiry. *Beattie v. Pool*, 13 S. C. 379.

The fact that plaintiff knew his daughter-in-law was living on the land, and that she told him the property had been conveyed to her, was not sufficient notice of fraud to require plaintiff to bring an action to set aside the deed within six years. *Harrell v. Kea*, 37 S. C. 369, 16 S. E. 42.

After which, reasonable diligence to ascertain existence of fraud must be used.—After a party is possessed of facts sufficient to place him on inquiry he must exercise reasonable diligence to ascertain the existence of the alleged fraud. *Tucker v. Weathersbee*, 98 S. C. 402, 82 S. E. 638, 640.

Where certain alleged fraudulent conveyances were made in 1894 and 1896 and valuable improvements were placed on the property by the vendee and the making of the conveyances could have been immediately ascertained by the exercise of the slightest diligence, creditors of the husband of the grantee were barred by laches from maintaining a suit instituted in 1910 to have the conveyances set aside. *Tucker v. Weathersbee*, 98 S. C. 402, 82 S. E. 638, and the authorities therein cited.

And the conflict in the rules prior to the code.—In the case of *McLure v. Ashby*, 7 Rich. Eq. 430, at page 444, the rule is laid down in these words: "The notice of the fraud, the want of which will prevent the statute from running, is not alone positive information that a fraud has been actually committed. The notice will be sufficient to prevent the suspension of the statute if it be such as would put a reasonably diligent man upon inquiry. Nor must the aggrieved party wait until he has discovered evidence by which he may establish the fraud in a court of justice. If he has knowledge that a fraud has been committed, though that knowledge be confined to himself, he must proceed diligently; for the statute in such case will not be suspended." *Harrell v. Kea*, 37 S. C. 369, 16 S. E. 42, 43.

In *Shannon v. White*, 6 Rich. Eq. 96, 101, 9 Am. Dec. 115, we find the following language: "On the trial, then, of this question of notice, it was incumbent upon the defendant to prove that the plaintiff had notice of the fraud more than four years prior to the filing of the bill. And here it is to be remarked that it would not be sufficient to prove that the plaintiff had a suspicion of the fraud, but it is necessary to bring home to the defendant (doubtless a misprint for 'plaintiff') a knowledge of the facts constituting the fraud. Suppose some one were to tell him that a fraud had been committed, it would not be sufficient, unless he were informed of the facts constituting the fraud, or put in possession of a clew, by which, with a proper diligence, he might come to a knowledge of the facts." *Harrell v. Kea*, 37 S. C. 369, 16 S. E. 42, 43.

Has been removed to some extent by the enactment of this section.—It is somewhat difficult to reconcile these two statements of the rule, inasmuch as the former seems to imply that mere knowledge of the fact that a fraud has been committed, without a knowledge of the facts which would establish such fraud, or the means by which such knowledge of the facts might be acquired by the use of due diligence, would not be sufficient; while the latter seems to imply that mere knowledge that a fraud had been committed would be sufficient. But fortunately the whole matter has been taken out of the domain of judicial exposition, and the doubt and conflict theretofore existing, was removed by the enactment of this section.—Ed note.

Mr. Justice McGowan, as the organ of the Supreme Court, in construing this section in the case of *Beattie v. Pool*, 13 S. C. 379, expressly approved the rule laid down in *Shannon v. White*, supra, so that, the rule there stated may be considered as the one adopted in this state. See also, *Harrell v. Kea*, 37 S. C. 369, 16 S. E. 42. It seems, however, that the more recent cases have not always drawn the distinction between the two rules stated above, and the rule in the *Shannon Case*, supra, has not in every case been applied with any perceptible degree of rigidity.

Burden is on defendant to show plaintiff had knowledge of fraud.—The burden is on the defendant to show that the plaintiff had knowledge of the fraud, or of such facts as would have led to knowledge if pursued with reasonable diligence. *Grayson v. Fidelity Life Ins. Co.*, 114 S. C. 130, 103 S. E. 477, and the authorities there cited. See also, *Means v. Feaster*, 4 S. C. 249, 257; *Richardson v. Mounce*, 19 S. C. 477, where knowledge

of the fraud was denied in the complaint.

But if action is commenced after expiration of period, affirmative denial of knowledge is necessary.—Under subd. 6 of this section, it is essential, in action for equitable relief on the ground of fraud, brought more than six years after the occurrence, to allege that fraud was not discovered until within the six-year period. *Grayson v. Fidelity Life Ins. Co.*, 114 S. C. 130, 103 S. E. 477, citing *Smith v. Linder*, 77 S. C. 535, 58 S. E. 610.

Section merely prohibits suit after limitation period expires.—This section (subd. 6) does not have the effect of converting a fraudulent deed into a valid deed, by reason of the lapse of the prescribed time, but it simply forbids the right of action for relief on the ground of fraud; and hence, if the question as to the fraudulency of the deed arises in any other way than in such an action, there is nothing in this section which forbids its being assailed for fraud. *Jackson v. Plyler*, 38 S. C. 496, 17 S. E. 255, 258, 37 Am. St. Rep. 782, citing *Amaker v. New*, 33 S. C. 28, 11 S. E. 386, 8 L. R. A. 687.

Subd. 6 of this section does not prevent a mortgagee, in a foreclosure suit, from showing that the conveyance of the land by the mortgagor prior to the mortgage under which defendant claims paramount title was fraudulent, though such attack was not made within the period of limitation. *Jackson v. Plyler*, 38 S. C. 496, 17 S. E. 255, 256, 37 Am. St. Rep. 782.

Such a holding does not violate the provisions of subd. 6 of this section for the reason that the action is not to set aside the deed for fraud, but to recover land of which the questioned deed is a link in the chain of title. *Amaker v. New*, 33 S. C. 28, 11 S. E. 386, 8 L. R. A. 687. See also, *Wilson v. Kelly*, 16 S. C. 216.

Subdivision applies only where action based on fraud.—Subd. 6 of this section does not apply to a counterclaim for the conversion of property and the concealment thereof, when the tort is waived, and a recovery is sought on an implied contract, as it is not based on fraud, and was not formerly solely cognizable in the court of chancery. *Lenhardt v. French*, 57 S. C. 493, 35 S. E. 761.

But it is not confined to secret frauds.—There is nothing in subd. 6 of this section limiting the application of the provision to secret frauds. *Toole v. Johnson*, 61 S. C. 34, 39 S. E. 254, 257, applying the provision to a transaction (chilling the bidding) at a public sale.

Cancellation of deed executed under duress.—A suit for cancellation of a deed, as executed under duress, comes clearly within the provision "solely cognizable by the court of chancery," in

subd. 6. Furthermore, it is "an action for relief on the ground of fraud" within the meaning of the term "in equity jurisprudence." *National Bank of Savannah v. All*, 260 F. 370, 384.

Cancellation of forged deed.—In the case of *Du Pont v. Du Bos*, 52 S. C. 244, 29 S. E. 665, where it was sought to cancel a forged deed, the court said:

"At law fraud must be taken advantage of within six years of its discovery. Where, however, an equitable action must be brought, by analogy a court of equity will follow the period fixed in law cases by statute."

Cancellation of deed for illegal consideration.—The limitation provided in subd. 6 of this section does not apply to a suit to cancel a conveyance of lands on the ground that the consideration for the conveyance (which was the suppression of criminal proceedings) was illegal. *All v. All*, 250 Fed. 120, the court saying that this section was inapplicable to equity suits of this kind.

Conveyances in fraud of creditors.—In the case of *Smith v. Linder*, 77 S. C. 535, 58 S. E. 610, and *Tucker v. Weathersbee*, 98 S. C. 402, 82 S. E. 638, the Supreme Court of South Carolina held a suit in equity to set aside conveyances in fraud of creditors a suit within the meaning of this section.

Where owner stored cotton in warehouse to be redelivered on surrender of certificate, no cause of action for conversion accrued, as regards limitations statute, until owner demanded redelivery. *Roberts v. James et al.*, 160 S. C. 291, 158 S. E. 689.

Widow's failure to commence action to vacate purported renunciation of dower on ground of fraud within six years after discovery of alleged fraud did not bar her right to admeasurement of dower on husband's death, since wife has no right of dower until husband's death. *Tuten v. Almeda Farms et al.*, 184 S. C.

195, 192 S. E. 153.

Beneficiary's action against insurer for damages for alleged wrongful and fraudulent cancellation of policy is barred where insured died more than six years after receiving notice of cancellation of policy for nonpayment of premiums without having taken action to have policy continued in force. *Hungerpiller v. Acacia Mut. Life Ins. Co.*, 194 S. C. 264, 9 S. E. (2d) 553.

VII. SUBDIVISION (7).

Agreement decreasing period of limitation is void.—In view of subd. 7 of this section, a constitutional provision of a mutual benefit order that no action shall be brought after six months from disallowance of claim does not bar an action until after six years. *Sternheimer v. Order of United Commercial Travelers of America*, 107 S. C. 291, 93 S. E. 8.

The purpose of the legislature was to avoid such stipulations in policies of insurance; and, although there are other provisions of the statutes to the effect that the constitution and laws of fraternal benefit associations shall be binding upon the members thereof, and that the general insurance laws of the state shall not apply to such associations, unless specifically made applicable thereto, these provisions when construed together, and in connection with previous and subsequent legislation on the same subject show that the legislature did not intend to except the policies of these associations from the provisions of subd. 7 of this section. *Sternheimer v. Order of United Commercial Travelers of America*, 107 S. C. 291, 93 S. E. 8, 12.

Agreement changing period of limitation is void.—See this catchline under the instant section, analysis line II.

Cited, as to inapplicability to contract entered into prior to enactment of statute, *Sample v. Ins. Co.*, 46 S. C. 491, 24 S. E. 334.

§ 389. Three years.—Within three years:

(1) An action against a sheriff, coroner or constable, upon a liability incurred by the doing of an act in his official capacity, and in virtue of his office, or by the omission of an official duty, including the non-payment of money collected upon an execution. But this section shall not apply to an action for an escape.

(2) An action upon a statute, for a penalty or forfeiture, where the action is given to the party aggrieved, or to such party and the State, except where the statute imposing it prescribes a different limitation.

1932 Code, § 389; Civ. P. '22, § 332; Civ. P. '12, § 138; Civ. P. '02, § 113; 1870 (14) § 115.

Test for "action upon a statute."—In determining what is "an action upon a statute" within the meaning of this section, the inquiry is whether a penalty or

a cause of action for a penalty exists irrespective of the statute. If the action is allowed only by virtue of the statute then it is "an action upon a statute."

Sauls-Baker Co. v. Atlantic Coast Line Ry. Co., 109 S. C. 285, 96 S. E. 118, 119.

This section applies unless statute imposing penalty prescribes different period.—In the dissenting opinion in Land Mortgage Investment & Agency Co. v. Gillam, 49 S. C. 345, 26 S. E. 990, 999, 29 S. E. 203, it is said that the provisions of this section show beyond dispute that an action for a penalty or forfeiture imposed by statute must be commenced within three years from the accrual of the cause of action, except where the statute imposing the penalty or forfeiture prescribes a different period.

But a different limitation may be fixed by implication.—It seems that the statute imposing the penalty need not expressly provide a different limitation so as to make the instant section inapplicable. It is sufficient if the statute, by plain implication, provides a different limitation. See Earle v. Owings, 72 S. C. 362, 51 S. E. 980, 982.

Recovery of statutory penalty for loss of goods in transit.—An action to recover the penalty, provided by § 7165 of the Civil Code, for failure of a common carrier to pay claim for loss in transit within a specified period, is an action upon a statute within the meaning of the instant section. Sauls-Baker Co. v. Atlantic Coast Line Ry. Co., 109 S. C. 285, 96 S. E. 118. Section 7165 of the Civil Code provides no limitation, and therefore an action for the recovery of the

penalty must be brought within the three year limitation in this section. Id.

The action for the recovery of the penalty for charging usurious interest accrues when the usurious interest is paid. Land Mortgage, etc., Co. v. Gillam, 49 S. C. 345, 26 S. E. 990, 1000, 29 S. E. 203. (Dissenting opinion.)

A proceeding to estreat a recognizance is not an action upon a statute for a forfeiture or penalty, so as to make this section applicable. State v. Cornell, 70 S. C. 409, 50 S. E. 22, 23.

Counterclaim follows the main contract.—The statute (Civ. Code, § 6740) imposing the penalty for usury, and providing the recovery thereof by counterclaim, by plain implication, indicates that the counterclaim is available and is effective as long as the right of action exists on the principal sum. In other words, the counterclaim follows the main contract, and it is not barred within the three years under this section. Earle v. Owings, 72 S. C. 362, 51 S. E. 980, 982.

Action to recover tax penalties from taxpayers brought by surety which was subrogated to right of county was an "action for collection of taxes" under 10-year statute and not an "action for a penalty or forfeiture" under this section and section 390. American Surety Co. v. Hamrick Mills, and three other cases, 191 S. C. 362, 4 S. E. (2d) 308.

§ 390. Two years.—Within two years:

(1) An action for libel, slander, assault, battery, or false imprisonment.

(2) An action upon a statute, for a forfeiture or penalty to the State.

1932 Code, § 390; Civ. P. '22, § 333; Civ. P. '12, § 139; Civ. P. '02, § 114; 1870 (14) § 116.

Stipulated damages are not penalties.—An amount stated as a forfeiture for each year of the unexpired term of an escaped convict is not a technical penalty, but is stipulated damages, and an action therefor is not barred in two years. Lipscomb v. Seegers, 19 S. C. 425.

Proceeding to estreat recognizance is not within section.—A proceeding to estreat a recognizance is not an action upon a statute for a penalty on the state

within the meaning of subd. (2) of this section. State v. Cornell, 70 S. C. 409, 50 S. E. 22, 23.

"Fine" construed as "penalty." State v. Liggett & Myers Tobacco Co., 171 S. C. 511; 172 S. E. 857.

This section does not apply to action for recovery of tax penalties. American Surety Co. v. Hamrick Mills, 191 S. C. 362, 4 S. E. (2d) 308.

§ 391. One year.—Within one year:

An action against a sheriff or other officer for the escape of a prisoner arrested or imprisoned on civil process.

1932 Code, § 391; Civ. P. '22, § 334; Civ. P. '12, § 140; Civ. P. '02, § 115; 1870 (14) § 117.

§ 392. Action upon current account.—In an action brought to recover a balance due upon a mutual, open, and current account, where there have been reciprocal demands between the parties, the cause of action shall be

deemed to have accrued from the time of the last item proved in the account on either side.

1932 Code, § 392; Civ. P. '22, § 335; Civ. P. '12, § 141; Civ. P. '02, § 116; 1870 (14) § 118.

An action on a sealed note alone cannot in any sense be called an "open account." *Chapman v. Chapman*, 31 S. C. 405, 10 S. E. 106, 107.

Nor may a note be considered evidence of a mutual account. — Judge O'Neill said, in delivering the judgment of the court in the case of *Cunningham v. Executors of Green*, Dud. (S. C.) 351: "It is true beyond all question that a note of hand cannot be regarded as the evidence of a mutual account. It has directly the contrary effect; it furnishes a presumption that the accounts between the parties to its date have been settled. The plaintiff's due-bill to the testator cannot, therefore, be regarded as a mutual account between these parties," etc. *Chapman v. Chapman*, 31 S. C. 405, 10 S. E. 106, 107.

Where, in an action on a sealed note,

the defendant set up as a counterclaim an account running back nine years, on which only one item was credited to the plaintiff, it was held that this did not establish a mutual account within the meaning of this section. *Chapman v. Chapman*, 31 S. C. 405, 10 S. E. 106.

A suit by patient's committee against physician's executrix and devisees to set aside patient's will, favoring physician, and for accounting as to property conveyed to physician and to third party, who paid consideration to physician, was not barred by six-year limitation, where there was mutual current account between physician and patient, the last entry being within the limitation, and patient was illiterate and relied on physician's position of trust, which physician did not repudiate. *Jackson v. Johnson*. 186 S. C. 155; 195 S. E. 239.

§ 393. Action for penalties.—An action upon a statute, for a penalty or forfeiture given, in whole or in part, to any person who will prosecute for the same, must be commenced within one year after the commission of the offense; and, if the action be not commenced within the year by a private party, it may be commenced within two years thereafter, in behalf of the State, by the attorney general, or the solicitor of the circuit where the offense was committed, unless a different limitation be prescribed in the statute under which the action is brought.

1932 Code, § 393; Civ. P. '22, § 336; Civ. P. '12, § 142; Civ. P. '02, § 117; 1870 (14) § 119.

An action against a railroad company for the penalty for violation of the separate coach law, is within this section

and is barred in one year. *Sturkie v. Southern Ry. Co.*, 71 S. C. 208, 50 S. E. 782.

§ 394. Action for other relief.—An action for relief not hereinbefore provided for, must be commenced within ten years after the cause of action shall have accrued.

1932 Code, § 394; Civ. P. '22, § 337; Civ. P. '12, § 143; Civ. P. '02, § 118; 1870 (14) § 120.

Redemption and recovery of land from mortgagee.—An action to redeem land, and to recover possession thereof from a mortgagee, is not specifically referred to in the statute of this State, and this section, therefore, governs such an action. *Frady v. Ivester*, 118 S. C. 195, 110 S. E. 135, 141.

In *Jones, Mtge.*, vol. 2, § 1144, it is said: "The right of the mortgagor to redeem being an equitable and not a legal right, the statute of limitations does not strictly constitute a bar to a bill to redeem; but equity adopts the statutory period of 20 years (10 years in this State) after forfeiture and possession taken by

the mortgagee, beyond which the mortgagor shall not be allowed to redeem if he has paid no interest in the meantime. Such lapse of time affords evidence of a presumption that the mortgagee has abandoned his right. . . . After the mortgagee has remained in possession for 20 years (10 years in this State) without accounting or in any way acknowledging the right of redemption in the mortgagor, the latter cannot redeem." *Frady v. Ivester*, 118 S. C. 195, 110 S. E. 135, 141.

Action to set aside deed for fraud.—In *Smith v. Linder*, 77 S. C. 535, 58 S. E. 610, counsel strenuously maintained that

this section governs an action to set aside a deed as obtained by fraud. Subd. (6) of § 388 clearly covers such a case, and the court in the above cited case so held.

See generally, *McMakin v. Gowan*, 18 S. C. 502; *Williams v. Halford*, 73 S. C. 125, 53 S. E. 88; *Brock v. Kirkpatrick*, 69 S. C. 231, 48 S. E. 72.

§ 395. Clause in contract not in conformity to statute of limitations declared void.—No clause, provision or agreement in any contract of whatsoever nature, verbal or written, whereby it is agreed that either party shall be barred from bringing suit upon any cause of action arising out of said contract if not brought within a period less than the time prescribed by the statute of limitations, for similar causes of action, shall bar such action, but the same may be brought notwithstanding such clause, provision or agreement if brought within the time prescribed by the statute of limitations in reference to like causes of action.

1932 Code, § 395; Civ. P. '22, § 338; Civ. P. '12, § 144; 1911 (27) 130.

Change of limitation in contract is to be ignored.—Under this section, suit may be brought against a surety after the expiration of the six months' period within which the bond, upon which action is brought, required it should be brought. *State Agricultural, etc., Soc. v. Taylor*, 104 S. C. 167, 88 S. E. 372.

Under this section an action brought against a surety company on a bond within the period of limitations cannot be dismissed, though it was brought af-

ter the date stated in the bond as the latest date on which suit thereunder could be instituted. *City of Sumter v. United States Fidelity & Guaranty Co.*, 116 S. C. 29, 106 S. E. 778.

Action brought under this section within the period of limitation on a contractor's bond cannot be dismissed though it was brought after the period stated in the bond, one year. *Barringer v. Fidelity & Deposit Co.*, 161 S. C., 4, 159 S. E., 373.

§ 396. Actions by State.—The limitations prescribed by this chapter shall apply to actions brought in the name of the State, or for its benefit, in the same manner as to actions by private parties.

1932 Code, § 396; Civ. P. '22, § 339; Civ. P. '12, § 145; Civ. P. '02, § 119; 1870 (14) § 121.

An action in the name of the state, on the relation of the highway department, against a railroad to recover part of the cost of constructing a bridge over

its tracks, may be barred by limitations, in view of this statute. *State ex rel. State Highway Department v. Piedmont & N. Ry. Co.*, 186 S. C. 49, 194 S. E. 631.

TITLE 4-A

Actions for Services against Counties over 85,000

§ 396-1. Bring action for services rendered against counties over 85,000 people within one year from date of accrual of right.—No action against any county of this state, having a population as shown by the United States official census of 1930 in excess of eighty-five thousand (85,000) people, or against any county of said state which may be shown by any future United States official census, to have a population in excess of said number, shall be brought by any former, present or future officer (including county auditors and county treasurers) employee, or agent thereof on account of any claim for salary, wages, fees, costs, or other emolument or claim alleged to be due him or her, on account of services rendered or performed, nor shall any such action be brought upon any such claim by an assignee or personal representative thereof, where the cause of action shall accrue after March 17, 1938, unless the action be begun in a court of record having jurisdiction thereof, within one year from the date of

the accrual of the right of action: *provided* that in all cases where such right of action, based upon the matters above set forth, shall have accrued on or prior to March 17, 1938, and the same is not barred under the present statute of limitations, an action for the causes mentioned may be brought in a court as above outlined within a period of three months from March 17, 1938, but not thereafter.

1938 (40) 1631.

This statute, in so far as it relates to claims against counties which had accrued on or before the passage of the act, violates the equal protection and due

process clauses of the State and Federal Constitutions. *Gillespie v. Pickens County*, 197 S. C. 217, 14 S. E. (2d) 900.

TITLE 5

Parties to Civil Actions

CHAPTER 14. Parties to Civil Action Generally, § 397.

CHAPTER 15. Wrongful Death Actions and Survival of Actions, § 410.

CHAPTER 14

Parties to Civil Action Generally

397. Real party in interest to sue.

398. Action by assignee.

399. Action by representative.

400. Action by and against married woman.

401 and 402. Infants and their guardians.

403. Party plaintiff.

404. Party defendant.

405. State as defendant in action affect-

ing realty.

406. One may sue or defend for others.

407. Action against parties to bills and notes.

408. Abatement of action.

409. Interpleader.

409-1. Insane persons.

409-2. Imprisoned persons.

409-3. Powers of guardians ad litem.

§ 397. Party in interest to sue—action by grantee of land held adversely.

Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section 399, but this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract. But an action may be maintained by a grantee of land in the name of the grantor, or his or her heirs or legal representatives, when the grant or grants are void by reason of the actual possession of a person claiming under a title adverse to that of the grantor at the time of the delivery of the grant, and the plaintiff shall be allowed to prove the facts to bring the case within this provision.

1932 Code, § 397; Civ. P. '22, § 354; Civ. P. '12, § 160; Civ. P. '02, § 132; 1870 (14) § 134.

In general.—This section does little more than give expression to the general principle long established, that all persons interested in the subject-matter of the suit should be made parties. *Cathcart v. Sugenheimer*, 18 S. C. 123, 131.

This section is to be read in connection with § 399. See *Billings v. Williamson*, 6 S. C. 119, followed in *Carroll v. Still*, 13 S. C. 430.

It is said in *Johnson v. Dawkins*, 20 S. C. 528, at page 532, the effect of these two sections, when construed together, is the same as if the statutory provision read as follows: "either the real party in interest or the party with whom a contract is made for another may institute an action on such contract." To the same effect, see *Billing v. Williamson*, 6 S. C. 119, recognized and followed in *Carroll*

v. Still, 13 S. C. 430. And see also, Barnwell v. Marion, 54 S. C. 223, 32 S. E. 313, 314.

Suit must be brought and continued by real party in interest.—This section not only prohibits the bringing of an action by one not the real party in interest, but prohibits its further prosecution by a plaintiff after his interest has been extinguished. *Matthews v. Cantey*, 48 S. C. 588, 26 S. E. 894, applying this rule in an action by a pledgee of a note and mortgage, where the debt was paid in full after the commencement of the action.

The word "prosecuted" used in this section implies that the suit must be brought and continued in the name of the real party in interest, except as provided in § 399. *Matthews v. Cantey*, supra.

Decedent's heirs names.—In action in their own names, individually, and as attorneys in fact for a decedent's heirs, plaintiffs were required under statute to set out heirs' names. *Wilson et al. v. Gibbes Machinery Co., et al.*, 189 S. C. 426, 1 S. E. (2d) 490.

Otherwise the court is without jurisdiction.—Unless the real party in interest institutes the suit and is before the court, the court is without jurisdiction. *Hodges v. Lake Summit Co.*, 155 S. C. 436, 152 S. E. 658.

And plaintiff must show that he is the real party in interest.—A party instituting an action must be able to show that he is the real party in interest within the meaning of this section, or that he falls within the exception mentioned in § 399. *Sullivan v. Hellams*, 6 S. C. 184.

And section prohibits the institution of a suit by a nominal party. *Hodges v. Lake Summit Co.*, 155 S. C. 436, 152 S. E. 658.

The pledgee of a note, after the debt for which the note was held in pledge is paid, is only a nominal party and cannot, under this section institute suit upon the note. *Hodges v. Lake Summit Co.*, 155 S. C. 436, 152 S. E. 658, 666.

Collusive assignments are prohibited.—This section prohibits the assignment to a resident trustee of a foreign note, which assignment is made for the sole purpose of evading the laws of the foreign state (statute of limitations in the case cited below). In such case the assignee cannot be considered the real party in interest and he cannot institute suit. *Hodges v. Lake Summit Co.*, 155 S. C. 436, 152 S. E. 658.

Demurrer is proper method of raising real party in interest question.—The proper method of taking advantage of the fact that the plaintiff is not the real party in interest seems to be by demurrer. See *Sullivan v. Hellams*, 6 S. C. 184, and the authorities therein cited. It

has been said that the objection can only be raised by demurrer. *State v. Moses*, 18 S. C. 366, 371.

Amendment to show trustee capacity of plaintiff.—Where the court grants a nonsuit for defect of parties plaintiff it is proper to refuse to allow the plaintiff to amend so as to make the plaintiff trustee for the absent parties, where there is no evidence that the plaintiff was in fact trustee for such parties. *Williams v. Working Benevolent, etc., Lodge*, 109 S. C. 233, 95 S. E. 517.

In other words, § 399 serves to relax the rigid rule of the instant section only where the plaintiff is in fact trustee for the absent parties. *Id.*

Assignee of tort claim may sometimes sue.—In *Bultman v. Atlantic Coast Line R. Co.*, 103 S. C. 512, 88 S. E. 279, 280, the court said that in spite of the prohibition in this section against the assignment of a thing in action not arising out of contract, this section must be considered modified by § 419 which provides for the survival of causes of action. The court further held that in view of § 419, a right of action against a railroad company, for firing premises, may be assigned notwithstanding the provisions of the instant section.

Illustrations of "real party in interest."—The general principles which have just been discussed have been applied in various forms of actions. We set out in the following paragraphs some of these illustrations in order to show who is considered the real party in interest under a given set of facts.—*Ed. note.*

Suit to enforce right of subrogation of insurance company is properly brought in name of insured.—Where an insurance company pays a loss under a policy, and becomes subrogated to the rights of the insured against the person whose tortious act gave rise to the loss, the proper mode of enforcing such right of subrogation is by an action in the name of the assured for the benefit of the insurance company. *Mobile Ins. Co. v. Columbia, etc., R. Co.*, 41 S. C. 408, 19 S. E. 858, 44 Am. St. Rep. 725, 860. And there is nothing in this section to prevent this mode of enforcing the right. *People's Oil, Fertilizer Co. v. Charleston, etc., Ry. Co.*, 83 S. C. 530, 65 S. E. 733, 735.

Because the insured is regarded a trustee.—This holding is based upon the fact that the insured is considered a trustee for the insurance company to the extent of the money paid by the insurance company. See *Mobile Ins. Co. v. Columbia, etc., R. Co.*, 41 S. C. 408, 19 S. E. 858, 44 Am. St. Rep. 725; *People's Oil, etc., Co. v. Charleston, etc., Ry. Co.*, 83 S. C. 530, 65 S. E. 733, where the rights of the insured were assigned to the insurance company, but the language

employed showed an intent to subrogate the company to the rights of the insured to a limited extent only.

But the insurance company may be joined as a party.—The insurance company, for whom the legal title to the cause of action is held in trust, may, however, be joined as a party to the suit. *People's Oil, etc., Co. v. Charleston, etc., Ry. Co.*, 83 S. C. 530, 65 S. E. 733, 735. In either case the court will guard the defendant from liability to be subjected to pay the same loss twice. *Id.*

Suit by receiver of mutual insurance company on behalf of policy and certificate holders of fraternal group insurance.—A receiver of a mutual insurance company is not a "real party in interest" so as to be entitled under statute to bring action on behalf of policy and certificate holders of fraternal group insurance, which had been taken over by mutual insurance company, against other insurance companies, which allegedly had fraudulently dumped the insurance on mutual insurance company, since holders of claims on such policies were the true owners, and since mutual insurance company was only secondarily liable. *Ex Parte Brock*, 183 S. C. 469; 191 S. E. 342.

Suit on administrator's bond.—This section does not prevent a probate judge and the heirs of a deceased person from joining as co-plaintiffs in a suit on an administrator's bond. *McCorkle v. Williams*, 43 S. C. 66, 20 S. E. 744. But the distributees themselves may maintain an action on the bond without joining the probate judge as a party plaintiff. *Kaminer v. Hope*, 9 S. C. 253, cited in *McCorkle v. Williams*, *supra*.

The bond in such case is not made for the benefit of the probate judge but he is the custodian and trustee of the persons for whose benefit the bond was given, and he falls within the exception stated in § 399. See *Johnson v. Dawkins*, 20 S. C. 528.

Suit on bond is properly instituted by beneficiary.—Suit may be instituted on a bond by the person for whose benefit such bond was given, as such person is the real party in interest, within the meaning of this section, even though the bond does not expressly name the obligee. *General Motors Acceptance Corp. v. Hutto*, 136 S. C. 207, 134 S. E. 232.

Or legal title holder.—A mortgage given to secure the redemption of certain bonds issued by the mortgagor is properly sued upon by and in the name of the obligee of the bonds secured by the mortgage, who is the legal owner and holder thereof. *City Council of Charleston v. Caulfield*, 19 S. C. 201, 210.

Holder of one of several bonds secured by mortgage may foreclose.—Plaintiff, holder of one of eight bonds secured by real estate mortgage, may bring action to foreclose; although she has not title to mortgage. *Hibbett v. Charleston Heights Co. et al.*, 163 S. C., 327, 161 S. E., 499.

Tort action by wife against husband.—Under this section and § 400 a wife may maintain an action in tort against her husband for willfully beating her. *Prosser v. Prosser*, 114 S. C. 45, 102 S. E. 787.

Suit on note for benefit of another.—This section prohibits the payee of a sealed note from maintaining an action thereon, where he sues for the benefit of another. *Sullivan v. Hellams*, 6 S. C. 184.

An action for the benefit of another could have been maintained prior to this section, under the Act of 1798, commonly called the Statute of Ann which was repealed when this section was adopted. *Sullivan v. Hellams*, 6 S. C. 184, 185. See also, *Pomeroy's Treatise on Remedies*, § 138.

Suits on official bonds.—The party aggrieved by the misconduct of a public officer may maintain an action, under this section as the real party in interest, on the official bond of such officer. *Greenville County v. Runion*, 9 S. C. 1, the county in this case being the aggrieved party.

For statute permitting a county to sue and be sued, see § 888 of the Civil Code, and the note thereto.

In *State v. Moses*, 18 S. C. 366, the court said that it would seem that an action on the official bond of a clerk of court may be brought in the name of the State alone.

Guardian assignee of bond may sue without joining ward.—Under this and § 399 a guardian who is the assignee of a bond made payable to a certain trustee or his assigns may sue on it without joining his wards. *Barnwell v. Marion*, 54 S. C. 223, 32 S. E. 313.

Lunatic sues in equity by committee.—Where equitable relief is sought in the court of chancery, it seems that the committee may sue alone and without using the name of the lunatic as a party plaintiff, and that the judgment will be as binding upon the lunatic's estate as if he were personally present. *Cathcart v. Sugenhimer*, 18 S. C. 123, and the authorities therein cited.

But an action at law must be in name of lunatic.—An action at law for the recovery of the property of a lunatic or damages for its detention, must be brought in the name of the lunatic by his committee. *Cathcart v. Sugenhimer*, 18 S. C. 123, and authorities cited

§ 398. Assignment of thing in action.—In the case of an assignment of a thing in action, the action by the assignee shall be without prejudice to any set-off or other defense existing at the time of, or before notice of, the assignment; but this section shall not apply to a negotiable promissory note or bill of exchange, transferred in good faith, and upon good consideration, before due.

1932 Code, § 398; Civ. P. '22, § 355; Civ. P. '12, § 161; Civ. P. '02, § 133; 1870 (14) § 135.

This section, which applies only to the "assignee."—This section refers to an action "by an assignee" and has no application to an action by the representatives of an assignor against a subassignee. *Westbury v. Simmons*, 57 S. C. 467, 35 S. E. 764, 769.

And does not affect rights of those dealing in good faith with an assignee clothed with the indicia of ownership.—Hence where life policies were assigned by insured to bank for loan, which bank paid the premiums and later notified insurer that they were absolute property of bank, insurer was justified in dealing with the bank alone in making loans under the policies. *New York Life Ins. Co. v. Brown*, 99 F. (2d) 199 (reversing 22 F. S. 82.)

Places the assignee "in the shoes" of his assignor.—In view of this section an assignee of a note and mortgage stands in no better position than did his assignor. *British & American Mortg. Co. v. Smith*, 45 S. C. 83, 22 S. E. 747; *Woodrow v. Frederick*, 133 S. C. 431, 131 S. E. 598; *Patterson v. Rabb*, 38 S. C. 138, 17 S. E. 463, 19 L. R. A. 831.

Assignee takes subject equities between original assignor and his assignee and original assignor and his debtors.—Assignee of nonnegotiable bond and mortgage from attorney, to whom same was endorsed in blank by original assignor to collect, but who fraudulently assigned same, takes said instrument subject to equities between original assignor and his assignee as well as to equities existing between original assignor and original debtor; and the original assignor is not estopped from asserting claim to said instrument. *Noland v. Law*, 170 S. C. 345; 170 S. E. 439.

And the equities and defenses against the assignor are available against the assignee.—Under this section a nonnegotiable bond and mortgage, given for the purchase price of a lot, is subject, in the hands of an assignee, to all equities and defenses existing between the mortgagee and mortgagor, which in this case was an oral agreement that the bond was to be paid by commissions to become due to the mortgagor from the mortgagee. *Woodrow v. Frederick*, 133 S. C. 431, 131 S. E. 598, and the numerous authorities therein discussed. See also, *Moffatt v. Hardin*, 22 S. C. 9.

In *Woodrow v. Frederick*, 132 S. C. 431, 131 S. E. 598, 601, it is said that in this state no mortgagor has ever been denied the right to set up against the assignee of a mortgage any bona fide defense which he had against the original mortgagee prior to the notice of assignment.

And this principle may be thus illustrated.—Where the purchaser of realty gave purchase-money mortgage for part of price and used part of cash payment in satisfaction of prior mortgage, but, instead of having mortgage marked paid, had it transferred to him, and after its maturity pledged it with bank as collateral for loan, it was held that under this section pledgee bank acquired no greater rights than purchaser, who, as against vendor, could not assert such mortgage as lien superior to purchase-money mortgage. *Willoughby v. Ray*, 131 S. C. 317, 127 S. E. 441.

The assignee of a distributee's share of an estate takes subject to the liability of the distributee on the administrator's bond, where such distributee is surety thereon. *Bobo v. Vaiden*, 20 S. C. 271.

Where a note has been signed and sealed by one person, and indorsed in blank, without seal, by another, the maker can set up under this section, against the holder for value, before maturity, defenses of fraud and failure of consideration. *McLaughlin v. Braddy*, 63 S. C. 433, 41 S. E. 523, 524, 90 Am. St. Rep. 681.

In an action by an assignee of a note against the maker, the defendant may set up a debt due him by the assignor, and such debt may be pleaded as a counterclaim. *Sullivan v. Blythe*, 14 S. C. 622.

In *Patterson v. Rabb*, 38 S. C. 138, at page 152, 17 S. E. 463, 467, 19 L. R. A. 831, 836, it is said "that, under our law, an innocent assignee of a chose in action under seal takes such chose in action subject to all the infirmities in and against his assignor."

Where buyer of land gave a mortgage to a third person, who agreed to finance, purchase and pay an outstanding mortgage, but took an assignment of the outstanding mortgage instead, the mortgage was thereby paid and became dead, and one to whom it was subsequently assigned after maturity took it subject to existing defenses under this section.

Ives v. Rutland, 135 S. C. 173, 133 S. E. 539.

But the rule applies only to equities existing at time of assignment or before notice thereof.—In order for the general rule, embodied in this section, to apply it seems to be essential that the equity in favor of the debtor should exist at the time of the assignment or before notice thereof. See dissenting opinion in *Mars-ton v. Rivers*, 138 S. C. 295, 136 S. E. 222, 230.

The rule embraced in this section applies merely to defenses existing at the time of the assignment, in favor of the obligor on the chose in action. *McCand-less v. Klauber*, 158 S. C. 32, 155 S. E. 141, containing many quotations of test-writers bearing upon the rule contained in this section.

And the assignee is not affected by anything occurring after assignment.—This doctrine merely binds the assignee to take the bond and mortgage, subject to such infirmities as existed against the assignor at the date of the assignment. The assignee is not bound by anything which may have occurred by and through the assignor after that date. *Singleton v. Singleton*, 60 S. C. 216, 38 S. E. 462, 469.

So that, fraud of assignor after assignment will not affect assignee.—Fraud of the assignor perpetrated after assignment will not affect the assignee unless the assignee participates therein. *Singleton v. Singleton*, 60 S. C. 216, 38 S. E. 462, 469. And the mere fact that the assignee did not have his assignment placed upon record at the time of such fraud will not affect this rule. *Id.* See also, *Williams v. Paysinger*, 15 S. C. 171.

But even after notice the assignee may nevertheless prove estoppel against assignor.—Although an assignee does not come within the protection of the law as a purchaser for valuable consideration without notice, he, of course, can show such acts as estop the assignor from asserting his legal rights. *Westbury v. Simmons*, 57 S. C. 467, 35 S. E. 764, 769.

Thus, an assignee of stock may, under this section, show acts of negligence not known by him, though known by his assignor, which estop the rightful owner from asserting title. *Maxwell v. Foster*, 67 S. C. 377, 45 S. E. 927.

Defense of want of consideration unavailable.—Since defense of want of consideration, as distinguished from failure of consideration, was not available to original real estate mortgage, it was unavailable as against assignee of mortgage. *Bank of Charleston v. Oates et*

al., 160 S. C. 188, 158 S. E. 272.

Protection of rights of third parties.—The rule embraced in this section seems not to apply where the court in the exercise of its sound judicial discretion finds it necessary to dispense with the rule in order to protect the equitable rights of third persons not parties to the suit. *Simmons v. Reid*, 31 S. C. 389, 9 S. E. 1058, 17 Am. St. Rep. 36.

Burden of proof as to time of accrual of equity of defense.—Under this section the burden of showing that the assignment of a past-due mortgage on which suit is brought was made before the accrual of a set-off in favor of defendant and against the assignor rests upon the plaintiff. *Bank of Columbia v. Gadsden*, 56 S. C. 313, 33 S. E. 575.

Section applies to successive assignments.—This section applies to an assignment of a life policy by a person to whom the policy had been assigned by the insured, and where the assignment made by the prior assignee was expressed as the assignment of all the right, title, and interest of the prior assignee therein, the assignee takes it subject to all existing equities. *Westbury v. Simmons*, 57 S. C. 467, 35 S. E. 764.

The transfer of a note carries with it a mortgage given to secure payment thereof. *Ballou v. Young*, 42 S. C. 170, 20 S. E. 84, and the cases therein cited.

And such mortgage may be adapted to the fate of the note it secures. *Patterson v. Rabb*, 38 S. C. 138, 152, 17 S. E. 463, 19 L. R. A. 831. See also, *Woodrow v. Frederick*, 133 S. C. 431, 131 S. E. 598; *Nichols v. Briggs*, 18 S. C. 473, 485.

This section not only does not apply to a negotiable promissory note, transferred in good faith, and upon good consideration, before due, but does not apply to a mortgage given to secure payment of such note. Under such circumstances the rule of the commercial law applicable to negotiable promissory notes is likewise applicable to the mortgage given to secure payment of the same. *Ballou v. Young*, 42 S. C. 170, 20 S. E. 84, 85, and the authorities cited.

A plea of bona fide purchaser will not avail an assignee of a note and mortgage transferred after maturity. *British & American Mortg. Co. v. Smith*, 45 S. C. 83, 22 S. E. 747.

Nor is the assignee of a nonnegotiable bond and mortgage purchased before maturity a "purchaser for value". *Dangerfield v. Brown et. al.*, 181 S. C. 120, 186 S. E. 641.

Certificates of stock have been held in this state to be nonnegotiable. *Maxwell v. Foster*, 67 S. C. 377, 45 S. E. 927, 930, and cases there cited.

§ 399. Actions by executor, trustee, etc.—An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue, without joining with him the person for whose benefit the action is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another.

1932 Code, § 399; Civ. P. '22, § 356; Civ. P. '12, § 162; Civ. P. '02, § 134; 1870 (14) § 136.

Editor's note.—The provisions of this section constitute statutory exceptions to the general rule embraced in § 397, to which section reference is hereby made.

Effect of section when construed with § 397.—The effect of this section, when construed with § 397, is that either the real party in interest or the party with whom a contract is made for another may institute an action on such contract. *Barnwell v. Marion*, 54 S. C. 223, 32 S. E. 313, 314. The instant section is only a modification of the rule embodied in § 397. *Williams v. Working Benevolent Lodge*, 109 S. C. 233, 95 S. E. 517, 519.

In view of this section a complaint should aver for whose benefit the action is brought.—*Copeland v. Southern Ry. Co.*, 76 S. C. 476, 57 S. E. 535.

But amendment is allowable only where there is evidence of plaintiff's fiduciary capacity.—*Williams v. Working Benevolent Lodge*, 109 S. C. 233, 95 S. E. 517, it was held that an amendment should not be allowed when the effect thereof would be to make a party the trustee of other persons, when there is no evidence that such party is in fact the trustee of such persons.

In view of this section, the amendment of a complaint by adding a party plaintiff, through error, is harmless, where the original plaintiff stood in the position of a trustee of an express trust to the person who was added as a plaintiff. *Cousar v. Heath*, 80 S. C. 466, 61 S. E. 973.

In an action against a cotton broker to recover margins paid to such broker to cover losses on a contract for the future delivery of cotton, the evidence was considered, and, was held sufficient to show that plaintiff was a "trustee of an express trust," within the meaning of this section. *Cousar v. Heath*, 80 S. C. 466, 61 S. E., 973.

Nor is refusal to amend error where plaintiff proves nature of his trust.—The refusal to require plaintiff to amend his complaint so as to set forth facts showing for whose benefit the action is brought is harmless error where under defendant's general denial, the plaintiff proved for whom he was trustee, and the nature of his trust. *Copeland v. Southern Ry. Co.*, 76 S. C. 476, 57 S. E. 535.

It is no defense to an action on a note

that the proceeds belong to the plaintiff as a trustee, since this section entitles him to sue without joining the beneficiary. *Watford v. Windham*, 64 S. C. 509, 42 S. E. 597.

"Trustee of an express trust."—Bank that sold certain securities and gave purchaser trust receipt for said securities, which stated it held securities subject to order of purchase and agreed to repurchase securities at sale price, held trustee of an express trust and could foreclose securities in its name. *Greenwood Cotton Mills v. Pace*, 172 S. C., 531; 174 S. E., 473.

Guardian may sue without joining ward.—Under this section a guardian who is the assignee of a bond made payable to a certain trustee or his assigns may sue on it without joining his wards. *Barnwell v. Marion*, 54 S. C. 223, 32 S. E. 313, reconciling the early cases. *Moore v. Hood*, 9 Rich, Eq. 311, 70 Am. Dec. 210; and *Long v. Cason*, 4 Rich Eq. 60.

Under this section a judge of probate may sue on a guardian's bond without joining the wards as parties. *Smith v. Moore*, 109 S. C. 196, 95 S. E. 351.

This sections does not prevent a probate judge and the heirs of a deceased person from joining as co-plaintiffs in a suit on an administrator's bond. *McCorkle v. Williams*, 43 S. C. 66, 20 S. E. 744. But the distributees themselves may maintain an action on the bond without joining the probate judge as a party plaintiff. *Kaminer v. Hope*, 9 S. C. 253.

Liquidating trustee of insolvent bank properly sues in own name as trustee.—By a divided court, it has been held that a director's action as liquidating trustee against a co-director for malfeasance is properly brought in the name of such director as liquidating trustee, rather than in the name of the corporation, in view of this section. *Peoples v. Hornik*, 149 S. C. 40, 146 S. E. 680. And the corporation is not a necessary party to such action. *Id.* Nor need the director who is sued individually for malfeasance, be joined as a party plaintiff in his capacity as liquidating trustee. *Id.*

As to power of directors to settle the affairs and collect the debts of a corporation after dissolution, see § 7710 of the Civil Code and note thereto.

Substituted trustee may sue for undis-

closed beneficiary. — Where defendant entered contract of guaranty with trust company as trustee, but name of beneficiary of trust was undisclosed, the beneficiary being whoever might own bond secured by mortgage, the plaintiff, as substituted trustee, is entitled to bring suit on guaranty in foreclosure proceedings under this section, since he represents owner of bond secured by mortgage sought to be foreclosed. *Mullally v. Garner Realty Co.*, 154 S. C. 401, 151 S. E. 571.

A commissioner in equity may sue in his own name, under this section, on a bond given to him for the benefit of others, although the bond has been turned over to his successor, the clerk of the court. *Billings v. Williamson*, 6 S. C. 119. Although it probably is better practice to let the clerk in such case institute the suit. *Id.* See also, *Daniels v. Moses*, 12 S. C. 130, 137; *Clark v. Smith*, 13 S. C. 585.

Suits based upon standard mortgagee clause.—Under this section a mortgagor, on the refusal of the mortgagee to proceed against the insurer under the standard mortgage clause in a policy, has the right to bring an action against the mortgagee and the insurer to compel collection and application on the mortgage. *Walker v. Queen Ins. Co.*, 136 S. C. 144, 134 S. E. 263, 52 A. L. R. 259, and the cases cited.

Suit to enforce right of subrogation of insurance company is properly brought in name of insured. See this catchline under § 397, and cases treated thereunder.

Suit by administrator on note belonging to estate.—Where a decree showed that there was a final settlement of an estate, and that a note executed in favor of decedent belonged to the heirs, but a subsequent order showed that such settlement was not agreed upon by one certain heir, to whom leave was granted to meet the administrators before the court and correct errors in the former settlement, the administrators may sue on said note for the benefit of those interested, in view of this section, since under such circumstances, it is not shown that the administrators have lost

their interest in the note or their right to collect it. *Hill v. Hill*, 51 S. C. 134, 28 S. E. 309.

An action on a sealed note, payable to an administrator, may be instituted by the administrator, even though such note has been assigned, such suit being for the benefit of the assignee. *Carroll v. Still*, 13 S. C. 430.

Lunatic sues in equity by committee.—A suit by a committee of a lunatic against the executors of the deceased committee for an account of profits is a suit by a trustee to recover profits due his cestui que trust, and may be maintained by the committee without joining the lunatic as a party. *Ashley v. Holman*, 15 S. C. 97, 105. See, also, *Cathcart v. Sugenheimer*, 18 S. C. 123.

But an action at law must be in name of lunatic. See this catchline under § 397. And see, also, *Griffin v. Griffin*, 20 S. C. 486.

And an action brought by attorneys in fact must set out the names of the real parties in interest. *Wilson et al. v. Gibbs Machinery Co. et al.*, 189 S. C. 426, 1 S. E. (2d) 490.

The superintendent of the penitentiary may sue in his own name for the amounts due the state by a hirer of convicts, on account of the loss of those who were permitted to escape. *Lipscomb v. Seegars*, 19 S. C. 425.

Under this section the seller of lumber can maintain an action for the price without joining with him others among whom he had divided the order to supply the lumber, under a custom of the trade by which the seller was not required to pay such others unless he was able to collect. *Folley & Co. v. Smith*, 103 S. C. 445, 88 S. E. 24.

Suits against trustee.—A stranger to a trust may sue the trustee without joining the beneficiaries. *Price v. Krasnoff*, 60 S. C. 172, 38 S. E. 413, 416.

Applied in *Buist v. Fitzsimmons*, 44 S. C. 130, 21 S. E. 610.

Cited in *Palmetto Bank & Trust Co. v. McCown-Clark Co.*, 143 S. C. 98, 141 S. E. 155, 156; *Matthews v. Cantey*, 48 S. C. 588, 26 S. E. 894.

See generally, *Rowell v. Hyatt*, 108 S. C. 300, 94 S. E. 113.

§ 400. Action by and against married woman.—A married woman may sue and be sued as if she were unmarried: *provided*, that neither her husband nor his property shall be liable for any recovery against her in any such suit; but judgment may be enforced by execution against her sole and separate estate in the same manner as if she were sole. When the action is between herself and her husband, she may likewise sue or be sued alone.

1932 Code, § 400; Civ. P. '22, § 357; Civ. P. '12, § 163; Civ. P. '02, § 135; 1870 (14) § 137; 1925 (34) 263.

As to joinder of causes of actions, see § 487 and the note thereto.

Editor's note.—It is interesting to note the evolution of the law concerning married women as parties. By the early common law the identity of a married woman was merged with that of her husband. She could not sue or be sued, neither could she be held on her contracts. The husband was liable for his wife's torts, and, in many cases, her less serious crimes. At a later stage she could sue and be sued if her husband was joined as a party. The first radical departure from the common law principles on this subject was made when this section was made to read, in terms, that when a married woman is a party, her husband must be joined with her, except in the instances therein provided for, and unless the particular case fell within one of the exceptions it was mandatory that the husband be joined with his wife. See *Priester v. Southern Ry. Co.*, 151 S. C. 433, 149 S. E. 226.

In 1925 the section was repealed and re-enacted to read as it now stands. The early cases cited hereunder may be read and considered in the light of the changes above referred to.

—Tort action by wife against husband.—Wife may maintain a tort action against her husband for willfully beating her. *Prosser v. Prosser*, 114 S. C. 45, 102 S. E. 787, cited in *Faris v. Hope* 298 Fed. 727, 730 and for injuries sustained in automobile accident. *Pardue v. Pardue*, 167 S. C. 129; 166 S. E. 101.

Common-law liability of a husband for the torts of his wife committed by her without his participation has been abrogated by this statute and enactments of a similar nature.—*Bryant v. Smith et ux.*, 187 S. C. 453, 198 S. E. 20. "An analysis of the broad and comprehensive language of Sec. 400 shows that the legislature meant to complete the work of

emancipation, and to give married women all the rights and remedies possessed by unmarried women, and to subject them to all of the laws of the State, without reference to the marital relation." *Ibid.*

Husband is not exempted, however, from liability for his wife's torts in cases where he would be jointly responsible with her, if the marriage did not exist. *Ibid.*

A complaint alleging that wife committed assault and battery and that her husband instigated, urged, and abetted wife to make the assault, did not misjoin causes of action as against contention that complaint stated cause of action against husband for merely being present at the assault. *Ibid.*

Necessity of suing and defending by guardian or next friend.—In *Hiers v. Atlantic Coast Line Ry. Co.*, 75 S. C. 311, 55 S. E. 457, 9 Am. Cas. 1114, the phrase "in no case need she prosecute or defend by guardian or next friend" which was contained in this section prior to the amendment in 1925, was construed not to authorize an action by a married woman who is a minor. Her suit must be brought by a guardian ad litem.

The above ruling was based upon the fact that the clause related to the disability of coverture and not that of infancy. The quoted phrase was stricken from the section by the 1925 amendment. —Ed. note.

Applied in *Rogers v. Western Union Tel. Co.*, 72 S. C. 290, 51 S. E. 773; *Seibels v. Northern Cent. Ry. Co.*, 80 S. C. 133, 61 S. E. 435, 16 L. R. A. (N. S.) 1026; *Ryder v. Jefferson Hotel Co.*, 121 S. C. 72, 113 S. E. 474, 25 A. L. R. 739; *Lowry v. Jackson*, 27 S. C. 318, 3 S. E. 473.

See generally, *Messervy v. Messervy*, 82 S. C. 559, 64 S. E. 753; *Ross v. Linder*, 12 S. C. 592; *Bannister v. Bull*, 16 S. C. 220.

§ 401. Infants—action by and against.—When an infant is a party, he must appear by guardian, who may be appointed by the court in which the action is prosecuted, or by a judge thereof, or a judge of probate, clerk of court, or by a master in those counties where the office of master now or may hereafter exist.

1932 Code, § 401; Civ. P. '22, § 358; Civ. P. '12, § 164; Civ. P. '02, § 136; 1870 (14) § 138; 1879 (17) 32; 1898 (22) 688.

Guardian ad litem settle actions, see section 409-3.

See the section immediately following, and the note thereto.

An infant must appear by guardian ad litem. *Mitchell v. Cleveland*, 76 S. C. 432, 57 S. E. 33.

And this is true though infant be married.—In *Heirs v. Atlantic Coast Line Ry. Co.*, 75 S. C. 311, 55 S. E. 457, 458, 9

Am. Cas. 1114, it is said that this section makes no exception as to infants who are married, and that it would be going too far for the court to undertake to do so.

And presumption of authority of attorney of record as to adults does not apply as to infants.—In *Jones v. Haile Gold Mining Co.*, 79 S. C. 47, 60 S. E. 35, 36, it is said that it will be presumed that

an attorney of record had authority to represent an adult client, citing *Sanders v. Price*, 56 S. C. 1, 33 S. E. 731, but since by this section an infant can appear only by guardian ad litem, this presumption does not apply to an infant.

Thus, a judgment against infant not represented by guardian is voidable.—It is error to render a judgment against an infant who is not represented by a guardian ad litem, in view of this section. In such case the judgment is voidable upon a proper proceeding and satisfactory showing for that purpose. *Robertson v. Blair*, 56 S. C. 96, 34 S. E. 11, 15, 76 Am. St. Rep. 543. But such judgment is not void. *Id.*

The mere fact that the judgment was rendered against one who is a minor and not represented by a guardian ad litem will not of itself constitute ground for setting the judgment aside. *Robertson v. Blair*, 56 S. C. 96, 34 S. E. 11, 15, 76 Am. St. Rep. 543. This is especially true where the rights of third parties have intervened. *Id.*

In *Haigler v. Way*, 2 Rich. Law, 324, the court, after holding that a judgment obtained against an infant, who did not appear by guardian, is erroneous, goes on to say that the court is not bound, after the infant has attained his majority, to set aside such a judgment upon the mere fact that he was an infant when it was obtained, but may consider lapse of time, the conduct of the defendant, and other circumstances as having confirmed the judgment or rendered the interference of the court improper. *Robertson v. Blair*, 56 S. C. 96, 34 S. E. 11, 15, 76 Am. St. Rep. 543.

And motion to vacate such judgment

is proper method of attack.—A motion in a cause to vacate a judgment rendered against an infant not represented by guardian ad litem is the proper method of attacking the judgment, where the record does not disclose the fact of infancy, or that he was not represented by a guardian ad litem. *Robertson v. Blair*, 56 S. C. 96, 34 S. E. 11, 76 Am. St. Rep. 543.

And the motion in such case should be supported by affidavits showing the facts which do not appear of record. *Robertson v. Blair*, 56 S. C. 96, 34 S. E. 11, 15, 76 Am. St. Rep. 543.

Judgment not vacated because clerk was appointed guardian ad litem. *Middleton v. Stokes*, 71 S. C. 17, 50 S. E. 539.

Probate judge may make appointment.—Under this section the guardian may be appointed by a probate judge on plaintiff's application, without any further notice, though the order of continuance served on the infants and their father provided that the application might be to "this court," i. e., the court of common pleas, in which the action was pending. *Lyles v. Haskell*, 35 S. C. 391, 14 S. E. 829. See also, *Trapier v. Waldo* 16 S. C. 276.

And so may a magistrate.—Under this section and § 274, subd. 15, providing that the provisions of the Code as to actions shall apply to magistrate's courts, a magistrate has power to appoint a guardian ad litem in a suit in his court. *Wideman v. Patton*, 64 S. C. 408, 42 S. E. 190.

A void appointment by the clerk may be validated by order of court. *Ex parte Pearson*, 79 S. C. 302, 60 S. E. 706.

§ 402. Guardian—how appointed.—The guardian shall be appointed as follows:

(1) When the infant is plaintiff, upon the application of the infant, if he be of the age of fourteen years; if under that age, upon the application of his general or testamentary guardian, if he has any, or of a relative or friend of the infant; if made by a relative or friend of an infant, notice thereof must first be given to such guardian, if he has one; if he has none, then to the person with whom such infant resides.

(2) When the infant is defendant, upon the application of the infant, if he be of the age of fourteen years, and apply within twenty days after the service of the summons. If he be under the age of fourteen, or neglect so to apply, then upon application of any other party to the action, or of a relative or friend of the infant, after notice of such application being first given to the general or testamentary guardian of such infant, if he has one within this State; if he has none, then to the infant himself, if over fourteen years of age, and within the State; or, if under that age, and within the State, to the person with whom such infant resides. And in an action for the partition of real property, or for the foreclosure of a mortgage or other instrument, or any other case affecting real estate in which

an infant has an interest, when an infant defendant resides out of the State or is temporarily absent therefrom, the plaintiff may apply to the court in which the action is pending, or to a judge, clerk or master thereof, and will be entitled to an order designating some suitable person to be the guardian of the infant defendant for the purpose of the action, unless the infant defendant, or some one in his behalf, within a number of days after the service of a copy of the order, which number of days shall be in the said order specified, shall procure to be appointed a guardian ad litem for the said infant; and the court or officer appointing shall give special directions in the order for the manner of the service thereof, which may be upon the infant. And in case the infant defendant, having an interest in the events of the action, shall reside in any State with which there shall not be a regular communication by mail, on such fact satisfactorily appearing to the court, the court may appoint a guardian ad litem for such absent infant party, for the purpose of protecting the right of such infant in said action, and on such guardian ad litem process, pleadings and notices in the action may be served in the like manner as upon a party residing in the State.

1932 Code, § 402; Civ. P. '22, § 359; Civ. P. '12, § 165; Civ. P. '02, § 137; 1870 (14) § 139; 1912 (27) 623.

Guardian ad litem settle actions, see section 409-3.

Insane person appear by, see § 409-1.

Persons imprisoned appear by, see § 409-2.

As to necessity of appointment of guardian, and the effect where there is an irregularity in the appointment, see the preceding section and note thereto.

Full compliance necessary to court's jurisdiction.—No jurisdiction of the persons of infants can be obtained except by exact compliance with the requirements of this section. *Finley v Robertson*, 17 S. C. 435; *Riker v. Vaughn*, 23 S. C. 187; *Tederall v. Bouknight*, 25 S. C. 275.

Evidential value of compliance with section.—Full compliance with this section will be considered by the court in upholding the presumption in a collateral proceeding that the court would not have acted in ordering and confirming a sale in partition against a minor defendant, without the existence of an order for publication even though such order is not in the judgment roll where good practice would place it. *Fleming v. Chappell*, 118 S. C. 290, 110 S. E. 148.

Proper applicant for appointment.—A mother of infant defendants under 14 years of age is a proper person to apply for the appointment of a guardian ad litem for them, under subd. 2 of this section, where it does not appear that they have a general or testamentary guardian, or that they reside apart from her; and she need not wait until the expiration of 20 days after service of summons on them. *Easterby v. McIntosh*, 51 S. C. 393, 29 S. E. 87.

Premature appointment is a mere Ir-

regularity.—Under subd. 2 of this section, where an application was made by another on behalf of an infant defendant over 14 years old, the fact that it was made before expiration of the 20 days was only an irregularity, which was cured by the judgment, where the infants signed the answer with their guardian ad litem, who was appointed on said application. *Eastery v. McIntosh*, 51 S. C. 393, 29 S. E. 87. See, also, *Middleton v. Stokes*, 71 S. C. 17, 50 S. E. 539, holding that for mere irregularity in the appointment, the decree will not be set aside.

Notice to appear and plead is equivalent to notice of necessity of appointment of guardian.—Under this section, where infant defendants have no general or testamentary guardian, notice to them, and their father, with whom they resided, to appear and answer the complaint, is substantially a notice that they should have a guardian ad litem to enable them to do so, and in default thereof that the plaintiff will proceed to have a guardian appointed, and is a sufficient notice. *Lyles v. Haskell*, 35 S. C. 391, 14 S. E. 829, 832.

Service of process upon infants.—Jurisdiction of a minor under fourteen is obtained by service on her father of summons and complaint, and acceptance by him, her general guardian, or service of the summons and complaint, and notice of appointment of guardian ad litem is sufficient, although she resides with another, and the appointment of guardian ad litem is upon petition of her father. *Barrett v. Moise*, 61 S. C. 569, 39 S. E. 755.

§ 403. Who may be plaintiffs.—All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except as otherwise provided in this title.

1932 Code, § 403; Civ. P. '22, § 360; Civ. P. '12, § 166; Civ. P. '02, § 138; 1870 (14) § 140.

As to necessity that suit be prosecuted by real party in interest, see § 397 and the note thereto.

Section permits joinder of causes.—Where the manager and director of a corporation by means of fraudulent misrepresentations as to the financial condition of the corporation induced the stockholders to sell their shares for less than their value, the wrong to them is in the nature of a joint wrong, and the defrauded stockholders may under this section join in an action to require the manager to account for the profits made in the transaction. *Black v. Simpson*, 94 S. C. 312, 77 S. E. 1023, 46 L. R. A. (N. S.) 137. See, also, *Roberts v. Johns*, 10 S. C. 101; *Hellams v. Switzer*, 24 S. C. 39.

For full treatment of subject of joinder of causes of action, see § 487 and note thereto.

Under this section a husband and wife may join in an action *ex contractu* for loss of baggage, consisting of articles belonging to each. *Park v. Southern Ry. Co.*, 78 S. C. 302, 58 S. E. 931.

A bill against a guardian by four wards, all children of the same parents, praying for an account, the removal of the guardian, and general relief, is not demurrable on the ground of multifariousness. *Stallings v. Barrett*, 26 S. C. 474, 2 S. E. 483, followed in *Lide v. Burn*, 141 S. C. 476, 141 S. E. 365.

Under this section and § 406, the three causes of action of the assignees of bonds, given as part payment of purchase price of land sold in partition, payment of which was defaulted, to recover judgment thereon and to foreclose the mortgage securing the bonds, were not misjoined in one action, on the ground that all the plaintiffs were not united in interest in each of the bonds. *Turner v. Clark*, 109 S. C. 132, 95 S. E. 334.

And plaintiffs need not be "united in interest."—The court in *Turner v. Clark*, 109 S. C. 132, 95 S. E. 334, said that it is to be noted that this section does not use the phrase that the plaintiffs must be "united in interest" in the subject of the action or in the relief demanded, but it says "all parties having an interest" therein, which means any interest therein. Of course, that means such an interest, legal or equitable, as would make them proper parties to the action.

As to necessity of parties being joined when they are "united in interest," see § 406 and note thereto.

Nor need all parties having an interest be joined.—Under this section an action may be maintained without joining all parties having an interest. *Lamar v. Croft*, 73 S. C. 407, 53 S. E. 540, following *McCorkle v. Williams*, 43 S. C. 66, 20 S. E. 744.

Consolidation of actions.—*Sons v. Bank*, 170 S. C. 548; 171 S. E. 35.

§ 404. Who may be defendants.—Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved therein, and in an action to recover the possession of real estate, the landlord and tenant thereof may be joined as defendants; and any person claiming title or a right of possession to real estate may be made parties plaintiff or defendant, as the case may require, to any such actions.

1932 Code, § 404; Civ. P. '22, § 361; Civ. P. '12, § 167; Civ. P. '02, § 139; 1870 (14) § 141.

Cross references.—For numerous illustrations of what are actions for the recovery of real property, see § 374 and the note thereto. As to rendition of judgment against one or more defendants to action, see § 657 and the note thereto.

This section is permissive, instead of being mandatory. *Marion County Lumber Corp. v. Whipple*, 118 S. C. 90, 110 S.

E. 70, approving *Murray Drug Co. v. Harris*, 77 S. C. 410, 57 S. E. 1109; *Graham v. Alliance Ins. Co. et al.*, 192 S. C. 370, 6 S. E. (2d) 754.

Person, to be made a party defendant to an action, must have an interest contrary to claim which is the foundation of plaintiff's action. *Bomar v. City of Spartanburg*, 181 S. C. 453; 187 S. E.

921; Medical Soc. of S. C. v. Huger, 185 S. C. 137; 193 S. E. 642.

The naming of parties defendant is within the trial court's discretion.—Cleveland v. City of Spartanburg, 185 S. C. 373; 194 S. E. 128.

And the bringing in new parties is discretionary with court.—Under this section and § 409, the power to bring in new parties is entirely within the discretion of the circuit judge. Marion County Lumber Corp. v. Whipple, 118 S. C. 90, 110 S. E. 70 and the authorities therein cited. See also, Fidelity Fire Ins. Co. v. Windham, 134 S. C. 373, 133 S. E. 35. And this is true in suits in equity. People's Bank of Hartsville v. Bryant, 148 S. C. 133, 145 S. E. 692, 694.

Which means "legal discretion."—The "discretion" referred to in the decisions on this point means "legal discretion," and an abuse thereof is reviewable. Fidelity Fire Ins. Co. v. Windham, 134 S. C. 373, 133 S. E. 35, 39.

But only parties affected may complain of alleged improper exercise thereof.—Where certain defendants do not complain of an order retaining them as defendants, other defendants who appeal the cause, are not entitled to complain that the first-mentioned defendants were so retained. People's Bank of Hartsville v. Bryant, 148 S. C. 133, 145 S. E. 692.

One who could not be injured by a misjoinder of causes of action cannot be heard to complain thereof. Robinson v. McMaster, 108 S. C. 384, 94 S. E. 879.

Section has been liberally construed.—This section has been liberally construed for the purpose of bringing before the court all parties who may be necessary to a complete determination or settlement of all questions in the action. People's Bank of Hartsville v. Bryant, 148 S. C. 133, 145 S. E. 692, 694; Graham v. Alliance Ins. Co. et al., 192 S. C. 370, 6 S. E. (2d) 754.

In *Mordecai v. Canty*, 86 S. C. 470, 68 S. E. 1049, it is said: "When jurisdiction of a subject-matter is conferred upon the court, the power to bring before it all necessary and proper parties for the determination of the matter follows as an incident to the jurisdiction," quoted in *Fidelity Fire Ins. Co. v. Windham*, 134 S. C. 373, 133 S. E. 35, 39.

And this is particularly true when the action relates to the foreclosure of a real estate mortgage. People's Bank of Hartsville v. Bryant, 148 S. C. 133, 145 S. E. 692, 694.

Suit to foreclose mortgage on ground that trustee holding mortgage for plaintiff's benefit, pursuant to conspiracy with trustee's father subsequently acquiring mortgaged land, fraudulently satisfied mortgage of record without any consideration to plaintiff, states a joint cause

of action under state law against both defendants, so as to prevent removal to federal court by alleged trustee. *McCown v. Williams, et al.*, 10 F. S. 168.

In actions for foreclosure, a party in possession, claiming title to land, was properly made a party defendant. *Sale v. Meggett*, 25 S. C. 72.

In *Robinson v. McMaster*, 108 S. C. 384, 94 S. E. 879, it is held that subsequent mortgagees or lienors were proper parties to an action to foreclose a prior mortgage.

The title to property, real or personal, sold under the order of the court of equity, should be clear and free, not only for the purpose of giving the purchaser at such sale good title, but for the further purpose of making the property bring its real worth at the sale. It is always better, therefore, for the court to have before it, in any action where the sale of property is sought, any and all persons who have, or may claim to have, any interest in the property. *People's Bank v. Bryant*, 148 S. C. 133, 145 S. E. 692, 694.

In action to foreclose mortgage and recover on note relating to mortgage indebtedness, it is not error to retain as defendant the original owner of mortgage who was plaintiff's assignor, notwithstanding that no affirmative relief could be obtained against her. *People's Bank v. Bryant*, 148 S. C. 133, 145 S. E. 692.

Persons who cancelled mortgage upon execution of deeds to his wife in belief no other liens existed against property was properly made party defendant in foreclosure action instituted by holder of another mortgage. *Maxwell v. Epton*, 177 S. C., 184; 181 S. E., 16.

And has for its purpose the prevention of multiplicity of suits.—In *Miller & Barnhardt v. Ins. Co.*, 132 S. C. 78, 129 S. E. 131, it was sought to bring in, as a party defendant, the sheriff, whose bondsman was being sued. The Supreme Court reversed an order refusing the motion, and declared: "It occurs to us that every conceivable ground was present to induce the conclusion that the bringing in of the sheriff as a party defendant was just, reasonable, and in line with the policy of the law 'to prevent a multiplicity of suits and that there may be a complete and final decree between all parties interested,' certainly 'a consummation devoutly to be wished,' a desirable result." *Peurifoy v. Mauldin*, 142 S. C. 7, 140 S. E. 253, 255. *Anderson County v. Griffin et al.*, 164 S. C. 75, 161 S. E. 875.

Illustrations.—The courts of this state have applied the foregoing general principles in various kinds of cases. The following authorities will illustrate the application of these rules.—Ed. note.

Suit to settle partnership estate.—Under this section any one holding or claiming an interest in partnership assets is a necessary party to a suit to settle the partnership estate. *Wagner v. Sanders*, 49 S. C. 192, 27 S. E. 68, 70.

Establishment of several liability of stockholders.—In *Parker v. Carolina Savings Bank*, 53 S. C. 583, 31 S. E. 673, 69 Am. St. Rep. 888, the court held that equity had jurisdiction to bring in all the stockholders of an insolvent bank and establish their several liabilities in one suit.

In a suit to marshal the assets of mutual insurance companies, and to ascertain the debts of the companies and the resulting liabilities of the members, the court has the power under this section to make all the members of the company parties defendant. *Wetmore v. Scalf*, 85 S. C. 285, 67 S. E. 298, 300.

The heir at law or devisee in, or claiming to be in, actual and exclusive possession of the real estate of a deceased debtor has such "an interest in the controversy adverse to the plaintiff creditor" under this section as entitles him to be joined as a proper party defendant in an action by such creditor against the personal representative. *Tolbert v. Roark*, 126 S. C. 207, 119 S. E. 571, 574.

Sue sureties on county officer's bond in one action.—In a suit against a present or former county treasurer for an accounting in equity for breaches of trust and defalcations occurring in two terms of offices, where the sureties for the several terms are different sureties, all the sureties can be made parties to the one action. *Anderson County v. Griffin et al.*, 164 S. C., 75, 161 S. E., 875.

Surety sued by employer on bond executed by it to protect employer from shortage of employer's employees, who agreed to protect surety from loss, may bring employees allegedly short in as defendants. *C. C. Pearce & Co. v. Ab. Surety Co. of N. Y.*, 173 S. C., 77; 174 S. E. 902.

Surety may bring in co-surety.—Under this section a surety is entitled to bring in as a defendant another surety to which it alleged misappropriated

funds and securities were delivered as indemnity. *Peurifoy v. Mauldin*, 142 S. C. 7, 140 S. E. 253, and the authorities therein cited.

Tenant may bring in his co-tenants.—Under this section a tenant has the right to make all his co-tenants parties to an action to recover possession of his interest in a tract of land. *Whitaker v. Manson*, 84 S. C. 29, 65 S. E. 953, 955, 137 Am. St. Rep. 835.

Grantee of co-tenant necessary party in partition proceedings. *Ex parte Union Mfg. & Pr. Co.*, 81 S. C. 265, 62 S. E. 259, 128 Am. St. Rep. 908.

A joint action upon a joint and several bond, by two obligors, may be brought against the survivor of them and the executor of the deceased one. *Trimmier v. Thomson*, 10 S. C. 164; *Susong v. Vaiden*, 10 S. C. 247, 30 Am. Rep. 50; *Wiesensfeld v. Byrd*, 17 S. C. 106.

Parties in action for death by wrongful act.—By a divided court, it was held in *Lytle v. Southern Ry.-Carolina Division*, 152 S. C. 161, 149 S. E. 692, that in an action by legal representative for wrongful death of employee for the benefit of deceased's mother, where there was no father or children and where woman married to deceased had deserted him without cause and eloped with adulterer, defendant railroad will be allowed to have widow of deceased made a party to avoid possibility of double recovery under this section and section 409.

For full discussion of subject of parties to action for death by wrongful act, see § 412 and the note thereto.

Personal representatives and grantees of a decedent are proper parties in action to marshal his assets and set aside conveyances as fraudulent. *Sheppard v. Green*, 48 S. C. 165, 26 S. E. 224.

The city council, mayor, commissioners, and city clerk and treasurer were not necessary parties to an action to enjoin the city and its tax collector from selling property of plaintiff in order that a paving assessment might be collected. *Cleveland v. City of Spartanburg*, 185 S. C. 373; 194 S. E. 128.

Tax actions.—See section 2808 and notes thereunder.

§ 405. State may be defendant in action affecting title to real estate—service of process.—In any action or suit at law affecting the title to real estate and when it appears that the state of South Carolina has or claims a judgment lien upon said real estate, the state of South Carolina may be made a party defendant in such action or suit at law: *provided*, no money demand is made in such suit or action at law against the state of South Carolina. Service of the summons and complaint in such action or suit at law upon the attorney general of the state of South Carolina will be sufficient service upon the state of South Carolina.

1932 Code, § 405; 1926 (34) 963.

Consolidation of Actions.—*Sons v. Bank*, 170 S. C., 548; 171 S. E., 35.

§ 406. One or more may sue or defend for all.—Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest of many persons, or when the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole.

1932 Code, § 406; Civ. P. '22, § 362; Civ. P. '12, § 168; Civ. P. '02, § 140; 1870 (14) § 142.

Scope of the section.—Analysis of this section shows that it provides that one or more persons may sue for the benefit of the whole in either of two separate conditions: first, when the question in the cause is one of common or general interest to many persons; or, second, where the parties are united in interest, but are very numerous, and it may be impracticable to bring them all before the court. *Whitaker v. Manson*, 84 S. C. 29, 65 S. E. 953, 954, 137 Am. St. Rep. 835.

This section is discussed at length in *Pom. Code Remedies*, wherein it is said: "The construction of this section of the Code has been established by the courts, and the rule is settled, as already stated, that, where the question to be decided is one of common or general interest, to a number of persons, the action may be brought by or against one for all the others, even though the parties are not so numerous that it would be impracticable to join them all as actual plaintiffs or defendants; but, on the other hand, when the parties are so very numerous that it is impracticable to bring them all into court, one may sue or be sued for all the others, even though they have no common or general interest in the questions at issue; and the necessary facts to bring the case within one or the other of these conditions must be averred," approved in *Faber v. Faber*, 76 S. C. 156, 56 S. E. 677, 679, 11 Ann. Cas. 780.

And its purpose stated.—The design of the last portion of this section was to provide a mode of obtaining a complete determination of the rights of the parties in cases where the number is so great as to make it impracticable to bring them all in by actual service. *Whitaker v. Manson*, 84 S. C. 29, 65 S. E. 953, 955, 137 Am. St. Rep. 835. See also, *Stemmermann v. Lilienthal*, 54 S. C. 440, 32 S. E. 535.

Reason underlying the section.—The reason for this rule is thus stated in *Smith v. Swormstedt*, 16 How. (U. S.) 288, 303, 14 L. Ed. 942: "Where the parties interested in the suit are numerous, their rights and liabilities are so subject to change and fluctuations, by death

or otherwise, that it would not be possible without very great inconvenience to make all of them parties, and would oftentimes prevent the prosecution of the suit to a hearing. For convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court." *Faber v. Faber*, 76 S. C. 156, 56 S. E. 677, 679, 11 Ann. Cas. 780.

Theory.—"The doctrine of virtual representation is based upon the theory that there is some party before the court whose interests in the issue to be decided are so identical with, or so closely similar to, the interests of the absent person, that in protecting his own interests the representative party will bring forward such matter and take such action that, as a necessary by-product, the court will have before it an adequate presentation of the interests which the absent person has in common with him." 30 *Illinois Law Rev.* 581; and see *Bofil v. Fisher*, 24 S. C. Eq. 1; *Faber v. Faber*, 76 S. C. 156, 56 S. E. 677, 11 Ann. Cas. 780.

Failure to make any members of the class parties, where it was practical to do so, is fatal, even though some of the parties had similar interests with the absent class. *Moseley v. Hankinson*, 22 S. C. 323.

Section applies at law and in equity.—This provision applies to legal as well as equitable action; but does not abolish entirely the common law requirements in legal actions for torts. *Hellams v. Switzer*, 24 S. C. 39; *Himes v. Jarrett*, 26 S. C. 480, 2 S. E. 393.

Power of one to sue or defend for all rests in discretion of court.—In the case of *Smith v. Williams*, 166 Mass. 510, 512, it is said: "How far such persons should be made parties to the suit depends largely upon the discretion of the court, considering, on the one hand, the difficulty and expense of joining them, and, on the other, the paramount importance of having such a representative of the interests concerned as may enable the question at issue to be fairly tried." Quot-

ed in *Faber v. Faber*, 76 S. C. 156, 56 S. E. 677, 679, 11 Ann. Cas. 780.

The first clause of this section is mandatory. *Murray Drug Co. v. Harris*, 77 S. C. 410, 57 S. E. 1109.

Authority of plaintiff to sue for others need not be alleged.—Where several members of a voluntary beneficial association sue for themselves and the other members to recover property of the association, the complaint need not allege the authority of plaintiffs to sue. *Stemmermann v. Lilienthal*, 54 S. C. 440, 32 S. E. 535.

Unity of interest is necessary for rule to apply.—"The parties thus represented by the plaintiff or defendant may not be in privity with each other, but there must be some bond of connection which unites them all with the question at issue in the action. The test would be to suppose an action in which all the numerous persons were actually made plaintiffs or defendants, and if it could be maintained in that form, then one might sue or be sued on behalf of the others; but, if such an actual joinder would be improper, then the suit by or against one as a representative would be improper, notwithstanding the permission contained in this section of the statute." *Pom. Code Remedies*. Approved in *Faber v. Faber*, 76 S. C. 156, 56 S. E. 677, 679, 11 Ann. Cas. 780.

One who asserts distinct claim, peculiar to himself, cannot join other creditors or claimants with him. *Warren v. Raymond*, 17 S. C. 163.

A person is not "united in interest" within the meaning of this section and does not have to be made a party defendant in an action relating to the sale of mercantile stocks in bulk, brought by creditors against the purchaser and seller to recover the goods at their value, unless it appear that he contributed to the capital stock, or has participated in the profits of the firm, or that there was a mutual agency between him and another in the conduct of the business. *Murray Drug Co. v. Harris*, 77 S. C. 410, 57 S. E. 1109.

And if there is identity of parties and identity of causes of action then rule of res judicata applies.—Where an action is brought by one taxpayer in behalf of all, and later another taxpayer institutes an action in behalf of all taxpayers, there is identity of parties within the rule of res judicata, in view of the instant section. *Davis v. Town of West Greenville*, 147 S. C. 448, 145 S. E. 193.

In the case of *Johnston-Crews v. Folk*, 118 S. C. 470, 111 S. E. 15, it is said: "If the identity of the parties and the identity of the causes of action have been established, the former adjudication is conclusive, not only of the precise issues

raised and determined, but of such as might have been raised affecting the main issue." *Davis v. Town of West Greenville*, 147 S. C. 448, 145 S. E. 193.

Infant remaindermen who are not made parties are not bound by the judgment.—*Mitchell v. Cleveland*, 76 S. C. 432, 57 S. E. 33. But the judgment is binding on all parties who stand out. *State v. C. & L. R. Co.*, 13 S. C. 290.

Illustrations.—The following cases will illustrate the application of the rule embraced in this section.—Ed note.

Under this section a few members of a voluntary beneficial association, the membership of which is over 200, may sue for themselves and all the other members, on the treasurer's bond, to recover the amount of a defalcation. *Stemmermann v. Lilienthal*, 54 S. C. 440, 32 S. E. 535.

Joinder of assignee in enforcement of mortgages.—Under this section, the assignees of bonds and mortgages given in part payment of land sold in partition, may join in the enforcement of such bonds and mortgages after payment has been defaulted, and such joinder will not constitute a misjoinder of actions. *Turner v. Clark*, 109 S. C. 132, 95 S. E. 334.

One legatee may defend for all.—This section authorizes the interests of the remote residuary legatees when the class consists of numerous persons, some within the jurisdiction of the court and some without, to be adjudicated in an action against them by making one member of the class a party defendant to represent the class. *Faber v. Faber*, 76 S. C. 156, 56 S. E. 677, 11 Ann. Cas. 780. See also, as to remaindermen not in esse, the cases of *Bernard v. Bernard*, 79 S. C. 364, 60 S. E. 700, 128 Am. St. Rep. 852; *Hunt v. Gower*, 80 S. C. 80, 61, S. E. 218, 128 Am. St. Rep. 862.

One co-tenant may sue for himself and his co-tenants.—Under this section one co-tenant may sue for himself and in behalf of the other co-tenants deriving title from the common source, where it is impracticable to bring them all before the court because of their number. *Whitaker v. Manson*, 84 S. C. 29, 65 S. E. 953, 137 Am. St. Rep. 835.

It was held in the case of *Bannister v. Bull*, 16 S. C. 220, 229, that the words "one or more to sue for the benefit of others," in the Code, does not apply to co-tenants, "but were manifestly intended for creditors of an insolvent estate, and cases of that character, where the interest is in common. They (co-tenants) may be said, in one sense, to have a common interest. * * * They have interests in the same property while it remains undivided, but such interests are distinct. Each has a right to the extent of his share." *Wilson v. Kelly*, 30 S. C. 483, 9 S. E. 523, 525.

The Whitaker case, *supra*, discussed fully the ruling made in the Bannister case, and held that it did not conflict with the Whitaker decision. The question before the court in the Bannister case was whether the instant section forbade one tenant in common to sue to recover possession of his interest in the land unless he joined all the co-tenants as plaintiffs. The court in the Whitaker case said that the only point decided in the Bannister case was that co-tenants have no common or general interest as making all of them necessary parties to a suit instituted by any one or more for the recovery of land. The Bannister case does not decide that tenants in common do not fall under the last clause or condition of this section. Neither is the case of *Wilson v. Kelly*, 30 S. C. 483, 9 S. E. 523, authority for that proposition.—Ed. note.

Action against receiver and single stockholder of insolvent bank.—An action by single creditor against receiver and stockholder of an insolvent bank for his debt is defective for want of parties; it should be brought by plaintiff on behalf of himself and other creditors. *Terry v. Calnan*, 4 S. C. 508, 514. And it should be against all the stockholders, and not one alone. *Terry v. Martin*, 10 S. C. 263.

Proceeding by an heir to adjust advancement to distributees is not a "suit."—An action by one of the heirs and distributees of a decedent against the others, brought to effect a sale of the land in lieu of a partition in specie, to adjust advancements to distributees, and to settle administration accounts, is not a suit within the meaning of this section, and therefore plaintiff's attorney cannot be compensated out of the common fund, through his services have inured to the benefit of all. *Wilson v. Kelly*, 30 S. C. 483, 9 S. E. 523.

Class suit by depositors suing on behalf of themselves and other creditors of insolvent bank is authorized. *Hernlen v. Vandiver*, 145 S. C. 412, 143 S. E. 222, 227.

As is suit by several teachers on behalf of 221, to force payment of salaries; and court will fix reasonable attorney's fee, payable out of the fund recovered. *Faile et al., v. Clyburn, Superintendent of Education, et al.*, 169 S. C. 355; 168 S. E. 732.

Discovery not permitted to ascertain whether class exists.—In proceeding involving liquidation of building and loan association, intervening claimants who allegedly overpaid their mortgage indebtedness to association properly denied permission to examine books of association for purpose of ascertaining if there were others who might claim to be creditors of same class, and right to represent such others as a class, since others of same class were not necessary to be represented to enable intervening claimants to enforce their claims. *Earle v. Webb*, 182 S. C. 175; 188 S. E. 798.

Judgment res judicata as to absent members of class.—Where petitioners for themselves and others similarly situated sought to have statute relating to primary election in city of Sumter invalidated, judgment thereon was res judicata in subsequent proceeding against same defendants by other voters to have statute invalidated. *Evans et al., v. Creech, Mayor, et al.*, 187 S. C. 371; 197 S. E. 365.

Names and ages of heirs, on whose behalf suit was alleged to be brought, will be required to be set out, on motion to make complaint more definite and certain in that particular. *Wilson et al., v. Gibbes Machinery Co., et al.*, 189 S. C. 426, 1 S. E. (2d) 490.

§ 407. One action against the different parties to bills and notes and other obligations.—Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes may all, or any of them, be included in the same action, at the option of the plaintiff.

1932 Code, § 407; Civ. P. '22, § 363; Civ. P. '12, § 169; Civ. P. '02, § 141; 1870 (14) § 143.

Section tends to prevent multiplicity of suits.—The court in *Georgian Co. v. Britton*, 141 S. C. 136, 139 S. E. 217, 218, construing this section, said that the present policy of the courts of this state is, and should be, against a multiplicity of actions.

Guarantor and principal debtor may be sued together.—Under this section an absolute guarantor and the principal debtor, either of whom may be sued

first, may at the option of the plaintiff be sued together. *Georgian Co. v. Britton*, 141 S. C. 136, 139 S. E. 217.

Holder need not sue indorser and maker of note together.—*Folk v. Felder*. Same v. *Felder et al.*, 168 S. C. 103, 167 S. E. 27.

Sufficiency of allegations of liability.—This section was cited in *McCrae v. Spires*, 121 S. C. 147, 113 S. E. 583, in support of the holding that an allegation

that a specified sum on the notes became due and payable "by defendants to plaintiff" on a certain day is sufficient, as equivalent to a general allegation of due performance on plaintiff's part of all conditions precedent to fixing liability of such defendants as indorsers.

Suit on sheriff's bond.—Sheriff and his deputy not "necessary parties" in suit on sheriff's bond, which liability is joint and several. *McAlister v. Fidelity*

& Deposit Co., of Maryland, 37 F. S. 956. See also, *Hartfield v. Kennedy*, 1 Bay 501; *State v. Williams*, 19 S. C. 62; *State v. Fidelity & Deposit Co.*, 114 S. C. 511, 104 S. E. 182; *Cohen v. Casualty Co.*, 4 F. (2d) 564.

See generally, *Trimmier v. Thomson*, 10 S. C. 164; *Susong v. Vaiden*, 10 S. C. 247, 30 Am. Rep. 50; *Wiesenfeld v. Byrd*, 17 S. C. 106.

§ 403. Action—when not to abate.—No action shall abate by the death, marriage, or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of death, marriage, or other disability of a party, the court, on motion, at any time within one year thereafter, or afterwards, on a supplemental complaint, may allow the action to be continued by or against his representative or successor in interest. In case of any other transfer of interest, the action shall be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action.

After a verdict shall be rendered in any action for a wrong, such action shall not abate by the death of any party, but the case shall proceed thereafter in the same manner as in cases where the cause of action now survives by law.

At any time after the death, marriage or other disability of the party plaintiff, the court in which action is pending, upon notice to such person as it may direct, and upon application of any person aggrieved, may, in its discretion, order that the action be deemed abated, unless the same be continued by the proper parties, within a time to be fixed by the court, not less than six months nor exceeding one year from the granting of the order.

1932 Code, § 408; Civ. P. '22, § 364; Civ. P. '12, § 170; Civ. P. '02, § 142; 1870 (14) § 144.

Common law rule stated.—At common law the death of a party before trial abated the action, and his representatives had to commence a new action. *McAuley v. Orr*, 97 S. C. 214, 81 S. E. 489 (from the dissenting opinion).

Section does not determine what actions survive.—This section does not determine what actions so survive, but the common law rule still governs; and an action *ex delicto* does not survive. *Huff v. Watkins*, 20 S. C. 477.

But it dispenses with bill of complaint and its accompaniments.—The manifest purpose of this section was to dispense with the necessity for the cumbrous proceeding by bill and its accompaniments, and to substitute in lieu thereof a simple motion. *Dunham v. Carson*, 42 S. C. 383, 20 S. E. 197, 199.

And the continuation does not constitute a new suit.—The continuation of an action against the heirs after the death of the ancestor is not to be regarded as a new action or as a proceeding bringing in independent parties, but as the continuance of the old action against the heir in right of his ancestor. *Sims*

v. Davis, 70 S. C. 362, 49 S. E. 872, 876, 34 Am. Dec. 581.

And formal summons need not be issued after continuance.—Under this section an action against an ancestor for trespass may be continued against an heir by service of supplemental complaint, without summons, but on rule to show cause. *Sims v. Davis*, 70 S. C. 362, 49 S. E. 872, 876, 34 Am. Dec. 581.

To the same effect is *Lyles v. Haskell*, 35 S. C. 391, 14 S. E. 829, 832, wherein it was held that where a case is continued by an order it is not indispensable that a summons issue. The court said that the absence of a formal summons could not be considered a jurisdictional defect, and that service of a copy of the order of continuance was sufficient.

The opinion in the case of *Arthur v. Allen*, 22 S. C. 432, 444, contains language that is susceptible of the construction that a formal summons must always be issued in cases of this kind. But what actually was before the court and decided by it, in the *Arthur* case was this: Upon the filing of the supplemental complaint, a summons was also issued

and served. The defendants moved to set aside the service upon the ground that this section does not contemplate a formal summons when a supplemental complaint is filed. The issuing and serving of a summons was held to be sufficient and proper. The point was not involved in that case whether an order to show cause would not have been equivalent to a summons, or sufficient notice to require the defendants to answer.

Procedure for obtaining continuance.

—On the death of a party to an action which survives, a party wishing to continue the same against the representatives of deceased should, on a proper showing, apply *ex parte* for a rule against the parties sought to be brought in, requiring them to show cause why the action should not be continued against them in the character ascribed to them; and, on default in showing cause, the action will be so continued. *Dunham v. Carson*, 42 S. C. 383, 20 S. E. 197. See also, generally on this subject, *Pickett v. Fidelity & Casualty Co.*, 60 S. C. 477, 38 S. E. 160; *Shull v. Bradford*, 58 S. C. 573, 37 S. E. 30.

Where a party dies after issue is joined, it is proper for the court to make an order of continuance, on the *ex parte* application of the adverse party, and requiring service of such order upon the successors in interest, and allowing them 20 days after service to appear and defend the issues joined. *De Loach v. Sarratt*, 55 S. C. 254, 33 S. E. 2, 35 S. E. 441.

No leave is necessary to file the supplemental complaint.—*Parnell v. Maner*, 16 S. C. 348.

And the right to revive is not limited in point of time.—*Best v. Sanders*, 22 S. C. 589.

Evidence to be considered upon motion for continuance.—On motion by the successor in interest to rights of a deceased plaintiff, under this section, for leave to continue or revive the action, the court will confine its consideration to the competency of the movant to revive or continue the action, and the sufficiency of his application without considering defenses or objections to the action on its merits. *Ex parte Jackson*, 99 S. C. 66, 82 S. E. 990.

Order of substitution may be amended.

—Under this section the court may amend its order of substitution, during the term it is entered, by substituting the heirs of the deceased party in place of his executor. *Shull v. Caughman*, 54 S. C. 203, 32 S. E. 301.

Or modified at judge's discretion.—In the case of *State v. Fullmore*, 47 S. C. 34, 24 S. E. 1026, it was held that the presiding judge was not in error in modifying his first order in such manner as

he saw fit.

Substitution may be made after trial and before judgment.—An action pending against an administrator for an accounting, may on the death of defendant after trial, and before judgment, be continued by a substitution of his representative, and judgment rendered against the substituted defendant without a second trial. *Quick v. Campbell*, 44 S. C. 386, 22 S. E. 479. See, also, *Marion v. Charleston*, 72 S. C. 576, 52 S. E. 418.

Proper procedure where party dies and no substitution is made.—Where at the time of the hearing of a case, the party himself is dead, and no motion has been made to continue the action against his representatives, as allowed by this section, the objection that the court had no authority to hear the case should be presented by motion to set aside the judgment, and not by petition for rehearing. *Aultman v. Utsey*, 35 S. C. 596, 14 S. E. 289.

Transferee to be substituted only where he claims under original party.—The provision of this section that on transfer of the interest of a plaintiff in a pending action the action shall be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted, applies only where the transferee claims under the original party, and does not authorize the continuance of an action by a pledgee of notes for their collection after his interest has been extinguished by the payment of his debt, and the notes have been transferred by the pledgor to a third person. *Matthews v. Cantey*, 48 S. C. 588, 26 S. E. 894.

Nonsuit should not be allowed for assignment after commencement of action.

—If a cause of action is assignable, then a nonsuit should not be granted because of an assignment after the commencement of an action, but, under the provisions of this section, substitution of the assignee should be allowed. *Evans v. Watkins*, 112 S. C. 419, 100 S. E. 153.

Action for rents and profits was continued against executrix of person in possession of land, in *Rabb v. Patterson*, 42 S. C. 528, 20 S. E. 540, 46 Am. St. Rep. 743.

An agreement to arbitrate, which does not name nor provide number and appointment of the arbitrators, does not discontinue action after death of plaintiff, revived by administratrix. *Lynch v. Goodwin*, 6 S. C. 144.

Right of action for injury to property is assignable. *Evans v. Watkins*, 112 S. C. 419, 100 S. E. 153.

Actions *ex delicto*, including actions for fraudulent representatives, do not survive, in absence of gain or advantage to wrong doer. *Halsey v. Minnesota*

South Carolina Land & Timber Co., 54 F. (2d) 933.

And section 419 is inapplicable to action for fraudulent representatives in sale of timber. *Ibid.*

Hence action against corporation and its agent for fraudulent representatives in sale of timber, abated as to agent in his death. *Ibid.*

§ 409. Court to decide controversy, etc.—interpleader.—The court may determine any controversy between the parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court must cause them to be brought in. And when, in an action for the recovery of real or personal property, a person not a party to the action, but having an interest in the subject thereof, makes application to the court to be made a party, it may order him to be brought in by the proper amendment.

A defendant against whom an action is pending upon a contract, or for specific, real, or personal property, may, at any time before answer, upon affidavit that a person not a party to the action, and without collusion by him, makes against him a demand for the same debt or property, upon due notice to such person and the adverse party, apply to the court for an order to substitute such person in his place, and discharge him from liability to either party, on his depositing in court the amount of the debt, or delivering the property, or its value, to such person as the court may direct; and the court may, in its discretion, make the order.

1932 Code, § 409; Civ. P. '22, § 365; Civ. P. '12, § 171; Civ. P. '02, § 143; 1870 (14) § 145.

This section shows who are indispensable parties. *Columbia W. P. Co. v. Columbia Electric St. Ry. L. & P. Co.*, 43 S. C. 154, 20 S. E. 1002, 1006.

The bringing in of new parties is discretionary with the court. *Marion County Lumber Corp. v. Whipple*, 118 S. C. 90, 110 S. E. 70; *Murray Drug Co. v. Harris*, 77 S. C. 410, 57 S. E. 1109. *Bennett v. Hindman*, 176 S. C., 151, 179 S. E. 794.

In foreclosure action by assignee, mortgagor not entitled to have mortgagee and others who had no interest in note, mortgage or property, made parties thereto. *Bennett v. Hindman*, 176 S. C., 151, 179 S. E., 794.

It is not only competent, but necessary, for the court to bring in other parties when a complete determination of the controversy cannot be had without the presence of such other parties. *Greenwood Loan & Guarantee Ass'n v. Williams*, 71 S. C. 421, 51 S. E. 272, 273.

And steps must be taken to have all necessary parties brought in.—Where a litigant supposes that it is necessary that others should be made parties to the proceedings, then he must take the necessary steps to have them brought in. *State v. Port Royal & A. Ry. Co.*, 45 S. C. 413, 23 S. E. 363; *Eakin v. Knox*, 6 S. C. 14.

Though court may of its own motion have them brought in.—Under this sec-

tion the court may properly, of its own motion, direct to be made a party one who, as shown by the master's report, may have an interest in the controversy. *Young v. Garlington*, 31 S. C. 290, 9 S. E. 960.

Which may be done by order of court.—Where a necessary party has not been joined, the defect may be cured by order of the court bringing in such party. *Kickbusch v. Ruggles*, 105 S. C. 525, 90 S. E. 163.

The court cannot order the state to be brought into an action, and where the state is an indispensable party to an action and does not appear therein, the action will be dismissed *Hopkins v. Clemson Agricultural College*, 77 S. C. 12, 57 S. E. 551, 559.

But prosecution of action should not be restrained.—In *Fidelity Fire Ins. Co. v. Windham*, 134 S. C. 373, 133 S. E. 35, it was held that an order restraining the prosecution of an action because of failure to join necessary parties defendant was improperly granted, since under this section the court had discretionary power to bring in new parties, with the right of review by the appellate court. See also, *Murray Drug Co. v. Harris*, 77 S. C. 410, 57 S. E. 1109.

And facts of each case determine necessary parties.—Whether it is necessary that an administrator or executor, as the case may be, should be made a party to

an action, depends upon the facts of the particular case. *Simon v. Sabb*, 56 S. C. 38, 33 S. E. 799, 801.

A wife, during coverture, has no right to have her inchoate right of dower ascertained and protected in the proceeds of sale under a mortgage upon land that was owned by her husband. *Grube v. Lilienthal*, 51 S. C. 442, 29 S. E. 230.

This section is cited in *Lytle v. Southern Ry.-Carolina Div.*, 152 S. C. 161, 149 S. E. 692, in support of the ruling that a defendant, in an action for death by wrongful act, will be allowed to have the widow of the deceased made a party where it is necessary to avoid the possibility of double recovery.

Defendant, in an action by a chattel mortgagor for injury to the property, can protect himself, either by requiring plaintiff to prove the consent of the mortgagee to the bringing of the action, or by having the mortgagee brought into court under the provisions of this section. *Wilkes v. Southern Ry. Co.*, 85 S. C. 346, 67 S. E. 292, 137 Am. St. Rep. 890, 21 Ann. Cas. 79.

Mortgagee not necessary party in action to enjoin condemnation.—Mortgagee of power company is not a necessary party in action by power company to enjoin condemnation proceedings by electric company of certain lands of said power company. *Twin City Power Co. v. Savannah River Electric Co.*, 163 S. C. 438, 161 S. E. 750. See also *Augusta Power Co. v. Savannah River Electric Company*, 163 S. C. 541, 161 S. E. 767.

In proceeding by state and county against county treasurer and his surety on treasurer's official bond to recover tax penalties accruing because of treasurer's failure to deposit immediately checks received for taxes, court, in exercise of its discretion, properly refused to require that taxpayers be made parties defendant. *State v. Brown*, 187 S. C. 223, 196 S. E. 889.

Objection as to lack of indispensable parties may be made at any time.—The objection that an indispensable party has not been joined may be raised at any time, and is jurisdictional in its nature. *Green v. Niver*, 43 S. C. 359, 21 S. E. 263, 267, and the cases there cited.

In *Lowry v. Thompson*, 25 S. C. 416, 1 S. E. 141, the objection as to lack of indispensable parties was interposed by the Supreme Court during the argument of the case in that court, and was sustained.

Relief prayed for should be denied where rights of absent parties will be affected.—In a suit for specific performance, where the granting thereof will necessarily affect the rights of absent parties, specific performance should not be decreed. *Midland Timber Co. v. Prettyman & Sons*, 93 S. C. 13, 75 S. E. 1012.

Lien creditors unnecessary parties in action to set aside deed for fraud.—In *Ex Parte Columbia Sav. Bank & Trust Co.*, 126 S. C. 378, 120 S. E. 371, the court held that a judgment creditor need not make lien creditors parties to his action to set aside the judgment debtor's deed as fraudulent.

In an action by a junior judgment creditor to set aside a deed as fraudulent, in which action four prior mortgagees were made parties defendant, though judgment had been rendered, the priorities fixed, and the property sold to plaintiff under a court order that it was to be sold "freed from all liens," it was held that, under this section a senior judgment creditor was entitled to be made a party defendant and to have the judgment modified accordingly, as plaintiff and the court treated the suit as one to marshal assets. *Ex parte Columbia Sav. Bank & Trust Co.*, 126 S. C. 378, 120 S. E. 371.

Provision as to interpleader does not apply to "parties."—The second paragraph of this section providing for interpleader, applies only when the claimant is not a party to the action. *Brock v. Southern Ry Co.*, 44 S. C. 444, 22 S. E. 601, 604.

Where sole question raised by pleadings was which of two brokers whom owner of realty sought to interplead was procuring cause of sale, there was identity of demands, within this section. *Williams v. Parker*, 129 S. C. 361, 123 S. E. 826.

Under this section owner of property sold held entitled to interplead rival brokers claiming commissions, notwithstanding contention of lack of privity; there being liability on his part for only one commission. *Williams v. Parker*, 129 S. C. 361, 123 S. E. 826.

Purchaser at judicial sale may intervene.—Where land is sold under execution after actions are commenced to foreclose mortgages on it and notices of lis pendens filed, the purchaser at such sale may intervene by petition as a proper party, charging the mortgages to be fraudulent. *Ex parte Mobley*, 19 S. C. 337. See also, *Ex parte Qualls*, 71 S. C. 87, 50 S. E. 646, holding that purchasers at judicial sales become parties to the action.

Multiplicity of suits to be avoided where possible.—A mortgagor leasing the mortgaged property to mortgagee, who held over after the expiration of his term, cannot maintain an action of ejectment against mortgagee pending an action for foreclosure, to which it would have been necessary, under this section to make mortgagor a party, if he had not already been such, in order to effect a complete determination of the controversy, which would be unnecessarily delayed by allowing both actions to be maintained. *Pearce v. Dunn*, 122 S. C.

441, 115 S. E. 621.

Where an action is brought against one individually, and it is afterwards found that as to the matter in controversy he was agent for another, who is then brought in, other matters between plaintiff and defendant in his own right will not be considered. *Young v. Garlington*, 31 S. C. 290, 9 S. E. 960.

Applied in *Taylor v. Strauss*, 91 S. C.

559, 75 S. E. 175; *Bank of Prosperity v. Dominick*, 106 S. C. 120, 90 S. E. 264; *Baum v. Trantham*, 45 S. C. 291, 23 S. E. 54; *Patterson v. Pagan*, 18 S. C. 584.

See generally, *Corbett v. Fogle*, 72 S. C. 312, 51 S. E. 884; *Woodward v. Lumbar Co.*, 73 S. C. 31, 52 S. E. 733, 114 Am. St. Rep. 76; *Springfield, etc., Ins. Co. v. Richmond, etc., R. Co.*, 48 Fed. 360.

§ 409-1. Insane person appear by guardian ad litem in actions—appointment of guardian ad litem.—An insane person, whether confined or not, shall appear by guardian ad litem in an action by or against him. When the insane person is a plaintiff, the guardian ad litem shall be appointed upon application made by his committee or by a relative or friend and, if by a relative or friend, notice thereof must first be given to his committee; or, if he has no committee, to the person with whom he resides. When the insane person is a defendant, the guardian ad litem shall be appointed upon application made by his committee, if he has a committee, and he apply within twenty (20) days after the service of summons, or, if his committee neglect or fail to apply within the time aforesaid or, if he has no committee, by a relative or friend, or any other party to the action, and, if by a relative or friend or other party to the action, notice thereof must first be given to his committee; or, if he has no committee, to the person with whom he resides. The application shall be made to, and the appointment shall be made by, the court in which the action is prosecuted, or by a judge, or the clerk, or the master thereof, or by the judge of the court of probate for the county in which the insane person resides, or for the county in which the action is prosecuted, who shall thereupon appoint some attorney or other competent person to act as guardian ad litem for such insane person, who shall receive out of the property of such person a reasonable compensation for such service rendered in his behalf. If the insane person resides out of the State, or is temporarily absent therefrom, a guardian ad litem may be appointed by an order nisi, in accordance with the practice relating to infants, as set forth in section 402. All such appointments heretofore made are hereby validated and confirmed.

1937 (40) 47; 1940 (41) 1828.

Proof of insanity required.—The court or officer to whom application for appointment of guardian ad litem for insane person is made should require proof, by affidavits or otherwise, reasonably sufficient to establish fact that subject is an insane person. *Barr v. One 1935 V-8 Ford Truck et al.*, 188 S. C. 181, 198 S. E. 389.

Petition on "information and belief."—The mere fact that petition for appointment of guardian ad litem for insane person is based upon information and belief without giving sources of information or grounds of belief will not invalidate appointment, provided reasonably sufficient proof of mental incompetency is presented in support of petition, but if such a verified petition is

offered for consideration as an affidavit, sources of information and grounds of belief must be stated therein. *Barr v. One 1935 Ford V-8 Truck et al.*, 188 S. C. 181, 198 S. E. 389.

A petition for appointment of guardian ad litem for insane person alleging that petitioner was informed and believed that such person was and had been for several years of unsound mind and incompetent to care for his person and incapable of managing business affairs was insufficient to warrant clerk in appointing guardian ad litem, in absence of sources of information and grounds of belief, and guardian ad litem appointed on such petition was without authority to maintain suit. *Ibid.*

§ 409-2. Person imprisoned appear by guardian ad litem in action—appointment of guardian ad litem.—A person imprisoned in this State, or any other State, shall appear by guardian ad litem in an action by or against him. When the imprisoned person is a plaintiff, the guardian ad litem shall be appointed upon the application of such person, or relative or friend of such person. When the imprisoned person is a defendant, the guardian ad litem shall be appointed upon the application of such person, if he apply within twenty days after the service of the summons, or, if he neglect or fail so to apply, then upon application of any party to the action, or of a relative or friend of such person, and, if by another party to the action or by a relative or friend, notice thereof must first be given to such imprisoned person. The application shall be made to, and the appointment shall be made by, the court in which the action is prosecuted, or by a judge thereof, or a judge of probate, clerk of court, or by a master thereof, who shall thereupon appoint some attorney, or other competent person, to act as guardian ad litem for such imprisoned person, who shall receive out of the property of such person a reasonable compensation for such service rendered in his behalf. If such person is imprisoned outside of the State, a guardian ad litem may be appointed by an order nisi, in accordance with the practice relating to infants, as set forth in section 402.

1940 (41) 1833.

§ 409-3. Guardians ad litem, on consent of circuit or county judge, settle actions brought recover damages for persons unable sue for themselves.—It shall be lawful for any guardian ad litem who has heretofore or who may hereafter institute any action in any of the courts of this state for the recovery of damages to the person or property of any minor or other person laboring under a disability to sue for himself, to effect a settlement of such action: *provided*, the settlement be approved by the resident or presiding judge of the circuit comprising the county in which the action is brought; or by the judge of the county court in which said action is instituted. When any such guardian ad litem receives an offer of settlement which he deems acceptable and advantageous to the minor or other person whom he represents, he shall present the court with a copy of the pleadings, and accompany same with a verified petition, stating the reasons why, in his opinion, the settlement should be made. It shall thereupon become the duty of the court with whom any such petition and pleadings is filed to give consideration to the entire matter and authorize the guardian ad litem to consummate said settlement, only, when in the discretion of the court, such settlement is proper and to the best interest of the minor, or other person, laboring under the aforesaid disability. Such settlements and proceedings may be heard and disposed of by the judges of the circuit and county courts, either in open court or at chambers.

1937 (40) 128.

CHAPTER 15

Wrongful Death Actions and Survival of Actions

- 410. Evidence of appointment of personal representatives.
- 411. Action for wrongful death.
- 412. Beneficiaries and damages.
- 413 and 414. Limitation of death actions.
- 415. Action against trespasser.
- 416. Execution by personal representative.
- 417. Action against one of several representatives.
- 418. When action may be commenced against representative.
- 419. Survival of action.

§ 410. Copies of orders by probate judge evidence of appointment of executors or administrators.—It shall be the duty of the judge of probate, on application by the executor or administrator of any deceased person, to whom letters testamentary or of administration have been respectively granted, to furnish a true copy of such order as he may make, concerning the probate of the will, or granting of administration, certified under his hand, which shall be sufficient evidence of the appointment of such executor or administrator in any court in this State.

1932 Code, § 410; Civ. P. '22, § 366; Civ. C. '12, § 3954; Civ. C. '02, § 2850; G. S. 2182; R. S. 2314; 1789 (5) 109; 1839 (11) 62.

Section provides new method of proving appointment.—This section obviates the necessity of introducing the whole record of the proceedings in the court of probate, which would otherwise be necessary. *Hankinson v. Charlotte, C. & A. R. Co.*, 41 S. C. 1, 19 S. E. 206; *Nickles v. Seaboard Air Line Ry.*, 74 S. C. 102, 54 S. E. 255.

But where record is introduced it is improper to attack it collaterally.—Where the whole record has been introduced in evidence, it is improper to assail any portion of it in a collateral manner. *Nickles v. Seaboard Air Line Ry.*, 74 S. C. 102, 54 S. E. 255.

Thus where the records have been admitted, it is not proper to ask the administrator on cross-examination, if he has been sworn in. *Nickles v. Seaboard Air Line Ry.*, 74 S. C. 102, 54 S. E. 255.

Letters amount to judgment of probate court.—The letters provided for in this section amount, practically, to a judgment of the court of probate rendered on proceedings of record in that court, instituted for that purpose, and in the absence of any statute upon the subject. *Hankinson v. Charlotte, C. & A. R. Co.*, 41 S. C. 1, 19 S. E. 206.

And letters are receivable where whole record would show jurisdictional defect.—Under this section letters of administration are receivable as evidence of appointment notwithstanding the fact that it is insisted by counsel for defendant that the whole record, if introduced,

would show a lack of jurisdiction on its face. *Hankinson v. Charlotte, C. & A. R. Co.*, 41 S. C. 1, 19 S. E. 206.

But where letters are void they may be collaterally attacked.—Where the lack of jurisdiction appears upon the face of the record letters of administration issued therein are void, and may be attacked in any collateral proceeding. *Hankinson v. Charlotte, C. & A. R. Co.*, 41 S. C. 1, 19 S. E. 206.

And evidence as to void letters should be heard.—Under this section, where the defendant proposes to introduce the entire record of the probate court, to prove its lack of jurisdiction to issue letters of administration, it is error for the court to refuse to receive such record as evidence. *Hankinson v. Charlotte, C. & A. R. Co.*, 41 S. C. 1, 19 S. E. 206.

Unless such evidence is outside the record.—Parol evidence deors the record is inadmissible to impeach the grant of letters under this section in a collateral proceeding. *Hankinson v. Charlotte, C. & A. R. Co.*, 41 S. C. 1, 19 S. E. 206.

Where letters are proffered suit must be in representative character.—When it becomes necessary for the plaintiff, by reason of the cause of action arising in his intestate's lifetime, to make proffert of his letters of administration, issued under this section, he must sue in his representative character. *Cauthen v. Green*, 80 S. C. 432, 61 S. E. 957.

§ 411. Civil action for wrongful acts causing death.—Whenever the death of a person shall be caused by the wrongful act, neglect, or default of another, and the act, neglect, or default is such as would, if death had

not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person or corporation who would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, although the death shall have been caused under such circumstances as make the killing in law a felony.

1932 Code, § 411; Civ. P. '22, § 367; Civ. C. '12, § 3955; Civ. C. '02, § 2851; G. S. 2183; R. S. 2315; 1859 (12) 825.

- I. General Consideration.
- II. Nature of right Conferred by Section.
- III. Negligence.
- IV. Release from Liability.

Cross References

See § 8377, as to modification of the common law principles of contributory negligence in cases involving accidents at railroad crossings, and the note thereto.

I. GENERAL CONSIDERATION

Editor's note.—This section, providing for the survival of a liability in cases of wrongful death is consistently cited by the court in conjunction with the following section (412) which provides the method of enforcing the liability, and that reason the practitioner is referred to that section for a more complete understanding of the action for wrongful death.

Common law doctrine.—This section is contrary to the common law in that it allows an action to be brought by the deceased's administrator for injuries done to the person, even after the death of such person. *Pinson v. Southern Ry.-Carolina Division*, 85 S. C. 355, 67 S. E. 464; *Kitchen v. Southern Ry.*, 68 S. C. 554, 48 S. E. 4, 1 Ann. Cas. 747; *Lilly v. Charlotte C. & A. R. Co.*, 32 S. C. 142, 10 S. E. 932.

See § 5856, as to actions against a county for damages for defective highways and bridges, and the note thereto.

Section does not allow action under § 5856.—This section does not apply to a case under § 5856, which gives to a person injured by a defect in a highway or bridge a right of action against the county wherein such highway or bridge is situated; in such case the right of action dies with the person. *All v. Barnwell County*, 29 S. C. 161, 7 S. E. 58.

Attention is called to the statute passed by the Legislature in 1903, now § 5858, by which such cause of action is now made to survive. The practitioner is referred to *Wilson v. Clarendon County*, 139 S. C. 333, 138 S. E. 33, for a case decided since the passage of this section.—Ed. note.

The right of action given in this section accrues to the personal representative where death is instantaneous. *Reed v. Northeastern R. C.*, 37 S. C. 42, 16 S. E. 289.

Action lies for death in foreign state.

—Where an action is brought in South Carolina for death by wrongful act in a foreign state, the action will lie where its provisions are not contrary to those of the *lex fori*. *Dennis v. Atlantic Coast Line R. R.*, 70 S. C. 254, 49 S. E. 869, 106 Am. St. Rep. 746.

And limitation of action in such state applies in South Carolina.—It is well settled in this state that the statute of limitations relates to the remedy, and is enforced according to the *lex fori*. *Sawyer v. Macaulay*, 18 S. C. 543. But the requirement that the action shall be commenced within one year after the party is killed is not a statute of limitations in South Carolina; the failure to commence the action within one year does not simply extinguish the remedy, but extinguishes the right conferred by the statute. *Dennis v. Atlantic Coast Line R. R.*, 70 S. C. 254, 49 S. E. 869, 106 Am. St. Rep. 746; *Free v. Southern Ry. Co.*, 78 S. C. 57, 58 S. E. 952.

Complaint may support action under this section though it is deficient under federal act.—Where an action is brought to recover for death under the Federal Employer's Liability Act and it is found that deceased was not an employee, the complaint may be sufficient to uphold a recovery under this section. *Jenkins v. Southern Ry.-Carolina Division*, 152 S. C. 386, 150 S. E. 128, 66 A. L. R. 416n.

And plaintiff need not elect.—Where the action is for the death of one volunteering to fire a locomotive who was killed in head-on collision, causes of action under Federal Employers' Liability Act and under this section, are not inconsistent so as to require the plaintiff to elect, where question whether deceased was firing engine as defendant's employee has to be determined by facts developed in trial. *Jenkins v. Southern Ry.-Carolina Division*, 152 S. C. 386, 150 S. E. 128, 66 A. L. R. 416n. See, also, *Brisdenon v. Chamberlain*, 53 Fed. 307, holding that an action under this section is a criminal law action for purposes of federal jurisdiction.

See § 484, as to pleadings in actions *ex delicto* for damages, and the note thereto.

But if action lies under federal act there may be no recovery under this section.—This section has no application

where deceased was employed by a railroad engaged in interstate commerce, and was himself so engaged at the time of his death, as the Federal Employers' Liability Act, limiting the right of action to dependent relatives, is paramount and exclusive as to employees engaged in interstate commerce. *Jones v. Charleston & W. C. R. Co.*, 98 S. C. 197, 82 S. E. 415.

See § 410, as to the grant of letters of administration by the probate court, and the note thereto.

11. NATURE OF RIGHT CONFERRED BY SECTION

This section confers the right of action.—See this catchline under § 412, treating the case of *Grainger v. Greenville, S. & A. Ry. Co.*, 101 S. C. 399, 85 S. E. 968.

But it provides only that the liability shall survive and confers the right of action on no one. *Grainger v. Greenville, S. & A. Ry. Co.*, 101 S. C. 399, 85 S. E. 968.

The right is for new cause of action and not a survival.—The right to sue for wrongful death, given by this section, is a new cause of action, independent of any cause of action for the tort committed by the defendant, which the deceased may have had, if he had during his life, or would have had, if he had survived the injury. *Wellman v. Bethea (S. C.)*, 243 Fed. 222; *Osteen v. So. Ry.*, 76 S. C. 368, 57 S. E. 196; *In re Mayo's Estate*, 60 S. C. 401, 38 S. E. 634, 54 L. R. A. 660.

It does not accrue until death.—The action provided for in this section does not accrue against the defendant until the death of the plaintiff's testator. *Wellman v. Bethea (S. C.)*, 243 Fed. 222; *Claussen v. Brothers*, 148 S. C. 1, 145, S. E. 539, 61 A. L. R. 826n.

And cannot be a "debt" within § 8995.—Where action is brought in a federal court under a Delaware statute, against an administrator in South Carolina for wrongful death caused by his testator, a judgment is not a "debt" within the meaning of § 8995, subd. 5, entitling it to prorate with a judgment upon a contractual cause of action. *Wellman v. Bethea (S. C.)*, 243 Fed. 222.

See § 8995, as to order of payment of debts and the note thereto.

Nor within § 418.—An action brought under this section is not a debt, so as to come within the provisions of § 418, providing that no action for debt may be brought against an executor or administrator for 12 months after the testator's death. *Newman v. Lemmon*, 149 S. C. 417, 147 S. E. 439.

Two causes of action exist upon death.—When this section is construed with § 419, providing for survival of actions, it will be seen that two causes of action ex-

ist upon the death of an injured person; a cause of action allowed by the common law for injuries suffered by the deceased person and kept alive by the survival statute for the benefit of his estate; and a cause of action for the death created by this section. *Claussen v. Brothers*, 148 S. C. 1, 145 S. E. 539, 61 A. L. R. 826n.

See § 419, as to survival of right of action, and the note thereto.

Which may not be joined in complaint.

—An executor or administrator may not under § 487 join an action for tort against the deceased with an action for wrongful death under this section, since in the first action the damages are recovered by the administrator as part of the assets of his intestate's estate, while in the second the administrator is merely suing as trustee for the benefit of the surviving spouse and children, in the first case recovering the damages sustained by deceased and in the latter those sustained by the survivors. *Grainger v. Greenville S. & A. Ry. Co.*, 101 S. C. 399, 85 S. E. 968; *Bennett v. Spartanburg Ry., Gas, etc., Co.*, 97 S. C. 27, 81 S. E. 189.

See § 487, as to what causes of action may be joined, and the note thereto.

In the case of *All v. Barnwell County*, 29 S. C. 161, 7 S. E. 58, an administrator, failing to maintain an action under this section and § 5856 for damages caused by defective highways, attempted to amend his complaint so as to sustain an action for damages for general administration, but was refused by the court on the ground that such amendment would change the entire scope and purpose of the action. The practitioner is referred to the catchline "Section Does Not Allow Action Under § 5856," under this section for further treatment of the case.—Ed. note.

And of which action for death does not survive against defendant's administrator.—The action for wrongful death under this section abates upon the death of the wrongdoer, and may not be made to survive by § 419, since that section, providing for the survival of causes of action in respect to "injuries to the person," can not apply to an action for wrongful death. *Claussen v. Brothers*, 148 S. C. 1, 145 S. E. 539, 61 A. L. R. 826n. The practitioner is referred to the note under this section catchlined "Right is for a new cause of action and not a survival," for a treatment of the nature of an action under this section.—Ed. note.

See § 419, providing for the survival of causes of action, and the note thereto.

It was said in the case of *Wellman v. Bethea (S. C.)*, 243 Fed. 222, that it was not clear that this section would support an action instituted against the defend-

ant's administrator for wrongful death, the court citing *Beavers' Adm'r. v. Putnam's Curator*, 110 Va. 713, 67 S. E. 353.—Ed. note.

It would seem, under the above construction, that the tort action, surviving to the personal representative of the deceased person, under the provision of the survival statute (§ 419) that causes of action shall survive both "to and against" the personal representative of the deceased person, would not abate upon the death of the wrongdoer, even though the action for wrongful death does so abate. See *Newman v. Lemon*, 149 S. C. 417, 147 S. E. 439.—Ed. note.

Tort by governmental agency.—This section gives an administrator no right of action, where the injury was caused by tort of a governmental agency, so that deceased could have maintained no action against it. *Mullinax v. Hambricht*, 115 S. C. 22, 104 S. E. 309.

III. NEGLIGENCE

Under this section negligence must be affirmatively alleged. *Reed v. Northeastern R. Co.*, 37 S. C. 42, 16 S. E. 289; *All v. Barnwell County*, 29 S. C. 161, 7 S. E. 58.

An allegation that certain switches were left open on a railroad track at a certain time "carelessly and negligently" was a sufficient argument of negligence. *Reed v. Northeastern R. Co.*, 37 S. E. 42, 16 S. E. 289.

But plaintiff may not blend two charges of negligence.—Where two charges of negligence are blended in the complaint, the plaintiff must either set up each charge separately, or elect which he will retain for trial. *Reed v. Northeastern R. Co.*, 37 S. C. 42, 16 S. E. 289.

In action for death caused when defendant's truck in which deceased was riding overturned, where complaint stated action brought by deceased's executrix under Lord Campbell's Act, only one cause of action was stated, as against defendant's contention complaint stated two causes of action which should be separated, notwithstanding allegations which sufficed to permit findings that deceased rode in truck either as guest, or as paying passenger. *Spurlin v. Colprovia Products Co.*, 185 S. C. 449, 194 S. E. 332.

See § 484 as to pleadings in actions ex delicto for damages, and the note thereto.

Question of negligence is for the jury.—The question of negligence of both deceased and defendant, under this section, is entirely for the jury. *Trimmier v. Atlanta & C. A. L. Ry. Co.*, 81 S. C. 203, 62 S. E. 209; *Osteen v. Southern Ry., Carolina Division*, 76 S. C. 368, 57 S. E. 196; *Harris v. Simon*, 32 S. C. 593, 10

S. E. 1076.

Except where there is not sufficient evidence presented to raise the question of negligence. *Davis v. Columbia & Greenville R. R. Co.*, 21 S. C. 93; *Hooper v. Columbia & Greenville R. R. Co.*, 21 S. C. 541, 53 Am. Rep. 691.

Test of right is whether deceased could have maintained action.—Under this section the test of right of an administrator to maintain an action is whether deceased could have maintained an action for the injury had he survived. *Reed v. Northeastern R. Co.*, 37 S. C. 42, 16 S. E. 289; *Price v. Richmond & D. R. Co.*, 33 S. C. 556; 12 S. E. 413, 26 Am. St. Rep. 700.

So that contributory negligence of deceased will preclude the beneficiary's recovery. *Reed v. Northeastern R. Co.*, 37 S. C. 42, 16 S. E. 289; *Hooper v. Columbia & Greenville R. R. Company*, 21 S. C. 541, 53 Am. Rep. 691; *Wilson v. Clarendon County*, 139 S. C. 333, 138 S. E. 33; *Cirosky v. Smathers*, 128 S. C. 358, 122 S. E. 864.

And may affect other beneficiaries.—In action under this section for death of infant for benefit of father and mother, wherein complaint contains allegation of freedom from negligence in accordance with § 5856, in actions against county, exclusion of testimony tending to show father and mother were not living together at time of injury, and that father had intrusted entire custody and care of child to mother, is error, in that contributory negligence on part of the mother might affect the right of the father to recover. *Wilson v. Clarendon County*, 139 S. C. 333, 138 S. E. 33.

But administrator may maintain action for death of child incapable of negligence.—Where a child seven years old is killed on a railroad track, there being no evidence as to his intelligence or capacity, the prima facie presumption is that he was incapable of personal negligence, and contributory negligence cannot be imputed to him, or to his parent or custodian, so as to prevent a recovery in an action by his administrator under this section. *Watson v. Southern Ry. Co.*, 66 S. C. 47, 44 S. E. 375. See *Mason v. Southern Ry. Co.*, 58 S. C. 70, 36 S. E. 440, 53 L. R. A. 913.

A recovery for death does not bar action for injuries suffered by deceased.—An action under this section, giving a recovery for wrongful death for the benefit of numerated persons, does not bar a tort action by the administrator, for the benefit of the estate, for damages for decedent's suffering. *Grainger v. Greenville, S. & A. Ry., Co.*, 101 S. C. 399, 85 S. E. 968, citing *Bennett v. Spartanburg Ry., Gas & Electric Co.*, 97 S. C. 27, 81 S. E. 189.

IV. RELEASE FROM LIABILITY.

Release by deceased in lifetime bars action.—Where the deceased, during his lifetime, has debarred himself from suit by the release of the wrongdoer, his administrator, cannot maintain the action, unless he shows that the release was procured by fraud or duress. *Rish v. Seaboard Air Line Ry.*, 106 S. C. 143, 90 S. E. 704; *Price v. Richmond & D. R. Co.*, 33 S. C. 56, 12 S. E. 413, 26 Am. St. Rep. 700.

Unless incapacity of duress of deceased is shown.—Where the defendant sets up in its answer, a release executed by plaintiff's intestate, of all claims for damages against defendant by reason of the accident, it is competent for the plaintiff to show incapacity and duress of intestate, to invalidate such release. *Price v. Richmond & D. R. Co.*, 38 S. C. 199, 17 S. E. 732.

Widow's release also bars action.—A widow's release of defendants, if valid, will preclude an administrator's action for husband's death for her benefit. *Aldridge v. Watts Mill*, 131 S. C. 222, 127 S. E. 213.

But much latitude is allowed in admission of evidence as to fraud concerning

release.—Where a release given by a widow was attacked on ground of fraud, evidence that at the time such release was given widow had received \$1,400 as proceeds of insurance policy, carried by defendant, and was given an additional \$500 in consideration of release, is admissible as showing or tending to show that release was voluntarily given. *Aldridge v. Watts Mill*, 131 S. C. 222, 127 S. E. 213, 214.

Settlement of claim for wrongful death by administratrix, who had herself fraudulently appointed as such, with consent of probate court, was set aside when lawful wife of deceased applied to probate court. *Ellenberg v. Arthur et al.*, 178 S. C. 490, 183 S. E. 306.

And instruction as to disposition of release money on verdict is not error.—An instruction that if the jury found for defendants, widow would be entitled to retain check given in consideration of alleged invalid release, but that if it found for plaintiff, she would not be entitled to retain such check, is not improperly given. *Aldridge v. Watts Mill*, 131 S. C. 222, 127, S. E. 213, 214.

§ 412. Beneficiaries of action for wrongful death—damages recoverable—distribution.—Every such action shall be for the benefit of the wife or husband and child, or children, of the person whose death shall have been so caused; and if there be no such wife, or husband, or child, or children, then for the benefit of the parent or parents; and if there be none such, then for the benefit of the heirs at law or the distributees of the person whose death shall have been caused and shall be brought by or in the name of the executor or administrator of such person; and in every such action the jury may give such damages, including exemplary damages where such wrongful act, neglect or default was the result of recklessness, wilfulness or malice, as they may think proportioned to the injury resulting from such death to the parties respectively, for whom and for whose benefit such action shall be brought. And the amount so recovered shall be divided among the before mentioned parties, in such shares as they would have been entitled to if the deceased had died intestate and the amount recovered had been personal assets of his or her estate.

1932 Code, § 412; Civ. P. '22, § 368; Civ. C. '12, § 3956; Civ. C. '02, § 2852; G. S. 2184; R. S. 2316; 1859 (12) 825; 1898 (22) 788; 1901 (23) 743; 1902 (23) 1071.

I. General Consideration.

II. The Beneficiaries.

III. The Damages.

IV. Apportionment and Disposition of Recovery.

Cross References

As to actions by executors and administrators, see § 399 and the note thereto. As to time actions may be commenced against an executor or administrator, see § 418 and the note thereto. As to modification of the common law principles of contributory negligence in cases involving accidents at railway crossings,

see § 8377 and the note thereto.

I. GENERAL CONSIDERATION

Editor's note.—This section provides the method of enforcing the liability made to survive by the preceding section 411, and in view of the fact that the sections are always cited together by the court, the practitioner is referred to the note to that section in conjunction with this note for a complete treatment.

Under the early standing of this section the provision as to punitive damages was not included. The practitioner is referred to the case of *Nohrden v.*

Northeastern R. Co., 59 S. C. 87, 37 S. E. 228, 82 Am. St. Rep. 826, construing the section as it stood in 1900. See, also, Garrick v. Florida Cent. & P. R. Co., 53 S. C. 448, 31 S. E. 334, 69 Am. St. Rep. 874.

Under the standing of this section in 1898, the provision was for the benefit of the heirs "of" the distributees, but was construed in *Kitchen v. Southern Ry.*, 68 S. C. 554, 48 S. E. 4, 1 Ann. Cas. 747, to have been meant to be read "or" the distributees, and on the strength of that decision has been so changed by the Legislature.

Section is constitutional.—This section, permitting exemplary damages in actions for negligent killing where the wrongful act was the result of recklessness, wantonness, or malice, does not deprive a carrier of its property without due process of law. *Hull v. Seaboard Air Line Ry.*, 76 S. C. 278, 57 S. E. 28, 10 L. R. A. (N. S.) 1213; *Osteen v. Southern Ry., Carolina Division*, 76 S. C. 368, 57 S. E. 196.

This action is only enforceable by the administrator or executor of the deceased's estate. In *re Mayo's Estate*, 60 S. C. 401, 38 S. E. 634, 54 L. R. A. 660. And it is said that he has precisely the same right to recover as the deceased would have, if living and suing for damages for injury. *Hooper v. R. R. Co.*, 21 S. C. 541.

Under this section a father may not maintain an action in his own name against a wrongdoer for damages for the wrongful death of his child. *Edgar v. Castello*, 14 S. C. 20, 37 Am. Rep. 714.

Administrator sues as trustee.—Under this section the administrator sues as trustee for the benefit of the surviving spouse and children. *Bennett v. Spartanburg Ry., Gas & Electric Co.*, 97 S. C. 27, 81 S. E. 189.

Action under foreign statute, procedural terms of this section must be followed.—Where action is brought by a mother in South Carolina to recover for a wrongful death in Georgia, and it is shown that the Georgia Statute provided that the mother should bring the action, but that the statute was primarily remedial rather than procedural, the mother will be forced to amend the complaint to show that she brings the action in the capacity of an administratrix, as required by the terms of this section. *Bussey v. Charleston & W. C. Ry. Co.*, 73 S. C. 215, 53 S. E. 165.

And recovery should be allowed where only foreign statute before court does not name beneficiaries.—Where an action is brought in South Carolina for a death by wrongful act in North Carolina, and the only North Carolina statute which the court may consider confers the right of action on the personal representative, but does not name the beneficiaries, the court will not grant a non-

suit because of the use in the complaint of the words "for the benefit of his parents," the reference to the supposed beneficiary being regarded as mere surplusage. *Free v. Southern Ry.*, 78 S. C. 57, 58 S. E. 952.

An administratrix appointed in North Carolina could not maintain statutory action in South Carolina for death of intestate, notwithstanding allegation that she was sole beneficiary under death action statute. *Heath v. Smyther*, 19 F. S. 1021.

See generally, *Youngblood v. South Carolina & G. R. Co.*, 60 S. C. 9, 38 S. E. 232, 85 Am. St. Rep. 824.

II. THE BENEFICIARIES

This section confers the right of action and names beneficiaries.—This section is inseparably linked with § 411, in that it provides the only persons for whose benefit the action shall be brought, the measure of damages, and how the amount shall be ascertained. *Grainger v. Greenville, S. & A. Ry. Co.*, 101 S. C. 399, 85 S. E. 968; *Childs v. Bolton*, 69 S. C. 555, 48 S. E. 618.

But existence of a beneficiary is condition precedent to maintenance of action.—In order for the administrator of the deceased to have a cause of action under this and the preceding section, there must be one or more persons bearing the relation to the deceased named in this section. *Kitchen v. Southern Ry.*, 68 S. C. 554, 48 S. E. 4, 1 Ann. Cas. 747.

However, railroad, sued for death of motorist at crossing collision in which motorist's husband also died, had burden of proving its assertion that husband survived motorist. *Collins v. Atlantic Coast Line R. C.* 183 S. C. 284; 190 S. E. 817.

Although the manner of distribution is secondary in importance to award of damages.—This and the preceding section are remedial in their character, and should be liberally construed, to accomplish their object; the award of damages being the important matter, and the manner of distribution of secondary importance. *Morris v. Spartanburg Ry., Gas & Electric Co.*, 70 S. C. 279, 49 S. E. 854.

And therefore action will not abate as long as any beneficiary exists.—The construction that an action under this section can abate as long as any beneficiary or class named in this section exists, is too narrow, and erroneous. *Morris v. Spartanburg Ry., Gas & Electric Co.*, 70 S. C. 279, 49 S. E. 854.

An action under this section brought for the alleged benefit of the father and brothers and sisters, does not abate on the death of the father, though he was the sole beneficiary under the statute when the action was commenced; the action may be carried on for the benefit

of whomever may be entitled to participate in the recovery. *Morris v. Spartanburg Ry., Gas & Electric Co.*, 70 S. C. 279, 49 S. E. 854.

But where complaint does not show proper beneficiaries it is demurrable.—Unless it is alleged in the complaint that the parties for whose benefit the action is brought, bear the relationship provided for in this section, the complaint states no cause of action and is demurrable. *Kitchen v. Southern Ry.*, 68 S. C. 554, 48 S. E. 4, 1 Ann. Cas. 747; *Nohrden v. Northeastern R. Co.*, 54 S. C. 492, 32 S. E. 524; *Lilly v. Railroad Co.*, 32 S. C. 142, 10 S. E. 932.

Unless proper beneficiaries also named.—Where one party is improperly included in the list of beneficiaries in the complaint, the complaint is not demurrable, is being proper to correct the error by striking out such name. *McDaniel v. A. C. L. Ry.*, 76 S. C. 189, 56 S. E. 956; *Reed v. Railroad Co.*, 37 S. C. 42, 16 S. E. 289.

The words "heirs" and "distributees" as used in this section mean the same thing. *Kitchen v. Southern Ry.*, 68 S. C. 554, 4 S. E. 4, 1 Ann. Cas. 747.

Illegitimate child is a "child" within meaning of section. In *McDonald v. Southern Ry.*, 71 S. C. 352, 51 S. E. 138, 2 L. R. A. (N. S.) 640n, it was held that a mother could not recover, as sole beneficiary, under this section, for the death of her illegitimate child. The court based its decision upon the fact that an illegitimate child is not a "child" within the meaning of this section.

Attention is, however, called to the provisions of § 8913, which was enacted soon after the decision of the above case, by the terms of which section, an action for the recovery of damages for the death of an illegitimate child is placed upon the same basis as an action for the death of a child born in lawful wedlock. The effect of § 8913, therefore, is to make an illegitimate child a "child" within the meaning of this section. The practitioner is referred to *Croft v. Southern Cotton Oil Co.*, 83 S. C. 232, 65 S. E. 216, for a case declaring § 8913, constitutional as relating to death by wrongful act.—Ed. note.

III. THE DAMAGES

In action for wrongful death, all damages, present and prospective, which are naturally the proximate consequence of the wrongful act, may be included, since only one action may be maintained.—*Mishoe v. Atlantic Coast Line R. Co.*, 186 S. C. 402, 197 S. E. 97.

Only such damages as are sustained by the beneficiaries may be recovered. *Bennett v. Spartanburg Ry., Gas & Electric Co.*, 97 S. C. 27 81 S. E. 189.

Under this section, limiting the recovery to the "injury resulting from the death" no recovery may be had for the

negligent or wanton exposure of decedent's dead body. *Pinson v. Southern Ry., Carolina Division*, 85 S. C. 355, 67 S. E. 464.

Where testimony was admitted showing the effect of deceased's suffering on the beneficiaries under this section, it was rendered harmless by a positive instruction that the jury could not consider as an element of damages, either the suffering of deceased or the grief of the beneficiaries, occasioned by witnessing such suffering. *Stuckey v. Atlantic Coast Line R. Co. of South Carolina*, 60 S. C. 237, 38 S. E. 416.

Not necessary that beneficiaries suffer pecuniary loss.—Under this section it is not essential, even to the recovery of compensatory damages, that the person for whose benefit the action is brought, should be dependent upon the deceased for support, or that they should suffer pecuniary loss. *Hull v. Seaboard Air Line Ry.*, 76 S. C. 278, 57 S. E. 28, 10 L. R. A. (N. S.) 1213; *Barksdale v. Seaboard Air Line Ry.*, 76 S. C. 183, 56 S. E. 906; *Mason v. Southern Ry. Co.*, 58 S. C. 70, 36 S. E. 440, 53 L. R. A. 913; *Strother v. South Carolina & G. R. Co.*, 47 S. C. 375, 25 S. E. 272; *Petrie v. Railroad*, 29 S. C. 303, 7 S. E. 515 See *Davis v. Columbia & Greenville R. R. Co.*, 21 S. C. 93.

"Injury" does not mean only the deprivation of a legal right.—The word "injury" contained in this section does not mean that damages are recoverable only for the deprivation of a legal right, but that all the elements of compensatory damages should be considered. *Barksdale v. Seaboard Air Line Ry.*, 76 S. C. 183, 56 S. E. 906.

Where it appears that the plaintiff has paid the funeral expenses of the deceased, it is proper for the jury to consider them as an element of damages. *Petrie v. Columbia & G. R. Co.*, 29 S. C. 303, 7 S. E. 515.

A wife and child may recover for mental anguish and loss of companionship. *Brickman v. Southern Ry.*, 74 S. C. 306, 54 S. E. 553.

And it is not necessary that any witness testify to the pecuniary value of decedent's services. *Petrie v. Columbia & G. R. Co.*, 29 S. C. 303, 7 S. E. 515.

But absence of such loss may be commented on.—While pecuniary loss is not essential to recovery under this section, it is an element of damages, and where there is no proof of such loss its absence may be commented on by the judge in his instructions to the jury. *Barksdale v. S. A. L. Ry.*, 76 S. C. 183, 56 S. E. 906.

Instruction as to earning capacity and expectancy of deceased is not error.—In *Southern Ry Co. v. Diseker*, 13 Ga. App. 799, 81 S. E. 269, the Court of Appeals of Georgia, in construing this section, held that: As the jury has the right

to award such damages as they think proportionate to the injury, resulting from the death of the deceased, which might include injury over and above any legal claims, the defendant was not hurt by the instruction upon the subject of the earning capacity of the deceased and his expectancy; this being merely one item of damage that might be considered by the jury.

But life expectancy of beneficiary is not applicable.—In an action for recovery of damages under this section, the probable duration of the beneficiary's life is not relevant to the inquiry as to damages. *Trimmier v. Atlanta & C. A. L. Ry. Co.*, 81 S. C. 203, 62 S. E. 209.

Section authorizes exemplary damages.—This section authorizes exemplary damages where the negligence was the result of wilfulness or malice. *Osteen v. Southern Ry., Carolina Division*, 76 S. C. 368, 57 S. E. 196.

Only where wantonness is proved.—Where, in an action under this section, there is no evidence of wilfulness or wantonness, it is reversible error to refuse a request by defendant to charge that punitive damages could not be recovered. *Trimmier v. Atlanta & C. A. L. Ry. Co.*, 81 S. C. 203, 62 S. E. 209.

Punitive damages are a legal right.—The right to punitive damages under this section, is a legal right, following directly on the jury's finding of recklessness, wilfulness, or malice, as a matter of law. *Brickman v. Southern Ry.*, 74 S. C. 306, 54 S. E. 553. The court in the above case cited the case of *Beaudrot v. Railway*, 69 S. C. 160, 48 S. E. 106, affirmed in *Poulnot v. Tel. Co.*, 69 S. C. 545, 48 S. E. 622, in support of the above contention as to punitive damages.—Ed. note.

Where, in an action to recover for death under this section, the action is for punitive as well as compensatory damages, evidence descriptive of the mangled condition of the body is relevant. *Brickman v. Southern Ry.*, 74 S. C. 306, 54 S. E. 553.

Where a passenger was killed in a railroad coach, allegations as to what occurred within 10 days before the accident will not be stricken out as irrelevant, since they tend to show gross negligence. *Stuckey v. Atlantic Coast Line R. Co. of South Carolina*, 60 S. C. 237, 38 S. E. 416.

And jury's discretion as to amount is absolute.—This section confers the right to punitive damages, and only leaves to the discretion of the jury the amount of such damages. Such discretion, however, is absolute, and will not be reviewed as to amount by the Supreme Court. *Brickman v. Southern Ry.*, 74 S. C. 306, 54 S. E. 553.

But new trials are permissible where excessive verdicts rendered.—This sec-

tion, providing that the jury shall assess damages proportionate to the injury, does not place such actions on a different basis from other actions in tort, and a trial judge has authority to grant a new trial where the verdict is excessive. *Stuckey v. Atlantic Coast Line R. Co. of South Carolina*, 57 S. C. 395, 35 S. E. 550. The practitioner is referred to this same catchline under § 34 (as to new trials in the circuit court), treating the case of *Nettles v. Harrison*, 2 McCord, 230.

Or where verdict gives inadequate damages.—See this catchline under § 34, treating the case of *Bodie v. Charleston, etc., Ry. Co.*, 66 S. C. 302, 44 S. E. 943.

If it is apparent that injustice has been done.—See this catchline under § 34, treating the case of *Hall v. Northwestern R. Co.*, 81 S. C. 522, 62 S. E. 848.

Unless the excess is remitted.—See this catchline under § 34, treating the case of *Hall v. Northwestern R. Co.*, 81 S. C. 522, 62 S. E. 848.

IV. APPORTIONMENT AND DISPOSITION OF RECOVERY

Funds recovered are not distributable according to statute of distribution.—The funds recovered under this and the preceding section must be distributed according to the provisions of this section and not in accordance with the terms of the statute of distribution (§§ 8906 et seq.). *Childs v. Bolton*, 69 S. C. 555, 48 S. E. 618.

Except that statute may be considered as to proportion receivable by beneficiaries.—Under the provision of this section that the amount shall be divided between the parties entitled in such shares as they would have been entitled to had the deceased died intestate and the amount had been personal assets of his estate, it is proper to look to the statute of distribution (§§ 8906 et seq.) for the purpose of determining alone the proportions in which the funds should be distributed. *Childs v. Bolton*, 69 S. C. 555, 48 S. E. 618.

See § 8906, as to the distribution of property and note thereto.

And recovery is absolute property of beneficiaries.—The amount recovered in actions under this and the preceding section belongs absolutely to the persons, named in this section, for whose benefit they are brought. *Rookard v. Atlanta & C. Air Line Ry Co.*, 89 S. C. 371, 71 S. E. 992.

For damages recovered are not assets of the estate.—Money collected by an administrator or executor under this section does not become a part of the assets of the deceased person's estate, in the sense that it becomes liable for his debts and passes under the statute of distribution. *Boyd v. Richie* (1930), 155 S. E. 844; *Rookard v. Atlanta & C. R. Co.*, 89 S. C. 371, 71 S. E. 992.

Except right is sufficient to authorize the grant of letters.—Where there are no assets left by deceased, a right of action existing under this section is sufficient to authorize the grant of letters of administration. In *re Mayo's Estate*, 69 S. C. 401, 38 S. E. 634, 54 L. R. A. 660.

And surety on bond is liable for misapplication of funds.—Where an administratrix brings an action for the benefit of herself and her minor son, she brings the action, in her official capacity, and collects the money by virtue of her office, with the resulting duty of disbursing it officially, hence the surety on her bond is liable for her misapplication of such funds. *Boyd v. Richie* (1930), 155 S. E. 844. The court based its opinion in this case upon the fact that § 413 makes an administrator liable for costs in certain events, and that §§ 8974, 8975 relating to an administrator's oath and bond, were in effect before this section was passed by the Legislature. The court also quoted with approval from the case of *Aetna Casualty & Surety Co. v. Young*, 107 Okl. 151, 231 P. 261, 264, in which a similar recovery against an administrator's bond was allowed. — Ed. note.

In the dissenting opinion in the above

case, written by Mr. Justice Cothran, it was said: The statute expressly provides that the action shall be brought "by or in the name of" such representative. It is conceivable that the representative might decline to bring the action; that would not prevent the beneficiaries from instituting it in his name and conducting the litigation without regard to him, and making the distribution, under the direction of the court without the representative being consulted or the money passing through his hands. It is noticeable that the statute makes no provision for a division by the representative. This is a forceable indication that the recovery was not intended to be a part of the assets of the estate. *Boyd v. Richie* (1930), 155 S. E. 844, 848.—Ed. note.

In the case of *Mullinax v. Hambright*, 115 S. C. 22, 104 S. E. 309, it was contended that the action allowed by this section is a property right and an asset of the estate, and that the denial of the right to recover damages in this action is, in effect, a taking of property without just compensation, in violation of the federal and state constitutions. The contention was rejected by the court as being without merit.—Ed. note.

§ 413. Limitation of actions for wrongful death—liability for costs.—

All such actions must be brought within six years from the death of such person, and the executor or administrator, plaintiff in the action, shall be liable to costs in case there be a verdict for the defendant, or nonsuit or discontinuance, out of the goods, chattels and lands of the testator or intestate, if any.

1932 Code, § 413; Civ. P. '22, § 369; Civ. C. '12, § 3957; Civ. C. '02, § 2853; 1903 (24) 96.

Cross references.—See § 387 et seq., as to the statute of limitations in general, and the note thereto. See § 360, as to the death of parties entitled to actions before limitation on such action expires, and the note thereto. See § 766, as to costs in actions by or against administrators, and the note thereto.

Editor's note.—Prior to the amendment of this section in 1903 the following provision was included after the words "if any," and "if none, then out of the proper goods and chattels of such executor and administrator." See *Rookard v. Atlanta & C. A. L. Ry. Co.*, 89 S. C. 371, 71 S. E. 992.

Compliance with section is condition precedent to right of action.—This section should be interpreted, not so much as a statute of limitations in that it extinguishes the remedy under §§ 411, 412, but as the limit of the action in that it extinguishes the right, and a showing that an action is within its limit is a condition precedent to the right of action. *Dennis v. A. C. L. Ry.*, 70 S. C. 254, 49 S. E. 869, 106 Am. St. Rep. 746.

Limitation is not tolled by § 418.—The limitation provided for in this section is not tolled by § 418, providing no action shall be commenced against an executor or administrator for his intestate's death until twelve months after such death, since a cause of action for wrongful death is not a "debt" within the meaning of § 418. *Newman v. Lemon*, 149 S. C. 417, 147 S. E. 439.

Administrator not personally liable unless guilty of bad faith in action before the court.—See this catchline under § 766.

Defendants costs may be deducted from recovery at subsequent trial.—Under this section and § 766, a judgment for the defendant for the costs of an appeal, decedent leaving no estate, may be deducted from the amount recovered by the plaintiff administrator at a subsequent trial of the same cause. *Rookard v. Atlanta & C. A. L. Ry. Co.*, 89 S. C. 371, 71 S. E. 992.

See generally, *McDaniel v. Atlantic Coast Line Railway*, 76 S. C. 15, 18, 56 S. E. 543.

§ 414. Exception to limitation of actions for wrongful death.—The provisions of sections 411, 412, and 413 shall not apply to any case where the person injured has, for such injury, brought action, which has proceeded to trial and final judgment before his or her death.

1932 Code, § 414; Civ. P. '22, § 370; Civ. C. '12, § 3958; Civ. C. '02, § 2854; G. S. 2186; R. S. 2318; 1859 (12) 825.

Section only intended to prevent double remedy in any case.—This section, in excluding a right of action in the administrator where deceased in his lifetime, has recovered a final judgment for his injury, does not imply that the administrator may maintain an action in every other case, but is only intended to prevent a double remedy in any case. *Price v. Richmond & D. R. Co.*, 33 S. C. 556, 12 S. E. 413, 26 Am. St. Rep. 700.

Right of action for death constitutes

"property."—This section was cited in *In re Mayo's Estate*, 60 S. C. 401, 38 S. E. 634, 54 L. R. A. 660, in support of the proposition that a right of action for wrongful death is sufficient property to authorize the grant of letters of administration for a decedent's estate.

See generally, *McDaniel v. A. C. L. Ry.*, 76 S. C. 15, 18, 56 S. E. 543; *Dennis v. A. C. L. Ry.*, 70 S. C. 254, 49 S. E. 869, 106 Am. St. Rep. 746.

§ 415. Actions against trespassers.—Executors in cases of trespass done to their testators, as of the goods and chattels of the same testators carried away in their life, shall have an action against the trespassers, and recover their damages in like manner as they, whose executors they are, should have had if they were in life.

1932 Code, § 415; Civ. P. '22, § 371; Civ. C. '12, § 3959; Civ. C. '02, § 2855; G. S. 2187; R. S. 2319; 4 Ed. 3, c. 7; 1712 (2) 425.

Section does not give third persons right to sue executors.—This section only gives executors the right to use trespassers, and does not give any right to third persons to sue executors for

trespasses or other torts. *Elmore v. Elmore*, 58 S. C. 289, 36 S. E. 656, 51 L. R. A. 261n.

See generally, *Middleton v. Robinson*, 1 Bay 58; *Huff v. Watkins*, 20 S. C. 477.

§ 416. Executions on judgments held by executors or administrators de bonis non.—Where any judgment after a verdict shall be had by or in the name of any executor or administrator, an administrator de bonis non may take out execution upon such judgment.

1932 Code, § 416; Civ. P. '22, § 372; Civ. C. '12, § 3960; Civ. C. '02, § 2856; G. S. 2188; R. S. 2320; 17 C. 2, c. 8; 1712 (2) 521.

§ 417. Actions against executors when one or more are out of state.—

In cases where there are two or more executors or administrators to any estate, and any one or more of them has withdrawn, or shall withdraw, or reside out of the State, it shall and may be lawful for any creditor or person having right or cause of action against such estate to commence his action against all the executors or administrators, naming and setting forth therein the executor or administrator, one or more, who is or are out of the State; and the summons being served in the usual form upon those who are within the State, the suit shall be deemed to be good and effectual in law, to all intents and purposes: saving only that the judgment in such cases shall not extend to work any devastavit upon the person or persons so absent, or to affect him, her or them in their private right.

1932 Code, § 417; Civ. P. '22, § 373; Civ. C. '12, § 3961; Civ. C. '02, § 2857; G. S. 2189; R. S. 2321; 1793 (7) 282.

§ 418. When actions may be commenced against executor or administrator.—No action shall be commenced against any executor or administrator

for the recovery of the debts due by the testator or intestate, until twelve months after such testator's or intestate's death.

1932 Code, § 418; Civ. P. '22, § 374; Civ. C. '12, § 3962; Civ. C. '02, § 2858; G. S. 2190; R. S. 2322; 1789 (5) 112; 1885 (19) 158.

Cross references.—See § 399, as to actions by executors and administrators, and the note thereto. See §§ 311, 312, as to the liability and method of enforcing such liability by an executor or administrator, and the notes thereto. See § 360, as to the death of parties entitled to actions before the limitation on such action expires, and the note thereto.

Editor's note.—Under the early standing of this section the limitation on actions against an administrator was only nine months. For a case construing the section as it then stood the practitioner is referred to *Moore v. Smith*, 29 S. C. 254, 7 S. E. 485.

Period herein mentioned must be added to period of limitations.—The time limit fixed in this section must be added to the time period fixed by the statute of limitations for bringing such action. *Moore v. Smith*, 29 S. C. 254, 7 S. E. 485; *Lawton v. Bowman*, 2 Strob 190; *Wilks v. Robinson*, 3 Rich. 182; *McCullough v. Speed*, 3 McCord 455; *Nicks v. Martindale*, Harp. 135, 18 Am. Dec. 647; *Moses v. Jones*, 2 N. & McC. 259; *Oswald v. Lawton*, et al., 187 S. C. 42, 196 S. E. 535.

Under this section prohibiting an action against the representatives for the recovery of a debt due by a decedent until twelve months after his death, the twelve months should be added to the statutory period of six years to determine the time within which a note of decedent was barred by the statute. *Moore v. Smith*, 29 S. C. 254, 7 S. E. 485.

Under this section and section 360 an action on a promissory note not under seal is not barred by limitations, where before the six years has run the maker dies, and after the six years has run, but within one year after the granting of letters of administration, the action is begun. *Gaston v. Gaston*, 80 S. C. 157, 61 S. E. 393, 394.

See §§ 387 et seq., as to the statute of limitations in general, and § 360, as to actions by representatives after death where the limitation has not expired, and the notes thereto.

Section does not apply to actions under §§ 411-413.—This section does not apply to actions for wrongful death brought under §§ 411-413, since such actions are not for a "debt" within the meaning of this section. *Newman v. Lemmon*, 149 S. C. 417, 147 S. E. 439.

See §§ 411-413, as to actions for death by wrongful act, and the note thereto.

Nor to action begun in decedent's lifetime.—This section does not apply to an action begun against the decedent in his lifetime, and continued by a substitution

of his legal representative. *Quick v. Campbell*, 44 S. C. 386, 22 S. E. 479.

As to manner of substitution, after death of party to action, see § 408 and the note thereto.

Or to executors de son tort. *Chambers v. Davidson*, 1 Hill 50.

Or to foreclosure suits where no deficiency judgment asked.—This section does not apply to a foreclosure suit where no judgment is asked against the administrator for deficiency, it being proper to bring such action within twelve months after such administrator's appointment. *Green v. McCarter*, 64 S. C. 290, 42 S. E. 157.

Though suit commenced before period and judgment rendered after period will support an order of sale.—Notwithstanding this section a sale of the intestate's land under a judgment secured against the administrator, 2 days after the expiration of the 12 months will be upheld, though the suit was commenced before the expiration of that period. *Hendrix v. Holden*, 58 S. C. 495, 36 S. E. 1010.

Section applies to suits in equity.—The provisions of this section apply to suits in equity against heirs or devisees where the suit involves the estate in the hands of an executor. *Cleveland v. Mills*, 9 S. C. 430.

Suit to compel accounting is for recovery of a "debt."—This section prohibits, within twelve months of decedent's death, a suit against the personal representative to compel an accounting of decedent's acts as guardian of the estate of an infant; such suit being one to recover a "debt" within the statute. *Beach v. Addison*, 98 S. C. 215, 82 S. E. 428.

But suit for fraudulent breach of contract is a tort.—An action by administrator de bonis non against estate of former administrator for a misappropriation of funds by such former administrator was not strictly a suit on a debt, but was one for the fraudulent breach of contract which is a tort, and could be brought within less than one year after such former administrator's death. *Bourne v. Maryland Casualty Co.* 185 S. C. 1; 192 S. E. 605.

No partition until expiration of twelve months' period.—Since this section forbids a creditor to bring suit for his debt until the expiration of twelve months after his debtor's death, equity will not entertain a bill for partition of the debtor's property, since to do so would subject the debtor to an unfair advantage. *In re Worley's Estate*, 49 S. C. 41, 26 S. E. 949.

§ 419 Survival of right of action.—Causes of action for and in respect to any and all injuries and trespasses to and upon real estate and any and all injuries to the person or to personal property, shall survive both to and against the personal or real representative (as the case may be) of the deceased persons, and the legal representatives of insolvent persons, and defunct or insolvent corporations, any law or rule to the contrary notwithstanding.

1932 Code, § 419; Civ. P. '22, § 375; Civ. C. '12, § 3963; Civ. C. '02, § 2859; R. S. 2323; 1892 (21) 18; 1905 (24) 945.

Cross references.—See §§ 411, 412, as to actions for death by wrongful act, and the notes thereto. As to the survival of action for death due to defects in highway, street or bridge, see § 5858, and the note thereto.

Only one action against county for death caused by defective highway.—See § 5859.

Editor's note.—Under an early standing of this section, it did not apply to an action *ex delicto*, the section being amended 1905 to its present form. For a case construing the effect of the section before amendment the practitioner is referred to *Lorick v. Palmetto Nat. Bank of Columbia*, 76 S. C. 500, 57 S. E. 527. See also *Sims v. Davis*, 70 S. C. 362, 49 S. E. 872, 34 Am. Dec. 581.

General rule of construction.—Though this section, as a remedial statute, should be construed liberally, the court must resort to the actual words used in the statute, as to effectuate the intent of the Legislature, rather than its own conception of right. *Claussen v. Brothers*, 148 S. C. 1, 145 S. E. 539, 61 A. L. R. 826n.

The question of whether or not an action has abated is for the court of common pleas. *Ex parte Conrad*, 75 S. C. 1, 54 S. E. 799.

As to abatement of actions, see § 408, and the note thereto.

Question of survival is raised by demurrer or answer.—The question as to whether a right of action for trespass on real estate survives to the personal or real representative should be made either by demurrer or answer. *Voyles v. Postal Tel. Cable Co.*, 78 S. C. 430, 59 S. E. 68; *Bourne v. Maryland Casualty Co.*, 185 S. C. 1; 192 S. E. 605.

But objection may not be raised by oral demurrer.—Under § 458, as to when the defendant may file demurrers, the defendant may not raise the objection that an action does not survive under this section by an oral demurrer at the trial. *Duke v. Postal Telegraph Cable Co.*, 71 S. C. 95, 50 S. E. 675.

Slander.—A cause of action for slander is, until reduced to judgment, a tort of a strictly personal character, and is not assignable. *Perry v. Atlantic Coast Life Ins. Co. et al.*, 166 S. C., 270, 164 S. E. 753.

Action *ex delicto* for fraud and deceit based on alleged false representations made by deceased in the sale of timber held not to survive. *Halsey v. Minn.-S. C. Land & Timber Co.*, 54 F. (2nd), 933.

Action for influencing and procuring execution by fraud of deed does not survive.—The influencing and procuring execution of deed real estate by fraud was not such damage to, or trespass upon, the real property of deceased as would survive. *Bernis v. Waters*, 170 S. C. 432; 170 S. E. 475.

Action for injuries sustained by deceased when defendant's truck ran onto sidewalk from private driveway. *Cobb v. Southern Public Utilities Co.*, 181 S. C. 310; 187 S. E. 363.

The heirs at law are the real representatives. *Duke v. Postal Telegraph Cable Co.*, 71 S. C. 95, 50 S. E. 675.

An action for trespass on real estate in erecting a telegraph line survives to the heir at law. *Duke v. Postal Telegraph Cable Co.*, 71 S. C. 95, 50 S. E. 675.

Action for death does not survive against defendant's administrator.—Under the provisions of this section an action for wrongful death will not survive against the defendant's administrator. *Claussen v. Brothers*, 148 S. C. 1, 145 S. E. 539, 61 A. L. R. 826n. The practitioner is referred to this same catchline under § 411.

But action for tort survives. *Cathcart v. Matthews*, 105 S. C. 329, 89 S. E. 1021.

And the administrator sues for damages to deceased.—In an action by an administrator for the tort causing his decedent's death, surviving under this section, the administrator sues to recover the damages sustained by the deceased and not those sustained by the survivors. *Electric Co.*, 97 S. C. 27, 81 S. E. 189.

Actions for death and for tort may not be joined.—Under the section an action for tort, surviving against a wrongdoer, may not be joined with an action for wrongful death, for which he is also liable. *Bennett v. Spartanburg Ry., Gas & Electric Co.*, 97 S. C. 27, 81 S. E. 189. The practitioner is referred to the catchline "Which may not be joined" under § 411, treating the above cited case in reference to its bearing on actions for unlawful death.—Ed. note.

This section authorizes the assignment of a right of action existing under § 8362. *Bultman v. Atlantic Coast Line R. Co.*, 103 S. C. 512, 88 S. E. 279.

See § 8362, as to the liability of a rail-

road company for fires caused by its engines.

See generally, *Allen v. Union Oil & Mfg. Co.*, 59 S. C. 571, 38 S. E. 274.

TITLE 6

Place of Trial of Civil Actions

420. Where subject of action situated.

421. Where cause of action arose.

422. Where defendant resided.

423 and 424. Actions against insurance companies.

425. Removal of action.

426. Changing place of trial.

§ 420. Actions to be tried where subject matter situated.—Actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial, in the cases as hereinafter provided:

(1) For the recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property.

(2) For the partition of real property.

(3) For the foreclosure of a mortgage of real property.

(4) For the recovery of personal property distrained for any cause: *provided*, that nothing in this section contained shall be so construed as to prevent the hearing of any of the said actions by consent of the parties or their attorneys, and of the guardian ad litem of any infant party to said action, in a county other than that in which said action may have been brought and may be pending, or other than that in which the property is situated.

1932 Code, § 420; Civ. P. '22, § 376; Civ. P. '12, § 172; Civ. P. '02, § 144; 1870 (14) § 146; 1887 (19) 835; 1894 (21) 793.

This and kindred sections for benefit of parties to suit only.—It would seem that this and the following sections as to place of trial were prescribed exclusively for the benefit of the parties to the suit, and that persons, outside of the record have no rights in the matter. See *Trapier v. Waldo*, 16 S. C. 276, 284.

The words "must be tried" are imperative and cannot be disregarded. *Trapier v. Waldo*, 16 S. C. 276, cited with approval in *First Nat. Co. v. Strak*, 148 S. C. 410, 146 S. E. 240, 242. See also *Riddle v. Reese*, 53 S. C. 198, 31 S. E. 222; *Ware v. Henderson*, 25 S. C. 385.

The "place of trial" is the place where the action is brought.—The place of trial is the place where the action is brought, and where the record is preserved for the guidance of those who may be interested. *Weathersbee v. Weathersbee*, 82 S. C. 4, 62 S. E. 838.

The county in which the land lies is venue for condemnation case.—In condemnation cases the proper venue is the county in which the land lies, regardless

of residence or principal place of business of the owner or of the condemning party. 10 R. C. L. 206, cited with approval in *Augusta Power Co. v. Savannah River Elect. Co.*, 152 S. C. 295, 149 S. E. 924.

One good reason why a condemnation case must be brought only in the county wherein the land lies is that such proceedings are special proceedings, the statutes prescribing just what shall be done and how it shall be done in order to subject lands for public use, and a court of one jurisdiction certainly could not enjoin a statutory proceeding commenced in another jurisdiction, and relief must be sought in the jurisdiction where the statutory proceeding is pending. *Augusta Power Co. v. Savannah River Elect. Co.*, 152 S. C. 295, 149 S. E. 924.

Which may not be waived. — If the situs of the land determines the jurisdiction, this may not be waived, and would be fatal to a cause brought in another county; while if the case is transferred

to the county where the land is situate, no other question of jurisdiction could arise, for by making this motion jurisdiction of the person is waived. *Augusta Power Co. v. Savannah River Elect. Co.*, 152 S. C. 295, 149 S. E. 924.

Jurisdiction cannot be waived by any act or omission to act of the parties, for the very obvious reason that the parties have no power to invest any tribunal with jurisdiction of a subject over which the law has not conferred jurisdiction upon such tribunal. Hence the common expression "consent" cannot confer jurisdiction. *Florence v. Berry*, 61 S. C. 237, 39 S. E. 389; cited with approval in *Silcox v. Jones*, 80 S. C. 484, 61 S. E. 948.

And an injunction from another county is void.—As all orders of a court without jurisdiction are nullities, a temporary restraining order from a court in a county other than that in which the land lies in a condemnation case, is void and all the parties are not bound by it. *Augusta Power Co. v. Savannah River Elect. Co.*, 152 S. C. 295, 149 S. E. 924.

But it may be obtained afterwards in proper county.—An order holding that one court is without jurisdiction except to transfer a case in condemnation proceedings to the proper county does not prejudice in any way the rights of parties to apply to court of the proper county, or any judge thereof, for a restraining order or rule to show cause as they may be advised. *Augusta Power Co. v. Savannah River Elect. Co.*, 152 S. C. 295, 149 S. E. 924.

Lex situs determines venue for action for specific performance of contract to convey land.—Under this section the venue of an action for specific performance of a contract to convey land is the county where the land is located, notwithstanding the defendant was a resident of another county. *Barrow v. Gowdy*, 114 S. C. 122, 103 S. E. 477.

Because such action is to determine a right or interest in real property.—An action for specific performance of a contract to convey land is one to determine the right or interest of the grantee in the real property, the subject-matter being the land. *Barrow v. Gowdy*, 114 S. C. 122, 103 S. E. 477.

Lex situs determines venue of action for injury to realty.—Where a complaint alleges injury to real estate and defendant sets up an easement, and therefore an interest, in the land, the case should be tried in the county where such land is situated, and an order granting a change of venue on the ground that defendant's place of business is in another county is erroneous. *Stuckey v. Alderman*, 107 S. C. 426, 93 S. E. 126.

An action for damages upon real property which would have been sufficient to sustain the old action of trespass *quare clausum fregit* must be tried in the coun-

ty where the land lies, without regard to the residence of defendant. *Henderson v. Bennett*, 58 S. C. 30, 36 S. E. 2; cited with approval in *Pierce v. Marion Lumber Co.*, 103 S. C. 261, 88 S. E. 135.

The wrongful taking of stumps affixed to the soil is an "injury to realty."—*Stuckey v. Alderman*, 107 S. C. 426, 93 S. E. 126.

And so are damages to growing crops.—Damages to growing crops are an "injury to real estate" within this section. *Pierce v. Marion Lumber Co.*, 103 S. C. 261, 88 S. E. 135. See also *Tittle v. Kennedy*, 71 S. C. 1, 50 S. E. 544, 4 Ann. Cas. 68.

Action to enforce a lien must be brought where land lies.—A proceeding by a receiver against a member of an insurance company to enforce an assessment secured by realty, if it be a separate suit, must be brought in the county in which the property is situated. See *Wetmore v. Scaff*, 85 S. C. 285, 67 S. E. 298.

Petition for appointment of a trustee does not come under this section.—A petition for the appointment of a trustee to succeed a deceased trustee in a deed of trust conveying both real and personal property in trust is not an action for the recovery of real estate so as to be governed by this section. *Cone v. Cone*, 61 S. C. 512, 39 S. E. 748.

Nor an action to require an accounting for the value of real estate.—An action to require one to account for the value of real estate bought by him at a sheriff's sale under a judgment in favor of his trustee and sold by him to third persons at a large profit is an action purely, personal and not within the scope of this section. *Bell v. Fludd*, 28 S. C. 313, 5 S. E. 810.

Nor does action against an executor in which it is asked that lands be sold to pay creditors.—An action against an executor by creditors of the deceased testator to compel an accounting and to marshal the assets, for which purpose a sale of testator's lands is asked is not an action to recover any real property, or any estate or interest therein and therefore does not come under this section. *Jordan v. Moses*, 10 S. C. 431.

But section applies when the action is to set aside deeds of devisees to third parties and to subject the land.—An action against executrix, devisees, and others, to subject real estate devised or descended to the payment of the debts of the ancestor, and to vacate deeds of transfer made by the devisees and heirs to third parties, is an action "for the recovery of real property, or of an estate or interest therein, or for the determination of such right or interest," and must be tried in the county where the lands are located; the circuit court of any other county is without jurisdiction. Ba-

cot v. Lowndes, 24 S. C. 392.

In such action as the above, before the deeds can be set aside the interest and rights of said heirs must be determined and adjudicated, there being the issues raised and that will determine the jurisdiction of the court. *Id.*

A decree for partition rendered in the proper county may be signed in another county.—A decree rendered on a hearing for partition of land in the county wherein the land was situated but signed in another county conforms to this section and is valid. This practice is justified by necessity and the decisions. *Weathersbee v. Weathersbee*, 82 S. C. 4, 62 S. E. 838.

And an order of sale in partition may be granted at chambers.—A circuit judge has jurisdiction to grant an order of sale in partition, at chambers, without the consent of the parties in interest in a proceeding in the county where the land lies. See *Woodward v. Elliott*, 27 S. C. 368, 3 S. E. 477.

Though § 35 contains no limitation on the powers of judges at chambers, such limitation is found in this section and a judge may not, while sitting in chambers in one county, grant an order of sale in partition of land situated in another county. *Woodward v. Elliott*, 27 S. C. 368, 3 S. E. 477, 481.

As to powers of circuit judges at chambers, see § 37, and note thereto.

Foreclosure must be in county where land lies.—An action for foreclosure of a mortgage on land must be brought in the county in which the land is located, and the mortgagor cannot give the court of another county jurisdiction by consent to make a decree of foreclosure in a case commenced in such other county. *Silcox v. Jones*, 80 S. C. 484, 61 S. E. 948; cited with approval in *First Nat. Co. v. Strak*, 148 S. C. 410, 146 S. E. 240, 242. See also *Barrow v. Gowdy*, 114 S. C. 122, 103 S. E. 477; *Stuckey v. Alderman*, 107 S. C. 426, 93 S. E. 126; *Pierce v. Marion Lumber Co.*, 103 S. C. 261, 88 S. E. 135; *Ware v. Henderson*, 25 S. C. 385; *Bacot v. Lowndes*, 24 S. C. 392; *Steele v. Exum*, 22 S. C. 276.

Section 37 authorizing circuit judges to hear and determine at chambers actions for foreclosure is limited by this section requiring such actions to be tried in county where land lies, so that a judge of one county is without jurisdiction to order a purchaser at a foreclosure sale in another county to show cause why he failed to comply with the terms of his bid. *Kaminsky v. Trant-ham*, 45 S. C. 8, 22 S. E. 746.

Though ownership of the land be an issue.—Where in a foreclosure suit defendant claims that he is not the owner of the land, an order, on defendant's motion changing the place of trial from county in which land lies is erroneous in

view of this section, as the only way in which to determine defendant's ownership is by a trial of this kind and not by *ex parte* showing in nature of an affidavit. *First Nat. Co. v. Strak*, 148 S. C. 410, 146 S. E. 240.

If the defendant should finally win out on his contention that there was no mortgage, the record of such finding ought to be in the county where the land lies so that anyone searching the record could ascertain without a trip to another county how this mortgage was disposed of; as in after years a prospective buyer or lender of money seeing the mortgage would naturally inquire the result of the foreclosure, and it would be a hardship and unnecessary expense to have to send to another county for this information, as the record would be in one county and the lot of land in another county. *First Nat. Co. v. Strak*, 148 S. C. 410, 146 S. E. 240, 242.

And a person is presumed to know this.—If a person give a mortgage purporting to cover land in a certain county, he has only himself to blame if he has to meet the issue in that county as he is presumed to know the law that a mortgage must be foreclosed in the county in which the land is located. *First Nat. Co. v. Strak*, 148 S. C. 410, 146 S. E. 240.

And such is the venue though part only of the land be so situated.—An action to foreclose a mortgage brought in the county in which a part of the property is situated, and in which one of the defendants resides, gives the court jurisdiction of the whole matter, including judgment for deficiency against a defendant residing and served in another county. *Wagener v. Swygert*, 30 S. C. 296, 9 S. E. 107.

As to jurisdiction of actions in county where defendant resides, see § 422, post, and note thereto.

And in such case title to party in another county may be tried.—The question of title to land lying in one county might be tried in another county when in both counties there are lands claimed by defendants in an action to subject these lands to the payment of a decedent's debts. See *Barrett v. Watts*, 13 S. C. 441.

County in which personal property is situate is proper venue in claim and delivery action.—In an action for claim and delivery for possession of a horse, where the defendant, who had possession, resided in one county and the plaintiff and other defendant resided in the county where the action was brought, it was error to refuse a change of venue in the light of this section. *Williams v. Rollins*, 107 S. C. 440, 93 S. E. 1. See also *All v. Williams*, 87 S. C. 101, 68 S. E. 1041, *Ann. Cas.* 1912 B. 837.

The remedy for noncompliance in such cases being motion for change of place of trial.—When an action for claim and delivery of personal property is brought in a county other than that in which the property is situated at the commencement, the venue should be changed to the proper county, to conform to this section, not by demurrer to the jurisdiction but by motion for an order to change the place of trial. All v. Williams, 87 S. C. 101, 68 S. E. 1041, Ann. Cas. 1912 B. 837.

As to provisions pertaining to power of court to change place of trial, see § 426 and note thereto.

But such is not the necessary venue in action for conversion.—It seems that while actions for claim and delivery must be brought in county in which property is situated, an action for conversion is not governed by this section but by § 422, post, and may be brought in the county of any defendant regardless of place of the personal property. See Williams v. Rollins, 107 S. C. 440, 93 S. E. 1, and case cited therein.

Consent to trial elsewhere does not have to be in writing.—This section which allows a trial out of the proper county by the consent of the parties does not require the consent to be in writing and the absence of such written consent will have no effect if the agreement is admitted or has been carried into effect. Pearson v. Breeden, 79 S. C. 302, 60 S. E. 706.

Suit to set aside deed, being one "affecting title to real property," is properly brought where land situated, though based on fraud. Dickerson v. Oliphant, 160 S. E. 288, 158 S. E. 546.

Claim and delivery, truck temporarily out of county of owner's residence.—

Where mortgagee brought action in claim and delivery based on past due mortgage for possession of truck and trailer in Jasper County when truck and trailer were temporarily in that county, though mortgagor was resident and ordinarily kept truck and trailer in

another county, mortgagor's motion for change in venue under statute on ground that action was not properly brought in Jasper County was properly refused, since action must be tried in county in which the subject of the action is situated. Smith v. Thomas, 184 S. C. 498; 193 S. E. 51.

Action for damages for forcible opening of door to house, and removal of safe is triable as an action for trespass upon real estate in county in which plaintiff's premises were located, without reference to defendant's residence. Bethea v. Home Furniture Co., 185 S. C. 271, 194 S. E. 10.

"Subject of action" defined; no suit in this state on bond of administrator executed in North Carolina.—The "subject of an action" is neither the "cause of action" or the "object of the action" but it is the matter or thing, differing from the wrong or the relief, in regard to which the controversy has arisen or concerning which the wrong has been done, and this ordinarily is the property or the contract and its subject-matter, or other thing involved in the dispute. Knight v. Fidelity & Casualty Co. of New York, 184 S. C. 362; 192 S. E. 558.

The undertaking of a surety on an administrator's bond which was executed in North Carolina to insure the faithful performance of administrator's duties in clerk of the superior court of county in that state and made payable to the that state, was a North Carolina contract relating to matter wholly within the jurisdiction of the courts of that state as respects action to recover for alleged defalcation of such administrator. Knight v. Fidelity & Casualty Co. of New York, 184 S. C. 362; 192 S. E. 558.

The "subject of action," whether legal or equitable, is plaintiff's main primary right which has been broken and as result of whose breach a remedial right arises. Knight v. Fidelity & Casualty Co. of New York, 184 S. C. 362; 192 S. E. 558.

§ 421. Actions to be tried where cause of action arose.—Actions for the following causes must be tried in the county where the cause, or some part thereof, arose, subject to the like power of the court to change the place of trial:

(1) For the recovery of a penalty or forfeiture imposed by statute, except that, when it is imposed for an offense committed on a lake, river, or other stream of water, situated in two or more counties, the action may be brought in any county bordering on such lake, river, or stream, and opposite to the place where the offense was committed.

(2) Against a public officer, or person specially appointed to execute his duties, for an act done by him in virtue of his office, or against a person who by his command or in his aid, shall do anything touching the

duties of such officer.

1932 Code, § 421; Civ. P. '22, § 377; Civ. P. '12, § 173; Civ. P. '02, § 145; 1870 (14) § 147.

See the precedings and following sections and notes thereto.

Language of section is imperative.—The language used in this section is imperative and cannot be disregarded. Ware v. Henderson, 25 S. C. 385; cited with approval in Riddle v. Reese, 53 S. C. 198, 31 S. E. 222. See also Fishburne v. Minott, 72 S. C. 572, 52 S. E. 646; Trappier v. Waldo, 16 S. C. 276; Steele v. Exum, 22 S. C. 276; Bacot v. Lowndes, 24 S. C. 392.

General rule is that defendant has right of trial in own county of transitory action.—The general rule is that a sole defendant has the right to have a transitory cause of action against him tried in the county of his residence. Darby v. Southern R. R. Co., 108 S. C. 145, 93 S. E. 716.

But that right may be waived. Darby v. Southern R. R. Co., 108 S. C. 145, 93 S. E. 716, 718.

And this section is an exception to general rule.—This section is an exception to the general rule that defendant has the right to be tried in his own county in a transitory action against him. Darby v. Southern R. R. Co., 108 S. C. 145, 93 S. E. 716.

But is modified by § 7170.—The provisions of this section as to the venue of an action for statutory penalties are modified by § 7170 providing for place of trial of claims for penalty on freight claim. Darby v. Southern R. R. Co., 108 S. C. 145, 93 S. E. 716.

A railroad company may be sued in any county in which it is a resident for loss or damage to freight, and for the penalty, and both causes of action against it may be united in the same complaint. Darby v. Southern R. R. Co., 108 S. C. 145, 93 S. E. 716. But see Riley v. Southern Ry. Co., 81 S. C. 387, 62 S. E. 509 which was decided prior to the enactment of § 7170.

As to the provisions for the place of trial of claims for penalty on freight claims see § 7170.

This section is a statutory requirement as to procedure merely.—This section as to venue of actions for penalty is a mere statutory requirement as to procedure, but it cannot be successfully contended that it constitutes the subject-matter of the action. Jenkins v. A. C. L. Ry. Co., 84 S. C. 343, 66 S. E. 409.

And compliance therewith is waived by pleading to merits.—Where defendant R. R. Co. contested a case in the magistrate's court on its merits in an action for damages and penalty for loss of goods, an objection that the magistrate was without jurisdiction because

the action was not brought in the county where the cause of action arose, was waived. Jenkins v. A. C. L. Ry. Co., 84 S. C. 343, 66 S. E. 409.

As to civil jurisdiction of magistrates in action on penalties, see § 257, subd. 3, ante, and note thereto.

County in which a loan is made is venue for action for penalty for usurious interest.—Under this section an action to recover a penalty for receiving usurious interest on a contract for the landing of money should be instituted in the county where the loan was made and in which the land that was mortgaged to secure the loan was located. All v. Mortgage Co., 104 S. C. 239, 88 S. E. 529.

Members of state board of veterinary examiners are public officers under this section.—Under subd. 2 of this section a circuit court has jurisdiction of an action to compel state board of veterinary examiners to issue license though none of board resided in county where suit was brought. Gregory v. McInnis, 140 S. C. 48, 134 S. E. 527.

Action against board of commissioners of the police insurance and annuity fund is a proceeding against a public officer or board and falls under this section; hence properly brought in Florence county, where claimant was a police officer, in connection with which official status his claim arose, and not in Richland county, where defendant has its offices and official residence. Baldwin v. Board of Commissioners of Police Insurance and Annuity Fund of S. C., 196 S. C. 112, 12 S. E. (2d) 846.

Not applicable to actions against state highway department.—This section not applicable to action against state highway department brought under § 5887 for negligent repair of state highway. Landrum v. State Highway Dept., 168 S. C. 139; 167 S. E., 164.

Nor to action against game warden for unlawful arrest in excess of his authority.—A game warden against whom, as an individual, an action for unlawful arrest and false imprisonment was brought for having arrested plaintiff without process while plaintiff was on a public road and not violating any game law, was not entitled to have case transferred to county in which acts were committed in preference to county in which action was brought, since such arrest was in excess of warden's authority and, under statute, warden as an official would be entitled to trial in county where cause arose only for acts performed within the scope of his authority. Into v. Georgia Cypress Co., 185 S. C. 437; 194 S. E. 336.

Title to state office must be tried at

the seat of state government.—An action to try the title to a state office does not come under subd. 2 of this section but the place of trial is at the seat of the state government where the office is left. *State v. Gibbes*, 109 S. C. 135, 95 S. E. 346.

Residence of defendants immaterial.—Under this section providing for venue in actions against public officers, the fact that some of an officer's co-defendants live in a county other than the one in which the cause of action arose does not give the right to sue in such other county. *Fishburne v. Minott*, 72 S. C. 572, 52 S. E. 646.

Section does not directly apply to mandamus proceedings.—This section relating to the place of trial of civil actions does not directly apply to proceedings in mandamus. *State v. Smith*, 50 S. C. 558, 27 S. E. 933. See also *State*

v. Scarborough, 70 S. C. 288, 49 S. E. 860.

As to the provisions for the place of trial of issues joined in mandamus proceedings, see § 849, post, and note thereto.

And a circuit judge at chambers in another circuit cannot pass on mandamus from own circuit.—A circuit judge while holding court in a circuit other than his own, has no jurisdiction, under this section, to hear and determine at chambers, in such other circuit, an application for mandamus in a cause which arose in his circuit. *State v. Smith*, 50 S. C. 558, 27 S. E. 933.

A "cause of action" is a legal wrong threatened or committed against the complaining party, whereas the "object of the action" is to prevent or redress wrong by obtaining some legal relief. *Knight v. Fidelity & Casualty Co. of New York*, 184 S. C. 362; 192 S. E. 558.

§ 422. Actions to be tried in county where defendant resides—proviso.—

In all other cases the action shall be tried in the county in which the defendant resides at the time of the commencement of the action; and if there be more than one defendant, then the action may be tried in any county in which one or more of the defendants to such action resides at the time of the commencement of the action; or if none of the parties shall reside in the State, the same may be tried in any county which the plaintiff shall designate in his complaint, subject, however, to the power of the court to change the place of trial in the cases as provided by law: *provided*, that any administrator or administratrix, heretofore or hereafter appointed by any probate court of this State, may be sued in the county where such administration has or shall be granted; any executor or executrix may likewise be sued in the county where the testator's will is proved or admitted to probate; and any guardian may likewise be sued in the county in which the letters of guardianship may be issued: *provided*, that nothing in this section contained shall be so construed as to prevent the hearing of any of the said actions by consent of the parties or their attorneys and of the guardian ad litem of any infant party to said action, in a county other than that in which said action may have been brought and may be pending, or other than that in which the property is situated.

1932 Code, § 422; Civ. P. '22, § 378; Civ. P. '12, § 174; Civ. P. '02, § 146; 1870 (14) § 148; 1875 (15) 913; 1898 (22) 687; 1905 (24) 848.

This section is expressly subject to the imperative provisions of § 421. *Fishburne v. Minott*, 72 S. C. 572, 52 S. E. 646.

Language of section is imperative.—The language in this section is imperative and not to be disregarded. It clearly implies that a case cannot be tried elsewhere than in the place appointed for the purpose, unless the place of trial be changed under § 426, and if tried elsewhere the trial and judgment entered therein are nullities for want of jurisdiction. *Ware v. Henderson*, 25 S. C. 385, cited in *Riddle v. Reese*, 53 S. C. 198, 31 S. E. 222; *Blakely v. Frazier*, 11 S. C. 122;

Trapier v. Waldo, 16 S. C. 276; *Bacot v. Lowndes*, 24 S. C. 392.

Residence is question of fact.—Residence of defendant moving for change of venue is a question of fact and depends upon intention as evidenced by his acts and declarations. *Sample v. Bedenbaugh*, 158 S. C. 496, 155 S. E. 828; *Barfield v. Coker*, 73 S. C. 181, 53 S. E. 170. See also *Riddle v. Reese*, 53 S. C. 198, 31 S. E. 222; *Le Hardy, etc., Co. v. Dibble*, 80 S. C. 482, 61 S. E. 950.

Change of residence so as to affect jurisdiction is not shown by the mere fact of defendant's arrest, imprisonment, and

escape. *Riddle v. Reese*, 53 S. C. 198, 31 S. E. 222.

And finding as to residence is usually conclusive.—Finding as to defendant's residence on motion for change of venue is conclusive unless wholly unsupported by testimony. *Sample v. Bedenbaugh*, 158 S. C. 496, 155 S. C. 828.

But where facts are admitted, whether defendant is a resident of county is question of law. *Shelton v. Southern Kraft Corp.*, 195 S. C. 81, 10 S. E. (2d) 341.

Residence for venue may be "actual" residence as distinguished from "legal" residence, and college student, whose parents' home is in another county, may be sued in county in which college is located. *Roof v. Tiller*, 195 S. C. 132, 10 S. E. (2d) 333.

But action on notes must be tried in county which defendant considered his permanent residence, and where he voted and owned farm, though his wife owned property in another county where he actually resided, and was employed by federal government and where he had his headquarters. *American Agricultural Chemical Co. v. Smith*, 173 S. C. 158, 175 S. E. 275.

Supreme Court's prior ruling as to jurisdiction is conclusive.—Where the Supreme Court on a prior appeal ruled that the lower court had jurisdiction over one of the two defendants an objection to the jurisdiction was properly overruled. *Elms v. So. Power Co.*, 79 S. C. 502, 60 S. E. 1110.

Place of last residence of defendant may be venue.—An action for an accounting against a non-resident may be brought in the county where he resided prior to his leaving the state. *Carolina Agency Co. v. Garlington*, 85 S. C. 114, 67 S. E. 225.

No specific legislation on venue of action against domestic corporations.—It seems that there is no specific legislation in South Carolina upon the subject of the place of trials of actions against domestic corporations. *Bass v. Products Corp.*, 124 S. C. 346, 117 S. E. 594, 30 A. L. R. 168n; *Tobin v. R. R. Co.*, 47 S. C. 387, 25 S. E. 283, 58 Am. St. Rep. 890.

But this section is said to be applicable to domestic corporations.—In a dissenting opinion it is said that this section is applicable as well to individuals as to domestic corporations. *Bass v. Products Corp.*, 124 S. C. 346, 117 S. E. 594, 30 A. L. R. 168n, and the cases quoted from and cited therein.

And it may be sued in any county where it has an agent and conducts its business.—In the absence of a statute confining residence to a particular county, a domestic corporation is a resident in any county in the State where it maintains an agent and conducts its corporate business and under this section must be sued in such county. *Elms v.*

So. Power Co., 78 S. C. 323, 58 S. E. 809. See also *McGrath v. Piedmont Mut. Ins. Co.*, 74 S. C. 69, 54 S. E. 218; *Nixon v. Piedmont Mut. Ins. Co.*, 74 S. C. 438, 54 S. E. 657. See also *Patterson v. Orangeburg Fertilizer Co.*, 120 S. C. 478, 113 S. E. 318; *Tucker v. Ingram*, 187 S. C. 525, 198 S. E. 25; *Willis v. Industrial Life & Health Ins. Co.*, 192 S. C. 304, 6 S. C. (2d) 706.

A railroad corporation is a resident of a county where its line is located, and where it maintains a public office, and an agent upon whom process may be served. *Tobin v. R. R. Co.*, 47 S. C. 387, 25 S. E. 283, 58 Am. Ct. Rep. 890.

The "residence" of a domestic corporation and place where corporation may be sued is the county where its principal place of business is fixed by its charter, and in any county where it has and maintains a place of business, or an agent engaged in conducting and carrying out the business for which it exists. *Morris v. Peoples Baking Co.*, 191 S. C. 501, 5 S. E. (2d) 286.

In tort action against domestic corporation engaged in manufacturing and delivering bakery products, finding that corporation had agent and conducted its corporate business in county in which action was brought so as to support venue in such county was supported by evidence, where it was shown that three of corporation's salesmen resided in county and each had delivery truck of corporation with name of salesman as "agent" printed on it, and that corporation maintained warehouse in county for temporary storage of its products and rented garage for housing of trucks. *Ibid.*

Where none of parties are residents, plaintiff may designate county of trial.—Where none of the parties to an action reside in this state, the county designated by the plaintiff is the proper county for the trial. *Steele v. Exum*, 22 S. C. 276.

And plaintiff may elect venue in action against foreign corporation.—Under this section, a plaintiff may elect in which county he will sue a foreign corporation. *Dennis v. A. C. L. Ry. Co.*, 86 S. C. 258, 68 S. E. 465.

An action against a foreign corporation may be brought in any county the plaintiff elects, and if the corporation appear and admits that it is a foreign corporation, the court acquires jurisdiction which cannot be overthrown by showing that defendant had become domesticated. *Elms v. So. Power Co.*, 78 S. C. 323, 58 S. E. 809.

Under this section, a court of common pleas would have jurisdiction of an action against a foreign fire insurance company, though the company had no agent in that county and the policy was issued in another county, where the insured property was located and in

which plaintiff resided at the time of loss. *Berry v. Insurance Co.*, 83 S. C. 13, 64 S. E. 859.

As to provisions for actions against foreign corporations and where and by whom brought, see § 826, ante, and note thereto.

And action against a resident and a foreign corporation may be transferred to county of resident.—A resident sued with a foreign corporation may, under this section, compel the case to be transferred for trial to the county of his residence, if the name is laid in any other county. *Barfield v. Oil Co.*, 87 S. C. 322, 69 S. E. 603.

In this case neither of the defendants appeared on the record as residents of the county from which the cause was adjudged to be transferrable. See *Hayes v. Ry. Co.*, 98 S. C. 6, 81 S. E. 1102, wherein this case was distinguished.—Ed. note.

Where foreign corporation has no agent or office in county of forum, and its codefendant resides elsewhere, venue should be changed to codefendant's residence. *Campbell v. Mutual Ben. Health & Acc. Ass'n*, 161 S. C. 49, 159 S. E. 490; *Tucker v. Ingram*, 187 S. C. 525, 198 S. E. 25.

But only if foreign corporation has no residence in the state.—A foreign corporation having a railroad running through a county and maintaining offices and agents therein is a resident thereof within this section and it is error to transfer the cause to the county where another defendant resides. *Hayes v. Ry. Co.*, 98 S. C. 6, 81 S. E. 1102; *Tucker v. Ingram*, 187 S. C. 525, 198 S. E. 25; *Warren v. Smith*, 190 S. C. 8, 1 S. E. (2d) 900.

Joinder of co-defendant merely to bring action in county other than real defendant's residence.—Statute providing that action shall be tried in any county in which one or more of the defendants reside at time of commencement of action, means a material and bona fide defendant against whom a cause of action has been stated. *White v. Nichols, et al.*, 190 S. C. 45, 1 S. E. (2d) 916.

Upon motion for change of venue timely made, court will inquire into facts of case sufficiently to determine the probability of a defendant being material when venue is dependent upon such defendant. *Ibid.*

In determining whether a defendant is immaterial and has been joined merely for purpose of permitting an action to be tried in a county other than county where real defendant or defendants reside, the fact that the complaint states a cause of action against the challenged defendant or that the same testimony given on hearing of case on merits would require issue of liability of such defendant to be submitted to jury does not nec-

essarily govern. *Ibid.*

In determining whether a defendant has been joined merely for purpose of permitting an action to be tried in county other than where real defendant or defendants reside, the judge before whom motion is made sits both as judge and jury. *Ibid.*

In motorcyclist's action for injuries sustained when struck by overtaking automobile of defendants who were not residents of county after motorcyclist had decreased speed because resident motorist had allegedly entered intersection without stopping at stop sign, under evidence of nonresident defendants that resident motorists had not entered intersection and that resident motorist was not guilty of negligence proximately causing accident, denial of nonresident defendant's motion for change of venue was error. *Ibid.*

But if it admits its foreign character it will be so treated though domesticated.—When a corporation appears and answers in a suit against it, admitting that it is a foreign corporation, it will be so considered for the purposes of jurisdiction under this section though it be shown afterwards that it had been domesticated. See *Elms v. So. Power Co.*, 78 S. C. 323, 58 S. E. 809.

This section is applicable to confessions of judgment.—A confession of a judgment can be entered only in the county in which the judgment could have been obtained by an action under this section, namely, the county wherein the defendant resides. *Ex parte, Ware Furniture Co.*, 49 S. C. 20, 27 S. E. 9.

And it applies to actions to set aside judgments and a sale of property thereunder.—An action to set aside a judgment, and sale of property thereunder, and for an accounting, is a personal action, and under this section, must be brought in the county where one or more of the defendants reside. *Bell v. Fludd*, 28 S. C. 313, 5 S. E. 810.

Suit against partners of different residences on partnership debt.—A justice of the county wherein resides a partner in a firm of three partners has jurisdiction, under this section, of an action against the three partners for the amount of a debt contracted by the partnership. *Strickland v. Strickland*, 95 S. C. 492, 79 S. E. 520.

The court of the county wherein resides one of the partners of a partnership has jurisdiction to try an action against the partnership and partners on a debt and appoint a receiver for the partnership assets. *Whilden v. Chapman*, 80 S. C. 84, 61 S. E. 249.

Action on a note against maker, indorser, and guarantor of different counties.—Where a complaint starts a cause of action against a maker and an indorser of a note, and a cause of action against

the guarantors, who live in different counties, the circuit court of either county has jurisdiction under this section in the absence of demurrer for improper joinder of causes of action. *Bank v. Adams*, 125 S. C. 210, 118 S. E. 417.

Transfer of suits to newly formed counties.—The court of a new county has jurisdiction of an action against two defendants, one of which resided in the new county formed from a portion of an old county, as the act forming the new county provided for the transferring of all pending suits from old counties to dockets of such new county. *Norris v. Clinkscales*, 59 S. C. 232, 37 S. E. 821.

Action against members of insurance company must be in his county.—A proceeding by a receiver, appointed in an action against a mutual fire insurance company against a member of the company, if regarded as a separate suit, must be brought in the county in which the member is a resident and in which the property alleged to be subject to a lien is situated. *Wetmore v. Scaff*, 85 S. C. 285, 67 S. E. 298.

And such action determines rights of other defendants residing elsewhere.—An action to foreclose a mortgage brought in the county of one defendant's residence, which was also the county wherein a part of the property was situated, gives the court jurisdiction over another defendant residing elsewhere for a deficiency in payment. *Wagener v. Swygert*, 30 S. C. 296, 9 S. E. 107.

A party may waive the provisions of the statute as the place of trial. *Jones v. Telegraph Co.*, 91 S. C. 273, 74 S. E. 492; *Jenkins v. R. R. Co.*, 84 S. C. 343, 66 S. E. 409; Cited in *Hodge v. Sovereign Camp*, 134 S. C. 343, 132 S. E. 822.

A party who consents to have the issues of an action begun in his county tried in another county and procures an order, dismissing the action in his county and transferring the issues to the other county, waives the right to have the cause subsequently removed back to his county. *Hodge v. Sovereign Camp*, 134 S. C. 343, 132 S. E. 822.

Absolute statutory right of defendant to be sued in county or residence should be claimed when defendant is apprised of action and before he has pleaded thereto, and if negligence is shown in his failure to claim such right at the proper time, he will be held to have waived it, since question of jurisdiction over person rather than over subject-matter. *Rosamond v. Lucas-Kidd Motor Co., Inc.*, 182 S. C. 331, 189 S. E. 641.

Unless the jurisdiction depends on residence of defendant.—It seems that when the jurisdiction depends on the residence of the defendant, the question relates to jurisdiction of the subject matter and cannot be waived. See *Nixon*

v. Insurance Co., 74 S. C. 438, 54 S. E. 657; *McGrath v. Insurance Co.*, 74 S. C. 69, 54 S. E. 218; *Bell v. Fludd*, 28 S. C. 313, 5 S. E. 810; *Ware v. Henderson*, 25 S. C. 385. But see *Garrett v. Herring Co.*, 69 S. C. 278, 48 S. E. 254; *Baker v. Irvine*, 62 S. C. 293, 40 S. E. 672. If the jurisdiction depends on service of summons, it relates to the jurisdiction of the person and may be waived, which may be done by a general appearance. See *Nixon v. Insurance Co.*, supra, and cases cited therein. See also *Jenkins v. R. R. Co.*, 84 S. C. 343, 66 S. E. 409, and cases cited therein; *Riddle v. Reese*, 53 S. C. 198, 31 S. E. 222.

But contest on the merits is not always a waiver of right to trial in own county.—Where a defendant appears specially and answers to the merits to prevent default judgment, but subject to a motion previously made to have the case transferred to his own county as was his right under this section, he does not submit to the jurisdiction or waive this right to transferring the case to his own county. *Barfield v. Oil Co.*, 87 S. C. 322, 69 S. E. 603.

Non-resident defendant waives want of jurisdiction by failure to appear when notified.—Where a defendant in a claim and delivery action in a magistrate's court did not reside within the territorial jurisdiction of the court and did not appear, though duly notified, he waived the want of jurisdiction over him, and a default judgment was valid. *Rogers v. Townes*, 97 S. C. 56, 81 S. E. 278. But note dissenting opinion.

As to constitutional provisions for trials and place of trials in magistrate's courts, see constitution of 1895, art. 5, § 23.

A party cannot confer jurisdiction by consent.—Where an act created a new county out of portions of old counties and provided for a transfer of all the pending suits in those portions to the new county, a court of one of the portions of the old county is deprived of jurisdiction of such an action, though defendant consents to trial by it. *Riddle v. Reese*, 53 S. C. 198, 31 S. E. 222.

But a subsequent act of law may direct jurisdiction already established.—It seems that a jurisdiction once established cannot be directed by any subsequent event arising out of acts or omissions of the parties, but it can be so directed by subsequent acts of law provided no constitutional limitations are transgressed. See *Riddle v. Reese*, 53 S. C. 198, 31 S. E. 222.

Jurisdiction of person is determined by service within state.—The court's jurisdiction of the person of a defendant is not determined by the fact of his non-residence, but by the fact of personal service of process within the State. *Wil-*

Williams v. Simon, 128 S. C. 315, 122 S. E. 772.

The fact appearing upon the face of the complaint that the defendant is a non-resident is not such affirmative showing that the court has no jurisdiction of the defendant's person as will sustain a demurrer. Williams v. Simon, 128 S. C. 315, 122 S. E. 772.

Available equitable remedy must be implied for equity of other county to take jurisdiction.—Where no facts are alleged showing plaintiff's remedy at law inadequate, equity will not assume jurisdiction on theory of existence of an equitable lien enforceable in a county other than that in which legal rights of parties would be adjudicated if alleged equitable remedy is not implied in view of this section. Gravel Co. v. Blassingame, 129 S. C. 18, 123 S. E. 324.

The question of jurisdiction may be first raised in the Supreme Court. McGrath v. Insurance Co., 74 S. C. 69, 54 S. E. 218; Riddle v. Reese, 53 S. C. 198, 31, S. E. 222; Bell v. Fludd, 28 S. C. 313, 5 S. E. 810; Ware v. Henderson, 25 S. C. 385; State v. Penny, 19 S. C. 218.

The disobedience of an order made by a court without jurisdiction is not a contempt. State v. Nathans, 49 S. C. 199, 27 S. E. 52; cited in State v. Scarborough, 70 S. C. 288, 49 S. E. 860, 861.

This section does not directly apply to proceedings in mandamus. State v. Smith, 50 S. C. 558, 27 S. E. 933; cited in State v. Scarborough, 70 S. C. 288, 49 S. E. 860.

But proceedings in mandamus are triable in the county where respondent resides. State v. Smith, 50 S. C. 558, 27 S. E. 933.

As to provisions for venue on issues raised in mandamus proceedings, see § 849, post, and note thereto.

Death of resident defendant does not affect jurisdiction.—After first trial resident defendant died, then sole surviving defendant, resident of another county, moved for a transfer of the cause to county where its residence was, held that county of deceased defendant still had jurisdiction, and motion for transfer denied. Halsey v. Minnesota-S. C.

Land and Timber Co., 168 S. C. 18; 166 S. E. 626.

Suit on a note is a transitory action, triable in county of maker's residence, though note was executed in another state. Odell Hardware Co. v. Scarborough's, Inc., 186 S. C. 370, 195 S. E. 631.

Defendant sued on note in wrong county must make motion to move to proper county before time to answer expires.—Jurisdiction of subject matter cannot be waived even by consent, however jurisdiction of the person may be waived; hence defendant, who is sued on a note in county other than the county in which he lives, waives jurisdiction by not making motion to move cause to proper county before his time to answer expires. The motion to move comes too late after judgment is entered. Lillard v. Searson, 170 S. C. 304; 170 S. E. 449.

Attachment proceedings against truck in county where injury occurred and truck is found, cannot be extended to give court jurisdiction of owner and driver who are non-residents of county, since provision of this section to effect that if there be more than one defendant, action may be tried in any county in which one or more of defendants resides, has reference only to personal defendants residing in different counties. Mahon v. Burkett et al., 160 S. C. 48, 158 S. E. 141.

Action for damages for alleged forcible removal from plaintiff's house of safe, from which defendant's agent first removed the dishes, etc., over the protest of plaintiff's wife, and for the forcible opening of plaintiff's locked front door with a hammer or hatchet, was triable as an action for trespass upon real estate in county in which the plaintiff's premises were located, without reference to defendant's residence. Bethea v. Home Furniture Co., 185 S. C. 271; 194 S. E. 10.

Court has jurisdiction at chambers to order place of trial changed to proper county. Ex parte Jones, 160 S. C. 63, 158 S. E. 134.

Writ of prohibition could not be invoked on ground court lacked jurisdiction because defendant did not reside in county of suit. Ibid.

§ 423. Suits against insurance companies may be brought in county where loss occurs.—All suits brought against any and all fire, life, or other insurance companies doing business in this State, may be brought in the county where the loss occurs: *provided, however*, that nothing herein contained shall be so construed as to prevent the court from changing the place of trial for any of the causes provided for in section 426.

1932 Code, § 423 and 7997; Civ. P. '22, § 379; Civ. P. '12, § 175; Civ. C. '22, § 4111; Civ. C. '12, § 2732; 1906 (25) 111.

Statute inapplicable in suit against insurance company for refusal to deliver policy.—The place of venue in suit to

recover against insurance company on account of alleged wrongful acts of defendant in failing and refusing to issue

and deliver to plaintiff a certain policy of insurance which plaintiff alleges defendant contracted to deliver, is determined by the law applicable to other domestic corporations doing business in this state, and not by this section. *Harrison v. Carolina Mut. Ben. Corporation of South Carolina*, 174 S. C., 338; 177 S. E., 395.

Failure of plaintiff in suit against insurance company for failure and refusal to deliver policy to serve defendant's agent in first county, if defendant had an agent in said county, entitled defendant to transfer case to court in another county, in which service was made upon officer of defendant where defendant's home office is located. *Ibid*.

§ 424. Suits by mutual life and fire insurance companies against members.—All suits instituted by mutual life insurance companies and mutual fire insurance companies heretofore formed in this State or hereafter formed in this State, against a member or former member of said companies, or any receiver of said companies against any member or former member of any such companies, shall be brought in the county in which such member resides.

1932 Code, § 424; Civ. P. '22, § 380; 1912 (27) 776.

§ 425. When such suit to be removed.—Wherever any such suit or proceeding has been brought, either as an independent suit or an ancillary proceeding to a receivership suit, in any county other than the county where the member or former member resides, the court where such proceeding is pending shall, upon motion of such member or former member sued, on affidavit showing that he resides in a different county, remove such suit or proceeding to the county where such member or former member resides for trial.

1932 Code, § 425; Civ. P. '22, § 381; 1912 (27) 776.

§ 426. Changing place of trial.—The court may change the place of trial in the following cases:

(1) When the county designated for that purpose in the complaint is not the proper county.

(2) When there is reason to believe that an impartial trial cannot be had therein.

(3) When the convenience of witnesses and the ends of justice would be promoted by the change.

When the place of trial is changed, all other proceedings shall be had in the county to which the place of trial is changed, unless otherwise provided by the consent of the parties, in writing, duly filed, or order of the court; and the papers shall be filed or transferred accordingly.

1932 Code, § 426; Civ. P. '22, § 382; Civ. P. '12, § 176; Civ. P. '02, § 147; 1870 (14) § 149; 1879 (17) 14.

Section 35 should be consulted in connection with this section.

Editor's note.—A former standing of this section provided, "if the county designated for that purpose in the complaint be not the proper county, the action may, notwithstanding, be tried there unless the defendant, before the time for answering expire, demand in writing that the trial be had in the proper county, and the place of trial be, therefore, changed by consent of parties or by the order of the court, as is provided in this section." See *Nixon & Danforth v. Piedmont Mut. Ins. Co.*, 74 S. C. 438, 54 S.

E. 657, 658, and the cases cited therein, which show that under this provision an answer to the merits was a waiver of the objection to the jurisdiction. But since this provision has been stricken out, there seems to be no foundation for such a holding. See the cases cited herein on the question of jurisdiction and waiver and also in the notes to preceding sections of this title on the same questions.

Section 35, providing for circuit judge's power to change the venue, is

often cited along with this section to authorize a change. It has been deemed expedient to place these annotations under section 35, ante, to which the practitioner is referred.

Section is constitutional.—Const. 1895, Art. 6, § 2 providing for a change of venue on one ground only is not exhaustive and does not preclude the legislature from enacting this section. *Utsey v. R. R. Co.*, 38 S. C. 399, 17 S. E. 141.

This section not affected by limitation of powers to change venue in § 35.—Section 35, relates only to a change of venue because a fair and impartial trial cannot be had in county of the venue, but it does not affect the court's power to change the venue on the other grounds specified in this section. *Hanley v. Light & Water Co.*, 110 S. C. 340, 96 S. E. 519.

Nor by section 422. *Williamson v. E. R. Squibb & Sons*, 30 F. S. 629.

Court without jurisdiction may remove cause but cannot dismiss the action.—A court in an action against a non-resident of the county may not dismiss the action for want of jurisdiction, but may remove the cause to the proper county for trial. *Rafield v. R. R. Co.*, 86 S. C. 324, 68 S. E. 631; *Geiser v. Sanders*, 26 S. C. 70, 1 S. E. 159. See also, *Bell v. Fludd*, 28 S. C. 313, 5 S. E. 810; *Steele v. Exum*, 22 S. C. 276; *Ware v. Henderson*, 25 S. C. 385.

There may be a full jurisdiction, or a limited jurisdiction in courts, determined by the law which confers it. This section confers upon the courts of this state jurisdiction to the extent of changing the place of trial. *Steele v. Exum*, 22 S. C. 276, cited in *Rafield v. R. R. Co.*, 86 S. C. 324, 68 S. E. 631. See, also, *All v. Williams*, 87 S. C. 101, 68 S. E. 1041.

And it is its imperative duty to order such removal. *Blakely v. Frazier*, 11 S. C. 122.

But change cannot be made if present venue is proper.—Affidavits to the effect that defendant was not the owner of the lands subject to foreclosure in an action to foreclose a mortgage did not authorize a change of venue from the county in which the land was located under sub'd. 1 of this section. *First Nat. Co. v. Strak*, 148 S. C. 410, 146 S. E. 240.

Where a complaint stated that defendant was a non-resident and owned the railroad through that county, the court of that county, in which the action is brought, must determine the issue of fact whether the company operated the line or only the trains over the line which the defendant claims is owned by another, so that on finding the complaint true, it could properly refuse to transfer the case. *Rafield v. R. R. Co.*, 86 S. C. 324, 68 S. E. 631.

A defendant whose principal place of business is in one county may be sued

in another county in which it has an agent conducting its business, and is not entitled to a change of venue to the county of its principal business, under sub'd. 1 of this section. *Patterson v. Fertilizer Co.*, 120 S. C. 478, 113 S. E. 318. See also, *Fair v. Lumber Co.*, 113 S. C. 460, 101 S. E. 845.

As to the provision for trials of actions in the county of defendant's residence, see § 422, ante, and note thereto, wherein it is pointed out that a domestic corporation may be sued in the county in which it maintains an agent and conducts business.

Action brought in county of nominal defendant may be changed to proper county.—An action against certain defendants for damages in an alleged fraudulent sale of property, one of whom had no connection with the sale except as an agent of the plaintiffs but who was made a defendant to justify the venue in his county, was not brought in the proper county and may be transferred under sub'd. 1 of this section. *Adams v. Fripp*, 108 S. C. 234, 94 S. E. 109.

Court's findings of defendant's non-residence not reviewable on appeal.—The findings of the court on a motion to transfer a case on the ground that defendant is a non-resident of the county are not reviewable by the Supreme Court on appeal. *Rafield v. R. R. Co.*, 86 S. C. 324, 68 S. E. 631.

An answer to the merits does not always waive right to change of venue.—A right to a change of venue is not waived by an answer to the merits, where the jurisdiction of the court from which the change is made is defective, not as to the person, but as to the subject-matter. *Nixon v. Insurance Co.*, 74 S. C. 438, 54 S. E. 657. See, also, *Baker v. Irvine*, 62 S. C. 293, 40 S. E. 672; *Garrett v. Herring Furniture Co.*, 69 S. C. 278, 48 S. E. 254.

When the jurisdiction depends on the residence of the defendant.—See this catchline in note to § 422, ante, wherein is discussed the distinction between jurisdiction of the person and of the subject-matter.

And this is true of a special appearance.—An appearance by defendant for the purpose of questioning the jurisdiction of the court and pleading only to such, alleging that it is a non-resident, is not a waiver of the right to object that the action was brought in the wrong county. *Rafield v. R. R. Co.*, 86 S. C. 324, 68 S. E. 631.

Four days' notice must be given.—See this catchline in note to § 35, ante.

A motion for a change of venue because the action is brought in the wrong county may be made at chambers at four days' notice. *Fishburne v. Minott*,

72 S. C. 572, 52 S. E. 646.

As to the provisions for the time for filing motions, see § 818, and note thereto. And as to the time of filing notice for application for change of venue in circuit courts, see § 35, ante, and note thereto.

Granting of motion serves to stay proceedings in original court.—See this catchline in note to § 35.

Time to make motion for change is not fixed.—This section fixes no time at which a motion for a change of venue shall be made, and the law thus being silent, the courts cannot say that it intended to say anything. *Willoughby v. R. R. Co.*, 46 S. C. 317, 24 S. E. 308.

But in criminal cases application for removal should be after issue joined.—In criminal cases, the application for removal of the cause should be made after the issue is joined. *State v. Addison*, 2 S. C. 356.

A plaintiff may move for change of venue after trial commenced.—A party bringing an action in a certain county is not afterwards estopped from moving for a change of venue to another county. *Willoughby v. R. R. Co.*, 46 S. C. 317, 24 S. E. 308.

Change of venue allowed even though only one county composes the circuit.—See this catchline in note to § 35.

Under this section, if the venue is laid in the wrong county, it must be changed to the proper county regardless of whether that county is in the same or different circuit. *Hanley v. Light & Water Co.*, 110 S. C. 340, 96 S. E. 519.

As to the provisions for a change of venue to another county of the same circuit, see § 35, ante, and note thereto; also, *Const. 1895, Art. 6, § 2* and note thereto.

Judge's finding as to possibility of impartial trial not reviewable on appeal.—The finding of a circuit judge on motion for change of venue under sub'd. 2 of this section, because plaintiff, who sued as administrator, was clerk of the court for that county is not reviewable on appeal. *McCown v. R. R. Co.*, 55 S. C. 384, 33 S. E. 506.

Formerly judge at chambers could not change venue to secure impartial trial.—A judge at chambers has no jurisdiction to remove a case on the ground set out in the 2nd sub'd. of this section. *Willoughby v. R. R. Co.*, 46 S. C. 317, 320, 24 S. E. 308, cited in *Castles v. Lancaster County*, 74 S. C. 512, 55 S. E. 115.

But apparently he can now. See *Dennis v. McKnight*, 161 S. C. 213 159 S. E. 557.

Attention is called to the fact that § 37, ante, was amended by an Act of 1925, so as to enable judges at chambers to exercise the same powers and jurisdiction as they exercised in open court

with certain exceptions therein mentioned. It is submitted that under the authority of this amendment, a judge at chambers may grant a change of venue on the 2nd ground herein mentioned.—Ed. note.

And may when motion is on either of other two grounds set out here.—A motion for a change of venue may be tried at chambers on the grounds set out in the first and third subdivisions of this section. *Utsey v. R. R. Co.*, 38 S. C. 399, 17 S. E. 141, cited in *Castles v. Lancaster County*, 74 S. C. 512, 55 S. E. 115. Also see *Ex Parte Jones*, 160 S. C. 63, 158 S. E. 134.

Change of venue for convenience of witnesses and promotion of justice is discretionary with judge.—Motion to change place of trial for convenience of witnesses and promotion of justice is addressed to circuit judge's discretion and ruling will not be disturbed unless manifestly erroneous. *Sample v. Bedenbaugh*, 158 S. C. 496, 155 S. E. 828; and cases cited therein. See also, *Barfield v. Coker*, 73 S. C. 181, 53 S. E. 170; *Gower v. Thomson*, 6 S. C. 313; *Patterson v. Charleston & W. C. Ry. Co.*, 190 S. C. 66, 1 S. E. (2d) 920; *Roof v. Tiller et al.*, 195 S. C. 132, 10 S. E. (2d) 333; *Tucker v. Ingram, et al.*, 187 S. C. 525, 198 S. E. 25.

As these sections fail to set out any requirements of an affidavit as necessary to have the place of trial changed, the circuit judge is empowered to make a change under sub'd. 3 of this section and only his judicial discretion need be satisfied by the affidavit. *McFail v. Barnwell County*, 54 S. C. 368, 32 S. E. 417.

But where inherent equities are judicially weighed and it appears that they are predominantly in favor of litigant requesting change, the denial of motion for change of venue on ground that convenience of witnesses and ends of justice will thereby be promoted is error. *Patterson v. Charleston & W. C. Ry. Co.*, 190 S. C. 66, 1 S. E. (2d) 920.

A showing that 12 material witnesses for defendant resided in county in which accident occurred and that each county was 145 miles from county in which actions were brought prima facie met both requirements of statute. *Ibid.*

The above case should be compared with *Brice v. State Co.*, 193 S. C. 137, 7 S. E. (2d) 850, where the motion was to change the venue from county of defendants' residence.

If the venue is changed under sub'd 3 of this section on account of the convenience of witnesses and to promote the ends of justice, the cause may be removed to another circuit. *Hanley v. Light & Water Co.*, 110 S. C. 340, 96 S. E. 519.

Burden of proof.—A defendant moving for change of venue on ground that con-

venience of witnesses and ends of justice would thereby be promoted had burden of proving that convenience of witnesses would be subserved by change and that change would promote ends of justice. *Patterson v. Charleston & W. C. Ry. Co.*, 190 S. C. 66, 1 S. E. (2d) 920.

And where defendant made *prima facie* showing that convenience of witnesses and ends of justice would be promoted by change of venue, burden shifted to plaintiff to show that at least one of such requirements had not been sufficiently satisfied. *Ibid.* Also see, *Brice v. State Company*, 193 S. C. 137, 7 S. E. (2d) 850.

But if change of venue is granted it must be to the place of trial stated in the motion. *Coogler v. California Insurance Co. of San Francisco, Cal.*, 192 S. C. 54, 5 S. E. (2d) 459.

As to the constitutional provisions for change of venue upon proper showing supported by affidavit see Const. 1895, Art. 6, § 2, and note thereto.

But both must appear together.—Convenience of witnesses and promotion of ends of justice will not warrant a change of venue unless both appear together. *Sample v. Bedenbaugh*, 158 S. C. 496, 155 S. E. 828. See also, *Utsey v. R. R. Co.*, 38 S. C. 399, 405, 17 S. E. 141; *Castles v. Lancaster County*, 74 S. C. 512, 55 S. E. 155; *Dennis v. McKnight et al.*, 161 S. C. 213, 159 S. E. 557; *Tucker v. In-*

gram et al., 187 S. C. 525, 198 S. E. 25.

A judge at chambers has no power to grant a change of venue on the ground, alone, that the ends of justice would thereby be promoted under sub'd. 3 of this section. *Castles v. Lancaster County*, 74 S. C. 512, 55 S. E. 115. But see *Willoughby v. R. R. Co.*, 46 S. C. 317, 24 S. E. 308, wherein a change of venue was allowed on the ground that it promoted ends of justice when it appeared that most of the witnesses would be inconvenienced by the change.

And must be substantiated by evidence and not mere opinions.—One moving for change of venue for convenience of witnesses cannot rely merely on beliefs, opinions, and conclusions of witnesses without disclosure of evidence. *Sample v. Bedenbaugh*, 158 S. C. 496, 155 S. E. 828. See also, *Adams v. Fripp*, 108 S. C. 234, 94 S. E. 109.

Court may refuse to change venue when convenience of witnesses is promoted by refusal.—Under subd. 3 of this section a court may refuse to change the venue because of the convenience of witnesses even though it may have been proper for the action to have been brought in the county to which defendants desired to have it removed. *Moore v. Authur*, 113 S. C. 112, 101 S. E. 640.

See generally *Griffin v. Omens*, 171 S. C. 276, 172 S. E. 221.

TITLE 7

Manner of Commencing Civil Actions

CHAPTER 16. Summons and Service, § 427.

CHAPTER 17. Notices, Filing and Service of Papers, § 443.

CHAPTER 16

Summons and Service

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| 427. Commencement of action. | 436. Service by publication. |
| 428. Summons. | 437. Service on non-residents. |
| 429. Notice in summons. | 438. Service on less than all defendants. |
| 430. Complaint not served with summons. | 439. When service by publication complete. |
| 431. Unreasonable defense. | 440. Proof of service. |
| 432. <i>Lis pendens</i> . | 441. When jurisdiction acquired. |
| 433 and 434. Service of summons. | 442. Action affecting state obligation. |
| 435. Service by publication on corporation. | |

§ 427. Actions—how commenced.—Civil actions in the courts of record of this State shall be commenced by service of a summons.

1932 Code, § 427; Civ. P. '22, § 383; Civ. P. '12, § 177; Civ. P. '02, § 148; 1870 (14) § 150.

Cross references.—As to definitions of an action, see § 2 and note thereto. As to when action is deemed commenced,

see § 357. As to requisites of a summons, see § 428 and notes thereto.

This section is mandatory, so that a

civil action must be commenced by the service of a summons. *Lee v. Storfer*, 159 S. C. 70, 156 S. E. 177; *Bissonette v. Joseph*, 170 S. C. 407, 170 S. E. 467. See also *Palmetto Bank & Trust Co. v. McCown-Clark Co.*, 143 S. C. 98, 141 S. E. 155.

Requiring service of summons upon the defendant.—For the purpose of charging a defendant with knowledge of the commencement of an action, it is not deemed commenced until the service of a summons on him. *Norris v. Hartford Fire Insurance Co.*, 55 S. C. 450, 33 S. E. 566, 74 Am. St. Rep. 765.

For only in such manner can an action be commenced in this State.—*Segars v. Parrott*, 54 S. C. 1, 31 S. E. 677, 695, second appeal reported in 54 S. C. 1, 31 S. E. 865.

Particularly in case of minors under fourteen. *Ruff v. Elkin*, 40 S. C. 69, 18 S. E. 220, 223.

As to application for appointment of a guardian ad litem for an infant under fourteen years old within twenty days after service of summons, see § 402 and note thereto.

As the summons is the necessary process to obtain jurisdiction of defendant.—The summons in a civil action is the necessary process by which the court obtains jurisdiction of the defendant. *Lee v. Storfer*, 159 S. C. 70, 156 S. E. 177. See the catchline "Compliance gives court jurisdiction of defendant's person" under § 357, where is treated the case of *Stephens v. Ringling*, 102 S. C. 333, 86 S. E. 683. See also *Robertson v. Blair*, 56 S. C. 96, 34 S. E. 11, 14, 76 Am. St. Rep. 543; *Wren v. Johnson*, 62 S. C. 533, 40

S. E. 937; *Little v. Christie*, 69 S. C. 57, 48 S. E. 89.

In courts of record.—This section applies only to courts of record, and has no application to a magistrates' court as it is not a court of record. *Hasten Furniture Co. v. Southern R. Co.*, 82 S. C. 238, 64 S. E. 223.

The provisions of the section must be strictly complied with. *Ruff v. Elkin*, 40 S. C. 69, 18 S. E. 220, 223.

But the copy delivered is construed more liberally than the original.—*Lee v. Storfer*, 159 S. C. 70, 156 S. E. 177. See also note to the following section. For example, clerical errors in the copy delivered will not affect the jurisdiction of the court, when the defendant has not been misled thereby. *Id.*

To the extent of presuming service to sustain jurisdiction. See *Kaylor v. Hiller*, 77 S. C. 393, 397, 58 S. E. 2.

And the action is commenced when the summons is issued in good faith.—See this catchline under § 357.

Applied in Atlantic Coast Lumber Corp. v. Morrison, 152 S. C. 305, 149 S. E. 243, 245; *Palmetto Bank & Trust Co. v. McCown-Clark Co.*, 143 S. C. 98, 141 S. E. 155.

Original actions against Governor as officer of state to set aside Governor's orders suspending state highway commissioners from office were properly before Supreme Court, notwithstanding only rules to show cause and not summons or other process had been served on Governor. *Dacus v. Johnston*, 180 S. C., 329; 185 S. E., 491. See also *Heyward v. Long*, 178 S. C. 351, 183 S. E. 145.

§ 428. Summons—requisites of.—The summons shall be subscribed by the plaintiff or his attorney, and directed to the defendant, and shall require him to answer the complaint, and serve a copy of his answer on the person whose name is subscribed to the summons, at a place within the State, to be therein specified, in which there is a postoffice, within twenty days after the service of the summons, exclusive of the day of service.

1932 Code, § 428; Civ. P. '22, § 384; Civ. P. '12, § 178; Civ. P. '02, § 149; 1870 (14) § 151.

The purpose of summons is to acquire jurisdiction and give notice.—The purpose of the summons is to acquire jurisdiction of the person of the defendant and to give him notice of the action and an opportunity to appear and defend. *State v. Sanders*, 118 S. C. 498, 110 S. E. 808, 810.

But this section requires no particular form.—While this section prescribes the requisites of the summons, it does not provide that it shall be in any particular form. *State v. Sanders*, 118 S. C. 498, 110 S. E. 808, 810.

And the summons is not subject to

highly technical objections.—Considering the purpose of this section an objection, which is purely and highly technical, will not be sustained, when the defendant is not misled or prejudiced in the slightest degree. To sustain such an objection would be to sacrifice substance for form. *State v. Sanders*, 118 S. C. 498, 110 S. E. 808, 810. See also *Butler v. Welch*, 76 S. C. 130, 56 S. E. 668.

For example, an order that a previous order of the court and the petition be regarded as a summons is conclusive of the objections that no summons has been served. *State v. Sanders*, 118 S. C. 498,

110 S. E. 808.

In proceedings in original jurisdiction of Supreme Court, the rule to show cause, together with the petition or complaint, fully serves the purpose of a summons. Heyward v. Long, 178 S. C. 351, 183 S. E. 145; Dacus v. Johnston, 180 S. C. 329, 185 S. E. 491.

And not necessary in such case to give 20 days to make return. Heyward v. Long, 178 S. C. 351, 183 S. E. 145.

Error committed in dating a summons does not affect its regularity.—The date placed upon a summons is not a necessary part of the summons. The effect of the summons on the defendant's rights depends wholly on the day of its service, and not in any respect upon the date usually placed on the summons itself. It would not be an irregularity if the date were omitted, nor can an error committed in dating affect the regularity of the summons. This results from the fact that the defendant cannot be prejudiced by such error, his time to plead being governed by the day of service, and the time of the commencement of the action depending on when it was lodged or delivered for service. Smith & Melton v. Walker, 6 S. C. 169, 175. See also Butler v. Welch, 76 S. C. 130, 56 S. E. 668.

That in action against corporation summons was addressed to president does not render it irregular.—A motion to set aside a judgment by default against a corporation, on the ground that the summons was addressed to the president and general agent of the corporation, and stated that, on failure to answer, "judgment will be taken against you," will be refused where it appears that the summons was properly entitled and the president knew the action was against the corporation. Clark v. Porcelain Manufacturing Co., 8 S. C. 22.

Sufficiency of the summons cannot be considered on appeal in the absence of exceptions thereto. Beattie v. Latimer, 42 S. C. 313, 20 S. E. 53.

Unsigned summons attached to verified and signed complaint does not affect jurisdiction.—Although this section requires that the summons shall be subscribed by plaintiff or his attorney, it does not prescribe at what particular

place thereon the subscription shall be placed, and where the complaint attached to a summons was verified by plaintiff and signed by his attorney, the proper service thereof, although the summons was not signed by either the plaintiff or his attorney, was sufficient to confer jurisdiction. Huenfeld Co. v. Sims, 120 S. C. 193, 112 S. E. 917.

Nor does stating defendant's initials erroneously.—The service of a summons is sufficient, though the copy served states defendant's initials erroneously, provided the defendant is not misled. Lee v. Storfer, 159 S. C. 70, 156 S. E. 177.

Nor does a summons need to be signed and sealed by clerk.—The signature and seal of the clerk of the circuit court are not necessary to the validity of a summons. Southern Cotton Oil Co. v. Hewlett, 107 S. C. 532, 93 S. E. 195.

But requirement of order to answer in less than twenty days is fatal jurisdictional defect.—Assuming that a rule to show cause issued by the chief justice is, in substance, a summons, as required by § 427 of this code, a requirement in such rule that the defendant answer in less than twenty days is a fatal jurisdictional defect. State v. Tollison, 95 S. C. 58, 78 S. E. 521.

Unless the right to question jurisdiction is waived.—Though a justice's summons requires defendant to appear within less than the time provided by this section, defendant, by appearing before judgment, and answering and demurring to the merits, waives his right to question the jurisdiction of the justice because of such defect. Rosamond v. Earle, 46 S. C. 9, 24 S. E. 44.

Nor can the time for answering be extended except by consent or order.—As the time for answering a summons is fixed by statute it can only be extended by consent or order obtained under rule 19 and is not extended by pendency of motion to make the complaint more definite and certain. Johnson v. Finger, 102 S. C. 354, 86 S. E. 673.

The sufficiency of service of summons cannot be considered on appeal in the absence of exceptions thereto. Beattie v. Latimer, 42 S. C. 313, 20 S. E. 53.

§ 429. Notice to be inserted in summons.—The plaintiff shall also insert in the summons a notice, in substance: that if the defendant shall fail to answer the complaint within twenty days after the service of the summons, the plaintiff will apply to the court for the relief demanded in the complaint.

1932 Code, § 429; Civ. P. '22, § 385; Civ. P. '12, § 179; Civ. P. '02, § 150; 1870 (14) § 152.

§ 430. Complaint need not be served with summons.—A copy of the complaint need not be served with the summons. In such case, the summons

must state where the complaint is or will be filed, and if the defendant, within twenty days thereafter, causes notice of appearance to be given, and, in person or by attorney, demands, and in writing, a copy of the complaint, specifying the place within the State where it may be served, a copy thereof must, within twenty days thereafter, be served accordingly; and, after such service, the defendant has twenty days to answer; but only one copy need be served on the same attorney.

1932 Code, § 430; Civ. P. '22, § 386; Civ. P. '12 § 180; Civ. P. '02, § 151; 1870 (14) § 153.

Defendant is bound to demand copy of complaint within twenty days after its filing and answer within twenty days after service.—A defendant is bound to demand a copy of the complaint within twenty days after its filing to his knowledge, and to answer within twenty days after service of a copy of the complaint; and where a defendant appears generally in an action, he is bound to demand a copy of the complaint within the twenty days, and to answer it within twenty days. *Stephens v. Ringling*, 102 S. C. 333, 86 S. E. 683. See *Dunton v. Harper*, 64 S. C. 338, 42 S. E. 153, as to what constitutes filing.

Demand for copy of complaint must be made within 20 days after service of summons.—It is the intent of this section when it is read in connection with sections 428 and 429 that defendant must give notice of appearance and make demand for copy of the complaint within twenty days after the service of the summons on him. *Bissonette v. Joseph*, 170 S. C. 407; 170 S. E. 467. *Baker-Jennings Hdw. Co. v. Culp*, 105 S. C. 418; 90 S. E., 26.

And default judgment proper on failure to make appearance or demand copy of complaint within 20 days of service of summons. *Ibid.*

But plaintiffs' electing to pursue publication after defendant's voluntary appearance waives right to insist on an-

swer in twenty days.—Where plaintiffs, after voluntary appearance of defendant, elected to pursue publication of summons and called upon defendant to answer within twenty days after publication, they waived their right to insist on answer within twenty days from the time of appearance, although appearance by defendant subjected him to jurisdiction of court and made it requisite that he answer within twenty days. *Stephens v. Ringling*, 102 S. C. 333, 86 S. E. 683.

Yet, where plaintiffs procured from the clerk an order of publication for service of a non-resident, the defendants were held to be in time where they filed a petition for removal before the service by publication became effective, plaintiffs having waived their rights after defendants' appearance when they thereafter petitioned for order of publication. *Stephens v. Ringling*, 102 S. C. 333, 86 S. E. 683.

And where twentieth day falls on Sunday service by mail on twenty-first day is good.—Where summons has been properly served without complaint, if it is deposited in the post office on the twenty-first day after demand for service when the twentieth day falls on Sunday, it is good. *Royal Exch. Assurance of London v. Bennettsville & C. R. Co.*, 95 S. C. 375, 79 S. E. 104.

As to computation of time, see §§ 821 and 822 of this Code.

§ 431. Defendant unreasonably defending.—In the case of a defendant against whom no personal claim is made, the plaintiff may deliver to such defendant, with the summons, a notice subscribed by the plaintiff or his attorney, setting forth the general object of the action, a brief description of the property affected by it, if it affects specific real or personal property, and that no personal claim is made against such defendant, in which case no copy of the complaint need be served on such defendant, unless, within the time for answering, he shall, in writing, demand the same. If a defendant, on whom such notice is served, unreasonably defend the action, he shall pay costs to the plaintiff.

1932 Code, § 431; Civ. P. '22, § 387; Civ. P. '12, § 181; Civ. P. '02, § 152; 1870 (14) § 154.

A defendant who answers after notice delivered under this section must be re-

garded as a volunteer. *Wylie v. Lyle*, 7 S. C. 202, 207.

§ 432. Notice of lis pendens.—In an action affecting the title to real property, the plaintiff, not more than twenty days before filing of the complaint, or at the time of filing the complaint, or at any time afterwards, or whenever a warrant of attachment, under chapter 25, shall be issued, or at any time afterwards, the plaintiff, or a defendant, when he sets up an affirmative cause of action in his answer, and demands substantive relief, at the time of filing his answer, or at any time afterwards, if the same be intended to affect real estate, may file with the clerk of each county in which the property is situated, a notice of the pendency of the action, containing the names of the parties, the object of the action, and the description of the property in that county affected thereby; and if the action be for the foreclosure of a mortgage, such notice must be filed twenty days before judgment, and must contain the date of the mortgage, the parties thereto, and the time and place of recording the same. From the time of filing only, shall the pendency of the action be constructive notice to a purchaser or encumbrancer of the property affected thereby; and every person whose conveyance or encumbrance is subsequently executed or subsequently recorded shall be deemed a subsequent purchaser or encumbrancer, and shall be bound by all proceedings taken after the filing of such notice to the same extent as if he were made a party to the action. For the purposes of this section, an action shall be deemed to be pending from the time of filing such notice: *provided, however*, that such notice shall be of no avail, unless it shall be followed by the first publication of the summons, or an order therefor, or by the personal service thereof, on a defendant within sixty days after such filing. And the court in which the said action was commenced may in its discretion, at any time after the action shall be settled, discontinued or abated, as is provided in section 408, on application of any person aggrieved, and on good cause shown, and on such notice as shall be directed or approved by the court, order the notice authorized by this section to be cancelled of record by the clerk of any county in whose office the same may have been filed or recorded; and such cancellation shall be made by an endorsement to that effect on the margin of the record, which shall refer to the order, and for which the clerk shall be entitled to a fee of twenty-five cents. *Provided, further*, that when the summons is published or served as above provided, the notice of the pendency of the action shall constitute notice for only five (5) years from the date of the filing of such notice, and, in order to provide constructive notice to a purchaser or encumbrancer of the property affected thereby, the said notice shall be refiled within five (5) years from the date of filing in the first instance, and within five (5) years from the date of any such refileing. In the event any such notice be refiled, the same shall be entered in the book provided therefor as required for the original entry, and the clerk shall note upon the record of the filing that the same is a refileing of such notice, and shall also note thereupon the date of the first entry and the book and page at which the same is filed.

1932 Code, § 432; Civ. P. '22, § 388; Civ. P. '12, § 182; Civ. P. '02, § 153; 1870 (14) § 155; 1930 (36) 1218; 1931 (37) 241; 1937 (40) 335.

Filing of lis pendens is ineffective except when action affects real estate.—The filing of a lis pendens against the property of a defendant in an ordinary

action on a money demand, which in no way affects the title to real estate, is ineffective for any purpose, since this section authorizes the filing of lis pendens

only when the action affects real estate. *Armstrong v. Carwile*, 56 S. C. 463, 35 S. E. 196.

And it is not as indispensable a prerequisite to a judgment in partition as for one in foreclosure.—This section does not make the filing of the *lis pendens* an indispensable prerequisite to a judgment in partition as it does for a judgment in foreclosure. *Ex parte Johnson*, 147 S. C. 259, 145 S. E. 113, 122.

And one taking deed to land with notice of mortgage is bound by judgment of foreclosure.—Where the wife of the mortgagor, having actual notice of the facts as well as constructive notice of the mortgage, by due filing of *lis pendens* twenty days before judgment, under this section, took a deed to the land from a prior owner, on the day of foreclosure sale to plaintiffs, she was by the terms of this section, bound by the judgment of foreclosure. *McNair v. Alex*, 105 S. C. 445, 90 S. E. 23; *Duke Power Co. v. Rutland*, 60 F. (2nd) 194.

As notice of *lis pendens* constitutes notice of lien to purchaser of land affected thereby.—The effect of this section seems to be that, after the notice of *lis pendens* is filed, any one who purchases the land affected by such *lis pendens* shall be treated as one who had notice of the lien of a mortgage. *Baum v. Trantham*, 45 S. C. 291, 23 S. E. 54, 59.

Thus, where there were two judgment liens on land, one senior and the other junior to plaintiffs' mortgage, and execution under the junior judgment was levied on the land, and on the day following the levy plaintiffs commenced a foreclosure, making the execution creditors parties, and at the same time filed a *lis pendens*, and the land was afterwards sold under the said execution, and purchased by a third party, who was thereupon made a party to the foreclosure suit, said purchaser, having been affected with notice of the *lis pendens*,

could not, by claiming under the senior judgment, divest the lien of said mortgage. *Baum v. Trantham*, 45 S. C. 291, 23 S. E. 54.

So that after *lis pendens* a renter of mortgaged property is not entitled to crop.—Where a foreclosure is commenced and *lis pendens* filed, a subsequent renter of the mortgaged property is not entitled to a crop planted by him, and standing on the land on the day of sale. *Tittle v. Kennedy*, 71 S. C. 1, 50 S. E. 544, 4 Ann. Cas. 68; see also *Pipkin v. Fletcher*, 165 S. C. 98, 162 S. E. 774.

But sale under execution before *lis pendens* give good title to purchaser.—Sale of land under execution levied before *lis pendens* is filed in action to foreclose mortgage on said land, gives good title to the purchaser; and he has the right as a proper party, by petition in the action, to contest the mortgage. *Ex parte Mobley*, 19 S. C. 337.

And deed recorded before filing of *lis pendens* is not affected thereby.—A purchaser whose deed is recorded before filing of *lis pendens* is not affected thereby. *Greenwood, etc., Ass'n v. Childs*, 67 S. C. 251, 45 S. E. 167.

As only subsequent purchasers or encumbrancers are protected by failure to file the notice.—So that one who is neither a subsequent purchaser nor encumbrancer is not protected by failure to file notice of *lis pendens*. *Vance v. Wesley*, 85 F. 157; *Wesley v. Tindal*, 81 F. 612.

In the absence of notice of a judgment.—A judgment is notice to one acquiring possession after entry of judgment, although no notice of *lis pendens* was filed. *Wesley v. Tindal*, 81 F. 612.

Right to file *lis pendens* cited by court is reason for laying venue in county where land situated in suit to set aside deed, even though action based on fraud. *Dickerson v. Oliphant*, 160 S. C. 288, 158 S. E. 546.

§ 433. Summons—by whom served—fees for service.—The summons may be served by the sheriff of the county where the defendant may be found, or by any other person not a party to the action. The service shall be made, and the summons returned, with proof of the service, to the person whose name is subscribed thereto, with all reasonable diligence. The person subscribing the summons may, at his option, by an endorsement on the summons, fix a time for the service thereof, and the service shall then be made accordingly: *provided*, that no costs shall be taxed to any person for the service of any summons, complaint, answer, demurrer, subpoena, or other legal process issuing out of the courts of common pleas and courts of probate, not made by the sheriff of the county where such process is served, or his legally constituted deputies.

1932 Code, § 433; Civ. P. '22, § 389; Civ. P. '12, § 183; Civ. P. '02, § 154; 1870 (14) 156; 1874 (15) 640.

Jurisdiction determined by personal service within state.—The court's jurisdiction of the person of the defendant is determined by the fact of personal service of process within the state. *Williams v. Simon*, 128 S. C. 315, 122 S. E. 772.

And not by the fact of nonresidence.—*Williams v. Simon*, 128 S. C. 315, 122 S. E. 772.

Even though nonresident defendant has no property in state.—This section authorizes a personal service on a nonresident in the state, within the jurisdiction of the court in which an action

brought by a nonresident plaintiff was pending against him, though defendant had no property in this state. *Ford v. Calhoun*, 53 S. C. 106, 30 S. E. 830.

See generally, as to when nonresident witness or party temporarily in state exempt from service, *Breon v. Miller Lumber Co.*, 83 S. C. 221, 65 S. E. 214, 137 Am. St. Rep. 803, 24 L. R. A. (N. S.) 276n.

Applied in *Easterling v. Odom*, 98 S. C. 171, 82 S. E. 407; *Smith v. Walker*, 6 S. C. 169; *Cureton v. Dargan*, 12 S. C. 122, 126.

§ 434. Summons—service.—The summons shall be served by delivering a copy thereof as follows:

(1) If the suit be against a corporation, to the president or other head of the corporation, secretary, cashier, treasurer, a director or agent thereof. Service upon any person occupying an office or room in any railway station, and attending to and transacting therein any business of any railroad, shall be deemed service upon the corporation under the charter of which such railroad is authorized by law; and such person shall be deemed the agent of said corporation, notwithstanding he may claim to be the agent of any other person or corporation claiming to operate said railroad by virtue of any lease, contract or agreement.

Such service can be made in respect to a foreign corporation only when it has property within the State, or the cause of action arose therein, or where such service shall be made in this State personally upon the president, cashier, treasurer, attorney or secretary, or any agent thereof. *Provided, further*, that, in the case of domestic corporations, service as effected under the terms of this section shall be effective and confer jurisdiction over any domestic corporation in any county where such domestic corporation shall own property and transact business, regardless of whether or not such domestic corporation maintains an office or has agents in that county.

(2) If against a minor under the age of fourteen years, to such minor personally, and also to his father, mother, or guardian; or if there be none within the State, then to any person having the care and control of such minor, or with whom he shall reside, or in whose service he shall be employed.

(3) If against a person judicially declared to be of unsound mind, or incapable of conducting his own affairs in consequence of habitual drunkenness, and for whom a committee or guardian has been appointed, to such committee or guardian, and to the defendant personally.

(4) If against a person imprisoned in this State, or a person confined in the state hospital, or in any other similar place of confinement in this state, to the defendant personally; and such service shall be made by the sheriff of the county in which such person shall be imprisoned or confined: *provided*, that it shall also be lawful for such service to be made by the respective superintendents of such institutions instead of the sheriff, and such superintendents shall not be entitled to any costs therefor: *provided*, that as to persons imprisoned in the penitentiary and lunatics confined

in the state hospital, it shall also be lawful for such personal service of process to be made by the respective superintendent of such institutions or by assistants duly designated by the said respective superintendent, instead of the sheriff, and superintendent, or their assistants so designated, shall be entitled to any costs therefor; *provided, however*, that in the event that the respective superintendent of such institution should designate an assistant or assistants to make such personal service of process that the respective superintendent shall sign a certificate reciting that such assistant or assistants have been designated by him for the purpose of making service of the said process.

(5) In all other cases to the defendant personally, or to any person of discretion residing at the residence or employed at the place of business of said defendant.

1932 Code, § 434; Civ. P. '22, § 390; Civ. P. '12, § 184; Civ. P. '02, § 155; 1870 (14) § 157; 1873 (15) 497; 1882 (18) 256; 1883 (18) 437; 1887 (19) 835; 1892 (21) 404; 1899 (23) 42; 1927 (35) 292; 1940 (41) 1831; 1941 (42) 275

I. In General.

II. Corporations.

A. Domestic Corporations.

B. Foreign Corporations.

1. In General.

2. Authority of Agents to Receive Summons.

3. Persons Constituting Agents.

III. Minors.

IV. All other Cases.

I. IN GENERAL

Requirements of section must be met.—Jurisdiction can be obtained only by service of process in manner prescribed by law of forum, and there must be certainty person served is such party as meets requirements of statute. *Dyar v. Georgia Power Co.*, 173 S. C., 527; 176 S. E. 711.

Second objection to jurisdiction based on alleged illegal service of summons.—Where an objection to the jurisdiction, based on the alleged illegal service of a summons, has been made and overruled, no second objection based thereon can be admitted, however much the specifications of the objections taken the first and second time may vary from each other. *Abbeville Electric Light & Power Co. v. Western Electrical Supply Co.*, 66 S. C. 328, 44 S. E. 952.

II. CORPORATIONS

A. Domestic Corporations

Cross references.—As to service of papers on foreign insurance companies, see § 7964; on bus line companies, see § 8511; on nonresident executors, see § 8952; as to service on nonresidents in actions arising out of collision of motor vehicles, see § 437, and note thereto.

Power to accept process is seldom conferred by express authority.—The authority of any agent to bind the corporation by acceptance or receipt of legal process is seldom conferred by express authority of the principal. *Bass v. American Products Export & Import Corp.*, 124 S. C. 346, 117 S. E. 594, 595,

30 A. L. R. 168n.

As such prerequisite would defeat purpose of statute.—Very rarely, perhaps, could service be made upon an "agent" if the service depended upon the express authority of the agent to act for the principal in that particular matter. *Bass v. American Products Export & Import Corp.*, 124 S. C. 346, 117 S. E. 594, 595, 30 A. L. R. 168n.

But it is implied by law from the ostensible relationship between the parties.—*Bass v. American Products Export & Import Corp.*, 124 S. C. 346, 117 S. E. 594, 595, 30 A. L. R. 168n.

Thus authority to contract is sufficient agency under this section.—An agent is generally defined as a person who acts on behalf of another person who is his principal. While in practical affairs the relation assumes many phases, it is often quite difficult to apply the definition; it is certainly necessary to constitute agency that there should be some kind of representation of the principal by virtue of authority conferred by him. Authority to contract is sufficient to constitute agency under this statute. *Jenkins v. Penn Bridge Co.*, 73 S. C. 526, 53 S. E. 991, 992.

Any authority short of power to contract being generally insufficient.—The claim of agency based on any other authority short of power to contract is said to have rarely been maintained, and certainly it should be allowed with great caution. *Jenkins v. Penn Bridge Co.*, 73 S. C. 526, 53 S. E. 991, 992.

For example an employee is not an agent under this section.—"Employee" is manifestly a much broader term than "agent" and it is therefore not sufficient under this statute to show that the service was made on an employee without showing that such employee was also an agent. *Jenkins v. Penn Bridge Co.*, 73 S. C. 526, 53 S. E. 991, 992.

And a fortiori a day laborer is not re-

garded as an agent.—Of all classes of employees a day laborer has the most transient and readily severed connection with the person whom he serves, and no warrant will be found either in legal precedent or the common understanding of practical men for regarding him an agent or representative. *Jenkins v. Penn. Bridge Co.*, 73 S. C. 526, 53 S. E. 991, 992.

A newspaper correspondent is not an agent of the newspaper upon whom service in libel action can bind the corporation. *Taylor v. News & Courier Co.*, 156 S. C. 537, 153 S. E. 571.

However, a relationship is sufficient which supports liability of corporation for acts of ostensible agent.—If the relationship between the person served and the corporation is such as would entail or support liability of the corporation as to third persons for acts of the ostensible agent within the apparent scope of his authority, there is no reason why such ostensible authority to bind the corporation should not be held to extend to and include the same implied authority to accept service or to act for the corporation in the receipt of legal process as an actual agent, without express authority, would have in like circumstances. *Bass v. American Products Export & Import Corp.*, 124 S. C. 346, 117 S. E. 594, 595, 30 A. L. R. 168n.

Thus a "timekeeper" may have no express authority to accept service, but his authority may be implied from a very limited actual authority to bind the corporation in respect to certain relations of his principal with others. *Jenkins v. Penn. Bridge Co.*, 73 S. C. 526, 532, 53 S. E. 991; *Bass v. American Products Export & Import Corp.*, 124 S. C. 346, 117 S. E. 594, 595, 30 A. L. R. 168n.

As the term "agent" cannot properly be given a more limited signification.—Clearly, the term "agent" as used in this section, enacted for the benefit of the general public, may not properly be given a more limited signification than it would have in adjudicating the rights of individuals arising out of a similar state of facts. *Bass v. American Products Export & Import Corp.*, 124 S. C. 346, 117 S. E. 594, 595, 30 A. L. R. 168n.

And this conclusion is reinforced by the chief object of service of process.—This conclusion is reinforced by the fact that the chief object of service of process is to give notice to the party served of the proceeding against him. *McSwain v. Grain & Provision Co.*, 93 S. C. 103, 114, 76 S. E. 117, Ann. Cas. 1914D, 981; *Bass v. American Products Export & Import Corp.*, 124 S. C. 346, 117 S. E. 594, 596, 30 A. L. R. 168n.

Likewise an agency by estoppel is sufficient.—Service of process upon one who is agent of defendant by estoppel,

and who has power to bind defendant, is sufficient and legal service. *Bass v. American Products Export & Import Corporation*, 124 S. C. 346, 117 S. E. 594, 30 A. L. R. 168n.

And of course summons on president while within state is good though he be a nonresident.—Whatever doubt may exist as to the right to serve the summons on the president, outside the state, when he is a non-resident, the Code clearly contemplates service of the summons on the president, if within the state, even though he be a non-resident and in attendance at court, either as a suitor or witness. It would lead to great injustice, if the officers of a domestic corporation had it in their power to render inoperative the provisions of this section. *Breon v. Miller Lumber Co.*, 83 S. C. 221, 65 S. E. 214, 216, 137 Am. St. Rep. 803, 24 L. R. A., N. S., 276n.

Sufficiency of service to convey notice is not decisive of its validity.—Though the sufficiency of service to convey notice of the proceeding is not decisive of its validity, it may be pertinent in determining the legality of service upon one whose representative character or agency is in question. *Bass v. American Products Export & Import Corp.*, 124 S. C. 346, 117 S. E. 594, 30 A. L. R. 168n.

A finding in a law case, whether process has been legally served on defendant's agent, is not reviewable on appeal, unless wholly unsupported by evidence or manifestly influenced or controlled by error of law. *Bass v. American Products Export & Import Corp.*, 124 S. C. 346, 117 S. E. 594, 30 A. L. R. 168n.

B. Foreign Corporations

1. In General

See sections 7765 and 7964.

"Doing business in this state" construed.—*Dyar v. Georgia Power Co.*, 173 S. C. 527, 176 S. E. 711; *Zeigler v. Puritan Mills*, 188 S. C. 367, 199 S. E. 420.

Federal authorities controlling.—*Zeigler v. Puritan Mills*, 188 S. C. 367, 199 S. E. 420; *Sadler v. Pennsylvania Refining Co.*, 33 F. S. 414.

A foreign corporation may appear solely to test service upon a party "as resident agent thereof" and have the service set aside. *Hester v. Rasin Fertilizer Co.*, 33 S. C. 609, 12 S. E. 563. Since the decision of this case, however, the section has been amended so that an agent, to receive service, need not be a resident agent, but the same may be served on any agent.—Ed. note.

Or may waive service by appearing generally.—A foreign corporation may waive service and submit itself to the jurisdiction of the court by appearing generally and answering on the merits. *Chaffee v. Postal Tel. Cable Co.*, 35 S. C. 372, 14 S. E. 764.

But not in federal court.—Foreign corporation did not waive objection to jurisdiction by answering to the merits and filing a counterclaim, in view of rules of civil procedure for district courts, rule 12(b), 28 U. S. C. A., following section 723c. *Sadler v. Pennsylvania Refining Co.*, 33 F. S. 414.

Section not repealed.—This section was not repealed, as to foreign insurance companies, by Act March 8, 1910 (26 St. at Large, p. 775) § 17, (Section 7964), requiring such companies to appoint as agent the state insurance commissioner to accept service on their behalf. *Montgomery v. U. S. Fidelity & Guaranty Co.*, 90 S. C. 283, 71 S. E. 1084; *Murray v. Sovereign Camp, W. O. W.*, 192 S. C. 101, 5 S. E. (20) 560.

Jurisdiction of magistrate under this section.—This section gives a magistrate jurisdiction of an action against a foreign corporation having property in the state to recover a penalty by due service of summons. *Best v. Seaboard Air Line Ry.*, 72 S. C. 479, 52 S. E. 223.

Objection that this section is inconsistent with the Federal Constitution. not raised until after the appeal is taken, comes too late. *Western Electric Supply Co. v. Abbeville, etc.*, *Power Co.*, 197 U. S. 299, 25 S. Ct. 481, 49 L. Ed. 765.

Service at place other than that designated in declaration filed in office of secretary of state.—Service within the state upon the resident agent of a foreign corporation owning property in this state, at a place other than that designated in the declaration filed in the office of the secretary of state, in a cause of action arising in this state, is valid. *Littlejohn v. Southern Ry. Co.*, 45 S. C. 96, 22 S. E. 761; *Tunstall v. The Lerner Shops, Inc.*, 160 S. C. 557, 159 S. E. 386.

Service in foreign jurisdiction.—This section does not authorize a personal judgment in an action for breach of contract commenced by serving the summons in a foreign jurisdiction against a corporation having no property or agent within the state. *Tillinghast v. Boston & P. R. Lumber Co.*, 38 S. C. 319, 17 S. E. 31.

Where property situated in the state, and passing by will, had by order of the court been converted into personalty, and turned over to the possession of a foreign corporation appointed trustee in the will, and was by it taken beyond the state, the trustee had no property within the state, and the state courts could not acquire jurisdiction of such foreign corporations by publication of summons and personal service on it at its residence, in an action by a beneficiary of the trust, a resident of the state. The state courts could not acquire jurisdiction of non-resident individuals interested in the trust fund by such service.

Emanuel v. Ferris, 63 S. C. 104, 41 S. E. 20.

Effect of prior appointment of a temporary receiver.—Service of a summons on a foreign corporation by delivery of copy to an agent is not invalid because of prior appointment of a temporary receiver of the corporation by the courts of the state incorporating it. *Pollock v. Carolina Interstate Building & Loan Ass'n*, 48 S. C. 65, 25, S. E. 977, 59 Am. St. Rep. 695.

A corporation organized and existing under the laws of another state cannot be bound by service of summons and complaint on agent of a corporation organized and existing under laws of this state and having no legal affiliation whatever with the corporation organized under the laws of such other state. *Harrell v. Sears, Roebuck & Co.*, 178 S. C., 482; 183 S. E., 303.

Applied in *Goodwin v. Dew*, 87 S. C. 402, 69 S. E. 876.

2. Authority of Agents to Receive Summons

Binding effect of circuit court's finding.—Circuit court finding that defendant foreign corporation is doing business in state and that person served is corporation's agent is binding on Supreme Court, unless unsupported by evidence. *March v. Union Trust Co. of Maryland*, 175 S. C. 291, 179 S. E. 34; *Jones v. General Motors Corp.*, 197 S. C. 129, 14 S. E. (2d) 628.

To accept service of process as agent of foreign corporation one need not have express authority.—*McSwain v. Adams Grain & Provision Co.*, 93 S. C. 103, 76 S. E. 117, Ann. Cas. 1914D, 981.

But such authority may be inferred from the facts.—So that where the character of the agency is such as to render it fair and just to imply an authority to receive service, the law will imply such authority, and service on such agent is sufficient. *McSwain v. Adams Grain & Provision Co.*, 93 S. C. 103, 76 S. E. 117, Ann. Cas. 1914D, 981.

Or it may be inferred from the law. *McSwain v. Adams Grain & Provision Co.*, 93 S. C. 103, 76 S. E. 117, Ann. Cas. 1914D, 981.

Prescribed by the legislature of the state, upon which conditions alone business can be lawfully conducted therein by such foreign corporation. *McSwain v. Adams Grain & Provision Co.*, 93 S. C. 103, 76 S. E. 117, 120, Ann. Cas. 1914D, 981.

Subject to some exceptions the states may prohibit foreign corporations from doing business therein altogether. It follows that they may impose such conditions upon the privilege of doing business therein by such corporations as they think proper, no matter how onerous, or even how arbitrary, they may

be. *New York Life Ins. Co. v. Bradley*, 83 S. C. 418, 65 S. E. 433; *McSwain v. Adams Grain & Provision Co.*, 93 S. C. 103, 76 S. E. 117, 119, Ann. Cas. 1914D, 981.

The decisions of the United States Supreme Court on the question of the authority of the states to enact such statutes as will enable their courts to acquire jurisdiction of foreign corporations doing business therein are controlling. And, it is governed by its decisions that, to acquire jurisdiction of a foreign corporation doing business within the state, the person on whom service is made within the state must bear such a representative relation to the corporation that the court can fairly infer from all the facts, including the statutes of the state and the assent to them by the corporation implied by doing business in the state, an implied legal authority in such person to accept service for the corporation. *McSwain v. Adams Grain & Provision Co.*, 93 S. C. 103, 76 S. E. 117, 118, Ann. Cas. 1914D, 981.

Such conditions becoming elements of contract between state and corporation.—*McSwain v. Adams Grain & Provision Co.*, 93 S. C. 103, 76 S. E. 117, 120, Ann. Cas. 1914D, 981.

And the corporation entering into the State being deemed to assent impliedly to authority of agent to receive service of process.—*McSwain v. Adams Grain & Provision Co.*, 93 S. C. 103, 76 S. E. 117, Ann. Cas. 1914D, 981.

As to conditions under which a foreign corporation may do business in the state, see §§ 7764 et seq.

Especially where the summons is forwarded by agent to corporation.—*Firestone Tire & Rubber Co. v. Marlboro Cotton Mills*, 278 F. 816.

3. Persons Constituting Agents

"Doing business"; "agent."—"Any agent" within statute providing for service on foreign corporations does not require that the agency be general, and statute is satisfied by service on an agent having limited authority to represent the corporation; intended to have a broad meaning and must be liberally construed to effectuate the legislative intent. *Jones v. General Motors Corp.*, 197 S. C. 129, 14 S. E. (2d) 628.

Generally, the person served as agent of a foreign corporation must have some measure of control over the business entrusted to him, or of some feature thereof, and must have a representative capacity and derivative authority rather than being a mere subordinate employee without discretion. *Ibid.*

The test usually applied in determining agency for purpose of service on a foreign corporation is whether the agent served sustained such relation to the corporation or to the business out of which alleged contract arose as to jus-

tify a fair and reasonable inference of a duty on his part to communicate the fact of service to the corporation. *Ibid.*

Process which it is sought to service on agent of a foreign corporation must be served on an agent having such relation to the corporation that notice to the agent may well be deemed notice to the principal, without violating principles of natural justice. *Ibid.*

The nature of a foreign corporation's business and the extent of authority given and exercised by agent who is served with process, rather than the descriptive name employed, is determinative of whether the agent is a proper person on whom service may be made. *Ibid.*

What constitutes "doing business" within state by foreign corporation in sense required to subject it, without consent, to jurisdiction of the state courts, cannot be formulated in an all-embracing rule, because solution of question depends on facts of particular case. *Ibid.*

A foreign corporation which sends an officer or agent into the state with reference to the settlement or adjustment of claim sued upon is "doing business" within the state, in sense subjecting it without consent to jurisdiction of the courts. *Ibid.*

Any agent can receive service of process.—Before this section was amended, service could only be made on a "resident agent" of a foreign corporation, and might be made on such agent without attachment. *Pollock v. Carolina Interstate Building & Loan Ass'n*, 48 S. C. 65, 25 S. E. 977, 59 Am. St. Rep. 695. Since the early amendment, however, the word "any," has been substituted for the word "resident" so that service can be made on any agent. *Ed. note*, and see *Forbes v. Kingan & Co.*, 174 S. C. 24, 176 S. E. 880.

Even one of limited authority.—In *Jenkins v. Penn Bridge Co.*, 73 S. C. 526, 532, 53 S. E. 991, 993, the court held that even the absence of power to contract was not conclusive that an agent did not sufficiently represent the company to receive service, saying: "The test of agency is not the power to make a contract binding the employer. Such power shows agency, but agency may also be shown by the fact that a person represents the master in some one or more of his relations to others, even though he may not have power to contract. The statute makes service on 'any agent' of a foreign corporation sufficient. The statute, therefore, does not require that the agent shall be general, but is complied with by a service upon an agent having limited authority to represent his principal." *McSwain v. Adams Grain & Provision Co.*, 93 S. C. 103, 76 S. E. 117, 119, Ann. Cas. 1914D, 981. See also *Firestone Tire & R. Co. v. Marlboro Cotton Mills*, 278 F. 816.

Federal courts are not bound by decisions of this state as to agency to receive summons. *McMaster, Inc. v. Chevrolet Motor Co.*, 3 Fed. (2d) 469.

One who has authority to contract for sales to be made by a foreign corporation is its agent for the purpose of accepting service of process within this section, authorizing service on specified officers or any agent. *McSwain v. Adams Grain & Provision Co.*, 93 S. C. 103, 76 S. E. 117, Ann. Cas. 1914D, 981.

Likewise one soliciting buyers on commission is an agent.—An agent of a foreign corporation employed to solicit buyers of its produce for a commission, with authority to quote prices and terms, and to make representations as to the quality of the produce sold, has authority implied by law to accept service of process as authorized by this section. *McSwain v. Adams Grain & Provision Co.*, 93 S. C. 103, 76 S. E. 117, 118, Ann. Cas. 1914D, 981.

But where agent merely comes into state to solicit orders, which must be approved by office of foreign corporation out of state, he is not agent of corporation within the meaning of this section. *Zeigler v. Puritan Mills*, 188 S. C. 367, 199 S. E. 420.

And sending of truck into state to make deliveries does not constitute "doing business" in the state. *Ibid.*

So also is a broker.—Generally speaking, a broker is an agent. *McSwain v. Adams Grain & Provision Co.*, 93 S. C. 103, 76 S. E. 117, 119, Ann. Cas. 1914D, 981.

But evidence of dealings of foreign corporation and representative of corporation who was Georgia resident and with whom corporation executed contract which designated the representative as a "broker" and gave him right to sell corporation's petroleum products in South Carolina on commission basis, showed that corporation was not "doing business" in this state, and representative was not "agent" of corporation. *Sadler v. Pennsylvania Refining Co.*, 33 F. S. 414.

A local soliciting agent.—Service may be had on a local soliciting agent of a foreign building and loan association, who receipts for and remits installment fines and dues, is paid a regular commission, has a standing advertisement in a local paper, over his name as agent, which is paid for by the association, and who negotiated the loan out of which the action arose. *Pollock v. Carolina Interstate Building & Loan Ass'n*, 48 S. C. 65, 25 S. E. 977, 59 Am. St. Rep. 695.

A timekeeper.—Service on a timekeeper of a foreign corporation doing certain construction work in the state is a good service on the corporation, under this section. (By divided court.) *Jen-*

kins v. Penn Bridge Co., 73 S. C. 526, 53 S. E. 991.

An attorney.—In an action by a resident to set aside a judgment obtained by a foreign corporation, service on the attorney obtaining the judgment after it was entered was a good service on such corporation. *Sellers v. Home Fertilizer Chemical Works*, 76 S. C. 343, 56 S. E. 978.

But service of summons, in an action against a foreign corporation, on an officer thereof who was also plaintiff's attorney in fact for the commencement and prosecution of such action, was invalid. *George v. American Ginning Co.*, 46 S. C. 1, 24 S. E. 41, 32 L. R. A. 764, 57 Am. St. Rep. 671.

And fact that attorney has represented defendant in other similar suits does not authorize him to act as agent to be served in another suit. *Dyar v. Georgia Power Co.*, 173 S. C. 527, 176 S. E. 711.

A traveling salesman.—Service on a traveling salesman of a foreign corporation not having a resident agent, place of business, or property within the state, when the salesman visited the state in relation to the transaction out of which the suit arose, is a good service on such corporation. *Abbeville Electric Light & Power Co. v. Western Electrical Supply Co.*, 61 S. C. 361, 39 S. E. 559, 55 L. R. A. 146, 85 Am. St. Rep. 890.

Service on person in this state, who was salesman for foreign corporation, who was designated on its stationery as its salesman, who canvassed the trade in auto with such corporation's name on it, although goods were shipped to consumers with draft, order notify bill of lading attached in many instances, valid. *Forbes v. Kingan & Co.*, 174 S. C. 24, 176 S. E. 880. *Dyar v. Georgia Power Co.*, 173 S. C. 527, 176 S. E. 711.

But person within state buying merchandise at wholesale f.o.b. carriers outside of state from foreign corporation and disposing of purchases in own way, receiving advice from and reporting to seller, is not an "agent" of the foreign corporation on whom process could be made, though referred to in contract and other documents as a "dealer." *State v. W. T. Rawleigh Co.*, 172 S. C. 415, 174 S. E. 385.

And a sub-agent.—Under this section a foreign coal corporation whose selling agent within the state is another foreign corporation may be served by service on the vice-president of the selling agent personally, since that is personal service on the agent. *Calhoun Mills v. Black Diamond Collieries*, 112 S. C. 332, 99 S. E. 821.

III. MINORS

Service on an infant under 14 years of age must be on such infant personally, as well as on his parent or guardian.

Hutto v. Black, 88 S. C. 1, 70 S. E. 420.

In order to give publicity to interested as well as disinterested parties.—The object of the Code in requiring service of the summons, both on the minor and on the parent or guardian, is two-fold: (1) To give publicity to the proceedings in the neighborhood of the minor. Personal service of the summons on the minor tends to give notice of his rights to others than those who might be interested in destroying them, and thus cause such rights to be more carefully guarded. (2) To give notice to the parent or guardian in order that they might see that the minor's interests are protected. Kennedy v. Williams, 59 S. C. 378, 38 S. E. 8, 10. See also Hutto v. Black, 88 S. C. 1, 70 S. E. 420, 421.

But this requirement is not so stringent on parent or guardian.—While it is indispensable that the summons should be served personally on the minor, in order to give the court jurisdiction, this requirement is not so stringent as to service of the summons on the parent or guardian. Hutto v. Black, 88 S. C. 1, 70 S. E. 420, 421; Kennedy v. Williams, 59 S. C. 378, 38 S. E. 8, 10.

Where a minor was living with the executor of the mother's estate, service of summons on such minor in action by the executor without proof of service on the parent, or without any showing in the proof of service as to absence of the father from the state, raises a presumption of jurisdiction of the minor which cannot be brought in question collaterally. Kaylor v. Hiller, 77 S. C. 393, 58 S. E. 2.

Neither of whom need be served when a party plaintiff.—The service of the summons on the parent or guardian is intended to make them, to that extent, a party to the proceedings. When, however, the parent or guardian is a plaintiff, he thereby becomes a party to the action, and there is no necessity in serving him with a summons which has been issued at his instance. Kennedy v. Williams, 59 S. C. 378, 38 S. E. 8, 10.

But to bind infant by judgment section must be complied with.—An infant is incapable of making himself or herself a party to an action by accepting service so as to be bound by a judgment therein. All the formalities prescribed by statute must be complied with. Finley v. Robertson, 17 S. C. 435, 439. See also Genobles v. West, 23 S. C. 154; Riker v. Vaughan, 23 S. C. 187; Whitesides v. Barber, 24 S. C. 373; Tederall v. Bouknight, 25 S. C. 275.

Although service on father with notice of appointment of a guardian ad litem is sufficient.—Under this section the service on the father will not be held insufficient as being intended to make the father himself, and not the infant, a party to the action, where the summons,

with a notice attached as to the appointment of a guardian ad litem, and making express reference to the infant, was delivered to the father, and where the infant appeared by a guardian, and defended, in the case. Faust v. Faust, 31 S. C. 576, 10 S. E. 262.

And service, without the appointment of a guardian ad litem, is sufficient to give jurisdiction of an infant. Robertson v. Blair, 56 S. C. 96, 34 S. E. 11, 76 Am. St. Rep. 543.

And a lapse of 20 years will raise presumption of proper service.—Where the record in the probate court does not show service of summons on minors under 14 years of age, or on their guardian or parent, after 20 years it will be presumed that they were properly served. Clark v. Neves, 76 S. C. 484, 57 S. E. 614, 12 L. R. A. (N. S.) 298n.

Applied in Ruff v. Elkin, 40 S. C. 69, 18 S. E. 220.

IV. ALL OTHER CASES

This subdivision applies only to service on a person within the state. Armstrong v. Brant, 44 S. C. 177, 21 S. E. 634.

It does not apply to non-resident individuals.—Hensley v. Green, 36 F. S. 671.

It authorizes service on nonresident defendant without property in state.—See note under § 433 of this code, treating the case of Ford v. Calhoun, 53 S. C. 106, 30 S. E. 830.

Estoppel to deny jurisdiction of court by accepting service of irregular summons.—Adult defendants having accepted service of an irregular summons issued by the court of probate, and making no resistance to the further proceedings, or to a sale made thereunder, are estopped in action against the purchaser to recover the land, from denying the validity of the sale or the jurisdiction of the court. Finley v. Robertson, 17 S. C. 435.

Service on other for defendant.—Sheriff's certificate of service showing summons and complaint were served upon defendant by delivering copy thereof unto and leaving the same with wife of defendant personally does not comply with subsection 4 of this section in that it fails to show left with person of discretion at defendant's home or place of business. This defect may be cured by defendant filing answer, etc. Miller v. White, 172 S. C., 333; 174 S. E. 17. See also Cannon v. Haverty Furniture Co., 179 S. C. 1, 183 S. E. 469.

Where service of process was attempted by serving summons and complaint on defendant's employee at defendant's place of business, proof of service which stated that service was made on defendant by leaving copies of summons and complaint at defendant's place of business with H., that affiant knew the per-

son so served to be the defendant in the action, was defective so that court did not obtain jurisdiction of defendant, where complaint showed that defendant had abandoned plaintiff and was no longer a resident of this State. *Matheson v. McCormac*, 186 S. C. 93; 195 S. E. 122.

In action by wife against husband, service of summons and complaint on person in charge of husband's office, who was out of state securing divorce from his wife, is valid. *St. Clair v. St. Clair*, 175 S. C., 83; 178 S. E. 493.

A citizen of another state within the borders of this state for the purpose of attending court as an attorney, or witness, is immune from suit or service of process while here. *Dyar v. Georgia Power Co.*, 173 S. C., 527; 176 S. E. 711.

However agent of foreign corporation in this state when court not in session engaged in making investigation for purpose of bringing information into court to testify as an expert witness, etc., may be served. *Dyar v. Georgia Power Co.*, 173 S. C., 527; 176 S. E., 711.

§ 435. Service of process of summons on domestic corporation by publication.—If any action or proceeding in this State where the defendant is a corporation created by or organized under the laws of this State and no officer or agent thereof upon whom service of process can be made can, after due diligence, be found in this State, and this is made to appear by affidavit, then process may be served upon said corporation by publication provided in section 436.

1932 Code, § 435; Civ. P. '22, § 391; 1920 (31) 797.

§ 436. Summons—publication.

(1) **Authorized.**—Where the person on whom the service of the summons is to be made cannot, after due diligence, be found within the State, and that fact appears by affidavit to the satisfaction of the court, or judge thereof, the clerk of the court of common pleas, master, or the probate judge of the county in which the cause is pending, and it in like manner appears that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a proper party to an action relating to real property in this State, such court, judge, clerk, master, or judge of probate, may grant an order that the service be made by the publication of the summons in any one or more of the following cases: (1) where the defendant is a foreign corporation, has property within the state, or the cause of action arose therein. (2) Where the defendant, being a resident of this State, has departed therefrom, with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein with like intent. (3) Where he is not a resident of this State, but has property therein, and the court has jurisdiction of the subject of the action. (4) Where the subject of the action is real or personal property in this State, and the defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partly in excluding the defendant from any interest or lien therein. The order shall direct the publication to be made in one newspaper, to be designated by the officer before whom the application is made, as most likely to give notice to the person to be served, and for such length of time as may be deemed reasonable, not less than once a week for three weeks. In case of publication, the court, judge, clerk, master, or judge of probate shall also direct a copy of the summons to be forthwith deposited in the postoffice, directed to the person to be served at his place of residence, unless it appears that such residence is neither known to the party making the application, nor can, with reasonable diligence, be ascertained by him. In case of minors, persons imprisoned outside of this State, or lunatics confined outside of

this State, in like cases, a similar order shall be made and like proceedings be had as in case of adults not under disabilities: provided, that personal service of the summons out of the State shall be equivalent to publication and deposit in the postoffice, and when such service is had, no affidavit, as hereinabove provided for, order for publication, or deposit in the post-office shall be necessary. And such personal service so made shall be complete and final on the day of the date of the personal service of the summons as fully as if such personal service had been made under the provisions of section 434. And all causes and proceedings heretofore brought in which personal service was made out of the State and in which no affidavit for procuring order for publication was filed, are hereby validated.

(2) Unknown parties—file complaint.—In actions affecting the title to real property, or for the partition of real estate, or for the foreclosure of a mortgage on real estate, if any party or parties having any interest in or lien upon such real estate are unknown to the plaintiff, and the residence of such party or parties cannot, with reasonable diligence, be ascertained by him, and such facts shall be made to appear by affidavit to the court, or judge, clerk of court, master, or judge of probate, of the county in which the cause is pending, such court, judge, clerk, master, or judge of probate shall grant an order that the summons be served on such unknown party or parties by publishing the same once a week for three weeks in a newspaper printed in the county where the premises are situated, which publication shall be equivalent to a personal service on such unknown party or parties.

And in all cases where publication is made, the complaint must first be filed and the summons, as published, must state the time and place of said filing.

(3) Rights of defendants.—The defendant against whom publication is ordered, or his representatives, on application and sufficient cause shown at any time before judgment, must be allowed to defend the action, and the defendant against whom publication is ordered, or his representatives, may, in like manner, upon good cause shown, be allowed to defend after judgment, or at any time within one year after notice thereof, and within seven years after its rendition, on such terms as may be just; and, if the defense be successful, and the judgment, or any part thereof, has been collected or otherwise enforced, such restitution may thereupon be compelled as the court directs; but the title to property sold under such judgment to a purchaser in good faith shall not be thereby affected.

(4) Magistrate court.—The magistrates of this State are hereby invested, in actions brought in their courts, within their jurisdiction, to grant orders of publication against absent defendants, in the same manner and to the same extent as authorized in this section to be done by the circuit court or a judge thereof, or the clerks of common pleas, the master, or the probate judge; and the service of any summons upon any absent defendant, or defendants, shall have the same binding force and effect as such service would have in the court of common pleas: *provided*, that the time for publication of a summons in the magistrate's courts shall be once a week for not less than three weeks.

1932 Code, § 436; Civ. P. '22, § 392; Civ. P. '12, § 185; Civ. P. '02, § 156; 1870 (14) § 157; 1876 (16) 190; 1898 (22) 698; 1901 (23) 635; 1904 (24) 379; 1913 (28) 40; 1914

(28) 534; 1933 (38) 452; 1940 (41) 1825; 1941 (42) 275. (See § 434 for effect of this provision).

See § 880 for service on unknown parties, rights minors, etc.

- I. General Consideration.
 - A. In General.
 - B. Compliance with Section.
 - C. Conveyance of Title to Real Property.
 - D. Affidavit and Bond.
 - E. Defects and Irregularities.
- II. Service by Publication on Non-resident with Property within State.
 - A. In General.
 - B. Jurisdiction.
 - C. Sufficiency of Service.
 - D. Attachment.
- III. Service by Publication on Foreign Corporation.
- IV. Service by Publication on Non-resident Infants.
- V. Service by Publication on Non-residents for Annulment of Marriage.

I. GENERAL CONSIDERATION

A. In General

All actions maintainable under this section.—It will be noted that the statute is general in its terms. It does not mention any particular action or actions by name, but merely describes several classes of actions which may be brought under it. But that is no objection to the statute, for, clearly, if the Legislature has power to enact such a statute at all, it may do so in general as well as in specific terms, and if the action comes within any one or more of the classes described it may be maintained, just as if it had been named. *Bush v. Aldrich*, 110 S. C. 491, 96 S. E. 922, 924.

Provided the cause of action arises within state.—An agreement was made in this State between a citizen thereof and a foreign mutual assessment life insurance association, whereby application was made for membership and the amount then paid was to be refunded, if the application was rejected; the rules of the Association required proof of death claims to be made at the home office, when an assessment was to be made and the claims paid there. It was held, that the claim of the beneficiaries under such citizen's certificate after his death was not a cause of action that arose in this State. *Rodgers v. Mutual Endowment Assessment Association*, 17 S. C. 406.

A promise to pay, contained in a telegram sent from Massachusetts to South Carolina, is a contract made in Massachusetts; and no cause of action can arise thereon in South Carolina, as the place of making is, presumably, the place of performance. *Tillinghast v. Boston & Port Royal Lumber Co.*, 39 S. C. 484, 18 S. E. 120, 22 L. R. A. 49.

Authority of magistrates to grant or-

der of publication.—Prior to an amendment inserting the last subdivision, magistrates had no authority to grant order of publication. *Ferguson v. Gilbert*, 17 S. C. 26. See note on page 29 of same case.

B. Compliance with Section

Section in Derogation of common law and must be strictly construed.—Service by publication of the summons upon a non-resident is in derogation of the common law, and the statute must be strictly construed. *Tenney v. American Pipe Mfg. Co.*, 96 F. 919.

So that service without publication and attachment is void.—Service of summons out of state without order of publication and attachment is void. *Emanuel v. Ferris*, 63 S. C. 104, 41 S. E. 20. See also *Wren v. Johnson*, 62 S. C. 533, 40 S. E. 937.

And is not complete until the expiration of prescribed period.—Service is not complete until the expiration of the full six (now three) weeks. *Tenney v. American Pipe Mfg. Co.*, 96 F. 919.

But an order of publication need not bear date or seal.—The order of publication of the clerk is valid, though bearing neither date nor seal. *Clemson Agricultural College of South Carolina v. Pickens*, 42 S. C. 511, 20 S. E. 401.

And need not be in the judgment roll.—The fact that the order of publication is not in the judgment roll, where good practice would place it, does not overcome the presumption that the court would not have acted without its existence; and that there is such a presumption is elementary. *Fleming v. Chappell*, 118 S. C. 290, 110 S. E. 148, 150.

Nor is service by publication or deposit in post office indispensable.—It is not necessary that there should be a service of summons by publication, or a deposit of papers in the post office, in order to establish an effective service. They are but two of the methods to effect a service. *George Norris Co. v. S. H. Levin's Sons*, 81 S. C. 36, 61 S. E. 1103, 1106.

Provided there has been a personal service.—When publication has been ordered, personal service out of the state is equivalent to publication and deposit in post office. *Darby v. Shannon*, 19 S. C. 526; *George Norris Co. v. S. H. Levin's Sons*, 81 S. C. 36, 61 S. E. 1103, 1106.

Stated in *Best v. Seaboard Air Line Ry.*, 72 S. C. 479, 52 S. E. 223, 224.

Cited but not construed in *Abbeville Electric L. & P. Co. v. Western Electrical Supply Co.*, 61 S. C. 361, 39 S. E. 559, 55 L. R. A. 146, 85 Am. St. Rep. 890; *Cleveland v. Calvert*, 54 S. C. 83, 31 S. E. 871; *Pollock v. Carolina Interstate Building & Loan Ass'n.*, 48 S. C. 65, 25 S. E. 977,

59 Am. St. Rep. 695.

C. Conveyance of Title to Real Property

Power to render judgment vesting legal title implied.—While this section does not, in express terms, confer the power to render a judgment vesting legal title to land in one party and divesting another of such title without any conveyance from him or act on his part, it does so by necessary implication, because its sole purpose is to subject the property to the jurisdiction and control of the court. To hold otherwise would be to deny to the statute any force and effect, and to convict the Legislature of having done a futile thing; for to what purpose would a nonresident be made a party defendant by publication, if the court has not the power by its judgment to divest him of his right, title, or interest in and to the property involved in the action and vest it in another? The rendition of such a judgment must have been contemplated by the lawmakers, because no personal judgment can be rendered in such a case. *Bush v. Aldrich*, 110 S. C. 491, 96 S. E. 922, 924.

And purchasers in good faith under judgment sale are protected.—In view of this section, as to purchasers in good faith under judgments, judgment in a partition suit, and sale made thereunder, must be sustained against collateral attack in an action to recover possession of the land, unless it affirmatively appears on the fact of the record that the court had no jurisdiction of the subject of the action and of the parties; a purchaser in good faith at a judicial sale being bound only to see that the court has jurisdiction of the subject of the action and the parties, not being affected by irregularities or errors in the record for which the judgment may be vacated on direct attack or reversed on appeal, or by secret vices affecting the judgment, which are not disclosed by examination of the record. *Gladden v. Chapman*, 106 S. C. 486, 91 S. E. 796.

Under this section which provides that "defendant against whom publication is ordered" may, upon good cause shown, be allowed to defend after the judgment, and if the defense be successful, and the judgment has been enforced, such restitution may be compelled as the court may direct, but the title to property sold under such judgment to a purchaser in good faith shall not be affected, such defendant cannot divest rights of innocent purchasers, which had vested before any assault had been made on the judgment, which on its face was entirely regular, though defendant was not duly and legally served by publication. *Hunter v. Ruff*, 47 S. C. 525, 25 S. E. 65, 58 Am. St. Rep. 907.

D. Affidavit and Bond

Sufficiency of affidavit.—The affidavit

on which the order of publication is based is not insufficient for want of venue, or for failing to state facts showing the court's jurisdiction of the subject-matter, where reference is made therein to the complaint which shows such jurisdiction. *Clemson Agricultural College of South Carolina v. Pickens*, 42 S. C. 511, 20 S. E. 401.

In the absence of fraud or collusion, if the affidavit satisfies the officer granting order of publications, his order is final. *Yates v. Gridley*, 16 S. C. 496. See also, *National Exch. Bank v. Stelling*, 31 S. C. 360, 9 S. E. 1028.

Validity of bond.—Rule 68 of the Circuit Court requires that there shall be indorsed on the bond of plaintiff in attachment the approval of the clerk of court. This section requires that the clerk shall be satisfied, as an officer, that the bond shall be approved. A bond in attachment, without the approval of the clerk indorsed thereon, is valid. *Watson v. Paschall & Co.*, 73 S. C. 413, 53 S. E. 646.

E. Defects and Irregularities

Appearance cures defect in service. *Townes v. City Council*, 46 S. C. 15, 23 S. E. 984; *Martin v. Bowie*, 37 S. C. 102, 15 S. E. 736, 740.

And irregularities are waived by general appearance.—Irregularities in issuing order of publication waived by general appearance. *Savannah Grocery Co. v. Rizer*, 70 S. C. 501, 508, 50 S. E. 199.

But only party to action can take advantage of a defect.—Only defendant can take advantage of alleged insufficiency in service of summons. *Darby v. Shannon*, 19 S. C. 526.

So that it has been held that service of summons and complaint will not be set aside on the motion of one not a party to the action. *Howell v. Atlantic Coast Line R. Co.*, 79 S. C. 493, 60 S. E. 1114.

And the question of good faith cannot be made on mere motion to vacate judgment, but can only be made under formal proceeding. *Yates v. Gridley*, 16 S. C. 496.

II. SERVICE BY PUBLICATION ON NON-RESIDENT WITH PROPERTY WITHIN STATE

A. In General

Where all the parties in interest are non-residents, they can be made parties by publication in an action to set aside an assignment as to real property situated within the state. *National Exch. Bank v. Stelling*, 31 S. C. 360, 9 S. E. 1028.

B. Jurisdiction

Under this section court has jurisdiction to foreclose a mortgage.—Under this section, the court, by proceedings to foreclose and the filing of a *lis pendens*, has jurisdiction, though the mortgagor

was a non-resident, where the subject of the action was real property in the state. *Greenwood Loan & Guarantee Ass'n, v. Williams*, 71 S. C. 421, 51 S. E. 272.

To compel specific performance.—Under this section, as amended by Act Feb. 26, 1914 (28 St. at Large, p. 534), as to service by publication, when a non-resident defendant claims an interest in real property, the court of common pleas has jurisdiction to compel specific performance of a contract of the non-resident to convey lands within the state and within the jurisdiction of the court. *Bush v. Aldrich*, 110 S. C. 491, 96 S. E. 922.

To collect value of improvements.—The court within the territorial jurisdiction of which the land was situate, and the contract relative thereto was made, has jurisdiction of an action to collect from the property the value of the improvements, the infant and his mother who had become non-residents being served with summons by publication under the provision of this section, allowing service in such manner on non-residents where the subject of the action is property within the state. *Shumate v. Harbin*, 35 S. C. 521, 15 S. E. 270.

To foreclose lien of municipality for improvement assessments.—In suit to foreclose lien of improvement assessments of municipality against non-residents, court is not without power to bar interests of nonresidents and residents alike, where jurisdiction of non-residents' interests is obtained in manner provided by statute, relating to publication of summons. *Town of Cheraw v. Turnage*, 184 S. C. 76; 191 S. E. 831.

C. Sufficiency of Service

Defendant is sufficiently served where he acknowledges service.—Acceptance or acknowledgment of service out of the State by a non-resident is equivalent to personal service, and a sufficient service, only where there has been an order for publication. *Riker v. Vaughan*, 23 S. C. 187.

Or is furnished with copy of complaint and summons.—On foreclosure of realty, where defendant, a non-resident, is served by publication, it is unnecessary to comply with the requirement of this section, that the summons, as published, shall state the time and place of filing the complaint, if the defendant is furnished with a copy of the complaint, as well as the summons. *Clemson Agricultural College of South Carolina v. Pickens*, 42 S. C. 511, 20 S. E. 401.

And failure to indorse date of filing on affidavit and complaint is immaterial.—Where order for publication of notice on a non-resident recited the filing of of the affidavit and complaint, the fact that the date of filing was not indorsed

on the affidavit and complaint at the time is immaterial. *Bush v. Aldrich*, 110 S. C. 491, 96 S. E. 922.

D. Attachment

Proceedings for publication of summons to a non-resident before attachment of his property are void. *Little v. Christie*, 69 S. C. 57, 48 S. E. 89.

As the attachment is essential to jurisdiction.—Attachment of the property of a non-resident is essential to jurisdiction. *Greenwood Grocery Co. v. Canadian County Mill & Elevator Co.*, 72 S. C. 450, 52 S. E. 191, 110 Am. St. Rep. 627, 5 Ann. Cas. 261, 2 L. R. A. (N. S.) 79n.

In the absence of an attachment, service of a summons without the state on a non-resident will not give jurisdiction. *Toms v. Richmond & D. R. Co.*, 40 S. C. 520, 19 S. E. 142.

Nor is attachment sufficient without publishing the summons.—This section is not sufficiently complied with by levying an attachment on land within the state belonging to a non-resident defendant, and leaving a copy at his place of residence, out of the state, in his absence, without publishing the summons. *Armstrong v. Brant*, 44 S. C. 177, 21 S. E. 634.

But publication and deposit of summons in post office is unnecessary where defendant personally served.—Service of summons on a non-resident by publication and deposit in the post office is not necessary in an attachment suit against a non-resident, notwithstanding an order for service in that manner; but a personal service outside the state will answer in view of this section. *Norris Co. v. S. H. Levin's Sons*, 81 S. C. 36, 61 S. E. 1103.

And where defendant is sufficiently served his property is subject to any judgment rendered against him.—In an action on a money demand against a non-resident defendant, where an attachment warrant is issued when the summons is filed, and property of defendant situated in the county where the action is brought is attached, and summons is had against such defendant both by publication under order obtained therefor and by actual service on him within the state, the court acquires jurisdiction of him to the extent that the attached property is subject to any judgment that may be rendered against him. *Gibson v. Everett*, 41 S. C. 22, 19 S. E. 286.

But this section does not apply to non-resident individuals doing business in the state.—*Hensley v. Green*, 36 F. S. 671.

III. SERVICE BY PUBLICATION ON FOREIGN CORPORATIONS

Jurisdiction of foreign corporation without property in state.—The courts of South Carolina cannot acquire juris-

diction of a foreign corporation, which has no property in the state, simply by personal service on such corporation in another state. *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565, followed. *Tillinghast v. Boston & Port Royal Lumber Co.*, 39 S. C. 484, 18 S. E. 120, 22 L. R. A. 49.

Receiver cannot be appointed under this section. *Porter v. Brown*, 149 S. C. 151, 146 S. E. 810.

IV. SERVICE BY PUBLICATION ON NON-RESIDENT INFANTS

Statutory mode of making infants parties to action must be strictly followed.—As is said in *Finley v. Robertson*, 17 S. C., at page 439: "The mode of making infants parties to an action in a court of record is clearly and expressly prescribed by statute, and a due and tender regard for the rights and welfare of infants requires that this statute shall

be strictly followed." *Riker v. Vaughan*, 23 S. C. 187, 188; *Lanham v. Bomar*, 123 S. C. 483, 116 S. E. 926, 124 S. E. 635.

As the only method of obtaining jurisdiction.—Jurisdiction of the person of a non-resident infant can only be obtained by pursuing the mode prescribed by statute. *Riker v. Vaughan*, 23 S. C. 187.

Insane person to defend by guardian ad litem. *Cathcart v. Jennings*, 137 S. C. 450, 135 S. E. 558.

V. SERVICE BY PUBLICATION ON NON-RESIDENT FOR ANNULLMENT OF MARRIAGE

Acquired by service within state or by voluntary appearance.—Jurisdiction of an action to declare a marriage void against a non-resident can be acquired only by service within the state, or by voluntary appearance of defendant. *Pepper v. Shearer*, 48 S. C. 492, 26 S. E. 797.

§ 437. Service on non-residents in actions arising out of accidents or collisions of motor vehicles.

(1) **Director of motor vehicle division lawful attorney.**—The acceptance by non-resident of the rights and privileges conferred by the laws now or hereafter in force in this state permitting the operation of motor vehicles, as evidenced by the operation of a motor vehicle by such non-resident on the public highways, streets of any incorporated or unincorporated municipality and public roads of this state, or the operation by such non-resident of a motor vehicle on the public highways, streets of any incorporated or unincorporated municipality and public roads of the state other than as so permitted or regulated, shall be deemed equivalent to the appointment by such non-resident of the director of motor vehicle division of the state highway department, or of his successor in office, to be his true and lawful attorney upon whom may be served all summons or other lawful process in any action or proceeding against him, growing out of, any accident or collision in which said non-resident may be involved by reason of the operation by him, for him, or under his control or direction, express or implied, of a motor vehicle on such public highway of this state, and said acceptance or operation shall be a signification of his agreement that any such process against him shall be of the same legal force and validity as if served on him personally. Service of such process shall be made by leaving a copy thereof, with a fee of one dollar, in the hands of said director of motor vehicle division of the state highway department, or in his office, and such service shall be sufficient service upon the said non-resident: *provided*, that notice of such service and a copy of the process are forthwith sent by registered mail by the plaintiff or the director of motor vehicle division of the state highway department to the defendant and the defendant's return receipt and the plaintiff's affidavit of compliance herewith are appended to the summons or other process and filed with said summons, complaint and other papers in the cause. The court in which the action is pending shall order such continuance as may be necessary to afford the defendant reasonable opportunity to defend the action.

(2) Director of motor vehicle division to keep records of all services.—

The director of motor vehicle division of the state highway department shall keep a record of all such processes, which shall show the day and hour of service upon him. When the registry return receipt shall be returned to the director of motor vehicle division of the state highway department, he shall deliver it to the plaintiff on request and keep a record showing the date of its receipt by him and its delivery to the plaintiff.

1932 Code, § 437; 1931 (37) 344; 1935 (39) 249.

For service on common carriers operating motor vehicles section 8511 should be consulted herewith.

It must appear that automobile was being operated for defendant, on allegation that it was being used to further and transact defendant's business. *Kirchner v. N. & W. Overall Co.*, 16 F. S. 915.

Commission salesman, working on own time and in own way, using and operating his own automobile, not subject to control of non-resident corporation for which he was making sales, was not operating automobile "for" corporation

within this section. *Ibid.*

Service by this method permitted in action by one non-resident against another non-resident. *Peeples v. Ramsbacher*, 29 F. S. 632.

Failure to file registry return receipt and affidavit of compliance along with summons and complaint does not require setting aside of service. They may be filed any time before trial. *Ibid.*

For case where affidavits held insufficient to authorize setting aside of service, see *Moorer v. Underwood*, 194 S. C. 72, 9 S. E. (2d) 29.

§ 438. Proceedings when part only of defendants served—partners.—

Where the action is against two or more defendants, and the summons is served on one or more of them, but not on all of them, the plaintiff may proceed as follows:

(1) If the action be against defendants jointly indebted upon contract, he may proceed against the defendant served, unless the court otherwise direct; and, if he recover judgment, it may be entered against all the defendants thus jointly indebted, so far only as that it may be enforced against the joint property of all and the separate property of the defendants served; and, if they are subject to arrest, against the persons of the defendants served; or,

(2) If the action be against the defendants severally liable, he may proceed against the defendants served, in the same manner as if they were the only defendants.

(3) If all the defendants have been served, judgment may be taken against any or either of them severally, where the plaintiff would be entitled to judgment against such defendant or defendants, if the action had been against them, or any of them, alone.

(4) If the name of one or more partners shall, for any cause, have been omitted in any action in which judgment shall have passed against the defendants named in the summons, and such omission shall not have been pleaded in such action, the plaintiff, in case of judgment therein shall remain unsatisfied, may, by action, recover of such partner separately, upon proving his joint liability, notwithstanding he may not have been named in the original action; but the plaintiff shall have satisfaction of only one judgment rendered for the same cause of action.

1932 Code, § 438; Civ. P. '22, § 393; Civ. P. '12, § 186; Civ. P. '02, § 157; 1870 (14) § 159.

The validity of subdivision one has been upheld.—The validity of legislation similar to this has been declared by the Supreme Court of the United States

in *Hanley v. Donoghue*, 116 U. S. 1, 3, 6 S. Ct. 242, 29 L. Ed. 242; *Allnut v. Lancaster*, 76 F. 131, 132.

And it has been held not imperative.—

The terms of this section are not imperative. The matter is within the discretion of the court. *Allnut v. Lancaster*, 76 F. 131, 132.

So that the court will exercise its discretion by ordering that all the defendants be served when they all reside within the jurisdiction of the court and can be served by process. *Allnut v. Lancaster*, 76 F. 131.

When such service is practicable.—This provision having been made to meet the evil of a case where it is impracticable to serve or bring within the jurisdiction of the court all of joint contractors, it would seem that it should only be used when the evil sought to be remedied exists. *Allnut v. Lancaster*, 76 F. 131, 132.

The section not applying where all defendants have been served and have answered.—The object the section, as declared in the first paragraph, is to provide the mode by which a plaintiff may proceed in an action where the summons has not been served upon all of the defendants; and it then proceeds to direct how the plaintiff, in such cases, may proceed in the several contingencies presented in the several subdivisions of the section. It is apparent, therefore, that, by the express terms of the section, its provisions do not apply to a case where both defendants have been served, and both have answered the complaint. This has been directly decided in *Dulaney v. Elford*, 22 S. C. 304, 309, where it is said: "Section 157 (now this section) of the Code, by its express terms, applies only to those cases in which only one of two partners has been served with the summons." And the same doctrine is recognized in *Whitfield v. Hovey*, 30 S. C. 117, 8 S. E. 840; *Pope Mfg. Co. v. Welch*, 55 S. C. 528, 33 S. E. 787, 789.

Under subdivision three an action by a creditor against stockholders may be discontinued as to all but one.—Under this section an action by a creditor against stockholders of a corporation whose charter makes each stockholder jointly and severally liable may be discontinued as to all defendants but one. *Sadler v. Nicholson*, 49 S. C. 7, 26 S. E. 893.

Subdivision four does not make partnership contracts joint and several.—

Pope Mfg. Co. v. Welch, 55 S. C. 528, 33 S. E. 787.

In an action brought against a partnership, in which all the partners are served, the judgment entered is a joint judgment, and no several judgments can be entered against one of the persons composing the partnership. The effect of this joint judgment, as provided by statute, is simply that such joint judgment shall bind, not only the partnership property, but also the individual property of each of the partners who has been served; but the statute does not authorize the entry of a several judgment against any of the persons composing the partnership. *Pope Mfg. Co. v. Welch*, 55 S. C. 528, 33 S. E. 787, 791.

Nor does it authorize a judgment against one not served.—This section does not authorize a general judgment against the one not served, and does not authorize any judgment other than against the one served, where the summons is issued against him alone, though the complaint is against two defendants, and alleges a sale to them as partners. *Roberts v. Pawley*, 50 S. C. 491, 27 S. E. 913.

The fact that partner who was personally served with process in tort action was served as co-partner did not govern capacity in which he was required to defend, and under South Carolina law the action could proceed against him individually although the other partner was not served with process. *Duncan v. Pearson et al.*, 35 F. S. 631.

Except in so far as partnership property is concerned.—Under this section service of a summons of a justice against a firm on one member thereof, and judgment against the firm, binds the partnership property and that of the individual served. *Pierce v. Varn, Byrd & Co.*, 76 S. C. 359, 57 S. E. 184.

Amendment properly allowed to change name of corporation to firm name.—It is not error for a magistrate to permit a summons to be amended, by changing the name of the corporation defendant to the firm name to conform to the proof. *Pierce v. Varn, Byrd & Co.*, 76 S. C. 359, 57 S. E. 184.

Applied in *Card v. Hine*, 39 F. 818; *Dominion Nat. Bank v. Olympia Cotton Mills*, 128 F. 181.

§ 439. When service by publication complete.—In the cases mentioned in section 436, the service of summons shall be deemed complete at the expiration of the time prescribed by the order for publication, except in the case of personal service, in which case such service shall be complete and final on the day on which it is made, as provided in said section 436.

1932 Code, § 439; Civ. P. '22, § 394; Civ. P. '12, § 187; Civ. P. '02, § 158; 1870 (14) § 160; 1901 (23) 635.

§ 440. Proof of service—amend process or proof of service.—Proof of the service of the summons, and of the complaint or notice, if any, accompanying the same must be as follows:

- (1) If served by the sheriff, his certificate thereof; or,
- (2) If by any other person, his affidavit thereof; or,
- (3) In case of publication, the affidavit of the printer, or his foreman, or principal clerk, showing the same, and an affidavit of a deposit of a copy of the summons in the postoffice, as required by law, if the same shall have been deposited.

When the service is made out of the State, the proof of such service may be made, if within the United States, by affidavit before any person in this State authorized to take an affidavit, or before a commissioner of deeds for this State, or a notary public, who shall use his official seal, or before a clerk of a court of record, who shall certify the same by his official seal; or, if made without the limits of the United States, before a consul or vice-consul, or consular agent of the United States, who shall use in his certificate his official seal.

- (4) The written admission of the defendant.

In case of service otherwise than by publication, the certificate, affidavit, or admission must state the time and place of the service. *Provided*, that at any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.

1932 Code, § 440; Civ. P. '22, § 395; Civ. P. '12, § 188; Civ. P. '02, § 159; 1870 (14) § 161; 1884 (18) 745; 1891 (20) 1041; 1940 (41) 1830.

Subdivision one of this section relates solely to the service of a summons by which a civil action is commenced; and where the summons is not issued for the commencement of a new action, but for a mere continuance of the original action (*McDowall v. Reed*, 28 S. C. 466, 6 S. E. 300), it may well be questioned whether the legislature intended to require the same strictness of proof of service of a paper issued after the action was commenced as would be required for the service of a summons by which an action is commenced. *Prince v. Dickson*, 39 S. C. 477, 18 S. E. 33, 34.

So that on subsequent proceedings defendant cannot contradict the record by showing lack of service.—Where the record shows on its face that the court rendering a judgment had acquired jurisdiction of defendant, on a subsequent proceeding to renew the judgment, defendant will not be permitted to contradict the record by showing lack of service of summons. *Prince v. Dickson*, 39 S. C. 477, 18 S. E. 33.

While sheriff's return is presumptively correct it is rebutted when disproved.—A sheriff's return of personal service, while presumptively correct, is rebutted when disproved by the entry in his writ book, and by the testimony of the deputy to whom the paper was delivered

for service, and of the person upon whom the alleged service was made. *Genobles v. West*, 23 S. C. 154, 155.

A personal service by sheriff's deputy is sufficient.—The return on a summons for the renewal of a judgment indorsed and signed by the sheriff in these words: "By my special deputy (naming him), delivered a copy of this notice to (defendant) personally, at her residence (giving place and date), and left the same with her," is sufficient to confer jurisdiction of defendant. *Prince v. Dickson*, 39 S. C. 477, 18 S. E. 33.

Affidavit of service by deputy sheriff is only prima facie evidence.—*Laurens, etc. v. Copeland*, 154 S. C. 391, 151 S. E. 617.

And a misnomer of defendant does not affect conclusiveness of service.—Where there is a misnomer of defendant, but the summons is served on the party intended and he fails to appear and object to the misnomer, and suffers judgment to be obtained by default, he is concluded; and in all future litigation, he may be connected with the judgment by proper averments. *Waldrop v. Leonard*, 22 S. C. 118, cited in *Genobles v. West*, 23 S. C. 154, 167.

Under subdivision two proof of service by a constable can be made to appear only by his affidavit. *State v. Cohen*, 13

S. C. 198.

Subdivision three authorized affidavit before consular agent even before amendment.—An affidavit, under this section, prior to the amendment of 1884, providing that proof of service outside the state shall be made by affidavit, without prescribing before whom it shall be made, could have been made before a consular agent of the United States authorized by Rev. St. U. S. 1878, p. 311, to take affidavits. *Marine Wharf & Storage Co. v. Parsons*, 49 S. C. 136, 26 S. E. 956.

Under subdivision three certificate of clerk of court may be appended after affidavit is taken.—It is not required that the certificate of the clerk of court as to the authority of the notary public should be appended to the affidavit at the time it is taken, but it may be furnished to the court afterwards. *National Exch. Bank v. Stelling*, 31 S. C. 360, 9 S. E. 1028.

Under subdivision four the written admission of the defendant is service. *Benson v. Carrier*, 28 S. C. 119, 5 S. E. 272.

And a written admission by defendant's authorized attorney is binding.—A written admission of service of a summons by the duly authorized attorney for defendant is binding on defendant. *Sullivan v. Susong*, 40 S. C. 154, 18 S. E. 268.

But such authority is indispensable to legality of service.—The written admission of service of summons by a duly authorized attorney would probably be binding upon the defendant, but acceptance of service by an attorney having no authority so to do, does not constitute a legal service. *Reed v. Reed*, 19 S. C. 548.

Except where defendant is estopped to deny authority.—Where a defendant expressly refused to authorize his attorney to accept service of summons for him, the court could not imply such authority, except perhaps upon a principle of estoppel in proper cases. *Reed v. Reed*, 19 S. C. 548.

Provided the acceptance was not made under a misapprehension.—The acceptance of service in this case was made

under a misapprehension, and efforts were promptly made by defendant's attorneys to have the mistake corrected without disadvantage to plaintiff. There is, therefore no ground for estoppel. *Reed v. Reed*, 19 S. C. 548.

And a stranger to action cannot take advantage of defective admission.—A judgment cannot be attacked by a stranger to the action on the ground that the admission of service was defective. *Martin v. Bowie*, 37 S. C. 102, 15 S. E. 736.

A return that defendant was served "at her residence" is sufficient as to time and place.—Under this section, requiring as proof of service of a summons, an affidavit stating "the time and place of service," a return stating that defendant was served "at her residence" will be held, on a collateral attack, to sufficiently show the place of service; it appearing from the record that the land, the subject-matter of the action, was in F. county, that the action was brought in that county, and that the summons was lodged in the office of the sheriff of that county, and served by his deputy. *Lyles v. Haskell*, 35 S. C. 391, 14 S. E. 829.

Failure to state place of acceptance not fatal, in collateral attack.—The omission of the statement of the place of acceptance of service of summons in mortgage foreclosure action in the written record of the acceptance did not affect jurisdiction of the court or render the foreclosure decree subject to collateral attack by the mortgagor in proceedings by the mortgagor on a fire policy, wherein the mortgagor sought to establish an insurable interest in the property by proof that the mortgage foreclosure proceeding was invalid. *Abraham v. New York Underwriters Ins. Co.* 187 S. C. 70; 196 S. E. 531.

And see cases therein cited, to effect that irregularities will be disregarded if primary purpose of acquainting defendant with pendency of action is met.

Applied in *Fleming v. Chappell*, 118 S. C. 290, 110 S. E. 148; *Tillinghast v. Boston & Port Royal Lumber Co.*, 39 S. C. 484, 18 S. E. 120, 22 L. R. A. 49.

§ 441. When jurisdiction of action acquired.—From the time of the service of the summons in a civil action, or the allowance of a provisional remedy, the court is deemed to have acquired jurisdiction, and to have control of all the subsequent proceedings. A voluntary appearance of a defendant is equivalent to personal service of the summons upon him.

1932 Code, § 441; Civ. P. '22, § 396; Civ. P. '12, § 189; Civ. P. '02, § 160; 1870 (14) § 162.

Jurisdiction may be acquired by summons or voluntary appearance.—Under this section a court may acquire jurisdiction of the defendant's person by sum-

mons or by his voluntary appearance. *Stephens v. Ringling*, 102 S. C. 333, 86 S. E. 683.

As voluntary appearance is equivalent

to **personal service**. *State v. Cohen*, 13 S. C. 198; *State v. Marshall*, 24 S. C. 507; *Benson v. Carrier*, 28 S. C. 119, 5 S. E. 272; *Shumate v. Harbin*, 35 S. C. 521, 15 S. E. 270; *Cone v. Cone*, 61 S. C. 512, 39 S. E. 748; *Martin v. Bowie*, 37 S. C. 102, 15 S. E. 741; *Townes v. City Council*, 46 S. C. 15, 23 S. E. 984; *Ex parte Keeler*, 45 S. C. 537, 23 S. E. 865, 31 L. R. A. 678; *Greenwood Association v. Williams*, 71 S. C. 421, 51 S. E. 272; *Savannah Grocery Co. v. Rizer*, 70 S. C. 501, 50 S. E. 199; *Garrett v. Herring Furniture Co.*, 69 S. C. 278, 48 S. E. 254; *Sentell v. Southern Ry.*, 67 S. C. 229, 231, 45 S. E. 155; *Mayes v. Evans*, 80 S. C. 362, 364, 61 S. E. 216.

And is a **waiver of objection to jurisdiction of person**.—Appearance waives objection to jurisdiction of person, but not of subject matter. *McGrath v. Piedmont Mut. Ins. Co.*, 74 S. C. 69, 70, 54 S. E. 218; *Nixon v. Piedmont Mut. Ins. Co.*, 74 S. C. 438, 54 S. E. 657; *Jenkins v. Southern Ry.*, 73 S. C. 289, 53 S. E. 480. See also *Riley v. Southern Ry.*, 81 S. C. 387, 392, 62 S. E. 509.

And to defects that are not jurisdictional.—The failure of a trial justice in South Carolina to sign the original summons, and his action in fixing the date of trial at less than the requisite number of days after service, are not jurisdictional defects, and are cured by the written acceptance of a copy of the summons, and an appearance and defense to the action. *Benson v. Carrier*, 28 S. C. 119, 5 S. E. 272.

Provided it is made before judgment.—To be equivalent to personal service voluntary appearance must be made before judgment. *State v. Cohen*, 13 S. C. 198.

And shown by the proceedings.—Voluntary appearance may be shown by the pleadings or entry in magistrate's book; it must be shown by the proceedings, and cannot, in absence of such showing, be proved by parol testimony. *Barron v. Dent*, 17 S. C. 75.

Thus the voluntary appearance of an infant is binding upon judgment where the face of the proceedings fails to show his infancy. *State v. Lewis*, 21 S. C. 598.

In order to raise objection of plaintiff's want of capacity to sue there must be a general appearance. *Riley v. Southern Railway*, 81 S. C. 387, 392, 62 S. E. 509.

For example defendant's answer to the merits is a formal appearance. *Stephens v. Ringling*, 102 S. C. 333, 86 S. E. 683.

So also is his coming into court of his own notion after hearing he was sought by sheriff.—Where a defendant announced in open court that, having heard the sheriff was looking for him, he came of his own notion into court, the action constituted a voluntary appearance and submission to the jurisdiction

of the court. *Stephens v. Ringling*, 102 S. C. 333, 86 S. E. 683.

Or appearance for the purpose of demurring to jurisdiction.—Party bound by appearance for purpose of demurring to jurisdiction. *Cotton v. Johnson*, 71 S. C. 413, 51 S. E. 245.

Or appearance to intervene.—Appearance to intervene gives jurisdiction of person. *Whilden v. Chapman*, 80 S. C. 84, 61 S. E. 249.

Or any action by the defendant, amounting to a manifestation of an intent to be in court, is a voluntary appearance, and may be by formal writing or by informal parol action, the act of "appearance" being either a coming into court, the first act of a defendant in court, or a submission to the jurisdiction of the court. *Stephens v. Ringling*, 102 S. C. 333, 86 S. E. 683.

Likewise, appearance by a foreign corporation is submission to jurisdiction. *Elms v. Southern Power Co.*, 78 S. C. 323, 326, 58 S. E. 809.

Jurisdiction may also begin at the time of the allowance of a provisional remedy. *Jordan v. Wilson*, 69 S. C. 256, 48 S. E. 224, 225.

And even where no summons has been served, but attachment has been issued, the court has jurisdiction for certain purposes. *Darby v. Shannon*, 19 S. C. 526.

But action must be regularly commenced by attachment to have effect. *Tillinghast v. Boston & Port Royal Lumber Co.*, 39 S. C. 484, 18 S. E. 120, 22 L. R. A. 49.

Under this section procedure by attachment is part of the whole procedure in the cause, and is not severable from the summons, but dependent on it. *Stephens v. Ringling*, 102 S. C. 333, 86 S. E. 683.

Special appearance to question jurisdiction is not equivalent to personal service.—If defendant appear only to object to jurisdiction because he has not been served, the court is without jurisdiction. *State v. Marshall*, 24 S. C. 507.

Or appearance to vacate judgment obtained by void service.—An appearance for purpose of motion to vacate judgment obtained by void service of summons in foreign state gives no jurisdiction of the person. *Wren v. Johnson*, 62 S. C. 533, 40 S. E. 937.

Or appearance to remove cause to federal court.—Appearance for the sole purpose of removing cause to the federal circuit court is not a general appearance and does not waive objections to manner of service of process. *Clark v. Wells*, 203 U. S. 164, 27 S. Ct. 43, 51 L. Ed. 138.

Where service of original summons and complaint is valid, court has jurisdiction of subsequent proceedings. *St.*

Clair v. St. Clair, 175 S. C. 83, 178 S. E. 96, 34 S. E. 11, 76 Am. St. Rep. 543; Darby v. Shannon, 19 S. C. 526; Beacham v. Ross, 187 S. C. 398, 197 S. E. 369.

Applied in Robertson v. Blair, 56 S. C.

§ 442. Bringing and prosecuting suits affecting obligations of the state.—No suit shall be filed, nor shall any pending suit be prosecuted, in any court of this State affecting the issuance or sale of any state security, certificate of indebtedness, or bond, the intent or effect of which is to prevent, delay, or affect the sale or other disposition thereof, or which would have this effect, unless and until the plaintiff in said action shall make application to the circuit judge presiding in the circuit in which the action is brought; or if there be no judge presiding, then to the resident judge of such circuit, or to the Chief Justice of the Supreme Court, if the same be brought in the original jurisdiction thereof; or, if he be disabled or disqualified, to an associate justice for leave to bring and/or prosecute said action and upon convincing such judge or justice of the merit in such action or proceeding, the same shall then not be filed or prosecuted unless and until the plaintiff or plaintiffs shall file in such court a bond in such amount as will adequately protect the State against loss, damage, injury and costs in an amount of not less than twenty-five thousand (\$25,000.00) dollars, subscribed by a duly licensed surety company, or the deposit of a like amount in cash, conditioned to pay all loss, damage, injury and costs, including attorney's fees, which the State may sustain in any such action: *provided, further*, that before any action as hereinbefore referred to shall be hereafter commenced at least ten days notice thereof shall be given to the Governor and the state treasurer, together with a copy of the proposed complaint, so as to afford them an opportunity to appear before the judge or justice in opposition to the filing of the suit and to be heard upon the amount of the bond to be required.

1932 Code, § 442; 1930 (36) 1221.

In *State ex rel. Edwards v. Osborne*, 193 S. C. 158, 7 S. E. (2d) 526, the court remarked that the parties had not invoked this section in view of the import-

ance of the issues presented and the nature and character of the interests involved, the action being one to test the validity of "diversion" of highway funds.

CHAPTER 17

Notices, Filing and Service of Papers

443. Notices.

444. Personal service.

445 thru 447. Service by mail.

448. Four days' notice of motion.

449. When service unnecessary.

450. Service on non-residents.

451. Filing of summons and pleadings.

452. Service on attorney.

453. Chapter not applicable in contempt cases.

§ 443. Notices, etc.—how served.—Notices shall be in writing, and notices and other papers may be served on the party or attorney, in the manner prescribed in sections 444, 445, and 446, where not otherwise provided by this Code of Procedure.

1932 Code, § 443; Civ. P. '22, § 760; Civ. P. '12, § 446; Civ. P. '02, § 408; 1870 (14) 423.

A notice by telephone is verbal and insufficient under this section. In re

Shier's Estate, 35 S. C. 417, 14 S. C. 931.
So also an oral notice of appeal is in-

effective. *Barnwell v. Marion*, 56 S. C. 54, 33 S. E. 719. See also *Abney v. Cole*, 30 S. C. 607, 609, 10 S. E. 390. **Applied in** *Walters v. Laurens Cotton Mills*, 53 S. C. 155, 31 S. E. 1.

§ 444. Service—how made.—The service may be personal, or by delivery to the party or attorney on whom the service is required to be made; or it may be as follows:

(1) If upon an attorney, it may be made during his absence from his office, by leaving it with the clerk therein, or with a person having charge thereof; or, when there is no person in the office, by leaving it, between the hours of six in the morning and nine in the evening, in a conspicuous place in the office; or, if it be not open so as to admit of such service, then by leaving it at the attorney's residence, with some person of suitable age and discretion.

(2) If upon a party, it may be made by leaving the paper at his residence between the hours of six in the morning and nine in the evening, with some person of suitable age and discretion.

1932 Code, § 444; Civ. P. '22, 761; Civ. P. '12, § 447; Civ. P. '02, § 409; 1870 (14) § 424.

Leaving notice with wife at residence is sufficient.—Service of notice by leaving copies of papers with the wife of a party, at his place of residence, in his absence, is sufficient. *Allen v. Cooley*, 53 S. C. 77, 30 S. E. 721, second appeal reported in 53 S. C. 414, 31 S. E. 634.

But notice by leaving copy under door of attorney's locked office is insufficient.—Attempted service of notices of issues for jury by putting copies under door of attorney's office, when office was locked, was insufficient. *Burn v. Nock* 159 S. C. 435, 157 S. E. 623.

§ 445. Service by Mail.—Service by mail may be made where there is a regular communication by mail.

1932 Code, § 445; Civ. P. '22, § 762; Civ. P. '12, § 448; Civ. P. '02, § 410; 1870 (14) § 425; 1925 (34) 17.

Service by mailing on the last day is sufficient. *Walters v. Laurens Cotton Mills*, 53 S. C. 155, 31 S. E. 1.

And when last day falls on Sunday service on day following is sufficient.—Depositing in the post office on the day after the last day prescribed for service is a good and legal service where such last day falls on Sunday. *Royal Exchange Assurance of London v. Bennettsville & C. R. Co.*, 95 S. C. 375, 79 S. E. 104.

But service by written acceptance is not converted into "service by mail" merely because transmitted by mail.—Service by written acceptance or acknowledgment is not converted into "service by mail," within this section

and the two following sections, merely because the paper served was transmitted by mail. *Priester v. Priester*, 131 S. C. 284, 127 S. E. 18.

Notice of intent to appeal from decree given more than ten days after acceptance of service of notice of filing of decree is not, under this section and the two following sections, served within the time required by law, though the notice was transmitted by mail. *Priester v. Priester*, 131 S. C. 284, 127 S. E. 18.

As to service of notice of appeal on magistrate, see *Wright v. Southern Railway*, 74 S. C. 27, 30, 54 S. E. 211.

See generally *Martin v. Hutto*, 82 S. C. 432, 438, 64 S. E. 421.

§ 446. Deposit of papers, address, and payment of postage.—In case of service by mail, the paper must be deposited in the postoffice, addressed to the person on whom it is to be served, at his place of residence and the postage paid.

1932 Code, § 446; Civ. P. '22, § 763; Civ. P. '12, § 449; Civ. P. '02, § 411; 1870 (14) § 426.

See § 445 of this Code and notes thereto.

Service on non-resident by leaving copy with him in foreign state is suffi-

cient.—A rule to show cause is properly served on a non-resident by leaving the copy with him in a foreign state. *State v. Johnson*, 77 S. C. 252, 253, 57 S. E. 846.

So also is notice deposited in post office at one o'clock of tenth day.—Where a notice with postage paid was deposited in the post office, directed to the attorney of respondents at one o'clock on the tenth day after the rising of the circuit court, but did not reach such attorney

until the eleventh day, it constituted a sufficient notice. *Walters v. Laurens Cotton Mills*, 53 S. C. 155, 31 S. E. 1.

As to effect of not receiving notice, see *Martin v. Hutto*, 82 S. C. 432, 438, 64 S. E. 421.

§ 447. Double time where service by mail.—When the service is by mail, it shall be double the time required in cases of personal service.

1932 Code, § 447; Civ. P. '22, § 764; Civ. P. '12, § 450; Civ. P. '02, § 412; 1870 (14) § 427.

See § 445 of this Code and notes there-to.

This provision is intended for the benefit of the party upon whom the service is made and not for the party making the service. *Sullivan v. Speights*, 12 S. C. 561.

And the service is complete when the paper is deposited in the post office

properly stamped and addressed. *Sullivan v. Speights*, 12 S. C. 561.

Time for service of exceptions not extended when sent by mail.—The time for service of exceptions upon the judge, after rising of the court, is not extended when sent by mail. *Sullivan v. Speights*, 12 S. C. 561.

§ 448. Notice of motion, etc., where personally served.—Notice of a motion or other proceeding before a court or judge, when personally served, shall be given at least four days before the time appointed therefor.

1932 Code, § 448; Civ. P. '22, § 765; Civ. P. '12, § 451; Civ. P. '02, § 413; 1870 (14) § 428.

Order to enjoin decree for sale of mortgaged premises requires prescribed notice.—An order to enjoin a decree for the sale of mortgaged premises cannot be made without four days' notice. *Rice v. Mahaffey*, 9 S. C. 281.

So also does a motion requiring security for costs.—*Dulany v. Elford*, 22 S. C. 304.

As to notice of motion for change of venue, see *Willoughby v. N. E. Ry. Co.*, 46 S. C. 317, 24 S. E. 308.

Moving party should be confined to the relief asked for in his motion or specified in the notice thereof, or at

most to relief necessarily incident thereto.—Where plaintiff served notices of motions to change place of trial from Richland county to Chester county, and the motions were thereafter refused but court on its own motion ordered that venue be changed from Richland county to Fairfield county without notice to the defendants or opportunity for them to be heard on question of whether case should be transferred to that county, order would be reversed because denying defendants their day in court. *Coogler v. California Ins. Co.*, 192 S. C. 54,, 5 S. E. (2d) 459.

§ 449. When papers need not be served on defendant.—When a defendant shall not have demurred or answered, service of notice or papers in the ordinary proceedings in an action need not to be made upon him unless he be imprisoned for want of bail, but shall be made upon him or his attorney, if notice of appearance in the action has been given.

1932 Code, § 449; Civ. P. '22, § 766; Civ. P. '12, 452; Civ. P. '02, § 414; 1870 (14) § 429.

Under this section an application for a certificate that the notes sued on are for purchase money of a homestead is an ordinary proceeding, and a defaulting

defendant is not entitled to notice thereof. *Odom v. Burch*, 52 S. C. 305, 29 S. E. 726.

§ 450. Service of papers where parties reside out of state.—Where a plaintiff or a defendant who has demurred or answered, or gives notice of appearance, resides out of the State, and has no attorney in the action, the service may be made by mail, if his residence be known; if not known, on the clerk for the party.

1932 Code, § 450; Civ. P. '22, § 767; Civ. P. '12, § 453; Civ. P. '02, § 415; 1870 (14) § 430.

See § 664-2 for service on judgment creditors.

§ 451. Summons and pleadings to be filed.—The summons and the several pleadings in an action shall be filed with the clerk within ten days after the service thereof respectively, or the adverse party, on proof of the omission, shall be entitled without notice to an order from a judge that the same be filed within a time to be specified in the order, or be deemed abandoned.

1932 Code, § 451; Civ. P. '22, § 768; Civ. P. '12, § 454; Civ. P. '02, § 416; 1870 (14) § 431.

This section recognizes the distinction between the summons and the pleadings, the latter of which—pleadings—em-

braces the complaint. *Royal Exchange Assurance of London v. Bennettsville & C. R. Co.*, 95 S. C. 375, 79 S. E. 104.

§ 452. Service on attorney.—Where a party shall have an attorney in the action, the service of papers shall be made upon the attorney instead of the party.

1932 Code, § 452; Civ. P. '22, § 769; Civ. P. '12, § 455; Civ. P. '02, § 417; 1870 (14) § 432.

Section applies only after the action has been commenced. *Duncan v. Brown*, 15 S. C. 414, 416.

Thus, service of notice of a survey, after the commencement of the action, should be made on the attorneys. *Kolb*

v. Jones, 62 S. C. 193, 40 S. E. 168.

But notice to set aside an execution should be served on the parties; service upon the attorney who renewed the execution is not sufficient. *Duncan v. Brown*, 15 S. C. 414, 416.

§ 453. When this chapter does not apply.—The provisions of this chapter shall not apply to the service of a summons, or other process, or of any paper to bring a party into contempt.

1932 Code, § 453; Civ. P. '22, § 770; Civ. P. '12, § 456; Civ. P. '02, § 418; 1870 (14) § 433.

Service of complaint by mail.—Under this section a complaint that can be served by mail, as "process" is a writ, summons, or order issued in a judicial proceeding to acquire jurisdiction of a

person or his property, to expedite the cause or enforce the judgment. *Royal Exchange Assurance of London v. Bennettsville & C. R. Co.*, 95 S. C. 375, 79 S. E. 104.

TITLE 8

Pleadings in Civil Actions

CHAPTER 18. The Complaint, § 454.

CHAPTER 19. The Demurrer, § 457.

CHAPTER 20. The Answer, § 467.

CHAPTER 21. The Reply, § 471.

CHAPTER 22. General Rules of Pleading, § 474.

CHAPTER 23. Amendments and Relief in Case of Mistake, § 490.

CHAPTER 18

The Complaint

454. Forms of pleading.

455. The complaint.

456. Contents of complaint.

§ 454. Forms of pleading.—There shall be no other forms of pleading in civil actions in courts of record in this State, and no other rules by which the sufficiency of the pleadings is to be determined, than those prescribed by this Code of Procedure.

1932 Code, § 454; Civ. P. '22, § 397; Civ. P. '12, § 190; Civ. P. '02, § 161; 1870 (14) § 163.

Section intended to abolish petition for rehearing and bill of review.—It was the intention of Const. 1868, art. 5, § 3, providing that the General Assembly shall provide for abolishing the distinct forms of action and for a committee on revision, and the intention of the Legislature by this section to abolish proceedings by petition for rehearing and by bill or review. *New York Life Insurance Co. v. Mobley*, 90 S. C. 552, 73 S. E. 1032. See also *Carolina Nat. Bank v. Homestead Building & Loan Ass'n*, 56 S. C. 12, 33 S. E. 781.

And to substitute therefor the remedy provided by § 495, providing for the opening and vacating of a judgment for fraud, inadvertence, or excusable neglect on motion in the court rendering the

judgment. *New York Life Insurance Co. v. Mobley*, 90 S. C. 552, 73 S. E. 1032. See also *Carolina Nat. Bank v. Homestead Building & Loan Ass'n*, 56 S. C. 12, 33 S. E. 781.

But substantial characteristics of pleadings are still retained.—It was intended by this section to change materially the nature and effect of pleading, but not to abolish the substantial characteristics of the several pleadings that are retained either in name or by their equivalents under other names. *Mobley v. Cureton*, 6 S. C. 49, cited in *Warren v. Lagrone*, 12 S. C. 45.

Applied in *Palmetto Bank & Trust Co. v. McCown-Clark Co.*, 143 S. C. 98, 141 S. E. 155; *Fishburne v. Minott*, 72 S. C. 567, 52 S. E. 648.

§ 455. Complaint.—The first pleading on the part of the plaintiff is the complaint.

1932 Code, § 455; Civ. P. '22, § 398; Civ. P. '12, § 191; Civ. P. '02, § 162; 1870 (14) § 164.

The character and not name of pleading is controlling.—That the pleading of a moving party in a proceeding to foreclose a mechanic's lien was designated "petition" instead of "complaint," the term technically proper to be used under this section, was immaterial in determin-

ing whether the petition stated facts sufficient to constitute a cause of action in personam, since the name given to a pleading is not controlling, but its character is always to be determined by its allegations. *Atlantic Coast Lumber Corp. v. Morrison*, 152 S. C. 305, 149 S. E. 243.

§ 456. Complaint—what to contain.—The complaint shall contain:

(1) The title of the cause, specifying the name of the court in which the action is brought, the name of the county in which the plaintiff desires the trial to be had, and the names of the parties to the action—plaintiff and defendant.

(2) A plain and concise statement of the facts constituting a cause of action, without unnecessary repetition.

(3) A demand of the relief to which the plaintiff supposes himself entitled.

1932 Code, § 456; Civ. P. '22, § 399; Civ. P. '12, § 192; Civ. P. '02, § 163; 1870 (14) § 165.

The names of the individuals constituting the copartnership suing must appear in the title. *Smith v. Walker*, 6 S. C. 169.

But it is unnecessary to allege in what state corporation was incorporated.—It is unnecessary to allege in what state defendant corporation is incorporated or chartered. *Machen v. Western Union Telegraph Co.*, 63 S. C. 363, 41 S. E. 448.

Allegations may be stricken out and others inserted by way of amendment.—The practice of striking out allegations and inserting others by way of amending pleadings is very common, and the power to do so has not heretofore been questioned. But whether one may be allowed to strike out some statement of fact material to the action or defense of the adverse party after such fact stands admitted under the original pleadings, is a question of some difficulty. *Pickett v. Southern Ry., Carolina Division*, 74 S. C. 236, 54 S. E. 375, 377.

Thus in suit by corporation cotton manufacturer in its own behalf and in behalf of citizens of village, brought against city seven miles upstream for polluting waters with sewage, order sustaining demurrer as to all parties plaintiff except corporation, but giving it opportunity to amend, was proper as against exceptions that complaint did not conform to this section, that persons of diverse interests were joined, and that alleged causes of action were inseparable. *Conestee Mills v. Greenville*, 152 S. C. 153, 149 S. E. 595.

Allegations of answer responsive to allegations of prolix complaint will not be stricken out.—In action against administratrix of estate of plaintiff corporation's deceased manager for amount of his alleged indebtedness to corporation, allegations of answer, stating different history and background of parties' relations than those alleged in complaint as necessary part of cause of action, and alleging that deceased had larger interest in corporation than that alleged in complaint, plainly challenged truth of allegations of complaint, tended to elicit correct state of matter in issue, and were not irrelevant or redundant, so that court erred in striking them out. *Dickson's Drug Store, Inc. v. Davis*, 197 S. C.

294, 15 S. E. (2d) 332.

Failure to file complaint is not fatal on motion to set aside judgment. *Clemson Agricultural College v. Pickens*, 42 S. C. 511, 20 S. E. 401.

Plaintiff is not required to characterize facts stated.—While this section requires plaintiff to state facts constituting his cause of action and demand the relief to which he supposes himself entitled, he is not required to characterize the facts stated, or to give his cause of action a name, that being the province of the court. *Furman v. Tuxbury Land & Timber Co.*, 112 S. C. 71, 99 S. E. 111.

Hence, if the facts stated show a negligent invasion of his right, he is not required to say that his right was negligently invaded; and if they show willful invasion of it, he is not required to say that it was willfully invaded. *Furman v. Tuxbury Land & Timber Co.*, 112 S. C. 71, 99 S. E. 111, 113.

It follows that where plaintiff alleges and proves a willful tort, he may recover actual and punitive damages; and where he alleges a willful tort, he may, under that allegation, prove a negligent tort, growing out of the facts alleged, and recover actual damages therefor, without having specifically alleged that he was also negligently injured. This is so because the allegation of the greater wrong includes the lesser. *Furman v. Tuxbury Land & Timber Co.*, 112 S. C. 71, 99 S. E. 111, 113.

His characterization of them being of little consequence.—Though he may characterize the acts complained of as negligent or wilful, and it is the usual practice to do so, his characterization of them is of little consequence since their quality must be determined by the court, or by the jury, under proper instructions from the court. *Furman v. Tuxbury Land & Timber Co.*, 112 S. C. 71, 99 S. E. 111, 113.

As the court refers the facts to their appropriate form of action. *Mason v. Carter*, 8 S. C. 103; *Dowie v. Joyner*, 25 S. C. 123; *Warren v. Lagrone*, 12 S. C. 45.

The facts thus required to be stated being the basic, ultimate facts, as distinguished from facts which are merely evidentiary. *Alexander v. Du Bose*, 73 S.

C. 21, 52 S. E. 786, 789.

And a cause of action exists where the legal rights of one party have been invaded by another. Chalmers v. Glenn, 18 S. C. 469; Nance v. Georgia, C. & N. Ry. Co., 35 S. C. 307, 14 S. E. 629.

So that plaintiff cannot be made to state allegations of law or the evidence on which he relies to prove the facts alleged. A complaint should contain only allegations of naked facts accompanied by as few modifying adjectives as the case will permit. Bell v. Jackson, 93 S. C. 556, 78 S. E. 679.

Thus, it is not necessary to allege damages which are the direct result of a wrong. Southern Railway v. Gossett, 79 S. C. 372, 381, 60 S. E. 956.

In action for specific performance of contract for sale of land, it is not necessary to allege that contract was in writing. Hubbell v. Courtney, 5 S. C. 87.

In action against a commission merchant for account, it is unnecessary to allege a demand for account, after stating a refusal to do so. Mason v. Carter, 8 S. C. 103.

Neither wilfulness nor negligence is necessary to make a trespass on real estate a tort. Baldwin v. Postal Telegraph Co., 78 S. C. 419, 422, 59 S. E. 67.

It is not necessary to set out in haec verba written instruments sued on. They may be set out according to their legal effect. Bank v. Fidelity, etc., Co., 120 F. 315, 316.

Plaintiff not required to amend complaint for damage to warehouse, to show date of alleged delicts, since this would be statement of evidentiary facts. Rowland Warehouse Co. v. Sumter Packing Co., 160 S. C. 352, 158 S. E. 543.

But if the facts alleged do not show the existence and invasion of such rights, the complaint is defective, and will be held bad on demurrer. Southern Porcelain Co. v. Thew, 5 S. C. 5; Chalmers v. Glenn, 18 S. C. 469; Nance v. Georgia, C. & N. Ry. Co., 35 S. C. 307, 14 S. E. 629.

Want of probable cause should be alleged in a complaint in action for malicious arrest or it will be demurrable. Hogg v. Pinckney, 16 S. C. 387.

Allegation of actionable fraud must include scienter. Bromonia Co. v. Greenwood Drug Co., 78 S. C. 432, 59 S. E. 363.

So also where it merely alleges conclusions of law.—The complaint is also defective if it merely alleges conclusions of law and not facts. Tutt v. Port Royal & A. R. Co., 28 S. C. 388, 5 S. E. 831; Wallace v. Columbia & G. R. Co., 34 S. C. 62, 12 S. E. 815; Nance v. Georgia, C. & N. Ry. Co., 35 S. C. 307, 14 S. E. 629.

A cross-complaint and affidavit for damages for trespass, after notice, on defendant's property rights and vested interest in sawmill timber by codefendant did not state a cause of action with respect to notice attempted to be alleged

other than actual notice, since those allegations were merely "conclusions of law." Walker v. Preacher, 185 S. C. 462; 194 S. E. 868.

But it is enough if the allegations show distinctly the cause of action. Hammond v. Northeastern R. Co., 6 S. C. 130, 24 Am. Rep. 467.

Where paper sued on as a promissory note is not such, but the allegations show a cause of action, the complaint is sufficient. Dowie v. Joyner, 25 S. C. 123.

The complaint in an action against a railroad company for conversion alleged that plaintiff was the owner on August 15, 1890, of certain cross-ties, of the value of \$26.25, at or near the right of way of defendant at a certain place, and that defendant unlawfully took possession of such property and converted it to its own use, to the damage of plaintiff of \$26.25. It was held that under this section the facts stated were sufficient to constitute a cause of action. Chalmers v. Glenn, 18 S. C. 469, 471, followed in Nance v. Georgia, C. & N. Ry. Co., 35 S. C. 307, 14 S. E. 629.

Whether the cause of action be legal or equitable.—Complaint is sufficient if it states any cause of action, either legal or equitable. Mordecai v. Seignious, 53 S. C. 95, 30 S. E. 717, 721; Latham v. Harby, 50 S. C. 428, 27 S. E. 862; Independent Fire Engine Co. v. Richland Lodge, 70 S. C. 572, 50 S. E. 499; Ferst's Sons & Co. v. Powers, 64 S. C. 221, 41 S. E. 974.

Plaintiff may obtain any relief appropriate to the pleadings without regard to the form of prayer for relief. Shepard v. Green, 48 S. C. 165, 26 S. E. 224.

Where plaintiff states two causes of action, one in contract and one in tort, a state of facts from which only one liability in unliquidated damages arises, the amount sought to be recovered is limited to the amount asked in the prayer. Ray v. Southern Ry., 77 S. C. 103, 57 S. E. 636.

And a complaint is not demurrable for failure to contain prayer for relief.—Complaint is not demurrable as defective in not stating facts sufficient to constitute a cause of action because it contains no prayer for relief. Balle v. Moseley, 13 S. C. 439.

Applied in Huggins v. Watford, 38 S. C. 504, 17 S. E. 363; Watson v. Bar, 37 S. C. 463, 16 S. E. 188.

See generally, as to recovery of real property, Huggins v. Watford, 38 S. C. 504, 17 S. E. 363; as to conversion, Michelson v. All, 43 S. C. 459, 21 S. E. 323, 49 Am. St. Rep. 857; as to nuisance, Baltzger v. Carolina Midland Ry. Co., 54 S. C. 242, 32 S. E. 358, 71 Am. St. Rep. 789, as to damages from tort, Pickens v. S. C. & G. R. Co., 54 S. C. 498, 32 S. E. 567; as to action on note, Bolt v. Gray, 54 S. C. 95, 32 S. E. 148; on bond, State v. Seabrook, 42 S. C. 74, 20 S. E. 58; as to

specific performance of contract. *National Light and Thorium Co. v. Alexander*, 80 S. C. 10, 61 S. E. 214; as to action for construction of will and partition, *Hunt v. Gower*, 80 S. C. 80, 61 S. E. 218, 128 Am. St. Rep. 862; as to proof confined to particular act of negligence alleged, *Fitzgerald v. Langley Manufacturing Co.*, 74 S. C. 232, 234, 54 S. E. 373; as to proper statement of facts, *DuPre v. Southern Railway*, 66 S. C. 124, 44 S. E. 580; as to malicious prosecution, *McCall v. Alexander*, 81 S. C. 131, 61 S. E. 1106; as to action for cancellation of deed as a cloud on title, *Shute v. Shute*, 79 S. C. 420, 60

S. E. 691; *Pollitzer v. Beinkempfen*, 76 S. C. 517, 57 S. E. 475; *Guerard v. Jenkins*, 80 S. C. 223, 225, 61 S. E. 258; as to striking out allegations, *Pickett v. Southern Railway*, 74 S. C. 236, 242, 54 S. E. 375; as to sufficiency of complaint, *Hagood v. Blythe*, 38 F. 76; *Bryce v. Southern Ry. Co.*, 122 F. 709; as to action on note of officer against the state, *Carolina Nat'l Bank v. State*, 60 S. C. 465, 38 S. E. 629; as to particular complaints, *Watson v. Barr*, 37 S. C. 463, 16 S. E. 188, 189; as to exhibits, *Cauthen v. Green*, 80 S. C. 432, 61 S. E. 957; *Cave v. Gill*, 59 S. C. 256, 37 S. E. 817.

CHAPTER 19

The Demurrer

457. Defendant to demur or answer.
458. When demurrer proper.
459. Demurrer to specify objection.
460. Amended complaint.
461. Objection not appearing in com-

plaint.
462. Objection waived.
463. Objection to jurisdiction.
464 and 465. Notice.
466. Prescribed mode not exclusive.

§ 457. Defendant to demur or answer.—The only pleading on the part of the defendant is either a demurrer or an answer. It must be served within twenty days after the service of the copy of the complaint.

1932 Code, § 457; Civ. P. '22, § 400; Civ. P. '12, § 193; Civ. P. '02, § 164; 1870 (14) § 166.

Answer usually allowed after demurrer is overruled.—When defendant's demurrer, filed in good faith, is overruled, ordinarily he should be allowed to answer. *Sprunt v. Gordon*, 89 S. C. 426, 71 S. E. 1033.

But trial court is not obliged to permit defendants to answer over. *DePass v. City of Spartanburg*, 190 S. C. 22, 1 S. E. (2d) 904.

And failure to do so is not error, where defendants did not indicate they desired to answer and it appeared there was no meritorious defense on the merits. *Ibid.*

Also question of failure of petition to state necessary facts may be raised after answer.—Under this section and § 462 and circuit court rule 18, defendant in action to foreclose mechanic's lien, statute for which makes no special provisions for defendant's pleadings, may after answer by motion on due notice to dismiss petition raise the question that

petition fails to state facts necessary to show the lien, the defect appearing on the face of petition. *National Loan & Exchange Bank of Columbia v. Argo Development Co.*, 141 S. C. 72, 139 S. E. 183.

But it is improper to demur and answer at the same time.—Under this section it is improper to do both at the same time, except to challenge the complaint for want of facts or the court's jurisdiction, and defendant may be required to elect upon which he will stand. *Sprunt v. Gordon*, 89 S. C. 426, 71 S. E. 1033.

A motion to make a complaint more definite and certain is not a pleading, nor an alternative remedy for a demurrer or answer. *Lawrence v. Lawrence*, 81 S. C. 126, 62 S. E. 9.

See generally, *Dominion Nat. Bank v. Olympia Cotton Mills*, 128 F. 181. As to extension of time, see *Wilcox, etc., Co. v. Phoenix Ins. Co.*, 60 F. 929.

§ 458. When the defendant may demur.—The defendant may demur to the complaint when it shall appear upon the face thereof, either:

- (1) That the court has no jurisdiction of the person of the defendant or the subject of the action; or,
- (2) That the plaintiff has not legal capacity to sue; or,
- (3) That there is another action pending between the same parties, for

the same cause, or,

(4) That there is a defect of parties, plaintiff or defendant; or,

(5) That several causes of action have been improperly united; or,

(6) That the complaint does not state facts sufficient to constitute a cause of action.

1932 Code, § 458; Civ. P. '22, § 401; Civ. P. '12, § 194; Civ. P. '02, § 165; 1870 (14) § 167.

I. Lack of Jurisdiction.

II. Lack of Legal Capacity.

III. Pendency of Another Action.

IV. Defect of Parties.

V. Misjoinder of Several Causes of Action.

VI. Failure to State Cause of Action.

I. LACK OF JURISDICTION

Lack of jurisdiction must appear on face of complaint.—A complaint is not demurrable under this subdivision unless the lack of jurisdiction appears on the face thereof. *Duncan v. Duncan*, 93 S. C. 487, 76 S. E. 1099.

And court cannot consider service of process or defenses. *Thompson v. Queen City Coach Co.*, 169 S. C. 231; 168 S. E. 693.

Applied in *Bailey v. Cooley*, 153 S. C. 78, 150 S. E. 473.

II. LACK OF LEGAL CAPACITY

Question of capacity cannot be put in issue except by demurrer.—*Commercial Ins., etc., Co. v. Turner*, 8 S. C. 107, 110; *Palmetto Lumber Co. v. Risley*, 25 S. C. 309; *Liberian, etc., Steamship Co. v. Rodgers*, 21 S. C. 27.

And failure to demur constitutes waiver of objection.—Objection that the action is brought by the clerk of the court as administrator in his individual capacity when administration is granted to him officially must be taken by demurrer, and if not is waived. *Trimmier v. Atlanta, etc., Ry.*, 81 S. C. 203, 62 S. E. 209.

And incapacity to sue must appear in complaint.—A demurrer under this subdivision can only be interposed where the incapacity to sue appears in the complaint. *Cone Export, etc., Co. v. Poole*, 41 S. C. 70, 19 S. E. 203, 24 L. R. A. 289n.

Thus, where complaint alleges corporate existence in plaintiff and nothing appears on its face to show his want of corporate authority it is not demurrable on this ground. *Cheraw, etc., R. Co. v. White*, 14 S. C. 51. See also *Atlantic Coast Line R. Co. v. Epperson*, 85 S. C. 134, 67 S. E. 235.

And the ground of incapacity to sue must be distinctly stated. *Trimmier v. Atlanta, etc., Ry.*, 81 S. C. 203, 62 S. E. 209; *Blackwell v. British-American Mortgage Co.*, 65 S. C. 105, 116, 43 S. E. 395.

A demurrer to a complaint as not stating facts constituting a cause of action, in that there are no allegations of the appointment of a guardian ad litem for

infant plaintiffs, does not reach the question of legal capacity to sue. *Smith v. Smith*, 52 S. C. 205, 29 S. E. 549.

An objection to the complaint by what is called an "oral demurrer at the trial" comes too late when it arises under this subdivision. *Dawkins v. Mathis*, 47 S. C. 64, 24 S. E. 990, 991.

Objection that cause of action does not survive cannot be taken by oral demurrer. *Duke v. Postal Telegraph Co.*, 71 S. C. 95, 50 S. E. 675.

Pleading to amend complaint may be either by demurrer or answer. *Lawrence v. Lawrence*, 81 S. C. 126, 129, 62 S. E. 9.

Applied in *Land Mortgage Inv., etc., Co. v. Williams*, 35 S. C. 367, 14 S. E. 821; *Walpole v. City Council*, 32 S. C. 547, 11 S. E. 391.

See generally, *Smith v. Smith*, 50 S. C. 54, 27 S. E. 545, 549; *Mickle v. Congaree Const. Co.*, 41 S. C. 394, 19 S. E. 725; *Willis v. Tozer*, 44 S. C. 1, 21 S. E. 617; *Lookout Mountain Medicine Co. v. Hare*, 56 S. C. 456, 35 S. E. 130; *Riley & Son v. Southern Ry. Co.*, 81 S. C. 387, 391, 62 S. E. 509; *Battle v. Columbia, Newberry & Laurens R. Co.*, 70 S. C. 329, 49 S. E. 849; *Fishburne v. Minott*, 72 S. C. 567, 568, 52 S. E. 648; *Carroll v. Still*, 13 S. C. 430.

III. PENDENCY OF ANOTHER ACTION

Demurrer lies only where pendency of another action appears on face of complaint.—A complaint is not demurrable under this subdivision unless another action pending appears on the face thereof. *Duncan v. Duncan*, 93 S. C. 487, 76 S. E. 1099. *Setzer v. Fail*, 179 S. C. 232, 183 S. E. 907.

Under this section and § 461 a complaint in a suit by a wife against her husband, which alleges that she is the owner in fee of described land, that the husband continually trespasses on the land, and collects the rents and will not account therefor, and that he is unable to respond in damages, etc., states a cause of action as against a demurrer on the ground that there is another action pending between the same parties. *Duncan v. Duncan*, 93 S. C. 487, 76 S. E. 1099.

As to evidence of dismissal of former action, see *State v. Stickley*, 80 S. C. 64, 70, 61 S. E. 211, 128 Am. St. Rep. 855, 15 Ann. Cas. 136.

And if it does not so appear the objection must be by answer.—*Kiddell v.*

Bristow, 67 S. C. 175, 45 S. E. 174.

Affidavits served with the demurrer contesting the allegations of a complaint are not equivalent to an answer. Duncan v. Duncan, 93 S. C. 487, 76 S. E. 1099.

But failure to demur when proper waives objection.—This ground of objection is waived unless taken by demurrer. Daniels v. Moses, 12 S. C. 130.

However, this subdivision does not apply to actions pending in another State. Hill v. Hill, 51 S. C. 134, 28 S. E. 309.

Or in federal courts.—This section does not apply to pendency of action in federal court. Logan v. Atlantic, etc., R. Co., 82 S. C. 518, 64 S. E. 515; Mayfield v. Atlanta, etc., R. Co., 79 S. C. 558, 61 S. E. 106.

Nor does it apply where one suit is by only one plaintiff for the recovery of personal property, and the other, with additional plaintiffs, includes claim for punitive damages. Walters v. Laurens Cotton Mills, 53 S. C. 155, 31 S. E. 1.

As to pendency of another action by others of same class suing in common right, see State v. C. & L. R. R. Co., 13 S. C. 290, 308.

An action for injunction is not a bar to action in nature of quo warranto. State v. Stickley, 80 S. C. 64, 61 S. E. 211, 128 Am. St. Rep. 855, 15 Ann. Cas. 136.

IV. DEFECT OF PARTIES

This objection must be made by demurrer, and is waived upon failure to demur. Featherston v. Norris, 7 S. C. 472; Evans v. McLucas, 12 S. C. 56; Daniels v. Moses, 12 S. C. 130; Ross v. Linder, 12 S. C. 592; Shull v. Caughman, 54 S. C. 203, 32 S. E. 301; Allen v. Cooley, 53 S. C. 77, 30 S. E. 721.

Where there is a defect of parties plaintiff, it is the duty of the defendant, under this section, to demur to the complaint. And, in the absence of such demurrer, he is deemed to have waived the objection in view of § 462. Rowland v. Pruitt, 123 S. C. 244, 116 S. E. 456.

For example under this section and § 462 a defect of parties cannot be first urged on a motion for nonsuit. Shull v. Caughman, 54 S. C. 203, 32 S. E. 301.

Provided the defect appears on face of complaint.—When the defect of parties appears upon the face of the complaint, the proper remedy is by demurrer. If the defect does not appear upon the face of the complaint, the objection may be taken by answer. If such objection be not taken either by demurrer or answer, the defendant shall be deemed to have waived the same. Delleney v. Winnsboro Granite Co., 72 S. C. 39, 51 S. E. 531, 532.

Whether right of action for trespass on realty survives to personal or real representative should be raised by demurrer or answer. Voyles v. Postal Telegraph Cable Co., 78 S. C. 430, 432, 59 S.

E. 68.

But the right to demur is not waived by motion to have complaint made more definite.—Lawrence v. Lawrence, 81 S. C. 126, 62 S. E. 9.

This ground cannot apply in case of misjoinder of parties. Lowry v. Jackson, 27 S. C. 318, 3 S. E. 473.

As to defect of parties distinguished from misjoinder, see Wright v. Willoughby, 79 S. C. 438, 60 S. E. 971.

Applied in Kirton v. Howard, 137 S. C. 11, 134 S. E. 859. Gilbert v. Glenn, 159 S. C. 135, 156 S. E. 325.

V. MISJOINDER OF SEVERAL CAUSES OF ACTION

Under this subdivision the question of misjoinder can be raised only by demurrer, and not by motion to vacate an attachment. Seibels v. Northern Cent. Ry. Co., 80 S. C. 133, 61 S. E. 435, 16 L. R. A. (N. S.) 1026n; Field v. Hurst, 9 S. C. 277.

Demurrer, not motion to strike out, remedy for failure to state cause of action where there are several causes. Berry v. Moore Co., 69 S. C. 317, 321, 48 S. E. 249.

Where the defendant fails to raise the question of misjoinder by demurrer, he cannot afterwards do so by motion to require plaintiff to elect on which he will rely. Where the several causes of action are blended in one statement such motion may be made. Ross v. Jones, 47 S. C. 211, 25 S. E. 59.

Otherwise the objection is waived.—Objection to alleged misjoinder of causes ex contractu and ex delicto, the defect appearing on the face of the complaint, can be made only by demurrer; and, when not raised in that way, it is waived under this section and § 462. Savannah Chemical Co. v. Johnson, 105 S. C. 213, 89 S. E. 810, 811.

And it may be taken by any defendant. Suber v. Allen, 13 S. C. 317.

Provided it is good as to all defendants.—Joint demurrer bad as to all, must fail though good as to one who joins. Lowry v. Jackson, 27 S. C. 318, 3 S. E. 473; Guy v. McDaniel, 51 S. C. 436, 29 S. E. 196.

And provided the several causes of action are improperly joined.—Demurrer on this ground will not lie where several plaintiffs, severally owning adjoining tracts of land, join in action for damages in solido for injuries thereto by defendant's dam. Hellams v. Switzer, 24 S. C. 39. But demurrer will lie in such case, where the injuries are separate and distinct. Ibid.

Where only one primary right and wrong are stated there is only one cause of action. Wright v. Willoughby, 79 S. C. 438, 60 S. E. 971.

There is not misjoinder of causes of action where adult ward and three minor wards sue their guardian for accounting.

Stallings v. Barrett, 26 S. C. 474, 2 S. E. 483.

This objection does not apply where creditor sues heir in possession of intestate's land and alleges sufficient facts to show cause of action against administrator, and does not seek judgment against him. Lowry v. Jackson, 27 S. C. 318, 3 S. E. 473.

Complaint not demurrable for multi-fariousness where it alleges breach of trust, because it makes a party in possession of the assets under the breach, with notice, a defendant. Ragsdale v. Holmes, 1 S. C. 91; Melton v. Withers, 2 S. C. 561.

As to proper joinder of several causes of action, see Long v. Hunter, 58 S. C. 152, 36 S. E. 579, 581.

As the demurrer is not a remedy for jumbling causes of action. Marion v. Charleston, 68 S. C. 257, 47 S. E. 140; Duncan v. Jones Co., 82 S. C. 562, 64 S. E. 749.

Plaintiff may cure defect of misjoinder by voluntary amendment of complaint.

—Where there is improper joinder of causes of action, and a demurrer to the complaint therefore, the plaintiff may cure the defect by voluntary amendment of the complaint. Sullivan v. Sullivan, 24 S. C. 474.

VI. FAILURE TO STATE CAUSE OF ACTION

A complaint is sufficient if it states any cause of action. Independent Steam Fire Engine Co. v. Richland Lodge, 70 S. C. 572, 50 S. E. 499.

Or where plaintiff is entitled to relief thereunder.—Complaint is not demurrable when plaintiff is entitled to any relief whatever. Independent Steam Fire Engine Co. v. Richland Lodge, 70 S. C. 572, 50 S. E. 499.

Demurrer is proper where statement of cause is insufficient.—Demurrer proper remedy for defective statement of cause of action in counterclaim. Kentucky Refining Co. v. Saluda Oil Mill Co., 70 S. C. 89, 94, 48 S. E. 987.

Motion to compel plaintiff to elect, not demurrer, is proper remedy where allegations of complaint are appropriate to either of two causes of action. Welborn v. Dixon, 70 S. C. 108, 49 S. E. 232, 3 Ann. Cas. 407.

In which case the demurrer may be interposed after trial.—A demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action may be interposed after trial of issues raised by the pleadings, by virtue of sec. 453, providing that an objection to demurrable defects in a complaint is waived, unless made by demurrer or answer, "excepting only * * * the objection that the complaint does not state facts sufficient to constitute a cause of action." Garrett v. Weinberg, 50 S. C. 310, 27 S. E. 770.

The defect must be substantial, and such as cannot be cured except by allegations of answer. Childers v. Verner, 12 S. C. 1.

Where administrator of a distributee of an intestate brings action against the administrator of such intestate and joins with him as plaintiff a distributee of such aforementioned distributee, the complaint is demurrable as to such plaintiff distributee on this ground. Roberts v. Johns, 10 S. C. 101.

Otherwise a demurrer will not lie.—Until it does appear that some fact is omitted which is necessary to constitute the cause of action, no demurrer can be sustained. Balle v. Moseley, 13 S. C. 439.

Thus, in action to recover money won at game of faro, if the complaint does not allege that the money was won at one time and sitting, it is demurrable on this ground. Trumbo v. Finley, 18 S. C. 305.

But omission of allegation relating to capacity to sue is no ground for demurrer under this subdivision. Cone Export, etc., Co. v. Poole, 41 S. C. 70, 19 S. E. 203, 24 L. R. A. 289n; and other cases cited under subd. 2.

Allegation as to possession within ten years is not necessary in action for partition. Griffith v. Cromley, 58 S. C. 448, 36 S. E. 738, 741.

Complaint alleged subscription by defendant to stock of plaintiff of fifty acres of land, and a refusal to convey, and demanded payment in money for the land, without alleging promise to pay money or previous demand, and was held not demurrable on this ground. Cheraw, etc., R. Co. v. Garland, 14 S. C. 63.

As the judge cannot draw inferences outside of complaint to sustain it. Talbert v. Charleston, etc., Ry., 72 S. C. 137, 51 S. E. 564.

Demurrer is not the remedy for indefiniteness. Pierson v. Green, 69 S. C. 559, 561, 48 S. E. 624.

That action does not survive cannot be interposed on oral demurrer. Duke v. Postal Tel. Cable Co., 71 S. C. 95, 98, 50 S. E. 675.

Proceeding with trial after presentation of demurrer amounts to overruling it. Mauldin v. Seaboard Air Line Ry., 73 S. C. 9, 52 S. E. 677.

Codefendants who executed chattle mortgages to defendant corporation which plaintiff attached, may demur on ground no cause of action stated against them.—In action against foreign corporation for conversion of automobile on which plaintiff had lien, complaint held demurrable as against codefendants, who were allegedly indebted to corporation where there was no allegation that codefendants were under obligation to plaintiff, or had done him any wrong. Waldrop v. M. & J. Finance Corporation, 176 S. E., 490; 180 S. E. 555.

Writ of prohibition not warranted on ground that, because of defective averment in complaint for injunctions, plaintiff was not entitled to relief demanded. *Ex parte Jones*, 160 S. C. 63, 158 S. E. 134.

Applied in Georgia-Carolina Gravel Co. v. Blassingame, 129 S. C. 18, 123 S. E. 324.

See generally, as to contributory negli-

gence, *Cooper v. Atlantic, etc., R. Co.*, 69 S. C. 479, 48 S. E. 458; *Smith v. Southern Ry.*, 80 S. C. 1, 4, 61 S. E. 205; *McLean v. Atlantic, etc., R. Co.*, 81 S. C. 100, 61 S. E. 900, 1071, 128 Am. St. Rep. 892, 18 L. R. A. (N. S.) 763. As to demurrer to answer to enjoin condemnation proceedings, *Columbia v. Melton*, 81 S. C. 356, 62 S. E. 245, 399.

§ 459. Demurrer—what to specify.—The demurrer shall distinctly specify the grounds of objection to the complaint. Unless it do so, it may be disregarded. It may be taken to the whole complaint, or to any of the alleged causes of action stated therein.

1932 Code, § 459; Civ. P. '22, § 402; Civ. P. '12, § 195; Civ. P. '02, § 166; 1870 (14) § 168.

The demurrer must be to the entire cause of action, and not to a part of a cause of action or defense. *Buist v. Salvo*, 44 S. C. 143, 21 S. E. 615; *Lawson v. Gee*, 57 S. C. 502, 506, 35 S. E. 759.

Otherwise it should be overruled.—In view of this section, not providing that a demurrer may be interposed to a part of a cause of action, a demurrer to a part of executor's complaint for partition and sale which suggests a contest between heirs should have been overruled. *Scheper v. Scheper*, 115 S. C. 421, 106 S. E. 33.

A demurrer cannot be sustained which is good only as to certain paragraphs of a defense. *Buist v. Salvo*, 44 S. C. 143, 21 S. E. 615.

A joint demurrer to a complaint stating a cause of action against any of the defendants is bad. *Stahn v. Catawba Mills*, 53 S. C. 519, 31 S. E. 498.

As to objection for misjoinder of parties, see *Cousar v. Heath, etc., Co.*, 80 S. C. 466, 472, 61 S. E. 973.

The purpose of requirement that demurrer distinctly specify grounds of objection is to notify adversary of precise issue to be met upon argument of demurrer. *Weathers v. City of Laurens*, 187 S. C. 297, 197 S. E. 317.

And mere pleading of the words of section 458 does not meet this requirement. *Ibid.*

Exceptions presenting questions not presented to circuit judge in grounds of demurrer may not be considered on appeal. *Stewart v. Ficken*, 172 S. C., 151; 173 S. E., 301.

Applied in Land Mortgage Inv., etc., Co. v. Williams, 35 S. C. 367, 14 S. E. 821. As to requirement that demurrer distinctly specify the grounds of objection, see *Carroll v. Still*, 13 S. C. 430; *Buist v. Salvo*, 44 S. C. 143, 21 S. E. 615, followed in *Sloan v. Seaboard, etc., R. Co.*, 64 S. C. 389, 42 S. E. 197, 199; *Berry v. Moore Co.*, 69 S. C. 317, 321, 48 S. E. 249.

§ 460. How to proceed, if complaint be amended.—If the complaint be amended, a copy thereof must be served on the defendant, who must answer it within twenty days, or the plaintiff, upon filing with the clerk due proof of the service, and of the defendant's omission, may proceed to obtain judgment, as provided by section 535.

1932 Code, § 460; Civ. P. '22, § 403; Civ. P. '12, § 196; Civ. P. '02, § 167; 1870 (14) § 169.

This section applies only where no time is fixed in the order. *Lockwood v. Charleston Bridge Co.*, 60 S. C. 492, 38 S. E. 112.

And, within his discretion, a circuit judge may require an answer to an amended complaint in less than twenty days. *Lockwood v. Charleston Bridge Co.*, 60 S. C. 492, 38 S. E. 112.

An amendment may be allowed after sustaining demurrer. *Leesville Mfg. Co. v. Morgan, etc., Works*, 75 S. C. 342, 55 S. E. 768.

If defendant does not request permis-

sion to answer amended complaint he cannot object to failure to so provide in order allowing amendment. *McDaniel v. Atlantic, etc., R. Co.*, 76 S. C. 15, 56 S. E. 543.

Order permitting amendment to complaint by striking out certain words in complaint may be served alone, without service of complaint as amended. *McDaniel v. Atlantic, etc., R. Co.*, 76 S. C. 15, 56 S. E. 543; *Guess v. Southern Railway*, 73 S. C. 264, 267, 53 S. E. 421.

Construed with sec. 448 this section permits plea by either demurrer or an-

swer to amended complaint. The right to demur to a complaint is not lost by a motion to make more definite and specific. *Lawrence v. Lawrence*, 81 S. C. 126, 62 S. E. 9.

Applied in Citizens' Savings Bank v. Eford, 96 S. C. 18, 79 S. E. 637.

See generally, *Henning v. Western Union Tel. Co.*, 40 F. 658.

§ 461. Objection not appearing in complaint.—When any of the matters enumerated in section 458 do not appear upon the face of the complaint, the objection may be taken by answer.

1932 Code, § 461; Civ. P. '22, § 404; Civ. P. '12, § 197; Civ. P. '02, § 168; 1870 (14) § 170.

Applied in Kirton v. Howard, 137 S. C. 11, 134 S. E. 859; *Georgia-Carolina Gravel Co. v. Blassingame*, 129 S. C. 18, 123 S. E. 324; *Duncan v. Duncan*, 93 S. C. 487, 76 S. E. 1099; *Patterson v. Pagan*, 18 S. C. 584; *Kiddell v. Bristow*, 67 S. C. 175,

45 S. E. 174; *Land Mortgage Inv., etc., Co. v. Williams*, 35 S. C. 367, 14 S. E. 821; *Neel v. Clarke*, 193 S. C. 412, 8 S. E. (2d) 740; *Baker v. Hartford Fire Ins. Co.*, 195 S. C. 373, 11 S. E. (2d) 434.

§ 462. Objection waived.—If no such objection be taken, either by demurrer or answer, the plaintiff or defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action, or that the answer does not state facts sufficient to constitute a defense: *provided*, that in cases where the objection is made that the complaint does not state facts sufficient to constitute a cause of action, or that the answer does not state facts sufficient to constitute a defense, the party making such objection shall give at least five days' notice, in writing, to the opposite party of the grounds of such objection.

1932 Code, § 462; Civ. P. '22, § 405; Civ. P. '12, § 198; Civ. P. '02, § 169; 1870 (14) § 171; 1903 (14) 130.

Editor's note.—As this section is closely connected with § 458, the two sections, as well as § 461, should be considered together. The practitioner is therefore referred to said sections and to the notes under § 458.

In general.—The two objections expected are not waived by the failure to raise them by demurrer or answer; but it does not follow that they cannot be waived at all. Some of the cases, construing this section, hold that these objections can be raised at any time and at any stage of the proceedings. While this statement is true, nevertheless it is somewhat misleading; for instance it has been held that the objection for insufficiency cannot be raised for the first time on appeal. Therefore it is waived by a failure to raise it in the circuit court. *Miller v. George*, 30 S. C. 526, 9 S. E. 659; *Green v. Green*, 50 S. C. 514, 529, 27 S. E. 952, 62 Am. St. Rep. 846; *Exchange Bank of Meggett v. Bennett*, 193 S. C. 320, 8 S. E. (2d) 515. And it is quite certain that, once it has been properly raised and decided, it cannot be raised again. *Montgomery v. Robinson*, 93 S. C. 247, 76 S. E. 188, 189; *Long v. Carolina Baking Co.*, 193 S. C. 225, 8 S. E. (2d) 326.

If a defect appear on the face of the

complaint, the objection is not waived by answer without stating the objection, but may be urged on the trial, if the defendant give five day's notice in writing. *Peterman v. Pope*, 74 S. C. 296, 298, 54 S. E. 569.

Where objection was made by answer, but was stricken out on defendant's motion during the trial, it was waived. *Kiddell v. Bristow*, 67 S. C. 175, 45 S. E. 174.

Where defendant demurs and answers at the same time, both pleadings setting up want of facts, it is error to require him to elect on which he will stand. *Sprunt v. Gordon*, 89 S. C. 426, 71 S. E. 1033.

The object of section is to notify plaintiff of defenses defendant relies on.—The clear intention of this and foregoing sections of this chapter is that defendant shall give, by his demurrer or answer, specific notice that he intends to rely on one or more of these specific defenses, if he wishes to make them available. A general denial of all the facts alleged in the complaint is not a compliance with these requirements. The object of them is to relieve the plaintiff from the necessity of preparing to meet such objections, on trial, unless so notified of them. *Liberian Exodus, etc., Steamship Co. v. Rodgers*, 21 S. C. 27;

Palmetto Co. v. Risley, 25 S. C. 309; Walpole v. City Council, 32 S. C. 547, 11 S. E. 391.

So that objection for defect of parties must be made by demurrer or answer. Anderson v. Baughman, 69 S. C. 38, 40, 48 S. E. 38; Delleney v. Winnsboro Grains Co., 72 S. C. 39, 51 S. E. 531; Voyles v. Postal Telegraph Co., 78 S. C. 430, 433, 59 S. E. 68.

And such objection comes too late after failure to make it by demurrer or answer. Featherston v. Norris, 7 S. C. 472; Evans v. McLucas, 12 S. C. 56; Daniels v. Moses, 12 S. C. 130, 137; Ross v. Linder, 12 S. C. 592.

And it may not be made after case is called for trial.—Motion to eliminate a defendant, made upon the call of the case, is properly disallowed, under this section, requiring at least five days notice in writing to opposite party of grounds of such objection. Thompson v. Pacific Mills, 141 S. C. 303, 139 S. E. 619, 55 A. L. R. 1237n.

Nor may it first be made on appeal.—An objection that a trustee holding legal title for plaintiffs was a necessary party, though good, is too late when first made on appeal. Kirton v. Howard, 137 S. C. 11, 134 S. E. 859.

Objection that complaint does not state facts sufficient to constitute a cause of action may be made orally at any stage of the proceedings. Southern Porcelain Co. v. Thew, 5 S. C. 5, 10; Bowden v. Winsmith, 11 S. C. 409; Childers v. Verner, 12 S. C. 1; Balle v. Moseley, 13 S. C. 439; Kennerty v. Etiwan Phosphate Co., 17 S. C. 411, 43 Am. Rep. 607; Davis v. McDuffie, 18 S. C. 495; Hellams v. Switzer, 24 S. C. 39; Hall v. Young, 29 S. C. 64, 6 S. E. 938; Garrett v. Weinberg, 50 S. C. 310, 27 S. E. 770.

Demurrer for insufficiency may be taken orally at the trial. Mendelsohn v. Banov, 57 S. C. 147, 35 S. E. 499, 500.

So oral demurrer to answer setting up counterclaims may be made on the ground of want of cause of action, though not objected to by formal demurrer or answer. State v. Corbin, 16 S. C. 533.

Even after trial of the issues on circuit. Garrett v. Weinberg, 50 S. C. 310, 27 S. E. 770.

Provided the required notice is given.—The objection to the complaint on the ground that it does not state facts sufficient to constitute a cause of action can be made at any time before the circuit court without the objection having been raised either by demurrer or answer, subject only to the proviso that "the party making such objection shall give at least five days notice." Williamson v. Richards, 158 S. C. 534, 155 S. E. 890, 891.

But not for the first time on appeal in the Supreme Court. Green v. Green,

50 S. C. 514, 27 S. E. 952, 62 Am. St. Rep. 846.

Notwithstanding this section, an objection that the complaint does not state facts constituting a cause of action cannot be raised first on appeal, and is waived by failure to raise it in the trial court. Montgomery v. Robinson, 93 S. C. 247, 76 S. E. 188; Long v. Carolina Baking Co., 193 S. C. 225, 8 S. E. (2d) 326.

Nor after reference to master and before report is filed.—Under the authority of the case of Cartee v. Spence, 24 S. C. 550, it seems that the court cannot hear and determine a question raised by demurrer after all the issues, both of law and fact, in an action have been referred to the master or referee for trial, in advance of the coming in of the report. But, after the filing of the report, under such circumstances, a demurrer to the complaint on the ground that it does not state facts sufficient to constitute a cause of action may be heard by the trial judge (Hall v. Young, 29 S. C. 64, 6 S. E. 938), provided the notice required by this section be given. Winn v. Harby, 159 S. C. 257, 156 S. E. 767.

And where once overruled such ruling is binding on subsequent trial.—Where a demurrer for want of facts sufficient to constitute a cause of action is once overruled, such ruling is binding when motion is rendered on a subsequent trial. Long v. Hunter, 58 S. C. 152, 36 S. E. 579; Long v. Carolina Baking Co., 193 S. C. 225, 8 S. E. (2d) 326.

But a default judgment does not waive an objection that the complaint does not state a cause of action. Gadsden v. Home Fertilizer, etc., Co., 89 S. C. 483, 72 S. E. 15.

Objection to capacity to sue must be distinctly specified.—Blackwell v. British-American Mortgage Co., 65 S. C. 105, 116, 43 S. E. 395.

The objection that the court is without jurisdiction to entertain the action can be made at any stage of the proceedings, either in the circuit or in the Supreme Court, even without the requirement of notice. Williamson v. Richards, 158 S. C. 534, 155 S. E. 890, 891.

Applied in Temple v. Montgomery, 157 S. C. 85, 153 S. E. 640; National Loan, etc., Bank v. Argo Development Co., 141 S. C. 72, 139 S. E. 183; Farmers' Bank v. Eledge, 126 S. C. 517, 120 S. E. 362; Bank v. Adams, 125 S. C. 210, 118 S. E. 417; Rowland v. Pruitt, 123 S. C. 244, 116 S. E. 456; Shull v. Caughman, 54 S. C. 203, 32 S. E. 301; Allen v. Cooley, 53 S. C. 414, 31 S. E. 634; Smith v. Smith, 52 S. C. 205, 29 S. E. 549; People's Oil, etc., Fertilizer Co. v. Charleston, etc., Railway, 83 S. C. 530, 65 S. E. 733; Bowden v. Winsmith, 11 S. C. 409; Daniels v. Moses, 12 S. C. 130; Jackins v. Dickinson, 39 S. C. 436, 439, 17 S. E. 996; Ross v. Jones, 47 S. C. 211, 25 S. E. 59; Dawkins v. Mathis, 47 S. C.

64, 24 S. E. 990; *Smith v. Smith*, 50 S. C. 54, 27 S. E. 545; *Williams v. Grand Lodge*, 109 S. C. 233, 95 S. E. 517; *Savannah Chem. Co. v. Johnson*, 105 S. C. 213, 89 S. E. 810; *Marthinson v. McCutchen*, 84 S. C. 256, 66 S. E. 120; *Land Mortgage*

Inv., etc., Co. v. Williams, 35 S. C. 367, 14 S. E. 821; *First Carolinas Joint Stock Land Bank of Columbia v. New York Title and Mortgage Co.*, 172 S. C. 447, 174 S. E. 406; *Neel v. Clark*, 193 S. C. 412, 8 S. E. (2d) 740.

§ 463. Objection to jurisdiction of courts or tribunals, how made.—When in any case or proceeding before any court or other tribunal any party shall appear for the sole purpose of objecting to the jurisdiction of such court or tribunal, and such court or tribunal shall upon such objection being made overrule the same, such party may give notice, either to the court or tribunal or to the opposing party, that he intends to rely on such jurisdictional objection or reserve his rights thereunder. Upon the overruling of such objection to the jurisdiction and giving of such notice, such party may thereafter appear generally or answer or plead or contest upon the merits, and such general appearance, answer, pleading or contest upon the merits shall not be deemed a waiver of the objection to the jurisdiction.

1932 Code, § 463; Civ. P. '22, § 406; 1919 (31) 55.

Special appearance to question jurisdiction extends time within which to demur or answer.—Under this section defendant's special appearance to object to jurisdiction extended time within which to answer or demur, notwith-

standing §§ 464-466. *Cheraw Motor Sales Co. v. Seymour*, 130 S. C. 307, 126 S. E. 39.

Applied in *Georgia-Carolina Gravel Co. v. Blassingame*, 129 S. C. 18, 123 S. E. 324.

§ 464. Notice.—The notice required by section 463 need not be in any special form or in the exact language of this chapter, but any notice which informs the court, tribunal or opposing party in substance of the intention of the party to rely on the objection made, or reserving his rights thereunder, shall be deemed a sufficient notice. The notice may be oral, if given to the court or tribunal in the presence of the opposing party or his attorney, in which case it shall be the duty of the court or tribunal to make a note of the same, so as to preserve the rights of the party, but in all other cases such notice shall be in writing. Notice to the attorney representing any party shall be deemed notice to the party.

1932 Code, § 464; Civ. P. '22, § 407; 1919 (31) 55.

§ 465. Who may give notice.—The word party as used in sections 463, 464 and 466 shall include parties and all other persons interested in the case or proceeding and having a legal right to make the objection to the jurisdiction of the court or tribunal.

1932 Code, § 465; Civ. P. '22, § 408; 1919 (31) 55.

§ 466. Mode prescribed not exclusive, in what cases.—Nothing in this chapter shall be construed to impair the right of any party to object to the jurisdiction of any court or tribunal at any time and place in any manner now allowed by law and the practice in this State, when such objection is based upon the lack of jurisdiction of the subject matter of the case or proceeding.

1932 Code, 466; Civ. P. '22, § 409; 1919 (31) 55.

CHAPTER 20

The Answer

467. Contents of answer.

468. Counterclaim.

469. When demurrer and answer allowed.

470. Sham and irrelevant defenses.

§ 467. Answer—what to contain.—The answer of the defendant must must contain:

(1) A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief.

(2) A statement of any new matter constituting a defense or counterclaim, in ordinary and concise language, without repetition.

1932 Code, § 467; Civ. P. '22, § 410; Civ. P. '12, § 199; Civ. P. '02, § 170; 1870 (14) § 172.

Editor's note.—This section not only specifies what defendant may plead but specifically requires that the answer must contain certain matters set out in the section before his answer will be sufficient. From the specific language of the section, supported by authority, it will be seen that the above section is mandatory and must be complied with. *McAliley v. Barber*, 4 S. C. 45, 48; *Cohrs v. Fraser*, 5 S. C. 351; *Fidelity Fire Ins. Co. v. Windham*, 134 S. C. 373, 133 S. E. 35; *Frederick v. Chapman*, 144 S. C. 137, 142 S. E. 247.

Historical account.—For a brief historical account of this section, see the dissenting opinion in *Kirven v. Va.-Car. Chemical Co.*, 77 S. C. 493, 58 S. E. 424. For a case distinguishing a modern answer from the former chancery practice, see *Hubbell v. Courtney*, 5 S. C. 87.

Sufficiency of denial.—It is a good form of denial under this section to state "that defendant has no knowledge" of certain facts alleged in the complaint, without adding "or information sufficient to form a belief." *Tharin v. Seabrook*, 6 S. C. 113.

An answer denying "that defendant has knowledge and information sufficient to form a belief" is a sufficient compliance with this section, requiring a denial of "any knowledge or information." *Gilreath v. Furman*, 57 S. C. 289, 35 S. E. 516.

Defendant must plead all defenses whether legal or equitable in the same action.—*Frederick v. Chapman*, 144 S. C. 137, 142 S. E. 247. See also, the note to § 468.

Sufficiency of affirmative answer.—In an action to recover damages for an alleged assault and battery, an affirmative answer which alleges that plaintiff first assaulted defendant, who committed the acts complained of in self-defense, is sufficient on demurrer under this section. *Hughey v. Kellar*, 34 S. C. 268, 13 S. E. 475.

Facts put in issue by a general denial.—Where a complaint alleges the corporate capacity of defendant, a general denial does not put in issue such capacity. *Montgomery v. Seaboard Air Line Ry. Co.*, 73 S. C. 503, 53 S. E. 987; *Land Mortgage Inv., etc., Co. v. Williams*, 35 S. C. 367, 14 S. E. 821; *Palmetto Lumber Co. v. Risley*, 25 S. C. 309.

Under this section the plaintiff's corporate capacity to sue is not put in issue by a general denial. *Liberian Exodus, etc., Co. v. Rodgers*, 21 S. C. 27.

Only evidence tending to disprove plaintiff's case is admissible under general denial.—Only those facts which tend to negative or to disprove the material allegations of the complaint are admissible under a general denial. *Henderson v. Bennett*, 58 S. C. 30, 36 S. E. 2.

Under the general denial of this section, evidence of a distinct affirmative defense is not admissible. The only evidence which the defendant is entitled to give is limited to a contradiction of the plaintiff's proof, and to the disproval of the case made by him. *Williams v. Irby*, 15 S. C. 458, 461.

Where the complaint in an action for breach of contract of employment alleged that plaintiff, since the dismissal, has been unable to obtain steady or profitable employment, evidence as to earnings in the meantime may be shown by defendant under a general denial. *Latimer v. York Cotton Mills*, 66 S. C. 135, 44 S. E. 559.

Court will not set aside a judgment by default when the issue could have been raised by answer.—Where, after commencement of action to recover balance of price for motor yacht, plaintiff commenced a second action for damages for fraud, in that after defendant contracted to purchase yacht, he obtained possession of yacht and had extensive repairs made to motor, knowing he would thereby create a lien in favor of repairman, a default judgment in second action

would not be set aside on ground that it was based on facts inconsistent with complaint in first action, in absence of excuse for not raising defense by answer and plea in abatement, defense of pendency of first action as bar to second action presenting an issuable matter which

should have been pleaded. *Baitary v. Gahagan*, 195 S. C. 520, 12 S. E. (2d) 735.

See also, *Campbell v. Moore*, 189 S. C. 497, 1 S. E. (2d) 784, and *Bell, Probate Judge v. Mackey et al.*, 191 S. C. 105, 3 S. E. (2d) 816.

§.468. Counterclaim—several defenses.—The counterclaim mentioned in section 467 must be one existing in favor of a defendant, and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action:

(1) A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action.

(2) In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action.

The defendant may set forth by answer as many defenses and counterclaims as he may have, whether they be such as have been heretofore denominated legal or equitable, or both. They must each be separately stated, and refer to the causes of action which they are intended to answer, in such manner that they may be intelligibly distinguished.

1932 Code, § 468; Civ. P. '22, § 411; Civ. P. '12, § 200; Civ. P. '02, § 171; 1870 (14) § 173.

I. General Consideration.

II. Counterclaims.

I. GENERAL CONSIDERATION

Historical note.—For a brief historical discussion of this section, pointing out the purpose of the legislature, see the dissenting opinion in *Kirven v. Va.-Car. Chemical Co.*, 77 S. C. 493, 58 S. E. 424.

Defendant's opportunity for making various defenses enlarged.—This section was not intended to restrict the mode in which a party called to answer a complaint should make his defense. On the contrary, it has rather enlarged his opportunity for setting up the various matters on which he may rely to bar the recovery sought against him. *Cohrs v. Fraser*, 5 S. C. 351, 354; *Fidelity Fire Ins. Co. v. Windham*, 134 S. C. 373, 133 S. E. 35, 38.

But all rights must be enforced or protected by the same form of action.—While it is true that it has been held that the provisions of this section have not interfered with the essential and inherent distinction between the different causes of action, legal and equitable, and whatever was equitable before the adoption of this section still remains equitable, and whatever was legal is still legal, and even the mode of trial is preserved, yet it has been declared that all rights, legal or equitable, must alike be enforced or protected by the same form of action. *Fidelity Fire Ins. Co. v. Windham*, 134 S. C. 373, 133 S. E. 35, 38.

But separate defenses in answer need

not be consistent with each other.—The theory of this section is that the defendant should be permitted to include in his answer all the defenses to the plaintiff's causes of action set out in the plaintiff's complaint, and in pleading in the answer such separate defenses there need be no care that such separate defenses be consistent with each other. *Millan v. Southern Ry. Co.*, 54 S. C. 485, 32 S. E. 539, 540.

For example the defense of contributory negligence may be pleaded in an answer which also sets up a general denial of negligence on the part of defendant, because any number of inconsistent defenses may be set up in the same pleading. *Cohrs v. Fraser*, 5 S. C. 351; *Charping v. Toxaway Mills*, 70 S. C. 470, 50 S. E. 186.

II. COUNTERCLAIMS

Cross reference.—As to counterclaims based upon actions in tort, see § 485, and the note thereto.

A counterclaim must be such that an independent action may be brought thereon.—A counterclaim must be a cause of action existing in favor of a defendant against a plaintiff, the facts being such that the defendant could, if he saw fit to do so, maintain a separate and independent action thereon against the plaintiff. *Republic State Bank v. Bailey Furniture Co.*, 102 S. C. 329, 86 S. E. 680; *Greenville County v. Greenville*, 84 S. C. 410, 66 S. E. 417.

Upon which a separate judgment

might be had.—*Greene v. Washington*, 105 S. C. 137, 89 S. E. 649.

A counterclaim relates to matter that might be the subject of an action and give rise to a judgment independently of the matters set forth in the complaint to which it is interposed. It is rather in the nature of a cross action than of a defense, and may be pleaded jointly with as many defenses to the complaint as the defendant may have to offer. *Mobley v. Cureton*, 6 S. C. 49, 67.

Thus, part payment of a mortgage debt by delivery of cotton and payment of a note cannot be pleaded as a counterclaim, since no separate judgment could be based on such payment, which is a necessary requisite of a counterclaim under this section. *Greene v. Washington*, 105 S. C. 137, 89 S. E. 649.

And which must exist in favor of defendant at commencement of the action.—Under this section requiring that a counterclaim should exist "at the commencement of the action," it must have existed in favor of defendant at that time. *Enter v. Quesse*, 30 S. C. 126, 8 S. E. 796, 14 Am. St. Rep. 891; *W. T. Ferguson Lumber Co. v. Elliott et al.*, 171 S. C. 455, 172 S. E. 616.

Generally, damages incident to institution of action do not constitute a "cause of action existing at the commencement of plaintiff's action" within the meaning of statute. *Visanska v. Rotureau et al.*, 189 S. C. 433, 1 S. E. (2d) 493.

So that defendant cannot set off a claim purchased after the commencement of the action.—*Enter v. Quesse*, 30 S. C. 126, 8 S. E. 796, 14 Am. St. Rep. 891.

As the counterclaim must arise out of contract or transaction set forth in the complaint.—A counterclaim in order to be available must be either a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim. *Latimer v. Sullivan*, 30 S. C. 111, 8 S. E. 639.

Where a counterclaim is based upon a cause of action arising on a contract, by the express terms of this section it may be pleaded to an action on a contract, whether the damages be liquidated or unliquidated, ascertained or unascertained. *Bryce v. Parker*, 11 S. C. 337.

So in a suit by an insurer against an administrator to cancel an insurance policy on the ground that the insured made false and fraudulent statements in the application for it, defendant may counterclaim for the amount due on the policy, because "transaction," as used in this section means all of the negotiations leading up to the contract in the case, and includes facts giving rise to plaintiff's action for the amount due on the policy. *Southeastern Life Ins. Co. v.*

Palmer, 120 S. C. 490, 113 S. E. 310.

Or be connected with the subject of the action.—*Latimer v. Sullivan*, 30 S. C. 111, 8 S. E. 639.

The words "subject of the action" as used in this section mean the plaintiff's main primary right which has been broken, and because of which breach a remedial right arises. *Humbert v. Brisbane*, 25 S. C. 506, 513.

A counterclaim under this section, to be connected with the subject of the action, must be so directly connected that the parties could be supposed to have foreseen and contemplated it in their mutual acts. *Columbia Nat. Bank v. Rizer*, 153 S. C. 43, 150 S. E. 316, 68 A. L. R. 443n.

For example, in an action for failure of defendant, as a common carrier, to furnish plaintiff connection over its telephone system, damages arising to defendant out of breach of contract may be set up as a counterclaim under this section, because the counterclaim unquestionably was connected with the subject-matter of the action, for it was the foundation upon which the defendant based its refusal to allow the plaintiff the further use of the telephone. *Gwynn v. Citizens' Tel. Co.*, 69 S. C. 434, 48 S. E. 460, 104 Am. St. Rep. 819, 67 L. R. A. 111.

Which may thus be illustrated.—A demand growing out of the unsettled partnership transactions between the plaintiff and defendant may be pleaded as a counterclaim. *Mills v. Carrier*, 30 S. C. 617, 9 S. E. 350.

Where husband sought to annul contract of marriage and to repudiate liability for support of child begotten before and born after marriage ceremony, wife's counterclaim demanding that husband provide for child was maintainable as growing out of the cause of action set up in the complaint. *Campbell v. Moore*, 189 S. C. 497, 1 S. E. (2d) 784.

And a counterclaim for breach of agreement to furnish mortgagor with funds to purchase cotton seed could be interposed in mortgagee's action to foreclose the mortgages. *International Vegetable Oil Co. v. Townsend*, 156 S. C. 103, 152 S. E. 876.

Foreclosure of mortgages.—See generally dissenting opinion of chief Justice Blease in *Bank v. Palmer*, 171 S. C. 167; 171 S. E., 481.

A cause of action for conversion cannot be pleaded as a counterclaim to an action on a note. *Lenhardt v. French*, 57 S. C. 493, 35 S. E. 761.

But in *Exchange Bank of Meggett v. Bennett*, 193 S. C. 320, 8 S. E. (2d) 515, the court held that in an action on a note, counterclaims for conversion of stock deposited as collateral for the note, and for conspiracy to obtain possession

of such stock, were allowable.

Where holder of note allegedly conspired with others to obtain possession of stock deposited as collateral for such note, maker of note could sue the holder alone for such conspiracy and hence, could maintain counterclaim against holder alone in action on the note. *Ibid.*

Likewise a counterclaim arising out of tort is no defense to an action for damages for tort. *Simkins v. Columbia, etc., R. Co.*, 20 S. C. 258; *Roberts v. Jones*, 71 S. C. 404, 51 S. E. 240; *Farmers' Union Mercantile Co. v. Anderson*, 108 S. C. 66, 93 S. E. 422. But see § 485.

So in an action by a tenant against his landlord for damages in entering upon the leased premises, seizing the crop and carrying it off, a balance due by the tenant for rent cannot be asserted as a counterclaim. *Sharp v. Kinsman*, 18 S. C. 108.

And where two or more persons have a joint right of action and unite as plaintiffs to enforce the same, a counterclaim cannot be admitted against one or some of them in favor of any or all the defendants. *Copeland v. Young*, 21 S. C. 275, 291.

Where a petition is filed, under a call for creditors, to establish a note against an insolvent company, so as to receive payment out of the funds in court, another creditor resists this debt and sets up, by way of counterclaim, the fact that the petitioner has diverted a portion of the trust fund from its proper destination, and demands that he shall return this property to the trust-estate. If this demand is a just one, and well founded, there is a remedy; but it would be stretching the doctrine of counterclaim beyond all precedent to permit this question to be adjudged and determined under such a proceeding. *Ex parte Carolina Nat. Bank*, 18 S. C. 289, 298.

And in an action to recover the possession of specific chattels no counterclaim is possible, unless, perhaps, equitable relief may be demanded under some exceptional circumstances. *Williams v. Irby*, 15 S. C. 458, 462.

However, in manufacturer's action in claim and delivery for tobacco oil covers, defendant who alleged that he purchased the covers for resale purposes and rented a warehouse and incurred expenses in demonstrating and advertising the covers could counterclaim for loss, under statute, but could not counterclaim for future profits or injury to reputation. *Florence-Mayo Co. v. Eaddy*, 194 S. C. 277, 9 S. E. (2d) 727.

But a cause of action based on tort may be set up as a counterclaim to an action based on contract, provided that

it be shown to have arisen out of contract or transaction set forth in the complaint as foundation of plaintiff's claim, or connected with the subject of the action. *Columbia Nat. Bank v. Rizer*, 153 S. C. 43, 150 S. E. 316, 68 A. L. R. 443n; *Coastal Produce Association v. Wilson*, 193 S. C. 339, 8 S. E. (2d) 505.

In action by seller of automobile for balance due thereon purchaser may counterclaim for damages for plaintiff's alleged misrepresentations as to condition of automobile, which misrepresentations caused loss to defendant by necessitating employment of attorney, loss of time from business, and damage to reputation by having his car seized by sheriff. *Greenville Motor Co. v. Thackston*, 167 S. C., 305; 166 S. E., 357.

In suit by county treasurer to recover certain tax execution fees claimed under statute, counterclaim relating to payment of execution fees to sheriff which was presented on the theory of tort, in the nature of misfeasance in office, would not lie under statute since it did not present a cause "arising out of the contract or transaction set forth in the complaint as a foundation of plaintiff's claim" nor was it "connected with the subject of the action." *Salley v. McCoy*, 186 S. C. 1; 195 S. E. 132.

Counterclaim for damages to goods cannot be set up in a suit to collect freight charges. *Penn. R. v. S. C. Produce Asso.*, 25 Fed. (2nd) 315.

But a counterclaim is not limited to causes of action based upon contracts.—There is nothing in subdivision 1 of this section that intimates a purpose to limit the counterclaim to causes of action based upon contracts; the only restriction is that the cause of action which is made the basis of the counterclaim shall have arisen out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim or be connected with the subject of the action. If it had been intended that the counterclaim should be limited to causes of action based upon contracts, it would have been easy to insert a condition to that effect, as was done in subdivision 2 of the section; the absence of such a limitation presents a strong inference that none was intended. *Columbia Nat. Bank v. Rizer*, 153 S. C. 43, 150 S. E. 316, 317, 68 A. L. R. 443n.

And all counterclaims need not be pleaded in federal courts.—Under this section a defendant in an action in the federal courts of this state is not required to plead all counterclaims and offsets in his answer. *Va.-Car. Chemical Co. v. Kirven*, 215 U. S. 252, 30 S. Ct. 78, 54 L. Ed. 179.

§ 469. Demurrer and answer—when allowed.—The defendant may demur to one or more of several causes of action stated in the complaint, and answer the residue.

1932 Code, § 469; Civ. P. '22, § 412; Civ. P. '12, § 201; Civ. P. '02, § 172; 1870 (14) § 174.

§ 470. Sham and irrelevant defenses to be stricken out.—Sham and irrelevant answers and defenses may be stricken out on motion, and upon such terms as the court may, in its discretion, impose.

1932 Code, § 470; Civ. P. '22, § 413; Civ. P. '12, § 202; Civ. P. '02, § 173; 1870 (14) § 175.

This section constitutes full authority for striking for irrelevancy, either (1) an entire answer or (2) an entire separately pleaded defense.—*Burkhalter v. Townsend*, 139 S. C. 324, 138 S. E. 34, 37; *Harman v. Harman*, 54 S. C. 100, 31 S. E. 881; *Virginia-Carolina Chemical Corporation v. Tweed-Lumber Co.*, 174 S. C. 497, 178 S. E. 131.

A false pleading should be stricken out as sham.—Under this section if a pleading is manifestly false and interposed to defeat or delay the plaintiff's action, the court should strike it out as sham. *Tharin v. Seabrook*, 6 S. C. 113, 117; *Ransom v. Anderson*, 9 S. C. 438; *Germofert Mfg. Co. v. Castles*, 97 S. C. 389, 81 S. E. 665; *Ocean Forest Co. v. Woodside*, 184 S. C. 428, 192 S. E. 413, *Dixon v. Dial*, 24 F. S. 264.

The word "sham" as used in this section is synonymous with "false," and applicable to designate all the pleadings which are in fact false, whether good or bad in substance. *Id.*

But a pleading is not sham merely because it is legally insufficient or because it contains inconsistent averments or omits material facts. *Id.*

Provided the falsity clearly appears.—

A motion to strike a pleading or defense as sham is not regarded favorably, and will only be granted where the falsity of the pleading clearly appears. *Germofert Mfg. Co. v. Castles*, 97 S. C. 389, 81 S. E. 665.

And provided the motion be directed against an entire answer or defense.—

A motion to strike a pleading as sham can only be directed against an entire answer or defense, and an entire answer will not be stricken upon a showing that only a separable part of it is sham. *Germofert Mfg. Co. v. Castles*, 97 S. C. 389, 81 S. E. 665.

And does not in terms demand judgment.—A motion to strike out a sham or irrelevant answer, or defense, should not in terms demand judgment. *Tharin v. Seabrook*, 6 S. C. 113.

An answer denying the allegations of the complaint cannot be stricken out. *Ransom v. Anderson*, 9 S. C. 438.

But court has duty to strike answer as sham, although answer contains general denial if admissions in answer disclose that no defense exists. *Ocean Forest Co. v. Woodside*, 184 S. C. 428, 192 S. E. 413.

CHAPTER 21

The Reply

471. Reply—demurrer to answer.

472. Motion for judgment upon answer.

473. Demurrer to reply.

§ 471. Reply—demurrer to answer.—When the answer contains new matter constituting a counterclaim, the plaintiff may, within twenty days, reply to such new matter, denying generally or specifically each allegation controverted by him, or any knowledge or information thereof sufficient to form a belief; and he may allege, in ordinary and concise language, without repetition, any new matter not inconsistent with the complaint, constituting a defense to such new matter in the answer; and the plaintiff may, in all cases, demur to an answer containing new matter, where, upon its face, it does not constitute a counterclaim or defense; and the plaintiff may demur to one or more of such defenses or counterclaims and reply to the residue of the counterclaims. And in other cases, where an answer

contains new matter constituting a defense by way of avoidance, the court may, in its discretion, on the defendant's motion, require a reply to such new matter; and in that case the reply shall be subject to the same rules as a reply to a counterclaim.

1932 Code, § 471; Civ. P. '22, § 414; Civ. P. '12, § 203; Civ. P. '02, § 174; 1870 (14) § 176.

Plaintiff is not required to reply unless the answer contains new matter constituting a counterclaim.—*Craig Mill Co. v. Cromer*, 85 S. C. 350, 67 S. E. 289; *Fass v. Liverpool, etc., Ins. Co.*, 105 S. C. 364, 89 S. E. 1040.

Nor, in such a case, is a reply allowable, except under court's order. *Williams v. Jefferson Standard Life Insurance Company*, 181 S. C. 344, 187 S. E. 540.

However, in action on life policy wherein answer did not contain counterclaim and reply was not ordered by court, under this statute, reply denying that physician's statement attributing insured's death to suicide was a part of proof of death, as alleged in answer, was improper, but reading thereof was not prejudicial where reply was subsequently withdrawn. *McLove v. Reliance Life Insurance Co. of Pittsburg*, 192 S. C. 245, 6 S. E. (2d) 13.

So in an action to recover the amount due on a fire policy, where the complaint ignored an award as a nullity, and where the defendant's answer set up the award in bar of the action, the plaintiff was not required to reply to such answer. *Fass v. Liverpool, etc., Ins. Co.*, 105 S. C. 364, 89 S. E. 1040.

And where defendant set up in its answer a release, executed by plaintiff's intestate, of all claims for damages against defendant by reason of the accident, it was competent for plaintiff to show incapacity and duress of intestate, to invalidate such release, though she filed no replication setting up such facts, since under this section no reply to an answer is necessary, unless it sets up a counterclaim. *Price v. Richmond, etc., R. Co.*, 38 S. C. 199, 17 S. E. 732.

Or unless required to reply by special order of the court.—Under this section, where an answer contains new matter constituting a defense by way of

avoidance, the court may, by special order and on defendant's motion, require plaintiff to reply thereto; the matter of requiring a reply is within the trial court's discretion, which will not be interfered with, in the absence of prejudicial abuse. *Powell v. Continental Ins. Co.*, 97 S. C. 375, 81 S. E. 654; *Mobley v. Cureton*, 6 S. C. 49.

A reply without an order of the court and alleging no counterclaim, may be improper, but a refusal by the circuit judge to formally strike it out, is not error of law. *Davis v. Schmidt*, 22 S. C. 128.

Plaintiff's reply is for the benefit of the defendant.—The provisions of this section, requiring a reply to a defense by way of avoidance, was intended for the benefit of the defendant, by giving him notice of the facts upon which the plaintiff relied. *Kennedy v. Hill*, 79 S. C. 270, 60 S. E. 689; *Rish v. Seaboard Air Line Ry.*, 108 S. C. 30, 93 S. E. 250.

But plaintiff may reply and demur at the same time.—Under this section the plaintiff may, when he is in doubt whether the new matter set up in the answer constitutes a counterclaim or not, reply and demur at the same time. *Latimer v. Sullivan*, 30 S. C. 111, 8 S. E. 639.

The language of this section, when the whole section is read together, seems to provide, under certain circumstances, for both a reply and demurrer to an alleged counterclaim set up in an answer; the demurrer being in the nature of a defendant's demurrer to a plaintiff's complaint, on the ground that the facts stated do not constitute a cause of action, which is always available in any stage of the case. *Id.*

Demurrer to answer may be served more than twenty days after service of answer. *First Joint Stock Land Bank of Columbia v. N. Y. Title & Mortgage Co.*, 172 S. C. 446, 174 S. E. 406.

§ 472. Motion for judgment upon answer.—If the answer contain a statement of new matter constituting a counterclaim, and the plaintiff fail to reply or demur thereto within the time prescribed by law, the defendant may move, on a notice of not less than ten days, for such judgment as he is entitled to upon such statement; and, if the case require it, a writ of inquiry of damages may be issued.

1932 Code, § 472; Civ. P. '22, § 415; Civ. P. '12, § 204; Civ. P. '02, § 175; 1870 (14) § 177.

§ 473. Demurrer to reply.—If a reply of a plaintiff to any defense set up

by the answer of the defendant be insufficient, the defendant may demur thereto, and shall state the grounds thereof.

1932 Code, § 473; Civ. P. '22, § 416; Civ. P. '12, § 205; Civ. P. '02, § 176; 1870 (14) § 178.

CHAPTER 22

General Rules of Pleading

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| 474 and 475. Subscription and verification. | 482 and 483. Libel and slander. |
| 476. Statement of account. | 484. Pleading in tort action. |
| 477. Pleadings construed liberally. | 485. Counterclaim in tort action. |
| 478. Irrelevant, redundant and indefinite matter. | 486. Actions to recover distrained property. |
| 479. Pleading a judgment. | 487. Joinder of causes of action. |
| 480. Conditions precedent. | 488. Allegation not denied. |
| 481. Pleading statutes. | 489. Cross actions between co-defendants. |

§ 474. Pleadings to be subscribed and verified.—Every pleading in a court of record must be subscribed by the party or his attorney; and when any pleading is verified, every subsequent pleading, except a demurrer, must be verified also.

1932 Code, § 474; Civ. P. '22, § 417; Civ. P. '12, § 206; Civ. P. '02, § 177; 1870 (14) § 179.

In general.—Where the complaint is not verified, petition for removal of part of controversy to federal court need not be verified. *Harley v. Home Ins. Co.*, 125 F. 792.

Verified return on order to show cause accepted as true unless contradicted by evidence. *State v. Farnum*, 73 S. C. 193,

53 S. E. 85.

Plaintiff may return an unverified answer if complaint is verified. — Where the complaint is verified, plaintiff may, under the provisions of this section, return an unverified answer. *Southern Cotton Oil Co. v. Lightsey*, 100 S. C. 41, 84 S. E. 301.

§ 475. Pleadings—how verified.—The verification must be to the effect that the same is true to the knowledge of the person making it, except as to those matters stated on information and belief, and, as to those matters, he believes it to be true; and must be by the affidavit of the party, or, if there be several parties united in interest, and pleading together, by one at least of such parties acquainted with the facts, if such party be within the county where the attorney resides, and capable of making the affidavit. The affidavit may also be made by the agent or attorney, if the action or defense be founded upon a written instrument for the payment of money only, and such instrument be in the possession of the agent or attorney, or if all the material allegations of the pleading be within the personal knowledge of the agent or attorney. When the pleading is verified by any other person than the party, he shall set forth in the affidavit his knowledge, or the grounds of his belief on the subject, and the reasons why it is not made by the party. When a corporation is a party, the verification may be made by any officer or any agent thereof; and when the State, or any officer thereof in its behalf, is a party, the verification may be made by any person acquainted with the facts. The verification may be omitted when an admission of the truth of the allegation might subject the party to prosecution for felony. And no pleading can be used in a criminal prosecution against the party as a proof of a fact admitted or alleged in such

pleading: *provided*, that the verification of any pleading in any court of record in this state may be omitted in all cases where the party called upon to verify would be privileged from testifying as a witness to the truth of any matter denied by such pleading.

1932 Code, § 475; Civ. P. '22, § 418; Civ. P. '12, § 207; Civ. P. '02, § 178; 1870 (14) § 180; 1929 (36) 102.

A party to a suit may always verify his own pleadings.—This section does not restrict a party to a suit in verifying his own pleadings, but merely provides that he must verify; leaving unaffected the general principle that a party may always verify his own pleadings. *Holmes v. Moore*, 63 S. C. 182, 41 S. E. 90.

But it must be shown which allegations are made on knowledge and which on information and belief.—Where the allegations of the complaint imply that they are all made on plaintiff's knowledge, while the verification shows that some of them are made on information and belief, such verification must also show which allegations are made on knowledge, and which on information and belief. *Burmester v. Moseley*, 33 S. C. 251, 11 S. E. 786; *Carolina Agency Co. v. Garlington*, 85 S. C. 114, 67 S. E. 225.

In order to be understood by the other party.—When a plaintiff desires to make an allegation which is based upon his own knowledge, a simple statement of such fact is sufficient, but when he desires to allege a fact upon information and belief, then he should state that he is informed and believes that such fact is true. Then, when the complaint is verified, it will be understood by the other party which allegations are sworn to upon knowledge, and which upon information and belief. *Hecht v. Freisleben*, 28 S. C. 181, 5 S. E. 475; *Burmester v. Moseley*, 33 S. C. 251, 11 S. E. 786; *Adkinson v. Sujette*, 51 S. C. 305, 27 S. E. 631.

Where the verification is made by another than the party, it must set forth his knowledge or the grounds of his belief with sufficient clearness. *Id.*

But an answer verified on the affiant's own knowledge is sufficient.—An answer, verified by a statement that its contents are true on the affiant's own knowledge, except as to those matters therein stated to be on information and belief, and as to those that he believes them to be true, is sufficient, though the answer contains no allegations on information and belief. *Lockwood v. McLean*, 90 S. C. 302, 73 S. E. 190.

So in an action on notes and an open account, verification of complaint by the agent of plaintiff, stating that he was the manager of his business, that the notes were in his possession until delivered to the attorneys in the suit, and that the allegations as to the account

were true, within his personal knowledge, is a sufficient verification under this section. *Carolina Grocery Co. v. Moore*, 63 S. C. 184, 41 S. E. 88.

But a verification is defective in substance where it does not expressly appear, either by the verification or by the pleading verified, that every material averment or denial, except such as relate to matters expressly averred or denied according to or for want of information and belief, is made according to the knowledge of the party. *Smalls v. Wilder*, 6 S. C. 402.

When matters are pleaded upon knowledge, it is unnecessary to add the words "on information and belief." *Id.*

So, where it is upon information and belief, it is unnecessary to state that it is upon knowledge. *Id.*

And in some cases the verification of an answer may be omitted.—Where, in an action for alleged misappropriation of the proceeds of certain stock, defendant filed an unverified answer within the time required and an affidavit of his counsel, stating that the verification was omitted because an admission of the allegations of the complaint would subject defendant to a prosecution for a felony, and because defendant would be privileged from testifying as to the truth of certain matters embraced in the complaint, the answer was sufficient to save a default. *Lockwood v. McLean*, 90 S. C. 302, 73 S. E. 190.

Verification of corporation need not be by any particular officer.—This section does not limit the verification to any particular officer of a corporation. *Southern Cotton Oil Co. v. Lightsey*, 100 S. C. 41, 84 S. E. 301.

For example, where in an action by a corporation the complaint was verified by the assistant district manager, who deposed that it was true of his own knowledge, the verification was sufficient. *Id.*

But the verification of a complaint by an employee, clerk, agent, or local manager is insufficient. *Palmetto Guano Corp. v. Green*, 138 S. C. 106, 136 S. E. 132. But note effect of 1929 amendment on section, where the verification is by a corporation.

An attorney can verify a complaint only in two cases.—There are only two cases in which an attorney may, in the absence of the party from the county, verify a complaint under this section. *Hecht v. Freisleben*, 28 S. C. 181, 5 S.

E. 475.

As where the action is founded upon a written instrument for the payment of money only, and such instrument is in the possession of the attorney. *Hecht v. Freisleben*, 28 S. C. 181, 5 S. E. 475.

Under this section a complaint in a suit on a check and promissory notes is sufficiently verified where the verification is by the attorney, setting out his knowledge and belief, and showing the action to be on written instruments in his possession for the payment of money only, and it is not necessary to state the reason why the verification was not made by plaintiff in totidem verbis. *Boykens Buggy Co. v. Lightsey*, 102 S. C. 283, 86 S. E. 639.

And where all the material allegations of the complaint are within the person-

al knowledge of the attorney. *Hecht v. Freisleben*, 28 S. C. 181, 5 S. E. 475; *Palmetto Guano Co. v. Green*, 138 S. C. 106, 136 S. E. 132.

Thus an attorney cannot verify a complaint on an open account.—Under this section an attorney cannot verify a complaint to recover on an open account, though the account was in his possession and verified by an officer of the plaintiff corporation, and his affidavit stated generally that defendant had admitted to him the account, but failed to set forth the words used or how the admissions were made. *Bray Clothing Co. v. Shealy*, 53 S. C. 12, 30 S. E. 620.

Applied as to verification by officer of corporation, *Southern Cotton Oil Co., v. Lightsey*, 100 S. C. 41, 84 S. E. 301.

§ 476. How to state an account in pleading.—It shall not be necessary for a party to set forth in a pleading the items of an account therein alleged; but he shall deliver to the adverse party, within ten days after a demand thereof in writing, a copy of the account, which, if the pleading is verified, must be verified by his own oath, or that of his agent or attorney, if within the personal knowledge of such agent or attorney, to the effect that he believes it to be true, or be precluded from giving evidence thereof. The court, or a judge thereof, may order a further account, when the one delivered is defective, and the court may, in all cases, order a bill of particulars of the claim of either party to be furnished.

1932 Code, § 476; Civ. P. '22, § 419; Civ. P. '12, § 208; Civ. P. '02, § 179; 1870 (14) § 181.

In suit on a number of distinct claims, this section does not apply. *Hagood v. Blythe*, 38 F. 76.

Account furnished under this section is no part of complaint or cause of action. *Creighton v. Creighton & Co.*, 68 S. C. 326, 47 S. E. 439.

Nor may exhibits be considered in passing on demurrer.—Exhibits attached to complaint are not to be considered in passing on demurrer thereto. *Cave v. Gill*, 59 S. C. 256, 37 S. E. 817; *Nichols v. Montgomery*, 68 S. C. 332, 335, 47 S. E. 373.

Defendant cannot complain of a verdict if he fails to demand an itemized

account.—A defendant, having failed to demand an itemized account as provided for in this section, cannot complain of the verdict or decree upon the ground that the account sued upon was not itemized. *Sloan v. Westfield*, 17 S. C. 589.

Nor can he object to plaintiff's proving the full amount demanded.—Under this section, a defendant who has omitted to demand a copy of an account, sued on generally, has no right to object to the plaintiff's proving the several sums constituting the full amount demanded. *Albion Phosphate Min. Co. v. Wyllie*, 77 F. 541.

§ 477. Pleadings to be liberally construed.—In the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed, with a view of substantial justice between the parties.

1932 Code, § 477; Civ. P. '22, § 420; Civ. P. '12, § 209; Civ. P. '02, § 180; 1870 (14) § 182.

See section 8712 for relief of defendants real estate foreclosures when personal judgment demanded.

Pleadings should be liberally construed in favor of the pleader.—In order to determine whether the action brought is ex delicto or ex contractu, the plead-

ings should be liberally construed in favor of the pleader, so that substantive rights may not be defeated by technical rules. *Lorick v. Palmetto Nat. Bank*, 76 S. C. 500, 502, 57 S. E. 527; *Citizens' Nat. Bank v. Hawkins*, 140 S. C. 43, 138 S. E. 541; *Wallace v. Lark*, 12 S. C. 576, 32

Am. Rep. 516; *Dowie v. Joyner*, 25 S. C. 123; *Park v. Brooks*, 38 S. C. 300, 17 S. E. 22, 23; *Jerkowski v. Marco*, 56 S. C. 241, 34 S. E. 386; *Mason v. Carter*, 8 S. C. 103, 104; *Harle v. Morgan*, 29 S. C. 258, 7 S. E. 487; *Temple v. Montgomery*, 157 S. C. 91, 153 S. E. 640, 642; *Montgomery v. Conway Lumber Co.*, 171 S. E. 483, 172 S. E. 620; *Southern Bleachery & Print Works*, 184 S. C. 449, 192 S. E. 665; *Athanas v. City of Spartanburg*, 196 S. C. 19, 12 S. E. (2d) 39.

On plaintiff's appeal from judgment in action for excessive levy on plaintiff's personality sold for delinquent taxes, plaintiff's exception, which alleged error by court "in not holding that there was an unreasonable amount of property seized and sold in proportion to the amount of taxes involved which was an issue for the jury, the property levied on being easily separated and value found so that a sale of only amount required to satisfy amount due could be had," was construable as covering issues of whether complaint stated cause of action and whether court had jurisdiction of subject of action. *Connor v. Williams et al.*, 187 S. C. 119, 197 S. E. 211.

And a counterclaim involving contract to convey lands was held not demurrable under statute of frauds for failure to allege contract was in writing, the writing being presumed. *Spratt Building & Loan Association v. Roper et al.*, 160 S. C. 240, 158 S. E. 495.

A complaint which first demands judgment for a certain amount, the estate of the deceased being insufficient to pay the debts of the plaintiff and other creditors, and, second, that land of deceased be sold and the proceeds applied to the payment of costs of administration and debts of the estate, etc., wherein the complaint itself has no allegation that the estate is indebted to any person other than plaintiff, nor that suit was for the benefit of all creditors, nor pleading for other creditors to come in, cannot be

liberally construed under this section to state a cause of action for a creditor's bill. Pleading is not always form, but often substance, as it is in the instant case. Therefore, the demurrer should have been sustained. *Hand v. Kelly*, 102 S. C. 151, 86 S. E. 382.

Under this section a complaint attacked by a demurrer must be liberally construed. *Cline v. Southern Ry.*, 110 S. C. 534, 96 S. E. 532; *Harper v. Met. Life Ins. Co.*, 153 S. C. 478, 151 S. E. 60. *Montgomery v. Conway Lumber Co.*, 171 S. C. 483, 172 S. E. 620.

If a complaint contains allegations which when construed liberally, if necessary, entitle plaintiff to relief by stating any cause of action, however it may be miscalled, it will not be dismissed. *Cooper et al. v. Baxley*, 194 S. C. 270, 9 S. E. (2d) 721.

The common law rule being thus displaced.—It was early decided under the code that the latter displaced the contrary rule of the common law that a pleading should be construed strongly against the pleader. *Childers v. Verner*, 12 S. C. 1; also see, *Cooper et al. v. Baxley*, 194 S. C. 270, 9 S. E. (2d) 721.

And in doubtful cases every intentment is in favor of regarding the action as *ex contractu*.—*Randolph v. Walker*, 78 S. C. 157, 59 S. E. 856.

Thus a counterclaim will be presumed to be on contract instead of tort.—Where it is a doubtful question whether a counterclaim in an action on a contract is on contract or tort, it will under this section be presumed that the counterclaim was one on contract instead of tort, and all reasonable intentments will be given to that construction, where otherwise the counterclaim could not be sustained. *Farmers' Union Mercantile Co. v. Anderson*, 108 S. C. 66, 93 S. E. 422.

But this section does not admit allegations of fact in the alternative.—*Iseman v. McMillan*, 36 S. C. 27, 15 S. E. 336.

§ 478. Striking out irrelevant or redundant matter and making indefinite matter more definite.—If irrelevant or redundant matter be inserted in a pleading, it may be stricken out, on motion of any person aggrieved thereby. And when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment.

1932 Code, § 478; Civ. P. '22, § 421; Civ. P. '12, § 210; Civ. P. '02, § 181; 1870 (14) § 183.

An allegation is irrelevant when it has no substantial relation to the controversy.—*Alexander v. Du Bose*, 73 S. C. 21, 52 S. E. 786; *Nichols v. Briggs*, 18 S. C. 473; *Guess v. Southern Ry. Co.*, 73 C. 264, 53 S. E. 421.

An allegation is irrelevant when the issue formed by its denial can have no

connection with nor effect upon the cause of action. *Pom. Code Rem.*, § 551; *Smith v. Smith*, 50 S. C. 54, 27 S. E. 545; *Ragsdale v. Southern Ry. Co.*, 60 S. C. 381, 38 S. E. 609.

For example, in an action on a note, part of an answer alleging that defendants made it in renewal of a past-due

note, and that under legal advice they refused to pay the renewal note, and deposited the amount thereof in the bank to await the result of any litigation between the various claimants to the proceeds, and that other persons interested should have been made parties defendant to the action, was properly stricken out as irrelevant. *Watford v. Windham & Co.*, 64 S. C. 509, 42 S. E. 597.

And an allegation in a complaint, in an action for personal injuries, stating the reasons why a defendant was indifferent and careless was properly stricken out as irrelevant. *Gadsden v. Catawba Water Power Co.*, 71 S. C. 340, 51 S. E. 121.

In action for breach of contract by manager against publishing corporation allegations as to who owned the stock and who constituted the board of directors of the said corporation were stricken out as irrelevant on the grounds that the complaint was complete without them and the said allegations had no vital connection with the action. Allegations stating that plaintiff's discharge was wilful and that defendant had appropriated to its own use the salaries of plaintiff held not to warrant punitive damages and were irrelevant. *Holland v. Spartanburg Herald-Journal Co.*, 166 S. C., 454, 165 S. E., 203, 84 A. L. R. 1336.

Allegations of fraudulent acts accompanying breach of contract are properly struck out where no such acts are set out or do not support punitive damages. *Ibid.*; *Lilinthal v. South Carolina Public Service Co.*, 174 S. C. 177, 177 S. E. 98.

Irrelevant matter contained in defense and constituting part thereof may properly be stricken. *Virginia-Carolina C. Corporation v. Tweed-Lumber Co.*, 174 S. C. 497, 178 S. E. 131.

In an action under section 660 for the construction of a will, complaint alleges and the answer admits the will was duly probated in common form, and more than four years elapsed without probate in solemn form being required as provided in section 8932, and where the disability of infancy is not alleged, the striking from the answer allegations that the will was not properly executed, and that application will be made to probate court for probate in solemn form despite expiration of four-year period prescribed in section 8932 is proper. Infancy is the only disability made an exception to the four-year period by section 8932. *Wilkinson v. Wilkinson*, 178 S. C. 194; 182 S. E., 640.

Applied in *Waldrop v. M. & J. Finance Corporation*, 176 S. C. 490, 180 S. E. 555, where no cause of action was alleged concerning matters struck out.

But in an action for damages for mental anguish and physical suffering for

failure to deliver a telegram, allegations in the complaint that plaintiff was made sick, forced to take to her bed, and call in the services of a physician, and expend large sums in medicine, care, and nursing, are neither irrelevant nor surplusage. *Simmons v. Western Union Tel. Co.*, 63 S. C. 425, 41 S. E. 521, 57 L. R. A. 607.

But a demurrer cannot dispose of irrelevant matter.—Under this section a demurrer cannot generally dispose of irrelevant or redundant matter contained in a pleading. *Guignard v. Evans*, 80 S. C. 491, 61 S. E. 1003; *Buist v. Melchers*, 44 S. C. 46, 21 S. E. 449; *Piereson v. Green*, 69 S. C. 559, 48 S. E. 624.

Where a demurrer is interposed to a whole complaint, it cannot be sustained as to one portion thereof and overruled as to the balance. *Sloan v. Seaboard, etc.*, R. Co., 64 S. C. 389, 42 S. E. 197.

Or indefinite matter.—Under this section where indefinite or uncertain matter appears in the pleadings, it cannot be remedied by a demurrer thereto. *Sandall v. Atlanta Mut. Life Ins. Co.*, 53 S. C. 241, 31 S. E. 230; *State v. Jeter*, 59 S. C. 483, 38 S. E. 124; *Capers v. Western Union Tel. Co.*, 71 S. C. 29, 31, 50 S. E. 537; *Rentz v. Southern Ry.*, 82 S. C. 170, 63 S. E. 743; *Flenniken v. Buchanan*, 21 S. C. 432, 434; *Marion v. City Council*, 68 S. C. 257, 47 S. E. 140.

Likewise, where the complaint fails to state each of several causes of action separately, it is a vice in pleading, but cannot be remedied by a demurrer. *Hellams v. Switzer*, 24 S. C. 39; *Westlake v. Farrow*, 34 S. C. 270, 13 S. E. 469.

But where a complaint stated a cause of action against only one of several defendants other than one of them, the remedy was by demurrer, and not by motion to make the complaint more definite and certain. *Lyles v. Kinard*, 82 S. C. 415, 64 S. E. 409.

As the proper method is by motion to strike.—The proper method of objecting to and correcting redundant, immaterial, or irrelevant allegations in a pleading is by motion to strike the unnecessary matter. *Guignard v. Evans*, 80 S. C. 491, 61 S. E. 1003.

Where the motion is made to strike out parts of several causes of action, reference cannot be had to causes jointly. *Berry v. Moore Co.*, 69 S. C. 317, 321, 48 S. E. 249.

Allegation of punitive damages may be stricken out in claim and delivery proceedings. *Tittle v. Kennedy*, 71 S. C. 1, 7, 50 S. E. 544.

Or by motion to have the pleadings made more certain.—Where plaintiff desires to demur to certain defenses set up in the answer which are not separately stated, he may make a motion to have the pleading made more certain, and

then move that the irrelevant portions be stricken out, as provided by this section, but he cannot demur to a part of a defense. *Buist v. Salvo*, 44 S. C. 143, 21 S. E. 615; *Lawson v. Gee*, 57 S. C. 502, 35 S. E. 759; *Mobley v. Cureton*, 6 S. C. 49; *Garrett v. Weinberg*, 50 S. C. 310, 27 S. E. 770; *Savage v. Sanders*, 51 S. C. 495, 29 S. E. 248; *Hagood v. Blythe*, 38 F. 76.

Under this section a pleading cannot be stricken out for indefiniteness, as the proper remedy is a motion to make more definite and certain. *Computing Scales Co. v. Long*, 66 S. C. 379, 44 S. E. 963, 65 L. R. A. 294; *Smith v. Bradstreet Co.*, 63 S. C. 525, 41 S. E. 763.

And under rule XX of the circuit court the motion must be noticed before demurring or answering, and within twenty days after service of the pleading. *Dent v. South-Bound R. Co.*, 61 S. C. 329, 39 S. E. 527.

Where a party gives notice of a motion to make a complaint definite and certain, the notice should specify in what particulars it should be corrected, and the order granting the motion should specify in what particulars the complaint is to be amended, so if the order is not complied with the complaint may be struck out on motion. *Long v. Hunter*, 48 S. C. 179, 26 S. E. 228.

A motion to have the pleadings made more definite is the proper remedy under the following cases: If a defendant is in doubt as to the character of the claim made against him, *Dowie v. Joyner*, 25 S. C. 123; where, in an action on an account, it does not show which of the items sued on are admitted, and which denied, *Morgan v. Sammons*, 66 S. C. 388, 44 S. E. 966; where a defense and a counterclaim are improperly united, *McCown v. McSween*, 29 S. C. 130, 7 S. E. 45; where plaintiffs are not sufficiently referred to in the complaint, *Chapman v. City Council*, 28 S. C. 373, 6 S. E. 158, 13 Am. St. Rep. 681; where several notes are sued on as one cause of action, and the allegation is imperfect or informal, *Holland v. Kemp*, 27 S. C. 623, 3 S. E. 83; where the description of premises is not sufficiently particular. *Childers v. Verner*, 12 S. C. 1.

"Divers people" to whom alleged publication of slanderous words was made, required to be named. *Boling v. Clinton Cotton Mills*, 163 S. C. 13, 161 S. E. 195.

Cause of action alleging defamatory charge against defendant communicated to divers persons, and separate charge communicated to individual, subject to motion to make more definite and certain by separately setting forth several causes of action. *Ibid.*

But in an action for injuries to a servant, alleged to have been caused by defects in certain machinery or appliances, plaintiff should not be required to amend

the complaint so as to state the particulars in which the machinery was defective. *Moore v. Catawba Power Co.*, 68 S. C. 201, 46 S. E. 1004.

An action for accounting need not allege with particularity acts complained of. *Sigwald v. City Bank*, 74 S. C. 473, 477, 55 S. E. 109.

An order requiring plaintiff to amend complaint for damage to warehouse, to show date of alleged delicts, is erroneous as requiring statement of evidentiary facts, *Rowland Warehouse Co. v. Sumter Packing Co.*, 160 S. C. 352, 158 S. E. 543.

An exhibit attached to complaint can be used as a bill of particulars to make the allegations of the complaint more certain. *Dixon v. Roessler*, 70 S. C. 497, 499, 50 S. E. 184.

A rule to show cause why the complaint should not be made definite and certain is just as effective as a motion. *Bank v. Fidelity, etc., Co.*, 120 F. 315.

So that the opposite party may reply thereto.—The object of the motion to require the party to make his pleading definite and certain is to enable the opposite party to demur, answer, or reply intelligently, and such motion should be made or noticed, or the right reserved, before the time for answering or demurring has expired. *Lawrence v. Lawrence*, 81 S. C. 126, 62 S. E. 9; *Hughes v. Orangeburg Mfg. Co.*, 81 S. C. 354, 62 S. E. 404.

And if such motion be not made irrelevant allegations may be supported by evidence.—It is not error to admit testimony in support of irrelevant allegations, where there was no motion to strike out. *Blossingame v. Laurens*, 80 S. C. 38, 61 S. E. 96; *Mauldin v. Seaboard Air Line Ry.*, 73 S. C. 9, 12, 52 S. E. 677; *Milhou v. Southern Ry.*, 72 S. C. 442, 52 S. E. 41, 110 Am. St. Rep. 620. But it need not be admitted. *Bromonia Co. v. Greenwood Drug Co.*, 78 S. C. 482, 59 S. E. 363.

And unless it is made in time the motion is waived.—Under this section if the motion to make the pleadings more certain is not taken in due time (as before the answer), it is waived. *Bowden v. Winsmith*, 11 S. C. 409.

Such motion should be made before trial. *Zimmerman v. McMakin*, 22 S. C. 372, 375.

And the motion may be waived by answering the complaint. *Allen v. Cooley*, 60 S. C. 353, 38 S. E. 622, 627.

But the right to make the motion may be reserved in the answer. *Whaley v. Lawton*, 53 S. C. 580, 31 S. E. 660.

Where the answer is made definite additional defenses may be set up.—Where, in an action on an account, defendant was required to make his answer more definite, such order was no limitation on his right to set up in his

amended answer additional defenses. *Morgan v. Sammons*, 66 S. C. 388, 44 S. E. 966.

An order denying a motion to make the pleadings definite is not appealable.—*Miles v. Charleston Light, etc., Co.*, 87 S. C. 254, 69 S. E. 292; *Harbert v. Atlanta, etc., Ry.*, 74 S. C. 13, 53 S. E. 1001; *Dawkins v. Columbia Electric St. R. Co.*, 82 S. C. 166, 63 S. E. 746.

And this is true of an order refusing to strike out irrelevant matter.—An order refusing a motion to strike out portions of an answer as frivolous, irrelevant, and redundant is not reversible error, though the matter might well have been stricken out, since such an order is not appealable. *McCandless v. Mobley*,

81 S. C. 303, 62 S. E. 260; *Woodward v. Woodward*, 87 S. C. 247, 69 S. E. 232.

However, an order to make the pleadings definite may be appealable.—An order to make the pleadings definite and certain by amendment is appealable when it deprives the appellant of some substantial right. *Epstin v. Berman*, 78 S. C. 327, 58 S. E. 1013.

See generally, *Bell v. Floyd*, 64 S. C. 246, 42 S. E. 104; *Welborn v. Dixon*, 70 S. C. 108, 49 S. E. 232, 3 Ann. Cas. 407; *Williams v. Salmond*, 79 S. C. 459, 61 S. E. 79; *Wood v. Pacolet Mfg. Co.*, 80 S. C. 47, 61 S. E. 95; *Shaver v. Grendel Mills*, 74 S. C. 430, 54 S. E. 610; *Hix v. Belton Mills*, 69 S. C. 273, 48 S. E. 96.

§ 479. Judgment—how to be pleaded.—In pleading a judgment, or other determination of a court or officer of special jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation be controverted, the party pleading shall be bound to establish on the trial the facts conferring jurisdiction.

1932 Code, § 479; Civ. P. '22, § 422; Civ. P. '12, § 211; Civ. P. '02, § 182; 1870 (14) § 184.

§ 480. Conditions precedent—how to be pleaded.—In pleading the performance of conditions precedent in a contract, it shall not be necessary to state the facts showing such performance; but it may be stated generally that the party duly performed all the conditions on his part; and if such allegation be controverted, the party pleading shall be bound to establish, on the trial, the facts showing such performance. In an action or defense founded upon an instrument for the payment of money, it shall be sufficient for a party to give a copy of the instrument, and to state that there is due to him thereon from the adverse party a specified sum, which he claims.

1932 Code, § 480; Civ. P. '22, § 423; Civ. P. '12, § 212; Civ. P. '02, § 183; 1870 (14) § 185.

A condition precedent is something essential to the right asserted.—*Griffith v. Newell*, 69 S. C. 300, 48 S. E. 259.

And must be alleged in the pleadings.—A condition precedent must be alleged in the pleadings, as it is not a defense like a condition subsequent. *Griffith v. Newell*, 69 S. C. 300, 48 S. E. 259; *Peterman v. Pope*, 74 S. C. 296, 298, 544 S. E. 569.

Where, in an action on a note, the consideration, promise, and its breach are alleged in the complaint, in which the note is set out, it is sufficient under this section, as all the provisions are complied with. *Merchants', etc., Bank v. Blacksburg Spinning, etc., Mill*, 71 S. C. 525, 51 S. E. 274.

And an allegation that a specified sum on the notes, sued on, became due and payable "by defendants to plaintiff" on a certain day is sufficient, as equivalent

to a general allegation of due performance on plaintiff's part of all conditions precedent to fixing liability of such defendants as indorsers. *McCrae v. Spires*, 121 S. C. 147, 113 S. E. 583.

And a waiver of conditions precedent must be alleged.—In an action on a contract, a waiver of a condition precedent cannot be relied on unless pleaded. *Griffith v. Newell*, 69 S. C. 300, 48 S. E. 259.

In order to recover upon mutual, dependent contract, plaintiff must allege performance of all conditions precedent on his part, or, if he relies upon waiver of any such stipulations, or excuse for nonperformance, he must allege such waiver or excuse. *Hyder v. Metropolitan Life Ins. Co.*, 183 S. C. 98; 190 S. E. 239.

But the production of the inventory of a stock of goods is not a condition precedent.—The production of the inventory of a stock of goods, taken before the

issuance of a policy of insurance thereon, is not a condition precedent to recovery under the policy, and need not be affirmed in plaintiff's pleading in an action to recover for a loss. *Kingman v. Lancashire Ins. Co.*, 54 S. C. 599, 32 S. E.

762.

See generally. *Hollings v. Bankers' Union*, 63 S. C. 192, 196, 41 S. E. 90; *Bank v. Fidelity, etc., Co.*, 120 F. 315; *Copeland v. Western Assurance Co.*, 43 S. C. 26, 20 S. E. 754.

§ 481. Private statutes—how to be pleaded.—In pleading a private statute, or a right derived therefrom, it shall be sufficient to refer to such statute by its title and the day of its passage, and the court shall thereupon take judicial notice thereof.

1932 Code, § 481; Civ. P. '22, § 424; Civ. P. '12, § 213; Civ. P. '02, § 184; 1870 (14) § 186.

§ 482. Libel and slander—how stated in complaint.—In an action for libel or slander, it shall not be necessary to state, in the complaint, any extrinsic facts, for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose; but it shall be sufficient to state generally that the same was published or spoken concerning the plaintiff; and if such allegation be controverted the plaintiff shall be bound to establish, on trial, that it was so published or spoken.

1932 Code, § 482; Civ. P. '22, § 425; Civ. P. '12, § 214; Civ. P. '02, § 185; 1870 (14) § 187.

Section displaces technical rules of pleading.—For the purpose of relieving pleadings in libel cases from one of the rigid technical rules controlling them, this section was incorporated in this Code. *Hubbard v. Furman University*, 76 S. C. 510, 57 S. E. 478.

Thus no inducement, colloquium, or innuendo is necessary where the words impute a crime.—Where the alleged defamatory words in themselves impute to plaintiff the commission of a crime, and it appears that they were spoken of plaintiff, no inducement, colloquium, or innuendo is essential to proper pleading on plaintiff's part. *Bell v. Clinton Oil Mill*, 129 S. C. 242, 124 S. E. 7.

But where the words are not applicable to plaintiff or not actionable per se then inducement and innuendo are essential.—The common law rule was that, if an alleged defamatory statement was not on its face applicable to the plaintiff or was not actionable per se, the complaint must show, by what was termed the inducement, the extrinsic circumstances which, coupled with the language used, affected the construction and rendered it actionable; by what was termed the colloquium, its relation to the plaintiff; and by what was termed the innuendo, giving point or meaning to the matters expressed before in the charge, not as stating new facts but the construction which defendant intended and as bystanders understood, the import of the words used, coupled with the inducement, and under this section the inducement and innuendo are still essential under the circumstances stated,

but the colloquium is no longer necessary. *Bell v. Clinton Oil Mill*, 129 S. C. 242, 124 S. E. 7; *Duncan v. Record Pub. Co.*, 145 S. C. 196, 143 S. E. 31, 64.

Before this section was enacted, when the alleged libel did not mention the name of the plaintiff, it was necessary to state the extrinsic facts leading to the conclusion that the defamatory matter was applied to him. The change, however, does not obviate the necessity of setting out facts which make language, not in itself defamatory, have that import. *Hubbard v. Furman University*, 76 S. C. 510, 57 S. E. 478.

So where a publication is not libelous per se, malicious purpose to injure the plaintiff is not enough without an allegation that it effected the evil purpose by conveying to those to whom the publication was sent a charge injuriously affecting the character or business of the plaintiff. *Hubbard v. Furman University*, 76 S. C. 510, 57 S. E. 478.

An allegation that defendant at a certain time and place slandered plaintiff, by saying that he had sworn lies at a certain time and place, and in a named cause, states facts sufficient. *Zimmerman v. McMakin*, 22 S. C. 372, 375, 376.

And where the words of slander proved at trial are not the same as, but similar to, those alleged, it is for the jury to say whether they meant the same. *Id.*

And the absence of colloquium in complaint is not ground for demurrer.—The complaint in an action for publication of an alleged libelous article is not demurrable, notwithstanding the absence of the colloquium, as it is not required un-

der this section. *Smith v. Spartanburg Herald-Journal Co.*, 156 S. C. 69, 152 S. E. 823.

"Of and concerning the plaintiff."—Pamphlet published by insurance agent, which referred generally to insurance companies as a class, declared that several small companies had defaulted, advised purchasers of insurance to investigate financial standing and experience of insurance companies, and suggested purchase of insurance in agents' com-

pany, was mere "seller's talk" and was not "libelous per se" or "libelous per quod" of individual hospitalization insurance companies, and, even if it were defamatory, it was defamatory of a class and not of such individual companies as members of the class. *Hospital Care Corporation v. Commercial Casualty Ins. et al.*, 194 S. C. 370, 9 S. E. (2d) 796.

See generally. *Wilson v. Hamilton*, 9 Rich. Law. 382.

§ 483. Answer in such cases.—In the action mentioned in the last section, the defendant may, in his answer, allege both the truth of the matter charged as defamatory, and any mitigating circumstances, to reduce the amount of damages; and, whether he prove the justification or not, he may give, in evidence, the mitigating circumstances.

1932 Code, § 483; Civ. P. '22, § 426; Civ. P. '12, § 215; Civ. P. '02, § 186; 1870 (14) § 188.

Matter in mitigation of damages should be pleaded. — *Latimer v. York Cotton Mills*, 66 S. C. 135, 138, 44 S. E. 559.

Thus reputation may be pleaded and proved as a mitigating circumstance, in an action for libel, in view of the provisions of this section. *McLeod v. American Pub. Co.*, 126 S. C. 363, 120 S. E. 70.

And it may be that defendant can introduce evidence to show his belief in the truth of the charge made, in mitigation of damages. *Finch v. Finch*, 21 S. C. 342.

Whether defendant sustain his plea of justification or not, the jury may consider the evidence of mitigating circumstances. *Burckhalter v. Coward*, 16 S. C. 435, 439.

Mitigating circumstances may be pled and proved without pleading justification. *Johnston v. Life & Casualty Ins. Co.*, 192 S. C. 1518, 7 S. E. (2d) 463.

See generally. *Machen v. Western Union Tel. Co.*, 72 S. C. 256, 257, 51 S. E. 697. *Dumcan v. Columbia Record*, 145 S. C. 196, 143 S. E. 31, 64.

§ 484. Pleading in actions ex delicto for damages regulated. — In all actions ex delicto in which vindictive, punitive or exemplary damages are claimed in the complaint, it shall be proper for the party to recover also his actual damages sustained, and no party shall be required to make any separate statement in the complaint in such action, nor shall any party be required to elect whether he will go to trial for actual or other damages, but shall be entitled to submit his whole case to the jury under the instruction of the court.

How plead two or more causes of action for damages.—In all cases where two or more acts of negligence or other wrongs are set forth in the complaint, as causing or contributing to the injury, for which such suit is brought, the party plaintiff in such suit shall not be required to state such several acts separately, nor shall such party be required to elect upon which he will go to trial, but shall be entitled to submit his whole case to the jury under the instruction of the court and to recover such damages as he has sustained, whether such damages arose from one or another or all of such acts or wrongs alleged in the complaint.

1932 Code, § 484; Civ. P. '22, § 427; Civ. P. '12, § 216; Civ. P. '02, § 186a; 1898 (22) 693.

- I. Allegations as to Actual and Punitive Damages.
- II. Pleading Two or More Wrongs in Single Complaint.

I. ALLEGATIONS AS TO ACTUAL AND PUNITIVE DAMAGES

Editor's note.—Prior to the adoption of the Act of 1898, amending this section, the plaintiff was not allowed, under the rulings of the court, to commingle in his complaint allegations appropriate to an action for punitive damages based upon

willfulness or recklessness and allegations appropriate to an action for actual or compensatory damages arising out of negligence; but he was required to state such causes of action separately. When the causes of action were separately stated, the plaintiff could be required to elect upon which cause of action he would rely. *Glover v. Charleston, etc., Ry. Co.*, 57 S. C. 228, 234, 35 S. E. 510; *Steedman v. South Carolina, etc., R. Co.*, 66 S. C. 542, 45 S. E. 84, 85; *Greer v. Western Union Tel. Co.*, 105 S. C. 147, 89 S. E. 782, 784.

This section is applicable only to causes of action arising ex delicto.—*Mikell v. McCreery-Pressley Co.*, 105 S. C. 25, 89 S. E. 467; *Greer v. Western Union Tel. Co.*, 105 S. C. 147, 89 S. E. 782, 784.

An action for personal injuries resulting from defendant's negligent and willful misconduct, the only reference in the complaint to a contract between the parties being merely to show the existence between them, at the time of the wrongs, of the relation of carrier and passenger, is an action ex delicto under this section. *Taber v. Seaboard Air Line Ry.*, 81 S. C. 317, 62 S. E. 311, 313.

And does not apply to striking of matter from complaint containing actions based on contract and deceit.—This section does not apply to the striking out of irrelevant matter from a complaint containing allegations appropriate to a cause of action in contract and one based on deceit, where plaintiff does not indicate on which he relies or whether he relies upon the fact that the complaint contains two causes of action. *Mikell v. McCreery-Pressley Co.*, 105 S. C. 25, 89 S. E. 467.

Punitive damages in claim and delivery action allowed.—As to specific section covering damages in action for claim and delivery, see Civ. P. §§ 602 and 661 and notes thereto.

A cause of action for punitive damages and a cause of action for actual damages are technically separate and distinct, although they may be pleaded together under the "jumbling act," *Hallman v. Cushman*, 196 S. C. 402, 13 S. E. (2d) 498.

Nature of damages sought need not be pointed out in pleadings.—It is not necessary, under this section, in damage suits to point out whether punitive or actual damages are sought. *Glover v. Charleston, etc., Ry. Co.*, 57 S. C. 228, 35 S. E. 510, 512.

Only actual damages can be given in an action based on negligence.—*Greer v. Western Union Tel. Co.*, 105 S. C. 147, 89 S. E. 782, 783, citing *Wilson Lumber Co. v. Alderman*, 75 S. C. 299, 55 S. E. 447; *Furman v. Tuxbury Land, etc., Co.*, 112 S. C. 71, 99 S. E. 111, 114.

But actual damages may be given in addition to punitive damages in an action based on willfulness.—*Greer v. Western Union Tel. Co.*, 105 S. C. 147, 89 S. E. 782, 783, citing *Wilson Lumber Co. v. Alderman*, 75 S. C. 299, 55 S. E. 447; *Steedman v. South Carolina, etc., R. Co.*, 66 S. C. 542, 45 S. E. 84, 85.

And actual damages may be recovered in an action based on willfulness without alleging negligence.—Where plaintiff alleges a willful tort he may, under that allegation, prove a negligent tort out of facts alleged, and recover actual damages therefor, without having specifically alleged that he was also negligently injured. *Furman v. Tuxbury Land, etc., Co.*, 112 S. C. 71, 99 S. E. 111, 113.

Actual damages under verdict for punitive damages must be referred to action based on willfulness.—When a complaint contains allegations appropriate to a cause of action for negligence, and likewise a cause of action for willfulness, and the jury renders a verdict in favor of the plaintiff for punitive damages, and also for actual damages, the verdict for actual damages must be referred to cause of action based on willfulness, and not to cause of action founded on negligence. *Greer v. Western Union Tel. Co.*, 105 S. C. 147, 89 S. E. 782.

And willfulness must be present in order to recover even actual damages in such an action.—Actual or punitive damages cannot be recovered in an action for a willful tort, unless there was testimony tending to sustain the allegations of willfulness. *Greer v. Western Union Tel. Co.*, 105 S. C. 147, 89 S. E. 782, 784, citing *Chiles v. Southern R. Co.*, 69 S. C. 327, 48 S. E. 252.

And actual damages must be shown in order to recover punitive.—A verdict for punitive damages cannot be given under this section, unless there is testimony tending to show that the plaintiff has suffered actual damages. *Greer v. Western Union Tel. Co.*, 105 S. C. 147, 89 S. E. 782, 784, citing *Bethea v. Western Union Tel. Co.*, 97 S. C. 385, 81 S. E. 675; *Robinson v. Western Union Tel. Co.*, 101 S. C. 20, 85 S. E. 436.

But actual damages need not be alleged where raised by the pleadings.—It is not necessary, under this section, that the plaintiff allege actual damages, in an action for punitive damages, where it appeared that such were raised by the pleading and evidence, and the defendant was not misled. *Steedman v. South Carolina, etc., R. Co.*, 66 S. C. 542, 45 S. E. 84, 86.

But damages must be actual and not nominal.—Actual damages, in an action for punitive damages, must be actual, and not such as are commonly known

as nominal. *Greer v. Western Union Tel. Co.*, 105 S. C. 147, 89 S. E. 782, 784, citing *Bethea v. Western Union Tel. Co.*, 97 S. C. 385, 81 S. E. 675; *Robinson v. Western Union Tel. Co.*, 101 S. C. 20, 85 S. E. 436.

Punitive damages awarded for wanton and careless acts.—Vindictive damages are those damages awarded for injuries sustained as a result of wanton, and careless acts. *Appleby v. South Carolina, etc.*, R. Co., 60 S. C. 48, 38 S. E. 237, 239.

But punitive damages are not claimed eo nomine.—A cause of action for punitive or exemplary damages does not at all consist in claiming such damages eo nomine; but consists in a statement of such acts of wanton or willful wrongs as would justify the imposition of such damages within the sum demanded in the complaint. *Stembridge v. Southern R. Co.*, 65 S. C. 440, 43 S. E. 968; *Butler v. Western Union Tel. Co.*, 62 S. C. 222, 40 S. E. 162, 166, 89 Am. St. Rep. 893.

And an allegation of "wantonness, willfulness and recklessness" is sufficient for punitive damages.—A complaint in an action against a railroad company, alleging that defendant "willfully, wantonly, and recklessly," with intent to injure plaintiff, let off steam from its engine, and blew the whistle, thereby frightening plaintiff's team at a crossing, is sufficient under this section to justify an instruction that the plaintiff be given exemplary damages. *Proctor v. Southern Ry. Co.*, 61 S. C. 170, 39 S. E. 351, 353.

And a passenger injured as a result of the carelessness of a carrier is entitled to punitive damages.—A passenger receiving injuries as a result of the recklessness and carelessness of an engineer in suddenly backing the train, is entitled to exemplary damages under this section. *Appleby v. South Carolina, etc.*, R. Co., 60 S. C. 48, 38 S. E. 237, 240.

And punitive damages for intentionally failing to deliver a telegram may be demanded as of legal right.—*Poulnot v. Western Union Tel. Co.*, 69 S. C. 545, 48 S. E. 622, 623.

But punitive damages are not given for a tort committed by mistake.—Punitive damages are allowable, under this section, only where there is misconduct and malice, and a tort committed by mistake in the assertion of a supposed right, or without wrong intent, will not warrant exemplary damages. *Gwynn v. Citizens' Tel. Co.*, 69 S. C. 434, 48 S. E. 460, 463, 104 Am. St. Rep. 819, 67 L. R. A. 111.

Recovery of punitive damages by one plaintiff does not preclude another from recovering them.—Where two or more persons are injured by the negligent act of a railroad company, the fact that one of them sued and recovered exemplary

damages for an intentional wrong, is no bar to the claim of the others to recover exemplary damages. *Griffin v. Southern R. Co.*, 65 S. C. 122, 43 S. E. 445, 447.

Verdict for punitive damages inconsistent with one for actual damages based on negligence.—A verdict for punitive damages is wholly inconsistent with a verdict for actual damages founded on negligence; but a verdict for punitive damages is entirely consistent with a verdict for actual damages not based on negligence. *Greer v. Western Union Tel. Co.*, 105 S. C. 147, 89 S. E. 782, 784.

As verdict of jury for punitive damages is necessarily a finding that defendant was not guilty of negligence.—*Greer v. Western Union Tel. Co.*, 105 S. C. 147, 89 S. E. 782, 784.

And setting aside of verdict for punitive damages in verdict for actual and punitive necessitates setting aside verdict for the actual damages.—When there is a verdict for punitive damages, and likewise for actual damages, and the verdict for punitive damages is set aside, it necessarily follows that the verdict for actual damages must also be set aside, and a new trial granted as to the question of willfulness as well as that of actual damages. *Greer v. Western Union Tel. Co.*, 105 S. C. 147, 89 S. E. 782, 784.

But defendant not entitled to non-suit on whole cause where plaintiff fails to show only punitive damages.—The defendant is not entitled to a non-suit on the whole cause of action, under this section, where the complaint of the plaintiff alleges wantonness and willfulness, and also negligence, in the failure to deliver a telegram, and fails to show wantonness or willfulness. *Poulnot v. Western Union Tel. Co.*, 69 S. C. 545, 48 S. E. 622, 624; *Machen v. Western Union Tel. Co.*, 72 S. C. 256, 51 S. E. 697, 698; *Young v. Western Union Tel. Co.*, 65 S. C. 93, 43 S. E. 448, 450.

Duty of judge to submit question as to damages.—It is the duty of the judge to submit, under this section, the question as to actual and also as to punitive damages. *Appleby v. South Carolina, etc.*, R. Co., 60 S. C. 48, 38 S. E. 237, 240.

And judge cannot decide plaintiff's right to punitive damages.—The presiding judge cannot, under this section, decide that the plaintiff is not entitled to punitive damages without invading the province of the jury. *Norman v. Southern R. Co.*, 65 S. C. 517, 44 S. E. 83, 85, 95 Am. St. Rep. 809.

II. PLEADING TWO OR MORE WRONGS IN SINGLE COMPLAINT

Editor's note.—The salutary object of the statute, in so far as it refers to "how two or more causes of action for damages

shall be pleaded," was to abolish the practice, which had prevailed prior to its enactment, of requiring the plaintiff in a tort action to make of each separate negligent act or omission, capable in itself of producing the injury, a separate and distinct cause of action in the complaint. *Pendleton v. Columbia Ry., Gas, etc., Co.*, 133 S. C. 326, 131 S. E. 265, 268, citing *Mew v. Charleston, etc., Ry. Co.*, 55 S. C. 90, 32 S. E. 828; *Sloan v. Seaboard, etc., R. Co.*, 64 S. C. 389, 42 S. E. 197; *Bennett v. Follette*, 198 S. C. 348, 199 S. E. 412.

Section does not permit commingling of two causes of action.—This subdivision of the section does not authorize the commingling of two causes of action, but only gives relief from the requirement of separate statement when there has been one injury, and two or more acts may have caused or contributed to it. *Matheson v. American Tel., etc., Co.*, 125 S. C. 297, 118 S. E. 617, 618; *Bateman v. Wymojo Yarn Mills*, 155 S. C. 388, 152 S. E. 675, 676.

Where acts complained of and alleged to have been committed by agents of the defendants were separate and there was no allegation of conspiracy or allegations from which a conspiracy could be inferred, demurrer was properly sustained, notwithstanding statute relieving from the requirement of a separate statement of two or more causes of action when there has been one injury and the two or more acts may have caused or contributed to it. *Bennett v. Follette*, 198 S. C. 348, 199 S. E. 412.

As to specific section providing for joinder of causes of action, see Civ. Proc., § 487, and note thereto.

And motion cannot be made under section to elect remedies when separate causes stated.—A motion cannot be made under this section, to compel plaintiff to elect remedies where the complaint states two separate causes of action. *Barfield v. Coker & Co.*, 73 S. C. 181, 53 S. E. 170, 173.

Nor does section permit commingling of separate counterclaims.—This section applies to complaints and not to answers; and does not permit the commingling of separate counterclaims in a single statement. *Miller v. Johnson*, 126 S. C. 321, 119 S. E. 902, 903.

As to specific section providing for pleading of counterclaims, see Civ. Proc., § 468, and note thereto.

Splitting causes of action not permitted.—The rule against splitting causes of action applies to causes arising ex delicto, as single wrong gives rise to but one cause of action, for which only one action can be maintained, however numerous elements or items of resulting damage may be. *Floyd v. C. I. T. Corporation*, 191 S. C. 518, 5 S. E. (2d) 299.

A complaint, charging assault, trespass, and loss of services of plaintiff's wife on strength of allegations that defendant corporation's agent accused wife of lying in saying that she made payment on purchase price of plaintiff's automobile financed through defendant, dared plaintiff to come out of his house when told by plaintiff to leave his premises, cursed plaintiff and angrily informed him of intent to take automobile when plaintiff said his wife was ill, refused to leave premises, took something, which plaintiff believed was revolver, from agent's automobile, and came towards house while holding such instrument in his pocket in such manner as to appear to have weapon aimed at plaintiff, was fatally defective as splitting single cause of action into three causes. *Ibid.*

"Election of remedies" defined.—Election of remedies is the act of choosing between different remedies allowed by law on the same state of facts, or where the party has but one cause of action, one right infringed, one wrong to be redressed. *Barfield v. Coker & Co.*, 73 S. C. 181, 53 S. E. 170, 173.

Recovery cannot be had for act or wrong not alleged.—It is manifest that this section does not authorize a recovery for any act or wrong not "alleged in the complaint." *Proctor v. Southern Ry. Co.*, 61 S. C. 170, 39 S. E. 351, 357.

Common law acts of negligence may be alleged under the section.—This section gives the plaintiff the right to allege in the complaint, as one cause of action, acts of negligence at common law as well as those arising under the statute. *Cooper v. Charleston, etc., Ry.*, 65 S. C. 214, 43 S. E. 682, 683; *Rountree v. Atlantic Coast Line R. Co.*, 73 S. C. 268, 53 S. E. 424, 425; *Bowen v. Southern Ry. Co.*, 58 S. C. 222, 36 S. E. 590, 591.

Acts of negligence and willfulness may be alleged without separate statement.—Under this section, a plaintiff may allege, without separate statement and prove, acts of negligence and of willful conduct, and recover on both. *Boggero v. Southern Ry. Co.*, 64 S. C. 104, 41 S. E. 819, 822; *Schumpert v. Southern Ry. Co.*, 65 S. C. 332, 43 S. E. 813, 814, 95 Am. St. Rep. 802; *Piper v. American Fidelity, etc., Co.*, 157 S. C. 106, 154 S. E. 106, 110; *Machen v. Western Union Tel. Co.*, 63 S. C. 363, 41 S. E. 448, 449.

But a cause of action based on willfulness cannot be later amended to include one based on mere negligence.—This section does not change the rule that a complaint alleging a willful tort cannot be amended so as to also allege a cause of action based on mere negligence. *Proctor v. Southern Ry.*, 64 S. C. 491, 42 S. E. 427, 428.

As to specific section providing for

amendment of complaint, see Civ. Proc., § 494, and note thereto.

It is not necessary that all acts of negligence alleged occur in the state.—It is immaterial, under this section, that some of the acts of negligence, or other wrongs, contained in a complaint in an action for personal injuries, occurred out of the state, as an action is maintainable in the state for injuries occurring out of it. *Taber v. Seaboard Air Line Ry.*, 81 S. C. 317, 62 S. E. 311, 313.

And two or more acts of negligence may be submitted as one cause of action in action for personal injuries.—In an action to recover for personal injuries, the plaintiff may, under this section, submit his whole case to the jury under allegations of one cause of action, even though two or more acts of negligence are alleged as contributing to the injury. *Sloan v. Seaboard, etc., Ry. Co.*, 64 S. C. 389, 42 S. E. 197, 199; *Griffin v. So. Ry.*, 65 S. C. 122, 43 S. E. 445, 447; *Mew v. Charleston, etc., Ry.*, 55 S. C. 90, 32 S. E. 828, 830.

And also in case of trespass to realty.—A plaintiff may, under this section, in an action for trespass to realty, set out two or more acts of negligence, or other wrongs, which cause or contribute to the injury, without stating them separately. *Wichman v. Scarpa*, 101 S. C. 437, 85 S. E. 1061, 1062.

And failure to prove one is not grounds for a nonsuit.—Failure, under this section, to prove one of several grounds of negligence alleged in an action by a passenger for personal injuries, is no ground for a nonsuit or direction of a verdict for the defendant. *Cain v. Atlantic Coast Line R. Co.*, 74 S. C. 89, 54 S. E. 244, 248.

Act of trespass for illegal distress may be joined with one for excessive distress.—A complaint, in an action by a tenant against his landlord for unlawful distress for rent, because no rent was due, and because the distress was excessive, shows a single act, under this section, giving rise to different elements of damages. *Jones v. McCreary Land, etc., Co.*, 82 S. C. 456, 64 S. E. 225, 226.

As to specific section covering liability of landlord for excessive distress of rent, see Civ. C., § 4544, and note thereto.

Complaint alleging negligence of different defendants but not alleging cause of action against either is a joint action.—The filing of a complaint alleging

plaintiff's injury when struck by one defendant's automobile on leaving street car, and alleging negligence of both defendants with no separate cause of action formally alleged against either, is a prima facie election by the plaintiff to proceed on a joint tort. *Pendleton v. Columbia Ry., Gas, etc., Co.*, 133 S. C. 326, 131 S. E. 265, 268.

But plaintiff may be required to elect where complaint alleges joint and several cause of action.—A plaintiff may, under this section, in a suit against several defendants for a fire loss, alleging separate and independent causes of action against different defendants and a cause of action against all defendants jointly, be required to elect whether he would proceed on a joint or separate tort. *Fennell v. Woodward*, 141 S. C. 173, 139 S. E. 383.

And plaintiff can recover on only one cause of action.—*Greer v. Western Union Tel. Co.*, 105 S. C. 147, 89 S. E. 782, 784.

And a judgment thereon is conclusive of all questions arising out of the tort.—*Greer v. Western Union Tel. Co.*, 105 S. C. 147, 89 S. E. 782, 784.

And action is res adjudicata as to damages from willfulness as well as from negligence.—A cause of action becomes res adjudicata as to punitive and actual damages arising out of a willful tort, as well as for the compensatory damages founded on negligence. *Greer v. Western Union Tel. Co.*, 105 S. C. 147, 89 S. E. 782, 784.

Order requiring plaintiff to separate allegations is one involving merits.—An order requiring the plaintiff to separate several acts of negligence and other wrongs so as to allege what acts are negligent and what wanton, is an order involving the merits, and appealable. *Bolin v. Southern R. Co.*, 65 S. C. 222, 43 S. E. 665, 666; *Lynch v. Spartan Mills*, 66 S. C. 12, 44 S. E. 93, 95; *Wichman v. Scarpa*, 101 S. C. 437, 85 S. E. 1061, 1062.

As to specific section covering appeals from orders involving the merits, see § 26, and note thereto.

And is error on part of the judge.—It is error, under this section, for a circuit judge to order a plaintiff to reconstruct his complaint by stating what acts are negligent and what are wilful. *Du Pre v. Southern Ry.*, 66 S. C. 124, 44 S. E. 580, 583; *Lynch v. Spartan Mills*, 66 S. C. 12, 44 S. E. 93, 95.

§ 485. Pleadings of counterclaim by defendant in action in tort.—In all actions sounding in tort the defendant shall have the right to plead a similar cause of action against the plaintiff by way of counterclaim: *provided*, that the cause of action of the plaintiff and defendant arise out of the same state of facts.

1932 Code, § 485; Civ. P. '22, § 428; 1920 (31) 748.

Editor's note.—The object of this section was to permit the pleading of a counterclaim founded on tort in an action *ex delicto*, which could not be done under practice prior to its enactment. *Miller v. Johnson*, 126 S. C. 321, 119 S. E. 902, 903.

Section does not deal with pleading of counterclaims.—This section does not deal with the question of the proper mode of pleading two or more counterclaims, or prescribe how they shall be pleaded. *Miller v. Johnson*, 126 S. C. 321, 119 S. E. 902, 903.

As to specific section covering pleading of counterclaims, see § 468, and note thereto, and circuit court rule 18.

Counterclaims sounding in tort cannot be jumbled in a single statement.—*Miller v. Johnson*, 126 S. C. 321, 119 S. E. 902, 903.

Section has no application to actions arising in contract.—*Bank v. Bank*, 127 S. C. 210, 119 S. E. 841, 842.

Therefore claim setting up an independent tort in an action to recover a debt is not permitted.—In a suit on contract or to recover a debt, a counterclaim setting up a subsequent independent tort occurring about two years after the debt arose or the breach of contract occurred, cannot, under this section, be said to be "connected with the subject of the action," or to "arise out of the same transaction." *Bank v. Bank*, 127 S. C. 210, 119 S. E. 841, 842.

A cause of action to enforce chattel mortgage, by obtaining accounting, wherein it was alleged that defendant had converted the mortgaged property, stated only a cause of action in contract, and not one in tort, so as to authorize counterclaim for tort. *Coastal Produce Ass'n v. Wilson*, 193 S. C. 339, 8 S. E. 2d 505.

As respects right to counterclaim in tort or in contract, there is no certain test to determine whether the action is in

tort or in contract, and doubt must be resolved in favor of holding that the action is contractual. *Coastal Produce Ass'n v. Wilson*, 193 S. C. 339, 8 S. E. 2d 505.

Counterclaim as to wrongful taking of property is proper in action for claim and delivery.—It is error on the part of a judge, under this section, in an action of claim and delivery by the owner of an automobile, to sustain a demurrer to a counterclaim that plaintiffs went to defendant's home, and in a high-handed and willful manner took the automobile, and in so doing were disorderly and boisterous in their conduct, since the counterclaim arose out of the same state of facts, namely, the right to the possession of the automobile. *Bennett Cadillac Co. v. Slater*, 120 S. C. 202, 112 S. E. 918, 919. See sections 602 and 661 for further annotations.

But counterclaim of alleged sales agent for expenses and commissions is unauthorized in action for claim and delivery for pianos.—*Weaver Piano Co. v. Curtis*, 158 S. C. 117, 155 S. E. 291, 301.

Nor is counterclaim for trespass to land proper in action for willful destruction of truck.—A counterclaim for trespasses on defendant's land interposed in an action for willfully destroying truck hauling logs allegedly from defendant's land, is not a proper counterclaim under this section. *Smoak v. Robinson*, 156 S. C. 370, 153 S. E. 342, 344.

And city cannot counterclaim for use and occupation of street in action against it for damages by surface water.—*McNinch v. Columbia*, 128 S. C. 54, 122 S. E. 403, 404.

Verdict cannot be directed on counterclaim wrongly interposed.—The court cannot direct a verdict on a counterclaim not properly interposed under this section, but must do the equivalent of sustaining a demurrer to it. *Smoak v. Robinson*, 156 S. C. 370, 153 S. E. 342, 344.

§ 486. Answers in actions to recover property distrained for damage.—In action to recover the possession of property distrained doing damage, an answer that the defendant, or person by whose command he acted, was lawfully possessed of the real property upon which the distress was made, and that the property distrained was at the time doing damage thereon, shall be good without setting forth the title to such real property.

1932 Code, § 486; Civ. P. '22; § 429; Civ. P. '12, § 217; Civ. P. '02, § 187; 1870 (14) § 189.

§ 487. What causes of action may be joined.—The plaintiff may unite, in the same complaint, several causes of action, whether they be such as have been heretofore denominated legal or equitable, or both, where they all arise out of:

(1) The same transaction, or transactions connected with the same subject of action; or,

- (2) Contract, express or implied; or,
- (3) Injuries with or without force, to person and property, or either; or,
- (4) Injuries to character; or,
- (5) Claims to recover real property, with or without damages for the withholding thereof, and the rents and profits of the same; or,
- (6) Claims to recover personal property, with or without damages for the withholding thereof; or,
- (7) Claims against a trustee, by virtue of a contract, or by operation of law.

But the causes of action, so united, must all belong to one of these classes, and, except in actions for the foreclosure of mortgages, must affect all the parties to the action, and not require different places of trial, and must be separately stated. In actions to foreclose mortgages, the court shall have power to adjudge and direct the payment by the mortgagor of any residue of the mortgage debt that may remain unsatisfied after a sale of the mortgaged premises in cases in which the mortgagor shall be personally liable for the debt secured by such mortgage; and if the mortgage debt be secured by the covenant or obligation of any person other than the mortgagor, the plaintiff may make such person a party to the action, and the court may adjudge payment of the residue of such debt remaining unsatisfied after a sale of the mortgaged premises against such other person, and may enforce such judgment as in other cases.

Rendering judgment and ordering sale at same time — judgment to be credited.—The court shall also have the power to render judgment against the parties liable for the payment of the debt secured by the mortgage and to direct at the same time the sale of the mortgaged premises. The said judgment so rendered may be entered and docketed in the clerk's office in the same manner as other judgments. Upon sale of the mortgaged premises, the officer making the sale under the order of the court shall credit upon the judgment so rendered for the debt the amount or amounts paid to the plaintiff from the proceeds of the sale.

Parties in action for strict foreclosure and sale.—But it shall not be necessary to make the personal representative of a deceased mortgagor a party to any foreclosure proceeding; nor in any foreclosure proceeding (if the mortgagor be dead) shall it be necessary to first establish the debt by the judgment of some court of competent jurisdiction in order to obtain a decree of foreclosure and sale; nor shall it be necessary to make the mortgagor who may have conveyed the mortgaged premises a party to any action for foreclosure where no judgment for any deficiency is demanded.

Principal and surety jointly and concurrently liable on bonds or insurance required by law—join in same action.—In all cases where it is now or hereafter provided by law that an indemnity bond or insurance must be given by a principal for the performance of contract or as insurance against personal injury founded upon tort, the principal and his surety, whether on bond or insurance, may be joined in the same action and their liability shall be joint and concurrent.

1932 Code, §§ 487, 8712; Civ. P. '22, § 430; Civ. P. '12, § 218; Civ. P. '02, § 188; Civ. C. '22, § 5232; Civ. C. '12, § 3468; Civ. C. '02, § 2382; 1870 (14) § 190; 1894 (21) 816, § 2; 1900 (23) 349; 1935 (39) 406.

- I. General Considerations.
- II. Causes of Action Which May Be Joined.
 - A. Subdivision (1).
 - B. Subdivision (2).
- III. Misjoinder of Causes.
 - A. Subdivision (1).
 - B. Subdivision (5).
- IV. Necessity That Causes Belong to One of Classes Specified.
- V. Necessity That All Parties Be Affected.
- VI. Causes Must Be Stated Separately.
- VII. Foreclosure Proceedings.
 - A. Allowance of Deficiency Judgment.
 - B. Parties.

I. GENERAL CONSIDERATIONS

Cross references.—As to specific section providing for place of trial of claims for penalty on freight claims, see, § 7170, and note thereto. As to specific section covering trial of issues, see, § 593, and note thereto. As to specific section providing for parties to civil actions, see, §§ 397, 403, and note thereto.

"Cause of action" defined.—To be a cause of action the matter must be stated in a separate and distinct division of the complaint in such a manner that each division alone might be the subject of an independent action. *Hellams v. Switzer*, 24 S. C. 39; *Hammond v. Port Royal, etc., R. Co.*, 15 S. C. 10.

Causes united usually must be consistent with each other.—The general rule is that causes of action permitted to be united under this section in a single action, must be consistent with each other. *Walker v. McDonald*, 136 S. C. 231, 134 S. E. 222, 223.

And defendant is entitled to an order requiring election where inconsistent causes joined.—The defendant is entitled to an order requiring the plaintiff to elect a cause of action where inconsistent causes of action are joined. *Walker v. McDonald*, 136 S. C. 231, 134 S. E. 222, 224.

But inconsistent causes may be united where one recovery is sought.—Inconsistent causes of action may in some cases be united in the same complaint, where only one recovery is sought, and the pleader is uncertain what the evidence may disclose. *Walker v. McDonald*, 136 S. C. 231, 134 S. E. 222, 223.

Plaintiff joining causes triable in separate courts may be required to elect.—A plaintiff joining separate causes of action, one triable in a court of law and the other in a court of equity, may be required to elect on which cause of action he will proceed. *Walker v. McDonald*, 136 S. C. 231, 134 S. E. 222, 224.

And refusal of motion to state causes of action separately involves merits.—If a motion is made to require the plaintiff to make his complaint definite and certain by stating the causes of action sep-

arately, when the allegations are appropriate to two or more causes of action, the refusal of such motion necessarily involves the merits. *Hawkins v. Wood*, 60 S. C. 521, 39 S. E. 9, 10, citing *Blakely v. Frazier*, 11 S. C. 122; *Matheson v. American Tel., etc., Co.*, 125 S. C. 297, 118 S. E. 617, 618.

Such failure to so state each cause of action separately is a vice in pleading, but only to be remedied by motion to make more definite and certain. *Hellams v. Switzer*, 24 S. C. 39.

As to right of appeal from order "involving the merits," see § 26 and note thereto.

And so does order requiring plaintiff to set out two causes when only one exists.—It follows that, if the complaint contains but one cause of action, and the plaintiff is required to formulate his allegations so as to set out two or more causes of action, such order would involve the merits, and would be appealable. *Bolin v. Southern R. Co.*, 65 S. C. 222, 43 S. E. 665, 666.

But an order denying a motion to require statement of causes in separate paragraphs does not involve the merits.—An order denying a motion to require plaintiff to make definite and certain his complaint in an action based on a breach of warranty of title, by stating two alleged causes of action in separate paragraphs, does not go to the merits of the case. *Hawkins v. Wood*, 60 S. C. 521, 39 S. E. 9, 10.

Two or more demands for relief not a misjoinder.—*Emory v. Hazard Powder Co.*, 22 S. C. 476, 53 Am. Rep. 730.

Consolidation of actions.—The legal effect of a consolidation is to merge two or more actions into one, and chief ground for the union is plaintiff should have brought but one action; and main object of consolidation is to save costs and prevent a multiplicity of suits. *Ford v. New York Life Ins. Co.*, 180 S. C., 390; 185 S. E. 914.

Consolidation of actions at law unites and merges them into single action, as if different causes of action were originally joined in single action, and consolidation order by court of competent jurisdiction is binding on all parties to actions until vacated or set aside. *Ford v. New York Life Ins. Co.*, 180 S. C., 390; 185 S. E. 914.

After consolidation of actions at law, there can be no further proceedings in separate actions, which are discontinued and superseded by single action, and all subsequent proceedings therein should be conducted and parties rights adjudicated as in single action. *Ford v. New York Life Ins. Co.*, 180 S. C. 390; 185 S. E. 914.

Consolidation of two actions for recovery of benefits alleged to be due under

two separate policies of insurance, policies in question being identical as to dates, amounts, and provisions, proper. *Ford v. New York Life Ins. Co.*, 176 S. C., 186; 180 S. E. 37.

There can be no consolidation of independent actions at law, where parties are not the same, though different rule prevails in cases involving equitable jurisdiction. *Shuler v. Swift & Co.* 183 S. C. 140; 190 S. E. 447.

Cannot consolidate when plaintiffs have separate injuries tho actions arise from single act.—Actions for damages for desecrating grave yard bought by several plaintiffs in separate causes for injuries to separate graves cannot be consolidated unless plaintiffs agree. Each plaintiff has a separate action. *Sons et al. v. Bank*, 170 S. C. 548; 171 S. E. 35. 222, 43 S. E. 665, 666.

That the facts and witnesses in each case will be the same is not the test of the right of joinder. *Id.*

Consolidation of five occupants actions against same defendant for injuries received in same automobile accident is erroneous exercise of trial judge's discretion because depriving defendant of substantial right. *Bishop v. Bishop*, 164 S. C. 493, 162 S. E. 756.

Plaintiff may be required to try all cases together when he refuses to unite causes.—Although this section was enacted largely for the benefit of the plaintiff, it may in proper instance be invoked for the protection of the defendants and the court may require the plaintiff to try all such cases together if he refuses to unite. *Barrett v. Broad River Power Co.*, 146 S. C. 85, 143 S. E. 650, 654.

And where actions may be properly consolidated without injury to parties, it should be done. *Barrett v. Broad River Power Co.*, 146 S. C. 85, 143 S. E. 650, 654.

Demurrer proper remedy for joining separate causes of different plaintiffs.—A demurrer is the proper remedy for joining in a single complaint the separate causes of action of different plaintiffs. *Ryder v. Jefferson Hotel Co.*, 121 S. C. 72, 113 S. E. 474, 475, 25 A. L. R. 739.

But demurrer for misjoinder is bad if one cause is imperfectly pleaded. *New Home Sewing-Machine Co. v. Wray*, 28 S. C. 86, 5 S. E. 603.

An order overruling demurrer is res adjudicata as to causes of action in complaint.—An order overruling a demurrer to a complaint for misjoinder of causes of action, from which defendant did not appeal, is res adjudicata as to whether the complaint contained two causes of action that could not be joined together. *Walker v. McDonald*, 130 S. C. 513, 126 S. E. 646, 648.

Questions of fact in legal and equita-

ble causes treated as equitable cause, will be reviewed by Supreme Court.—Where legal and equitable causes of action are joined under this section, but both parties treat the case as an equitable one, and the matters of fact are determined by the court without a jury, the Supreme Court will not decline to review such questions of fact. *Hardin v. Clark*, 32 S. C. 480, 11 S. E. 304, 308. See § 26 and the note thereto.

II. CAUSES OF ACTION WHICH MAY BE JOINED

A. Subdivision (1)

The only limitation is that causes of action arise "out of same transaction."—There is nothing in this section which places any other limitation upon the character of the cause of action than that it arise "out of the same transaction." *Piper v. American Fidelity, etc., Co.*, 157 S. C. 106, 154 S. E. 106, 109.

Thus, a complaint against a bank and an association, alleging that plaintiff deposited money with the bank on its agreeing to retain enough thereof to pay the balance due the association, when the amount was determined, and to pay the balance to the plaintiff; that the association demanded a sum largely in excess of what was due it; and that the bank paid the same without notice to plaintiff, and in violation of its agreement, does not misjoin causes of action, as the causes of action against the two defendants arise "out of the same transaction," the payment of the money by the bank, and the receipt thereof by the association. *Pollock v. Carolina Interstate Bldg., etc., Ass'n*, 48 S. C. 65, 25 S. E. 977, 982, 59 Am. St. Rep. 695.

And causes of action for fraudulent breach and fraudulent procurement of a parol contract are included in the term.—Causes of action for fraudulent breach of a parol contract and for fraudulent procurement of the same parol contract arise out of the same transaction, and may be united under this section. *Cline v. Southern R. Co.*, 110 S. C. 534, 96 S. E. 532, 538.

A complaint, alleging that defendant, by fraudulent promises and representations, deceived and misled plaintiff into entering into contract, and fraudulently breached contract in certain details, was not demurrable as misjoining inconsistent causes of action for fraud and deceit in procuring contract and for breach thereof. *Stuckey v. Metropolitan Life Ins. Co.*, 195 S. C. 358, 11 S. E. (2d) 391.

Contract and tort actions are not necessarily so inconsistent as to preclude their joinder in same complaint, where both arise from same transaction or transactions connected with subject of action. *Ibid.*

The rule that inconsistent causes of action may not be joined in same complaint does not preclude joinder of cause

of action for fraud inducing contract with cause of action for breach of such contract. *Ibid.*

Also causes of action alleging goods sold to defendants as partners and another alleging goods sold to one for both.—Two causes of action, the first alleging goods sold to defendants as partners and the other alleging goods sold to one defendant to be used in a building being constructed by the two defendants relate to “the same transaction” and state causes of action in which both defendants are interested and may be joined under this section. *Lorick v. Heslep*, 112 S. C. 375, 99 S. E. 835.

And this is true of a cause of action by creditors, depositors, etc., for breach of duties of directors.—A complaint stating that a cause of action was brought by depositors, creditors, and stockholders of a bank for and in right of the bank for breaches of duties by the directors, states but one cause of action under this section, as the rights asserted are those of the corporation. *Stewart v. Ficken* (1931), 157 S. E. 445. But each cause of action must be stated separately. *Id.*

Action against bank officers for fraud, mismanagement, etc., states one cause.—Complaint in action against officers and directors of bank for breach of duty which they owed the bank; their negligence, and their wrongful conversion and deflection of the bank's asset states only one cause of action. *Brice v. Glenn*, 165 S. C., 509, 164 S. E., 302.

One cause of action in certain collisions.—Person driving his wagon on public highway and an automobile negligently strikes and injures his person and his personal property by one and the same act at one and the same time has only one cause of action in which he must recover all the damage he suffers. *Holcombe v. Garland & Denwiddie, Inc.*, 162 S. C., 382, 160 S. E., 881.

An action for damages for a tort and for an injunction against the continuance of the tort, seeking two different modes of relief, states but one cause of action. *Threatt v. Brewer Min. Co.*, 49 S. C. 95, 26 S. E. 970, 983.

Joint action by four wards against their guardian is not multifarious. *Stallings v. Barrett*, 26 S. C. 474, 2 S. E. 483.

A bill seeking settlement of all matters growing out of an estate is not multifarious. *Tucker v. Tucker*, 13 S. C. 318.

There is no misjoinder where, under a bill to marshal assets, two of the defendants claim different tracts of land. *Barrett v. Watts*, 13 S. C. 441.

B. Subdivision (2)

Action on open account may be joined with an action on account stated.—*Gwathney v. Burgiss*, 98 S. C. 152, 82 S. E. 394.

Actions for damages and loss of goods and for penalty may be joined.—Causes

of action for loss of goods and damage to property and for penalty though separate and distinct causes of action, may be properly joined under this section. *Jenkins v. Atlantic Coast Line R. Co.*, 84 S. C. 343, 66 S. E. 409, 410; *Darby v. Southern R. Co.*, 108 S. C. 145, 93 S. E. 716, 717.

Also, causes of action on single bill, promissory note and money account may be joined. *Cureton v. Stokes*, 20 S. C. 582.

And an action for specific performance of contract to devise or for value of services rendered under such contract is not an improper joinder of actions. *Scoggins v. Smith*, 31 S. C. 605, 9 S. E. 971.

Nor where a single action is brought upon a note and account against a corporation and its directors, who are jointly and severally liable therefor. *Sullivan v. Sullivan Mfg. Co.*, 14 S. C. 494.

An action of partner against devisee of copartner in possession of the land alleging that it was partnership property and demanding reconveyance or sale and division of proceeds did not improperly join several causes of action. *Jones v. Smith*, 31 S. C. 527, 10 S. E. 340.

Survivor and representative of surviving partner can be joined as defendants. *Wiesenfeld, Stern & Co. v. Byrd*, 17 S. C. 106.

Plaintiff may join suit on note with claim to set aside fraudulent transactions of his debtor, and failing in last, may have judgment for his debt. *Magruder v. Clayton*, 29 S. C. 407, 7 S. E. 844.

So also a complaint for dower against more than one defendant in possession of different tracts of land aliened by the husband in one tract, states but one cause of action. *Bostick v. Barnes*, 59 S. C. 22, 37 S. E. 24.

III. MISJOINDER OF CAUSES

A. Subdivision (1)

Questionable whether causes of action against maker and indorser and against guarantors can be joined.—Although not definitely deciding the question, the court suggested in *Bank v. Adams*, 125 S. C. 210, 118 S. E. 417, 418, that causes of action against the maker and indorser of a note, and also against the guarantors, were improperly joined, as the defendants entered into separate and distinct contractual relations with the plaintiff by two separate, independent contracts entered into at different times and relating to a different subject matter.

Cause of action for reformation of deed and one for settlement of estate may not be joined.—The view was taken in the dissenting opinion in *Erskine v. Markham*, 84 S. C. 267, 66 S. E. 286, 287, that a cause of action for the reformation of a deed executed by a decedent to his

wife and daughter could not be joined with an action for the settlement of his estate as the two causes of action did not arise out of the "same transaction," nor out of "transactions connected with the same subject of action."

And cause of action for deceit cannot be joined with action for accounting.—A cause of action for alleged deceit in inducing a partnership contract cannot properly be joined, under this section, with a cause of action for an accounting of partnership's affairs. *Walker v. McDonald*, 136 S. C. 231, 134 S. E. 222, 223.

Nor may action for damages to goods against one railroad company be joined with action against an unconnected railroad company.—A plaintiff may not, under this section, join a cause of action for damages sustained to goods checked with one railroad company, with cause of action for damages to goods checked on a baggage check with another railway, as the first railway had no connection with the other causes of action. *Darby v. Southern R. Co.*, 108 S. C. 145, 93 S. E. 716, 717.

B. Subdivision (5)

It is doubtful whether two causes of action, one for partition and the other for recovery of real estate, can be joined. *Westlake v. Farrow*, 34 S. C. 270, 13 S. E. 469.

And action for partition among remaindermen and for account of estate of life tenant is a misjoinder. *Shanks v. Mills*, 25 S. C. 358.

But complaint being dismissed as to land, it was properly retained as to accounting. *Rush v. Warren*, 26 S. C. 72, 1 S. E. 363.

Claims of plaintiffs as heirs at law to land descended, and as distributees, to an accounting, cannot be joined. *Rush v. Warren*, 26 S. C. 72, 1 S. E. 363.

A joint trespass by two and continued by one cannot be sued together. *Hines v. Jarrett*, 26 S. C. 480, 2 S. E. 393.

IV. NECESSITY THAT CAUSES BELONG TO ONE OF SPECIFIED CLASSES

Slander, malicious prosecution, false arrest are not in "classes specified."—Causes of action for slander, malicious prosecution, false arrest and imprisonment and trespass on property cannot be joined in the same complaint, under this section, as the section provides that all the "causes of action so united must all belong to one of the classes specified." *Bateman v. Wymojo Yarn Mills*, 155 S. C. 388, 152 S. E. 675, 676.

V. NECESSITY THAT ALL PARTIES BE AFFECTED

Cause of action for punitive damages against bus company may not be joined with one for negligence against insurance company.—One injured as a re-

sult of the negligence of a bus company, may not, under this section, join a cause of action against the bus company for punitive damages based upon an alleged wilful, wanton and malicious act, with a cause of action against the insurance company upon its indemnity contract to answer only for the negligence of the bus company, as the causes of action united "must affect all of the parties to the action." *Piper v. American Fidelity, etc., Co.*, 157 S. C. 106, 154 S. E. 106, 110; *Bern v. Camel City Coach Co.*, 162 S. C. 44, 160 S. E. 135.

But bus company and surety on statutory indemnity bond covering bus company's liability may be joined as defendants in action for personal injuries based on negligence only. *Bern v. Camel City Coach Co.*, 162 S. C. 44, 160 S. E. 135.

But this section, permitting joinder of action in contract against indemnitor with action in tort against tort-feasor, does not change essential nature of such actions or prevent them from presenting separable controversies warranting removal to the federal courts. *Hilton v. Southern Ry. Co.*, 21 F. S. 17; *Daniel v. Burdett*, 24 F. S. 218.

However, under subdivision 8, removal to federal court cannot be had if plaintiff, in tort action against principal and surety, confines his allegations to mere negligence and does not ask damages greater than amount of insurance. *Daniel v. Burdette*, 24 F. S. 218.

Nor can cause of action given personal representative for wrongful death be joined with one by wife.—An administrator of one who died from negligent injuries, cannot join under this section a cause of action given to the personal representative for such injuries, with one for wrongful death for the benefit of the wife or husband and children of the deceased, since in the first action the damages are recovered by the administrator as part of the assets of his intestate's estate while in the second the administrator is merely suing as trustee for the benefit of the surviving spouse and children, and "all the parties to the action" are not affected. *Bennett v. Spartanburg Ry., Gas, etc., Co.*, 97 S. C. 27, 81 S. E. 189, 190.

And husband and wife may not maintain single action for wrongful expulsion from hotel.—Husband and wife may not maintain a single action, under this section for being expelled from a hotel on charge that they were not married, as under this section their causes of action are separate, and do not "affect all the parties to the action." *Ryder v. Jefferson Hotel Co.*, 121 S. C. 72, 113 S. E. 474, 25 A. L. R. 739.

Action to enforce stockholders' statutory liability and suit to set aside alleged fraudulent conveyance from one stock-

holder to another improperly united. *Sharkey v. Ehrich*, 160 S. C. 489, 159 S. E. 371.

VII. CAUSES MUST BE SEPARATELY STATED

And action for foreclosure of mortgages and judgment for negligence of directors must be separately stated.—A complaint seeking foreclosure of mortgages, and judgment against directors of trust company for alleged negligent discharge of their duties, states two causes of action which, under this section, must be separately stated. *South Carolina Nat. Bank v. Mutual Inv. Co.*, 150 S. C. 365, 148 S. E. 213, 214.

Demand for foreclosure of four mortgages should state each separately.—A cause of action for foreclosure containing a demand for foreclosure of four distinct mortgages, should, under this section, state separately each demand for a foreclosure. *South Carolina Nat. Bank v. Mutual Inv. Co.*, 150 S. C. 365, 148 S. E. 213, 214.

Cause of action alleging defamatory charge against plaintiff communicated to divers persons and separate charge communicated to individual, must be separately stated. *Boling v. Clinton Cotton Mills*, 163 S. C. 13, 161 S. E. 195.

In action against owner of truck and insurer for damages sustained in collision with truck, insurer entitled to have cause of action against it on contract separately stated from that in tort against truck owner. *Miles v. Thrower*, 181 S. C. 392; 187 S. E. 818.

As to *res judicata*, see *Adderton v. Aetan Casualty & Surety Co.*, 182 S. C. 465, 189 S. E. 736.

Section 484 gives relief from the requirement of a separate statement of two or more causes of action belonging to one of the classes which may be united under this section, when there has been one injury and the two or more acts may have caused or contributed to it. *Bennett v. Follette*, 188 S. C. 348, 199 S. E. 412.

Principal and surety.—In action for injuries, sustained by child when struck by truck, against truck driver, truck owner, and liability insurer, trial court properly refused idemnity insurer's motion to require plaintiff to separately state the various causes of action set out in the complaint, since statute specifically provides that principal and his surety may be joined in the same action. *Holder v. Haynes*, 193 S. C. 176, 7 S. E. 2d 833.

While it is usually better practice to require separate statement of two or more causes of action, united in same complaint, before demurring thereto for misjoinder of such causes, failure to do so is not insuperable objection to such demurrer. *Stuckey v. Metropolitan Life Ins. Co.*, 195 S. C. 358, 11 S. E. (2d) 391.

VII. FORECLOSURE PROCEEDINGS

A. Allowance of Deficiency Judgment.

The rendition of a personal judgment, in mortgage foreclosure proceedings, is discretionary with the court under this section. *Berry v. Caldwell*, 121 S. C. 418, 114 S. E. 405, 408.

This section simply allows the court in its discretion to grant the personal judgment at the time of giving the judgment for foreclosure. *White v. Douglas*, 128 S. C. 409, 123 S. E. 259.

But the section does not give a discretionary power as to the amount of the judgment.—*White v. Douglas*, 128 S. C. 409, 123 S. E. 259.

A personal judgment for a deficiency cannot be rendered until after the sale and report of the master. — The court held in *Parr v. Lindler*, 40 S. C. 193, 18 S. E. 636, 639, that a personal judgment for a deficiency on a foreclosure proceeding, could not be rendered until after the sale and a report of the master had been made. But see *White v. Douglas*, 128 S. C. 409, 123 S. E. 259.

Where no judgment for deficiency is sought against personal representative, suit for foreclosure may be brought within year. *Green v. McCarter*, 64 S. C. 290, 42 S. E. 157, 159.

Conveyance made to prevent collection of deficiency judgment will be set aside.—A deed from a judgment debtor to his wife, made to prevent a creditor bank from collecting its expected deficiency judgment will be set aside in a proceeding by the bank after it has secured such a judgment, and a return of *nulla bona* has been made. *Farmers' Bank v. Bradham*, 129 S. C. 270, 123 S. E. 835, 837.

And suit therefor may be brought without first obtaining judgment. — A creditor can sue to set aside for actual fraud, a conveyance made by a debtor who is insolvent, without first reducing his demand to judgment, under this section. *Miller v. Hughes*, 33 S. C. 530, 12 S. E. 419.

And complaint is not demurrable because it makes no demand for judgment.—The complaint in such case is not demurrable because it makes no formal demand for judgment against the debtor for the amount due from him, facts sufficient to warrant such a judgment being stated. *Miller v. Hughes*, 33 S. C. 530, 12 S. E. 419.

Assignee may sue mortgagor and mortgagee in one action.—Under this section, an assignee of a mortgage and notes secured thereby may, on the default of the mortgagor, sue in one action the mortgagor to foreclose the mortgage and the mortgagee on his guaranty of the payment of the debt. *Welborn v. Cobb*, 92 S. C. 384, 75 S. E. 691, 692.

See generally, as to judgment for balance due after sale of mortgaged prem-

ises, *Wagener v. Swygert*, 30 S. C. 296, 9 S. E. 107.

B. Parties

In general.—After act of 1900, an order requiring personal representative of mortgagor made a party defendant was properly vacated. *Peoples v. Mims*, 64 S. C. 226, 42 S. E. 155; *Glenn v. Gerald*, 64 S. C. 236, 42 S. E. 155, 156.

Mortgagor having conveyed, is not a necessary party. *Greenwood Loan, etc., Ass'n v. Williams*, 71 S. C. 421, 424, 51 S. E. 272.

See generally. *Erschine v. Markham*, 84 S. C. 267, 269, 66 S. E. 286; *Jenkins v. Atlantic Coast Line R. Co.*, 84 S. C. 343, 356, 66 S. E. 409.

§ 488. Allegation not denied—when to be deemed true.—Every material allegation of the complaint, not controverted by the answer, as prescribed in section 467, and every material allegation of new matter in the answer, constituting a counterclaim, not controverted by the reply, as prescribed in section 471, shall, for the purposes of the action, be taken as true. But the allegation of new matter in the answer, not relating to a counterclaim, or of new matter in a reply, is to be deemed controverted by the adverse party as upon a direct denial or avoidance, as the case may require.

1932 Code, § 488; Civ. P. '22, § 431; Civ. P. '12, § 219; Civ. P. '02, § 189; 1870 (14) § 191.

Admission and denial of particular paragraphs of complaint.—Where the answer admitted and denied the allegations in specified paragraphs of the complaint, the allegations of the paragraphs not specified would be taken as true. *Lummus Cotton Gin Co. v. Counts*, 98 S. C. 136, 82 S. E. 391, 394.

General denial does not put in issue plaintiff's corporate existence.—An allegation in the answer that the defendant had neither knowledge nor information sufficient to form a belief as to the truthfulness of the allegation of the complaint pertaining to the plaintiff's corporate existence, and that he therefore denied such an allegation, amounted to nothing more than a general denial, and did not put in issue the plaintiff's corporate existence. *Lummus Cotton Gin Co. v. Counts*, 98 S. C. 136, 82 S. E. 391, 395; citing with approval *Liberian, etc., Steamship Co. v. Rodgers*, 21 S. C. 27. See, also, *Commercial Ins., etc., Co. v. Turner*, 8 S. C. 107, 111; *Palmetto Lbr. Co. v. Risley*, 25 S. C. 309; *American Button-Hole, etc., Co. v. Hill*, 27 S. C. 164, 3 S. E. 82; *Rembert v. South Carolina R. Co.*, 31 S. C. 309, 9 S. E. 968; *Land, etc., Co. v. Williams*, 35 S. C. 367, 14 S. E. 821.

Failure to deny is such admission of plaintiff's case as to allow defendant to open and reply. *Addison v. Duncan*, 35 S. C. 165, 14 S. E. 305.

An answer setting up defenses, other than counterclaim, not set aside on demurrer is left still as controverting the complaint by direct denial or avoidance. *Mobley v. Cureton*, 6 S. C. 49.

Section applies where validity of note sued upon is denied.—*State v. Hamilton*, 138 S. C. 164, 136 S. E. 391.

A denial of information sufficient to

form a belief as to an allegation that payee of the past due note is owner thereof, was held properly stricken out in all answers by the makers, in an action thereon, as a sham defense, where the admitted correspondence between the parties shows the makers had full information after maturity of the note that the payee held same and intended to enforce the payment. *Bank v. Fripp*, 101 S. C. 185, 85 S. E. 1070.

Admission of defendant's allegations by plaintiff's testimony.—In an action for refusal to accept flour sold, the defendant alleged that he was to have the right to examine the said flour. The fact that a witness for the plaintiff testified to this allegation did not have the effect of admitting the fact under this section. *Brooke v. Hill*, 65 S. C. 142, 43 S. E. 390, 392.

Answer including set-off.—In a case where the defendant in an action by the assignee of a mortgage past due when assigned to the plaintiff, set up an offset in his favor and against the plaintiff's assignor, it was held that as such plea is purely defensive and does not entitle the defendant to affirmative relief, the plaintiff may set up the statute of limitations against such set-off though he did not formally plead it. *Bank v. Gadsden*, 56 S. C. 313, 33 S. E. 575, 577.

Allegation of new matter in answer.—In a case where an answer admits the facts alleged in the complaint and alleges new matter in defense, and the cause of action is submitted on the pleading, the defendant's contention resting on the allegations of the answer setting up a defense by way of avoidance, as there is no proof of the facts alleged in the answer, they cannot be considered by the court except as to matters of

which the court will take judicial notice. *Simpson v. South Carolina Mut. Ins. Co.*, 59 S. C. 195, 37 S. E. 18, 19.

Attack release set up in answer and not replied to.—Where court had not required reply to allegations of insurer's answer in suit on life policy that insured had acknowledged receipt and payment of cash surrender value of policy, such allegations were in direct issue under statute, and plaintiff was authorized to attack such release on ground of incompetency of insured. *Williams v. Jefferson Standard Life Insurance Company*,

181 S. C. 344; 187 S. E. 540.

Applied in *Lummus Cotton Gin Co. v. Counts*, 98 S. C. 136, 82 S. E. 391; *Lupo v. True*, 16 S. C. 579; *Columbia Water, etc., Co. v. Columbia*, 4 S. C. 388; *Zimmerman v. Amaker*, 10 S. C. 98; *Gravely v. Gravely*, 20 S. C. 93; *Hubbell v. Courtney*, 5 S. C. 87; *Geiger v. Kaigler*, 15 S. C. 262; *Simpson v. South Carolina Mut. Ins. Co.*, 59 S. C. 195, 37 S. E. 18; *Bank v. Gadsden*, 56 S. C. 313, 33 S. E. 575; *Frasier v. Charleston, etc., R. Co.*, 73 S. C. 140, 143, 52 S. E. 964; *Hughey v. Kellar*, 34 S. C. 268, 13 S. E. 475.

§ 489. Cross actions between co-defendants in actions at law—pleadings and procedure.—Whenever a defendant in an action at law shall have a cause of action against a co-defendant or co-defendants therein which arose from the same transaction, or acts, or negligence, or wrong set forth in plaintiff's complaint, said defendant is hereby permitted to set forth such cause of action demanding relief in his answer, along with such defense as he might have to plaintiff's cause of action, and serve such answer upon such co-defendant or co-defendants against whom the relief is demanded, and such co-defendant or co-defendants shall be required to plead thereto in the same way and manner and within the same time as required in the original summons which the plaintiff shall have issued. Upon the trial, all issues joined by the entire pleadings shall be determined before the same court and jury in the same manner as any other action at law. It shall be the duty of the presiding judge upon the trial of such actions to require the jury to write such verdict as determines the rights of the plaintiff on the summons and complaint, and to write such verdict as determines the right of a defendant who has brought a cross action against a co-defendant or co-defendants on the answer of such complaining defendant.

1932 Code, § 489; 1929 (36) 68.

CHAPTER 23

Amendments and Relief in Case of Mistake

490 thru 492. Variances.

493. Amendments of course and after demurrer.

494. Amendments before or after judgment.

495. Relief in case of mistake.

496. Suing defendant by fictitious name.

497. Error not affecting substantial right.

498. Supplemental pleading.

§ 490. Material variances.—No variance between the allegation in a pleading and the proof shall be deemed material unless it have actually misled the adverse party, to his prejudice, in maintaining his action or defense, upon the merits. Whenever it shall be alleged that a party has been so misled, that fact shall be proved to the satisfaction of the court, and in what respect he has been misled; and thereupon the court may order the pleading to be amended, upon such terms as shall be just.

1932 Code, § 490; Civ. P. '22, § 432; Civ. P. '12, § 220; Civ. P. '02, § 190; 1870 (14) § 192.

In general.—This section and §§ 491, 492, 494, taken together, do not give to a circuit judge any greater power than that which was formerly exercised by the chancellors in this state. *Suber v. Chandler*, 28 S. C. 382, 6 S. E. 155; *Coleman v. Heller*, 13 S. C. 491.

This section is regulated and checked in its operation by § 492. *Kennedy Lumber Co. v. Rickborn*, 40 F. (2d) 228.

Scope of section and remedy of party misled.—Under this section, no variance is to be regarded as material, unless it has actually misled the party, and in that case his remedy is to satisfy the court immediately, by proof of affidavit, that he has been so misled. The effect of such proof is not to prevent the court from allowing an amendment to such case, but to entitle the party prejudiced by such amendment either time or such other compensatory terms and conditions as may be reasonable. The object of the code is to secure to parties acting in good faith the fullest right to rectify by amendment any defect in pleading, the result of misapprehension, inadvertence, or accident, but at the same time to protect, as far as possible, the substantial rights of the party prejudiced by such amendment. *Ahrens v. Bank*, 3 S. C. 401; cited with approval in *Wilson v. Kearse*, 145 S. C. 155, 143 S. E. 15; *Citizens' Savings Bank v. Efird*, 96 S. C. 18, 79 S. E. 637; *Roundtree v. Charleston, etc.*, R. Co., 72 S. C. 474, 52 S. E. 231, 232.

Amendment is the only remedy for variance.—Nonsuit cannot be granted for variance between the allegations and the proof; the only remedy is by amendment under this section upon such terms as shall be just. *Ahrens v. Bank*, 3 S. C. 401.

But the variance may not be urged for first time on appeal.—If a variance is deemed material by defendant, he should, under this section, have apprised the court in what respect he was misled to his prejudice, and it is too late to urge the variance for the first time on appeal. *Devlin v. Charleston, etc.*, R. Co., 79 S. C. 469, 60 S. E. 1123; *Langston v. Fiske-Carter Const. Co. et al.*, 180 S. C. 114, 185 S. E. 62.

Amendment may be made informally.—Under this section the amendment is to conform to the pleadings to the facts proven, and may be made informally, sometimes orally, or by the court of its own motion. *Chicester & Co. v. Hastie*, 9 S. C. 330.

And the allowance thereof is discretionary.—It is within the circuit judge's discretion, under this section, to grant an amendment. *Hewlett v. South Bound R. Co.*, 93 S. C. 76, 76 S. E. 32; *Suber v. Chandler*, 28 S. C. 382, 6 S. E. 155.

And may be allowed upon terms.—

Wilson v. Kearse, 145 S. C. 155, 143 S. E. 15.

But the variance must be material.—*Devlin v. Charleston, etc.*, R. Co., 79 S. C. 469, 472, 60 S. E. 1123. See sec. 492 as to what is not to be deemed a variance, and the note thereto.

Where the defendant, under the pleadings, might have shown as a complete defense that plaintiff was injured in a different way from that alleged, the allowance of an amendment to the complaint so as to conform to the proof and allege a new and independent act of negligence, to defendant's surprise, is error. *Scott v. Atlantic Coast Line R. Co.*, 105 S. C. 385, 89 S. E. 1038.

Under this section it was not an abuse of the trial court's discretion, in an action against carriers for delay in furnishing a rate for a shipment and in refusing to forward the shipment without payment of demurrage covering such delay, to permit plaintiff to amend the complaint to conform to the proof, by alleging that plaintiff afterwards offered to pay or deposit the demurrage claimed, but that such offer was rejected. *Hewlett v. South Bound R. Co.*, 93 S. C. 76, 76 S. E. 32.

Where the complaint correctly sets forth the statute under which the complaint is made, but the copy leaves out the words "and not," it is not a material variance within the meaning of this section, if the meaning, though confused, may be still ascertained. *State v. Schepher*, 33 S. C. 562, 11 S. E. 623, 12 S. E. 564.

Under this section proof that a plaintiff was injured in loading the wheels of a truck on a flat car is not a material variance from an allegation that the plaintiff was injured in loading a "truck." *Roundtree v. Charleston, etc.*, R. Co., 72 S. C. 474, 52 S. E. 231.

Under this section the variance between the complaint, alleging that an employee was injured in a collision between two cars by the negligence of the employer, and the proof, that the cars came so close together as to injure plaintiff, is not material, and is not prejudicial to defendant. *Pool v. Carolina Traction Co.*, 101 S. C. 387, 85 S. E. 897.

Any variance between pleadings seeking an adjudication that portion of will, bequeathing property in trust forever to be maintained as a museum, had failed and property involved had become part of residuary estate, and proof tending to establish that trust provided for was not a charitable trust, was not a "material variance" under statute, since adverse party could not have been misled thereby, where such evidence was first introduced at first reference and hearings continued intermittently over a period of five years. *Medical Soc. of South Carolina v. South Carolina Nat.*

Bank of Charleston, 197 S. C. 96, 14 S. E. 2d 577.

And defendant must show that he has been misled.—Alleged material variance between plaintiff's pleading and proof does not require withdrawal of issues from jury, where defendant fails to show to the court that he has been misled within the meanings of this section. *Wilson v. Kearse*, 145 S. C. 155, 143 S. E. 15; *Langston v. Fiske-Carter Const. Co.*, 180 S. C. 114, 185 S. E. 62.

Direction of verdict.—Under this section and secs. 491, 492, the verdict should be directed for plaintiff, where defend-

ant's counterclaim does not state the cause of action proved. *Kennedy Lumber Co. v. Rickborn*, 40 F. (2d) 228.

See generally, *Sevier v. Southern Ry.*, 82 S. C. 311, 64 S. E. 390; *Adams v. South Carolina, etc., R. Co.*, 68 S. C. 403, 410, 47 S. E. 693; *Jackson v. Southern Cotton Oil Co.*, 81 S. C. 564, 566, 62 S. E. 854; *Citizens Sav. Bank v. Efird*, 96 S. C. 18, 79 S. E. 637; *Moore v. Marion Cotton Oil Co.*, 100 S. C. 499, 85 S. E. 52; *Mew v. Charleston, etc., Ry. Co.*, 55 S. C. 90, 32 S. E. 828, 829; *Hammond v. North Eastern R. Co.*, 6 S. C. 130, 24 Am. Rep. 467.

§ 491. Immaterial variances.—Where the variance is not material, as provided in § 490, the court may direct the fact to be found according to the evidence, or may order an immediate amendment without costs.

1932 Code, § 491; Civ. P. '22, § 433; Civ. P. '12, § 221; Civ. P. '02, § 191; 1870 (14) § 193.

Section regulated by following section.—This and the preceding section are regulated and checked in its operation by the provisions of the following section as to what is not to be deemed a variance. *Kennedy Lbr. Co. v. Rickborn*, 40 F. (2d) 228.

The court may direct a verdict or order an immediate amendment where the variance is immaterial. — *Wilson v. Kearse*, 145 S. C. 155, 143 S. E. 15; *Ahrens v. Bank*, 3 S. C. 401.

Immaterial variance illustrated. — Where the complaint alleged that an unguarded hole in the floor caused an employee to catch his foot in a conveyor, an amendment alleging that the employer was negligent in leaving the conveyor so unprotected that the employee in walking over the floor had his foot caught and injured, did not substantially change the claim of the employee, under § 490, and was properly allowed at the trial, under this section. *Jackson v. Southern Cotton Oil Co.*, 81 S. C. 564, 62 S. E. 854.

Evidence that ladder from which em-

ployee fell was being used as stairway in building under construction was held admissible in action against employer, under allegation that employer failed to provide employee with safe place to work, in that such ladder was unsafe to use, since employee was required to allege ultimate facts only and not evidentiary matter. *Langston v. Fiske-Carter Const. Co. et al.*, 180 S. C. 114, 185 S. E. 62.

Under this and the preceding section it is not error to allow an indorsee of a note to be joined as a party plaintiff in an action brought by the indorser against the defendant to set aside as fraudulent a conveyance of land to defendant by the maker after judgment has been rendered on the note. *Suber v. Chandler*, 28 S. C. 382, 6 S. E. 155.

A judgment may be rendered on an account stated although no allegation of account stated was made. *Sloan v. Westfield*, 17 S. C. 589.

Applied, in *Citizens' Sav. Bank v. Efird*, 96 S. C. 18, 79 S. E. 637.

§ 492. What not to be deemed a variance.—Where, however, the allegation of the causes of action or defense to which the proof is directed is not proved, not in some particular or particulars only, but in its entire scope and meaning, it shall not be deemed a case of variance within sections 490 and 491, but a failure of proof.

1932 Code, § 492; Civ. P. '22, § 434; Civ. P. '12, § 222; Civ. P. '02, § 192; 1870 (14) § 194.

Section regulates two preceding sections.—This section is intended to cover cases which are not, properly speaking, cases of variance, and operates as a check on the two preceding sections dealing with such variances. *Kennedy Lbr. Co. v. Rickborn*, 40 F. (2d) 228.

Scope of section.—The court has pow-

er to correct any error during the term in which it occurs, and the amendment to the complaint is properly allowed where there is no denial of a material allegation, and no failure of proof, but only a variance between the proof and an allegation of the complaint. *Catawba Fertilizer Co. v. Gibson*, 155 S. C.

462, 152 S. E. 729; *Moore v. Christian*, 31 S. C. 337, 9 S. E. 981.

Failure of proof under this section warrants a nonsuit.—*Ahrens v. Bank*, 3 S. C. 401.

Direction of verdict.—See this catchline under § 490.

Where a counterclaim only alleges a refusal to receive lumber, and the proof shows a neglect on the part of the plaintiff to direct the hacking of the lumber, the verdict should be directed for the plaintiff. *Kennedy Lbr. Co. v. Rickborn*, 40 F. (2d) 228.

Where the complaint alleges injuries from "loading trucks" and the proof

shows injuries resulting from loading the "wheels of a truck," it is not true that the allegation is "not proved" within the meaning of this section. *Roundtree v. Charleston, etc., R. Co.*, 72 S. C. 474, 52 S. E. 231.

Cited in *Suber v. Chandler*, 28 S. C. 382, 6 S. E. 155, in support of the proposition that the Code does not give the circuit judge more power as to amendments than formerly existed in the chancellors in equity. As to applicability of section to trials in actions pending when the Code was adopted, see *Ahrens v. Bank*, 3 S. C. 401.

§ 493. Amendments of course, and after demurrer.—Any pleading may be once amended by the party of course, without costs, and without prejudice to the proceedings already had, at any time within twenty days after it is served, or at any time before the period for answering it expires; or it can be so amended at any time within twenty days after the service of the answer or demurrer to such pleading, unless it be made to appear to the court that it was done for the purpose of delay, and the plaintiff or defendant will thereby lose the benefit of a circuit or term for which the cause is or may be docketed; and if it appear to the court that such amendment was made for such purpose, the same may be stricken out, and such terms imposed as to the court may seem just. In such case a copy of the amended pleading must be served on the adverse party. After the decision of a demurrer, the court shall, unless it appear that the demurrer was interposed in bad faith, or for purposes of delay, allow the party to plead over upon such terms as may be just. If the demurrer be allowed for the cause mentioned in the fifth subdivision of section 458, the court may, in its discretion, and upon such terms as may be just, order the action to be divided into as many actions as may be necessary to the proper determination of the causes of action therein mentioned.

1932 Code, § 493; Civ. P. '22, § 435; Civ. P. '12, § 223; Civ. P. '02, § 193; 1870 (14) § 195.

This section is not limited in its application by the terms of § 494.—*Mallard Lbr. Co. v. Carolina Portland Cement Co.*, 134 S. C. 228, 132 S. E. 614; *Lane v. Home Ins. Co., et al.*, 190 S. C. 84, 2 S. E. (2d) 30.

Statute does not permit second amendment of pleading which was previously amended as of course. First *Carolinas Joint Stock Land Bank of Columbia v. Stuckey*, 170 S. C. 86, 169 S. E. 843.

Erroneous designation of pleading is not fatal.—Where a party erroneously designates an "amended answer" under this section as a "supplemental answer" under § 498, the error does not alter its legal status or deprive the party of his legal rights. *Fogel v. McDonald*, 159 S. C. 506, 157 S. E. 830; *Lane v. Home Ins. Co. et al.*, 190 S. C. 84, 2 S. E. (2d) 30.

In action to annul marriage, pleading designated "supplemental answer," alleging only matters occurring prior to

commencement of action, is an "amended answer" within this section. *Fogel v. McDonald*, 159 S. C. 506, 157 S. E. 830.

Demurrer may be heard before expiration of 20-day period.—This section does not prohibit a judge from passing on a demurrer to the complaint before the expiration of the 20-day period for amendment provided herein, where the parties appear before him for the purpose of hearing such demurrer. *McEachern v. Wilson*, 154 S. C. 201, 151 S. E. 472.

Filing of master's report does not preclude right to amend.—Although a referee's report has been filed in a marriage annulment action, the defendant is not deprived of the right given him by this section to serve an amended answer, there never having been a "trial." *Fogel v. McDonald*, 159 S. C. 506, 157 S. E. 830.

But in *Jordan v. State Highway De-*

partment, 188 S. C. 83, 198 S. E. 174, it was held that statute permitting one amendment of complaint within the time for answering without prejudice did not permit amendment after granting defendant's motion to strike portions of complaint; amendment could only be in conformity with court's order.

Amending complaint within 20 days after service of answer was not too late, though 20 days had expired since demurrer to complaint. McCoy v. State Highway Department, 169 S. C. 436, 169 S. E. 175.

Where demurrer sustained without leave to amend, matter is res adjudicata.—Where a demurrer to a complaint is sustained, without leave to plaintiff to amend under the provision of this section, and the plaintiff does not appeal from such order, the matter involved is res adjudicata, and an amended complaint is not allowable. McEachern v. Wilson, 154 S. C. 201, 151 S. E. 472; First Carolina Joint Stock Land Bank of Columbia v. Stuckey, 170 S. C. 86, 169 S. E. 843.

Where demurrer in good faith is overruled defendant may answer original as well as amended complaint.—Where a demurrer to a complaint is overruled but the plaintiff is given permission to amend the complaint, with permission to the defendant, under this section, to answer the amended complaint, permission should also be granted the defendant, upon terms, to answer the original complaint, the demurrer being made in good faith. New Home Sewing Mach. Co. v. Wray, 28 S. C. 86, 5 S. E. 603.

Amendment of course may be waived by motion for amendment.—Under this section the plaintiff's right to amend of course may be waived by motion for leave to amend; the granting of which is discretionary. Hamilton v. Carrington, 41 S. C. 385, 19 S. E. 616; Dunbar v. Fant, 174 S. C. 49, 176 S. E. 866.

But where plaintiff amended complaint as of course by dismissing certain defendants, plaintiff did not waive right to amend as of course by consenting to order of trial judge dismissing such defendants. Lane v. Home Ins. Co. et al., 190 S. C. 84, 2 S. E. (2d) 30.

Nature of terms in pleading over is discretionary.—Under this section, which provides that the court shall allow the party to plead over, after a demurrer "upon such terms as are just," the question of just terms is one of fact, and is determined by the circuit judge as a matter addressed to his discretion. Lowry v. Jackson, 27 S. C. 318, 3 S. E. 473, and the cases there cited; Cureton v. Stokes, 20 S. C. 582.

The plaintiff, under this section, may be allowed to plead over after demurrer on payment of costs. Cheraw, etc., R.

Co. v. White, 14 S. C. 51.

It is not necessary that costs be required of plaintiff to plead over after demurrer. Stallings v. Barrett, 26 S. C. 474, 2 S. E. 483.

Granting of amendment instead of demurrer is not prejudicial error.—Under the provision of this section that the court shall allow an amendment after demurrer granted, where a demurrer is refused by the court, which should have been granted, because the complaint did not state a cause of action against the defendant, leave to amend the complaint to connect the defendant with the action was not prejudicial error, as the effect was the same as though the demurrer had been granted with leave to plaintiff to amend. Hall v. Young, 29 S. C. 64, 6 S. E. 938.

And an amended answer may contain inconsistent defenses.—Where an amended answer, under this section, is inconsistent with the original answer, the defendant is not deprived of the benefit of the original answer. Fogel v. McDonald 159 S. C. 506, 157 S. E. 830.

Or allege negligence for first time.—Where a complaint alleges that defendant railroad company has built an embankment on its right of way, and has caused it to project outside of such right of way onto plaintiff's land, thereby injuring plaintiff, an amendment alleging that the embankment is made so to project owing to its negligent and unskillful construction is properly allowed, under this section. Sims v. Ohio River & C. Ry. Co., 56 S. C. 30, 33 S. E. 746.

Or it may set up an additional cause.—Under the provisions of this section, an amended complaint, served within proper time, may set up an additional cause of action. Mallard Lumber Co. v. Carolina Portland Cement Co., 134 S. C. 228, 132 S. E. 614.

And the amendment may change the cause of action.—Under this section an amendment, within the time limit here provided, may entirely change the cause of action stated in the original complaint. McDaniel v. Monroe, 63 S. C. 307, 41 S. E. 456. See Sullivan v. Sullivan, 24 S. C. 474.

The limitation upon the right to amend so as not to change the claim or defense substantially applies only to an amendment applied for during or after the trial, and not to an amendment under this section. Hall v. Woodward, 30 S. C. 564, 9 S. E. 684.

Amendment may not allege facts occurring since original complaint.—Facts occurring since commencement of action cannot be alleged as amendments to the original complaint; they can only be brought before the court by supplemental complaint. McCaslan v. Latimer, 17 S. C. 123. See § 498 and note thereto.

But it is not error for amendment to restate complaint.—Where an amendment to the complaint within the time allowed by this section is a repetition of the statement made in the original complaint, a refusal to strike it out is not

reversible error. *McDaniel v. Monroe*, 63 S. C. 307, 41 S. E. 456.

See generally. *Williams v. Newton*, 82 S. C. 227, 64 S. E. 219; *Kentucky Refining Co. v. Saluda Oil Mill Co.*, 70 S. C. 89, 94, 48 S. E. 987.

§ 494. Amendments by the court.—The court may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding, by adding or striking out the name of any party; or by correcting a mistake in the name of a party, or a mistake in any other respect; or by inserting other allegations material to the case; or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved.

1932 Code, § 494; Civ. P. '22, § 436; Civ. P. '12, § 224; Civ. P. '02, § 194; 1870 (14) § 196.

1. General Considerations.
- II. Allowance of Amendments.
 - A. In General.
 - B. The Discretion of the Court.
 - C. Amendments before Trial.
 - D. Amendments during and after Trial.
 1. General Principles.
 2. Illustrations.
 - a. Amendment Substantially Changing Claim or defense.
 - b. Amendment Not Substantially Changing Claim or Defense.

I. GENERAL CONSIDERATIONS.

Editor's note.—This section must be considered in relation to the preceding §§ 490-493, as to variances and amendments of course, and the practitioner is therefore referred to the notes thereto for a thorough treatment of the law as to amendments.

"Before or after judgment" means "at any time."—The provision of this section that an amendment may be allowed "before or after judgment" means "at any time." *Knight, Yancey & Co. v. Aetna Cotton Mills*, 80 S. C. 213, 61 S. E. 396; *Kennerty v. Etiwan Phosphate Co.*, 21 S. C. 226, 242, 53 Am. Rep. 669.

But where a plaintiff did not serve notice to be permitted to amend his complaint until four and a half months after an order permitting the filing of an amended complaint, and no extension of time was applied for, trial court's refusal to permit amendment was not error, notwithstanding statute permitting court to amend pleading in furtherance of justice. *Jordan v. State Highway Department*, 188 S. C. 83, 198 S. E. 174.

By adding the name of any party.—See *Campbell v. Moore*, 189 S. C. 497, 1 S. E. (2d) 785.

Order allowing amendment "as he may be advised" is limited by this section.—An order of court, on sustaining a demurrer to the complaint, allowing plaintiff to amend as he may be advised,

will be construed as meaning within the limitations of this section prescribing the amendments which may be made, and, as so construed, is not objectionable. *Smith v. Southern Ry. Co.*, 80 S. C. 1, 61 S. E. 205.

Section does not affect § 493.—The limitation in this section as to amendments substantially changing the claim or defense, does not affect in any way the functions of § 493. *Mallard Lumber Co. v. Carolina Portland Cement Co.*, 134 S. C. 228, 132 S. E. 614; *Lane v. Home Ins. Co.*, 190 S. C. 84, 2 S. E. (2d) 30.

Section affords method of amending after time had expired in which pleader has right to amend of course. *Lane v. Home Insurance Co. et al.*, 190 S. C. 84, 2 S. E. (2d) 30.

Effect of section upon admission of evidence.—Under this section providing that the court may allow an amendment when it does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved, in a servant's action for injuries the court properly admitted evidence that the plaintiff contracted the disease of pleurisy on account of the injury complained of in the complaint. *Prince v. Massasoit Mfg. Co.*, 107 S. C. 387, 93 S. E. 2. See also *Pickens County v. Love et al.*, 171 S. C. 235, 171 S. E. 799.

Section is not to be used to obtain a new trial.—The object of this section is only to perfect a proceeding in which a party has been successful, and not one in which he has lost his cause; it is not to be used as a means of obtaining a new trial after the case has been lost on the original cause of action. *Martin v. Fowler*, 51 S. C. 164, 28 S. E. 312, and the cases there cited; *Kennerty v. Etiwan Phosphate Co.*, 21 S. C. 226, 53 Am. Rep. 669; *Dunbar v. Fant*, 174 S. C. 49, 176 S. E. 866.

But limits court's power to amend.—*Metts v. Wenberg*, 158 S. C. 411, 155 S. E. 734; *Knight, Yancey & Co. v. Aetna Cotton Mills*, 80 S. C. 213, 61 S. E. 396.

Where a corporation defendant incorrectly named in the summons and complaint answers to the merits in addition to filing a plea of misnomer, the court acquires jurisdiction of the defendant, and is entitled to order the proceedings amended under this section by inserting defendant's correct corporate name. *Sentell v. Southern Ry.*, 67 S. C. 229, 45 S. E. 155. See also *Turnstall v. The Lerner Shops, Inc.*, 160 S. C. 557, 159 S. E. 386.

An affidavit is not a prerequisite to an amendment under this section. *Jennings v. Parr*, 54 S. C. 109, 32 S. E. 73.

An objection that the court below relied on a verbal statement of facts by counsel in support of a motion to amend a pleading cannot be made for the first time on appeal. *Millan v. Southern Ry. Co.*, 54 S. C. 485, 32 S. E. 539.

Any complaint stating a cause of action may be amended.—Wherever a complaint states a cause of action, however crudely or inartistically, it properly falls under this section for amendment. *Kitchen v. Southern Ry.*, 68 S. C. 554, 568, 48 S. E. 4, 1 Ann. Cas. 747.

And where a pleading shows intention to state facts without which it is demurrable, demurrer may be sustained and amendment allowed; test of proposed amendment being whether it is different matter, constituting another subject of controversy, or same matter more fully or differently stated. *Barr v. Witsell*, 173 S. C., 199; 175 S. E., 436.

And it may be done at chambers.—The circuit judge has power at chambers to grant an order permitting an amendment of the complaint. *Ellen v. Ellen*, 26 S. C. 99, 1 S. E. 413. See § 37 and the note thereto.

Before the trial of the cause.—This section makes provision for the granting of amendments between the expiration of 20 days after answer or demurrer, as provided in § 493, and the beginning of the trial. *Knight, Yancey & Co. v. Aetna Cotton Mills*, 80 S. C. 213, 61 S. E. 396.

But judgment will not be arrested because of defects in complaint which might have been cured by amendments before or after judgment. *Brickman v. South Carolina R. Co.*, 8 S. C. 173.

Immaterial that complaint amended would be barred by statute of limitations.—Where an amendment is granted during the course of a trial it is immaterial that the cause of action sued on would then be barred by the statute of limitations. *Sentell v. Southern Ry.*, 67 S. C. 229, 45 S. E. 155; *Blackwood v. Spartanburg Commandery, No. 3, etc.*, 185 S. C. 56, 193 S. E. 195; *Wilson v. Gregory* 189 S. C. 62, 200 S. E. 358.

In each of the above cases the court held that the amended complaint did not state a new cause of action. In both the *Sentell* case and the *Blackwood* case the amended complaint merely con-

nected the description of the legal entity of the defendant. The *Wilson* case goes farther in that, while holding that the amended complaint did not state a new cause of action, it allowed the plaintiff to seek in his amended complaint a different remedy on the cause of action.

But an amendment of complaint that sets up a new cause of action which is barred by limitations will not be allowed. *Coral Gables, Inc. v. Palmetto Brick Co., et al.*, 183 S. C. 478, 191 S. E. 337. Rule stated with approval in *Wilson v. Gregory*, 189 S. C. 62, 200 S. E. 358.

Amendment cannot incorporate into one action distinct actions against different parties.—Wide as is the latitude allowed by this section, an order to amend cannot be granted where its effect would be to incorporate into one action two distinct actions against different parties. *Howard v. Wofford*, 16 S. C. 148.

In permitting amendment of complaint to show indorsers on note were liable as makers, trial judge properly withdrew case from jury and allowed defendants right to serve new answer. *Henderson v. Rice, et al.*, 160 S. E. 307, 158 S. E. 258.

Defendant waives objection to amended complaint by unconditional answer.—Under this section a defendant waives objection to the action of the court in granting leave to amend the complaint without qualification or limitation if he answers the amended complaint without protest. *Ruberg v. Brown*, 50 S. C. 397, 27 S. E. 873.

Section inapplicable where judgment is conclusive of all rights of parties.—Where the judgment of the Supreme Court is conclusive of all rights which the parties might thereafter attempt to assert, this section has no application. *Singleton v. Cuttino*, 107 S. C. 465, 92 S. E. 1046.

But where case is remanded amendments are proper.—Amendment in the lower court, on the case being remanded by the Supreme Court for further proceedings, is "before trial," so that it is subject only to the provision of this section that it be "in furtherance of justice," and not to the part thereof allowing amendments, when they do not change substantially the claim or defense, by conforming the pleadings to the facts proved. *Jennings v. Parr*, 54 S. C. 109, 32 S. E. 73, and the cases there cited; *Taylor v. Atlantic Coast Line R. Co.*, 81 S. C. 574, 62 S. E. 1113; *Hall v. Woodward*, 30 S. C. 564, 9 S. E. 684.

Where the original complaint is for punitive damages alone, under the allegation that defendant as a carrier wantonly and recklessly violated its duty to plaintiff, a passenger, the allowance of an amendment by the circuit court, after the Supreme Court has sent the case

back for a new trial, and before the new trial, so as to charge as negligent the acts and omissions of defendant, described in the original complaint as wanton and reckless, is proper. *Taylor v. Atlantic Coast Line R. Co.*, 81 S. C. 574, 579, 62 S. E. 1113, 1114.

In action on bond and for foreclosure of mortgage securing bond, where case had been to Supreme Court after one amendment of defendants' answers had been allowed, defendants not precluded from again amending answers before the trial, so as to include defense of usury not previously pleaded. *Elliott v. Carroll*, 179 S. C., 329; 184 S. E., 92.

After case is remanded for new trial, amendment of answer changing defense of denial of bona fides of a deed to denial of execution, is permitted where hardship or surprise is not shown. *Cole v. Ward*, 85 S. C. 259, 67 S. E. 295.

In which case an amended answer may set up matters not decided in first trial.—In an action against a co-surety for contribution, where the only defense interposed was presumption of payment of the original debt as to defendant, the execution of the note by defendant and the fact of his suretyship, do not become res adjudicata, but may be set up in an amended answer on a second trial of the action. *Hall v. Woodward*, 30 S. C. 564, 9 S. E. 684.

An amendment to the pleadings, offered by defendant on the second trial, introducing the questions as to the execution of the note by defendant, and the fact of co-suretyship, which questions are decided on the trial adversely to plaintiff, will not be held on appeal to be frivolous or evasive, nor the allegations on which they rest to be manifestly untrue. *Hall v. Woodward*, 30 S. C. 564, 9 S. E. 684.

A petition to enforce mechanic's lien is subject to the liberal rules of amendment under this Code.—*McGee v. Piedmont Co.*, 7 S. C. 263.

When a litigant waits until after he has been successful in his appeal his motion to amend comes too late. *Cothran v. Knight*, 47 S. C. 243, 25 S. E. 142.

Plaintiff cannot introduce by amendment facts occurring subsequent to commencement of action. *Northrop v. Mercantile Trust, etc., Co.*, 119 Fed. 969, 971. See the next foregoing section and the note thereto.

II. ALLOWANCE OF AMENDMENTS

A. In General

Costs may or may not be required.—Under the provisions of this section the payment of costs upon amendments is discretionary with the circuit judge, and may or may not be required. *Wallace v. Columbia, etc., R. Co.*, 37 S. C. 335, 16 S. E. 35; *Green v. Iredell*, 31 S. C. 588, 10 S. E. 545; *Stallings v. Barrett*, 26 S.

C. 474, 2 S. E. 483.

But amendment must not prejudice adverse party.—Where the adverse party shows that the granting of a trial amendment to the pleadings would prejudice him, the trial court will either refuse the amendment or grant it on such terms as will prevent prejudice. *Grist v. Caldwell*, 123 S. C. 240, 116 S. E. 448.

So it is error at the trial to permit the name of sole plaintiff to be stricken out and another substituted without giving defendant time to answer. *Coleman v. Heller*, 13 S. C. 491; *Cleveland v. Cohrs*, 13 S. C. 397.

Unless defendant does not request permission.—Failure to provide in an order permitting an amendment permission to defendant to answer amended complaint is not error where permission is not requested. *McDaniel v. Atlantic Coast Line R. Co.*, 76 S. C. 15, 56 S. E. 543; *Tarrant v. Gittelsohn*, 16 S. C. 231.

And court requires affidavit where amendment will surprise adverse party.—Where an amendment to a pleading asked for immediately before or during the trial, operates as a surprise to the adverse party, whereby he will be misled to his prejudice, he must prove that fact by affidavit or otherwise, and, when that is done, the amendment must either be refused, or, if granted, the adverse party must be given time to prepare to meet the amended pleading. *Shelton v. Southern Ry. Co.*, 86 S. C. 98, 67 S. E. 899.

Where misnomer is not amended at trial objection will not be heard on appeal.—When an action should have been brought against the county of Pickens, by the corporate name of the county of Pickens, the error is simply one of a misdescription of the parties defendant, a misnomer by the terms of this section, amendable at the trial if objected to, and to be disregarded, both at the trial and on appeal, when such objection is not taken. *Commissioners v. Bank of Commerce*, 97 U. S. 374, 377, 24 L. Ed. 1060.

B. Discretion of the Court

Amendments are within the discretion of the court.—Rulings on amendments to pleadings, under this section, authorizing amendments not changing substantially the claim or defense, are within the discretion of the trial judge, and will not be interfered with, unless abused. *Heiden v. Atlantic Coast Line R. Co.*, 84 S. C. 117, 65 S. E. 987; *Cole v. Ward*, 85 S. C. 259, 67 S. E. 295; *Miller v. Klugh*, 29 S. C. 124, 7 S. E. 67; *Millan v. Southern Ry. Co.*, 54 S. C. 485, 32 S. E. 539; *Copeland v. Copeland*, 60 S. C. 135, 38 S. E. 269; *Knight, Yancey & Co. v. Aetna Cotton Mills*, 80 S. C. 213, 61 S. E. 396; *Trumbo v. Finley*, 18 S. C. 305, 315, and

the cases there cited; *Metts v. Wenberg*, 158 S. C. 411, 155 S. E. 734; *Sims v. Mutual Life Ins. Co.*, 103 S. C. 214, 87 S. E. 999; *Peterman v. Pope*, 74 S. C. 296, 54 S. E. 569; *Chichester & Co. v. Hastie*, 9 S. C. 330, 334; *Booth v. Langley Mfg. Co.*, 51 S. C. 412, 29 S. E. 204; *Interstate Bldg., etc., Ass'n v. Waters*, 50 S. C. 459, 27 S. E. 948; *Henderson v. Rice, et al.*, 160 S. C. 307, 158 S. E. 258; *Dunbar v. Fant*, 174 S. C. 49, 176 S. E. 866; *Jordan v. State Highway Department*, 188 S. C. 83, 198 S. E. 174; *Monteith v. Harvey et al.*; 190 S. C. 453, 3 S. E. (2d) 250.

An allowance, prior to the trial, of an amendment to the answer substantially changing the defense is within the sound discretion of the court. *J. B. Colt Co. v. Kyzer*, 131 S. C. 78, 126 S. E. 520.

And former trials are not controlling in the exercise thereof.—The fact that there have been two trials in which the verdicts have been set aside is not controlling in the exercise by a circuit court of discretion in allowing amendments in furtherance of justice. *Pickett v. Southern Ry.*, 74 S. C. 236, 54 S. E. 375.

Nor will the exercise thereof be disturbed by Supreme Court unless it deprives a party of a substantial right.—*Garlington v. Copeland*, 32 S. C. 57, 10 S. E. 616; *Green v. Iredell*, 31 S. C. 588, 10 S. E. 545; *Stallings v. Barrett*, 26 S. C. 474, 2 S. E. 483; *Trumbo v. Finley*, 18 S. C. 305; *Peterman v. Pope*, 74 S. C. 296, 54 S. E. 569.

Amendments being within the discretion of the court, refusal to allow one to set up usury, asked for after the testimony has been taken and reported, and not conforming to the facts proved, will not be reviewed. *Pelzer v. Morris*, 56 S. C. 88, 34 S. E. 22.

Refusal to allow substitution of a new party for a plaintiff, who shows no cause of action, is not error. *Strickland v. Bridges*, 21 S. C. 21.

Or unless the court abuses its discretion.—In action on a note given for the purchase price of a gas-lighting plant, in which the original answer pleaded fraudulent representations, the allowance, before trial, of an amendment, pleading that the plant as installed was defective and permitted escape of gas, was not an abuse of discretion. *J. B. Colt Co. v. Kyzer*, 131 S. C. 78, 126 S. E. 520.

Where the defendants do not allege that they are misled, it is an abuse of the trial court's discretion to refuse an amendment changing the name of the plaintiff from the C. Savings Bank to the C. Trust and Savings Bank. *Citizens' Sav. Bank v. Efid*, 96 S. C. 18, 79 S. E. 637.

But where the amendment is refused on legal grounds, the action of the court

will be reviewed. *Madden v. Watts*, 59 S. C. 81, 37 S. E. 209; *Sibley v. Young*, 26 S. C. 415, 2 S. E. 314.

Where the referee and the circuit judge both refuse amendments because, in their opinion, the amendments are not allowable, the Supreme Court may reverse the ruling where the law would have allowed the amendment and the court did not express its discretion. *Hamer v. David*, 124 S. C. 391, 117 S. E. 807.

Facts to be considered by court.—Whether a proposed amendment of pleadings is in furtherance of justice is a question for the trial court, on a review of all the circumstances; and the consideration that the party offering the amendment is put to a disadvantage by the death of witnesses is a proper matter to be considered, but is not conclusive. *Hall v. Woodward*, 30 S. C. 564, 9 S. E. 684.

And where an abuse of discretion on part of trial judge in allowing an amendment is charged, the supreme court should have the benefit of all matters and facts upon which judge exercised his discretion. *Blackwood v. Spartanburg Commandery No. 3, etc.*, 185 S. C. 56; 193 S. E. 195.

C. Amendments before the Trial

Limitation as to change of cause of action or defense not applicable to amendments before trial.—The limitation of the power of the court to allow amendments, as authorized by this section to conform the pleadings to the facts proved, that the amendment shall not change substantially the claim or defense, is by its terms applicable only to amendments proposed while the court is hearing the evidence, or after it has heard it, and not before trial. *J. B. Colt Co. v. Kyzer*, 131 S. C. 78, 126 S. E. 520; *Taylor v. Atlantic Coast Line R. Co.*, 81 S. C. 574, 62 S. E. 1113; *Standard Sewing Mach. Co. v. Alexander*, 68 S. C. 506, 47 S. E. 711, and the cases there cited; *Chamberlain v. Mensing*, 51 Fed. 511; *German-American Ins. Co. v. Southern Ry.*, 82 S. C. 1, 62 S. E. 1115; *Kennedy v. Hill*, 79 S. C. 270, 272, 60 S. E. 689; *Lilly v. Charlotte, etc., Co.*, 32 S. C. 142, 10 S. E. 932; *Edwards v. Cheraw, etc., Co.*, 32 S. C. 117, 10 S. E. 822; *Hall v. Woodward*, 30 S. C. 564, 9 S. E. 684; *Nesbitt v. Cavender*, 27 S. C. 1, 2 S. E. 702; *Dunsford v. Brown*, 19 S. C. 560, 567; *Trumbo v. Finley*, 18 S. C. 305, 316; *Cleveland v. Cohrs*, 13 S. C. 397; *Mason v. Johnson*, 13 S. C. 20, 21, 75 Am. Dec. 740.

Where a complaint alleges that plaintiff was damaged because of obeying a temporary injunction which was there-after dissolved but in which no bond has been executed, the complaint may be amended under Code Civ. Proc. sec. 494, authorizing amendments in the further-

ance of justice, to compel defendant to pay damages because of the injunction improperly obtained. *Batson v. Paris Mountain Water Co.*, 73 S. C. 368, 53 S. E. 500. See *Sutton v. Catawba Power Co.*, 70 S. C. 266, 49 S. E. 863; *Ruberg v. Brown*, 50 S. C. 397, 27 S. E. 873.

Defendant's motion for leave to amend answer by setting up statute of frauds, made after the case has been argued, may be denied as not in furtherance of justice, in view of this section. *Fanning v. Bogacki*, 111 S. C. 376, 98 S. E. 137.

However an amendment not relating to the original claim or defense will not be allowed.—Amendments under this section must be applied for at the proper time, and a party cannot be permitted, after planting himself upon a certain ground of action or defense and finding it unsuccessful, to shift his ground, and renew the controversy upon other grounds which he might have taken in the first instance, as this would lead to interminable litigation. *Clayton v. Mitchell*, 31 S. C. 199, 9 S. E. 814, 816, 10 S. E. 390; *McKnight v. Cooper*, 27 S. C. 92, 96, 2 S. E. 842. The amendment proposed should be material to a case which has been defectively stated. *Knight, Yancey & Co. v. Aetna Cotton Mills*, 80 S. C. 213, 61 S. E. 396, and the case there cited.

Where an action at law has been referred to a master, and the court finds that his conclusions of fact and law are correct, and overrules all the exceptions to his report, it is error to recommit the report to enable the losing party to introduce testimony to sustain new issues to be raised by an amendment of his answer, under this section, especially where he might have amended at the hearing, but made no effort to do so, being of opinion that no amendment was necessary. *Clayton v. Mitchell*, 31 S. C. 199, 9 S. E. 814, 10 S. E. 390.

But cause may be changed or new cause raised by a m e n d m e n t where amendment relates to original subject.—Under this section the power of the court to allow amendment "by correcting a mistake in the name of a party or a mistake in any other respect" is unlimited, except by the obligation imposed by the statute on the court to see that the amendment is in furtherance of justice, and that such terms are imposed as may be just. This power is conditioned on proof of a bona fide mistake in setting forth the plaintiff's rights and the defendant's invasion of them. Unless the amendment proposed relates to the same transaction or the same subject matter as the original complaint, then it is manifest that the plaintiff cannot claim to have made a mistake in the matter to which his pleading relates. When, however, the plaintiff makes the mistake of

supposing one of his rights has been invaded by the defendant in one transaction or a series of transactions relating to the same subject, and discovers another and different right was invaded, it is within the power of the court, when it appears to be in furtherance of justice to grant the amendment, though in strictness the amendment amounts to a change of the cause of action, or the insertion of another cause of action. *Holliday Co. v. Raleigh, etc., R. Co.*, 91 S. C. 51, 74 S. E. 41, 42; *Taylor v. Atlantic Coast Line R. Co.*, 81 S. C. 574, 579, 62 S. E. 1113, 1114.

Thus, where an allegation charges that a certain deed was not made bona fide it may be amended, before trial, to allege that the deed, if ever made, was never recorded. *Cole v. Ward*, 85 S. C. 259, 67 S. E. 295.

The court may allow an amendment to the complaint alleging a new cause of action for the same injury and negligence alleged in the original complaint. *Holliday Co. v. Raleigh, etc., R. Co.*, 91 S. C. 51, 74 S. E. 41.

A complaint in an action against a carrier for negligently transporting live stock may be amended under this section by eliminating the allegation that plaintiff filed with the carrier's agent a claim, and that it was responsible for the loss as limited by the bill of lading, and allowing a new complaint setting out same injury and negligence, but omitting such allegation. *Holliday Co. v. Raleigh, etc., R. Co.*, 91 S. C. 51, 74 S. E. 41. But see *Proctor v. Southern Ry.*, 64 S. C. 491, 42 S. E. 427, where an action for a willful tort was not permitted to be amended so as to include an action for negligence.—Ed. note.

An amendment may change the alleged date of the transaction in question where the other party is not misled thereby. *Dent v. South-Bound R. Co.*, 61 S. C. 329, 39 S. E. 527.

And such amendment does not destroy cause first pleaded.—Where, in attachment proceedings under § 536, providing that a creditor may sue on a debt not due, and procure a warrant of attachment, where the debtor has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete, his property with intent to defraud his creditors, amendments to the complaint are made, under this section, alleging that the debt sued for was incurred by defendant through his having obtained property by fraud and false pretenses and representations, such amendments do not destroy the causes of action and create new ones, so as to destroy the attachments as incidents to the original causes of action. *Ex parte Chase*, 62 S. C. 353, 38 S. E. 718.

Under § 374, providing that in actions

to recover realty the costs of the first action must be paid before a second action is brought, such payment is a condition precedent and should be alleged in the complaint; but, if not, in furtherance of justice it is proper under this section to permit defendant to amend his answer during the second term, after the second action has commenced, by alleging such nonpayment. *Peterman v. Pope*, 74 S. C. 296, 54 S. E. 569.

The court may also correct by amendment manifest errors and mere clerical mistakes. *Heyward v. Williams*, 48 S. C. 564, 26 S. E. 797; *Carroll v. Tompkins*, 14 S. C. 223.

D. Amendments During and After the Trial

1. General Principles

See the foregoing analysis line and the note thereto.

Rule stated.—The chief difference between the legal effect of amendments before the trial and those made at or after the trial is that an amendment may substantially change the cause of action or defense and still be allowed before the trial, whereas an amendment, to be allowed at or after the trial, cannot substantially change the nature of the cause of action or defense. See *Grist v. Caldwell*, 123 S. C. 240, 116 S. E. 448; *Greenville Community Hotel Corp. v. Reams*, 146 S. C. 203, 143 S. E. 806; *Kennedy v. Hill*, 79 S. C. 270, 60 S. E. 689; *South Carolina R. Co. v. Barrett*, 12 S. C. 173.

Original complaint must state a cause of action.—Plaintiff cannot be permitted to amend by stating a wholly different and new cause of action, when his complaint is held to state no cause of action. *Coker v. Monaghan Mills*, 119 Fed. 706; *Sullivan v. Sullivan*, 24 S. C. 474; *Trumbo v. Finley*, 18 S. C. 305.

But an incomplete statement of cause of action may be amended.—Under this section, granting power to amend any pleading "by inserting other allegations material to the case," a complaint not stating a cause of action may be cured by amendment, where the defect is not an entire absence of a cause of action, but merely a faulty or incomplete statement thereof. *Ruberg v. Brown*, 50 S. C. 397, 27 S. E. 873; *Taylor v. Atlantic Coast Line R. Co.*, 81 S. C. 574, 62 S. E. 1113; *Brown v. Carolina Midland Ry. Co.*, 58 S. C. 466, 36 S. E. 852; *Tobias v. Carolina Light & Power Co.*, 190 S. C. 187, 2 S. E. (2d) 686.

Where the complaint, in an action for injuries to a passenger, advises the carrier that it is charged with recklessness in running the train at a high speed over a defective roadbed, and its counsel so construes it, and the case as developed has reference to the fact that the train was being run at an excessive speed, an amendment thereto to conform to the

proof, received without objection, alleging more clearly the negligence in running the train at a high speed, is in furtherance of justice and within the court's power to grant under this section. *Shelton v. Southern Ry. Co.*, 86 S. C. 98, 67 S. E. 899.

Even after verdict and new trial ordered.—Under this section the allowance of an amendment of complaint after verdict and new trial ordered will not be disturbed, where the amendment is material to the case, which has been defectively stated, and does not substantially change the cause of action. *Sutton v. Catawba Power Co.*, 70 S. C. 266, 49 S. E. 863.

And the test is whether the proposed amendment treats same or different cause of action.—As long as the plaintiff adheres to the contract, or injury originally declared upon, an alteration in the modes in which the defendant has broken the contract or caused the injury is not an introduction of a new cause of action. The test is whether the proposed amendment is a different matter, another subject of controversy, or the same matter more fully or differently laid to meet the possible scope and varying phrases of the testimony. *Pickett v. Southern Ry.*, 74 S. C. 236, 54 S. E. 375, 377.

Rule does not prohibit a slight change.—This section does not prohibit a mere formal or slight change of the claim or defense, but only a substantial change. *Sibley v. Young*, 26 S. C. 415, 2 S. E. 314.

While the cause of action may not be changed under this section, still the relief flowing out of the cause of action may be increased by having a new point given to it. *Bomar v. Means*, 47 S. C. 190, 25 S. E. 60, 64.

2. Illustrations

a. Amendment Substantially Changing Claim or Defense

Alleging new action at common law.—Where an action is brought under sec. 8362 providing that a railroad company shall be liable for any property injured by the communication to it of fire originating on the company's property, plaintiff will not, after an action founded on negligence has been barred by limitation, be allowed to amend his complaint by striking out the allegations therein referring to the statute, and inserting in place thereof an allegation that the injury was caused by defendant's negligence. *Mayo v. Spartanburg, etc., R. Co.*, 43 S. C. 225, 21 S. E. 10.

Or alleging new action under statute.—It is not permissible to amend a complaint stating a cause of action under common law for damages from communicated fires so as to make it a cause of action under statute. *Brown v. Seaboard Air Line Ry.*, 83 S. C. 557, 65 S. E.

1102. See, also, *Sims v. Mutual Life Ins. Co.*, 103 S. C. 214, 87 S. E. 999.

Converting admissions into denials in answer.—It is error to allow an amendment during the trial after plaintiff has rested and the defendant has moved for a nonsuit, so as to convert admissions into denials in the answer. *Cuthbert v. Brown*, 49 S. C. 513, 27 S. E. 485.

Denial of administration.—This section authorizing the amendment of any pleading after judgment in furtherance of justice, does not permit a defendant, after judgment, to withdraw an admission that plaintiffs were administrators, and to amend by denying such fact. *Martin v. Fowler*, 51 S. C. 164, 28 S. E. 312, 313.

Reformation of contract sued upon.—In an action on stock subscription, in which defendant alleged that blank contract had been filled in by plaintiff's agents by mistake for amount in excess of that authorized, refusal of the court to permit trial amendment of defendant's answer in order to seek reformation of contract was proper, under this section. *Greenville Community Hotel Corp. v. Reams*, 146 S. C. 203, 143 S. E. 806.

Setting up statute of frauds after case is argued.—Defendant's motion to amend by setting up statute of frauds after case has been argued, can not be allowed under this section, if its effect is to change defense from denial of oral contract to avoidance. *Farming v. Bogacki*, 111 S. C. 376, 98 S. E. 137.

Amendment making answer conform to proof.—Where, in an action for the loss of baggage, the carrier answered by general denial, an amended answer to conform to the proof that the baggage was destroyed by fire at a station without fault on the carrier's part, after the baggage had remained there uncalled for for 16 days, materially changed the defense, within this section. *Heiden v. Atlantic Coast Line R. Co.*, 84 S. C. 117, 65 S. E. 987.

Amendment setting up special defense.—In a suit on an employer's liability policy, it was not error to refuse defendant's motion to conform the pleadings to facts alleged to have been proved, that an agreement had been consummated between the insured and the injured employee by which the damage suit had been compromised, which constituted a complete defense to the suit on the policy, since such amendment would have substantially changed the defense, which is forbidden by this section. *Pickett v. Fidelity, etc., Co.*, 60 S. C. 477, 38 S. E. 160; rehearing denied, 60 S. C. 477, 38 S. E. 629.

Conversion of claim and delivery into action for damages.—A plaintiff, having instituted a claim and delivery action,

may not upon the trial, at his election, without notice, convert it into an action for damages, admittedly "distinct and independent," in violation of this section, forbidding amendments changing substantially the claim. *Wilkins v. Wilimon*, 128 S. C. 509, 122 S. E. 503, 509.

Amendment to show necessary relationship in action for wrongful death.—Where, in an action brought under sec. 411 for wrongful death, the complaint fails to show that the deceased left surviving him any person bearing the necessary relationship to be a beneficiary under sec. 412, the plaintiff is properly refused permission to amend at the trial by alleging that she is the widow of deceased, and that she sues for the benefit of herself and his children, especially where the time within which to bring such action has elapsed, as it would have entirely changed the nature of the action, contrary to the provisions of this section. *Lilly v. Charlotte, etc., R. Co.*, 32 S. C. 142, 10 S. E. 932.

See §§ 411, 412, as to actions for death by wrongful act, and the notes thereto.

Insertion of additional claim.—Where on the trial of the action before a referee a motion to amend the complaint, by inserting an additional item of merchandise, was denied, it was error for the circuit court to allow the amendment, on exceptions to the referees' report, as it changed and added to the original cause of action. *Edwards v. Cheraw, etc., R. Co.*, 32 S. C. 117, 10 S. E. 822.

Allegation of independent act of negligence.—Where the defendant, under the pleadings, might have shown as a complete defense that plaintiff was injured in a different way than that alleged, the allowance of an amendment to the complaint so as to conform to the proof and allege a new and independent act of negligence, to defendant's surprise, is error. *Scott v. Atlantic Coast Line R. Co.*, 105 S. C. 385, 89 S. E. 1038.

Questionable whether Supreme Court may amend prohibition to injunction.—It is open to serious question whether, even if a formal amendment is applied for, in the Supreme Court, to change the action from prohibition to injunction, such an amendment, changing entirely the nature of the proceeding, suggested at the close of the argument, may be properly allowed, under the provisions of this section. *Hunter v. Moore*, 39 S. C. 394, 17 S. E. 797.

See generally, as to substituting a claim of right of way appurtenant for a right of way in gross, *Whaley v. Stevens*, 21 S. C. 221; as to claiming cancellation of an instrument instead of reformation thereof, *Kennerty v. Etiwan Phosphate Co.*, 21 S. C. 226, 53 Am. Rep. 669;

as to changing an action for accounting into a direct attack upon the settlement and receipt, set up in defense thereto, *Dunsford v. Brown*, 19 S. C. 560; making a case at law to recover mortgaged land a case in equity to redeem it, *Skinner v. Hodge*, 24 S. C. 165; as to changing action to enjoin judgment as paid into one for specific performance of contract, *Miller v. Klugh*, 29 S. C. 124, 7 S. E. 67.

b. Amendment Not Substantially Changing Claim or Defense.

Converting action against partnership to one against individuals.—It is within the discretion of the court to allow an amendment to a complaint converting it from an action against a copartnership to one against the individual members thereof. *Baker v. Hornik*, 51 S. C. 313, 23 S. E. 941.

In action against two parties, as copartners, the proof showing neither copartnership nor joint liability, and motion for non-suit made, the plaintiff was properly allowed to amend, striking out name of one defendant and proceeding against the other. *Bull v. Lambson*, 5 S. C. 288.

Complaint against alleged corporation amended to allege unincorporated association.—In action on note against unincorporated association alleged to be a corporation and against its members as indorsers, trial court properly allowed amendment alleging that association was an unincorporated association, and no new cause of action was stated as against members. Since amendment amounted only to a change in description of legal entity being sued. *Blackwood v. Spartanburg Commandery, No. 3, etc.*, 185 S. C. 56, 193 S. E. 195.

Amending complaint to conform to verdict.—In suit on bonds, where verdict included installments maturing up to time of verdict, complaint may be amended to conform to verdict, although judgment was not asked for installments payable after commencement of suit. *Post v. Wise Township*, 101 Fed. 204.

Additional damages and act of negligence.—A complaint may be amended on motion by alleging additional act of negligence and increasing amount of damages. *Pickett v. Southern Ry.*, 74 S. C. 236, 54 S. E. 375.

An amendment of a complaint alleging that a fire was communicated by defendant's locomotive to a tract of land by originating within the right of way and being communicated therefrom, which inserted after the words "right of way" the words "or originating within the limits of the right of way of said railroad in consequence of the acts of its authorized agents and employees," did not substantially change plaintiff's claim, and was properly allowed, under this section. *Bellamy v. Conway, etc., R. Co.*,

85 S. C. 450, 67 S. E. 545.

Amendment asking for interest.—In action for breach of a claim and delivery bond, the plaintiff was properly permitted to amend her complaint at trial to ask for interest, where the amendment contained no element of surprise and merely permitted the plaintiff to recover all the damages which flowed to her from the cause of action set up in her complaint. *Maynard v. Bank of Kershaw, et al.*, 188 S. C. 160, 198 S. E. 188.

Change from strict foreclosure to action for purchase money.—A complaint in foreclosure may be amended after the testimony is in, so as to allege a cause of action for the purchase money of the land only. *Whitmire v. Boyd*, 53 S. C. 315, 31 S. E. 306, 307.

Insertion of an additional defense.—In action for partition, where defendant pleads a general denial, and claims title in himself, an amendment allowing him also to plead that plaintiff was estopped to claim title does not materially change the defense. *Woodward v. Williamson*, 39 S. C. 333, 336, 17 S. E. 778.

Where the defendant admits to plaintiff that the signatures to a note and mortgage are his, the plaintiff, on foreclosure, after proof that the signatures were forgeries, may amend his complaint so as to set up an estoppel to deny the genuineness of the papers. *Whitmire v. Boyd*, 53 S. C. 315, 31 S. E. 306.

Joining executors as defendants.—Under this section, an amendment joining the executors of plaintiff's father's will as defendants, pursuant to a judgment of the Supreme Court on appeal, is not a substitution of a different cause of action from that stated in the original complaint. *Green v. Iredell*, 31 S. C. 588, 10 S. E. 545.

Change of action on note to one on open account.—Where the claim of the plaintiff is to recover money advanced by him to a firm, and in the complaint he bases his claim upon the allegation that the members of the firm had, by their promissory notes, bound themselves to pay him, etc., which allegation plaintiff attempts to support by the introduction of single bills or sealed notes admitted to have been executed in the firm name by one partner without authority, but claimed to have been ratified by the other, an amendment of the complaint, so as to base it on the open account, to secure which the bills were given, does not "entirely change the cause of action," nor does it "change substantially the claim," within the meaning of this section, providing for amendments. *Sibley v. Young*, 26 S. C. 415, 2 S. E. 314, 315.

Amendment is allowed so as to allege sealed note instead of promissory note.

Moore v. Christian, 31 S. C. 337, 338, 9 S. E. 981.

Amendment curing defect in appointment of guardian ad litem.—Where during the trial of an action by a minor, his attorney found that the order appointing the guardian ad litem had not been signed by the clerk and leave was sought either to have the clerk sign it nunc pro tunc, or to amend the complaint by striking out the allegation of plaintiff's minority and the appointment of a guardian, and to continue the action in the name of plaintiff, who had become of age, the court had power to grant either motion under this section. *Seigler v. Southern Ry. Co.*, 85 S. C. 345, 67 S. E. 296.

It is proper, upon the admitted fact of the lunacy of the defendant, to allow amendment making guardian ad litem party. *Boyce v. Lake*, 17 S. C. 481, 43 Am. Rep. 618.

Amendment curing defect in statement of cause of action.—As has been stated under the analysis line "General Principles," II, D, 1, an amendment may be allowed, to cure the defects in the statement of a cause of action, where there is not a total absence of a cause of action. See *Ruberg v. Brown*, 50 S. C. 397, 27 S. E. 873.

Many illustrations of the principle just announced will be found in the adjudicated cases. For example, the court has permitted a complaint against a railroad alleging damages to building from a fire set by defendant to be amended to show the destruction of the buildings. *Brown v. Carolina Midland Ry. Co.*, 58 S. C. 466, 36 S. E. 852; and the court has allowed an amendment of a complaint in an action for personal injuries, alleging the acts to have been done willfully and maliciously. *Morrow v. Gaffney Mfg. Co.*, 70 S. C. 242, 49 S. E. 573; and the court has permitted a complaint, alleging quantum meruit for work done, to be amended to show a special contract in order to allow proof of it. *Tarrant v. Gittelson*, 16 S. C. 231; and a complaint for assault, has been allowed to be amended so as to be for assault and battery. *Sullivan v. Sullivan*, 24 S. C. 474; and the plaintiff in an action on a note which, except for certain payments, would be barred by the statute of limitations, where he declared simply on a promise contained in the note, was allowed to amend by declaring on the new promise arising by operation of law from the payments. *Jacobs v. Gilreath*, 41 S. C. 143, 19 S. E. 308.

In an action for breach of contracts for the future delivery of spot cotton, it is proper under this section to allow plaintiffs to amend by bringing themselves within § 6315, making such contracts void, unless it is the bona fide

intention of both parties that the cotton should be actually delivered and received in kind at the future time mentioned. *Knight, Yancey & Co. v. Aetna Cotton Mills*, 80 S. C. 213, 61 S. E. 396.

Section authorizes striking of allegations in complaint.—Under this section authorizing the court to amend by adding or striking out the name of a party or correcting a mistake, or by inserting any other allegations, a complaint may be amended by striking out certain allegations of the same. *Pickett v. Southern Ry.*, 74 S. C. 236, 54 S. E. 375.

Amendment showing agency of some of defendants.—Where a client sues his attorney and others employed by the attorney and others employed by the attorney for money received by them, an amendment of the complaint, so as to state that those employed by the attorney were acting as plaintiff's attorneys, when they received the money sued for, is permissible, as it does not change the cause of action within this section. *Mad-den v. Watts*, 59 S. C. 81, 37 S. E. 209.

Amendment of body of pleading to conform to caption.—Where the caption of a complaint in an action on a promissory note styles defendants "J. H. Caldwell and John L. Boyce, trading under the firm name of Caldwell & Boyce," and in the complaint it is alleged that "the defendants made and delivered" to the plaintiffs the note sued on, it is within the trial court's discretion to permit a trial amendment of the complaint by inserting after the word "defendants" the descriptive phrase stated in the caption. *Grist v. Caldwell*, 123 S. C. 240, 116 S. E. 448.

And, in a suit against "county commissioners" on county bonds, the complaint may be amended at trial so as to be a suit against county by its corporate name. *Commissioners v. Bank of Commerce*, 97 U. S. 374, 24 L. Ed. 1060.

See generally, *Buist v. Williams*, 83 S. C. 321, 65 S. E. 343; *Clio Gin Co. v. Western Union Tel. Co.*, 82 S. C. 405, 64 S. E. 426; *Jackson v. Southern Cotton Oil Co.*, 81 S. C. 564, 566, 62 S. E. 854; *Smith v. Southern Ry. Co.*, 80 S. C. 1, 61 S. E. 205; *Knight, Yancey & Co. v. Aetna Cotton Mills*, 80 S. C. 213, 61 S. E. 396; *Cousar v. Heath, Witherspoon & Co.*, 80 S. C. 466, 470, 61 S. E. 973; *Webb v. Atlantic Coast Line R. Co.*, 76 S. C. 193, 56 S. E. 954, 11 Ann. Cas. 834, 9 L. R. A., (N. S.) 1218n; *Batson v. Paris Mountain Water Co.*, 73 S. C. 368, 379, 53 S. E. 500; *Morrow v. Gaffney Mfg. Co.*, 70 S. C. 242, 245, 49 S. E. 573; *Sutton v. Catawba Power Co.*, 70 S. C. 266, 270, 49 S. E. 863; *De Hihns v. Free*, 70 S. C. 344, 49 S. E. 841; *Morrow v. Gaffney Mfg. Co.*, 70 S. C. 242, 245, 49 S. E. 573; *Kentucky Refining Co. v. Saluda Oil Co.*, 70 S. C. 89, 48 S. E. 987; *Standard Sewing Ma-*

chine Co. v. Alexander, 68 S. C. 506, 508, 47 S. E. 711; Fairy v. Kennedy, 68 S. C. 250, 47 S. E. 138; Adams v. South Carolina, etc., R. Co., 68 S. C. 403, 410, 47 S. E. 693; Kiddell v. Bristow, 67 S. C. 175, 45 S. E. 174; Hellams v. Prior, 64 S. C. 543, 43 S. E. 25; Glenn v. Gerald, 64 S. C. 236, 42 S. E. 155; Peeples v. Mims, 64 S. C. 226, 42 S. E. 155; Pickett v. Fidelity & Casualty Co., 60 S. C. 477, 38 S. E. 160; Seegers v. McCreery, 41 S. C. 548, 19 S.

E. 696; Whaley v. Stevens, 21 S. C. 221.

Applied as to change of names of parties, Sadler v. Nicholson, 49 S. C. 7, 26 S. E. 893; Suber v. Chandler, 28 S. C. 382, 6 S. E. 155; Coleman v. Heller, 13 S. C. 491; McDaniel v. Atlantic Coast Line R. Co., 76 S. C. 15, 18, 56 S. E. 543; Runion v. Latimer, 6 S. C. 126; Cousar v. Heath, Witherspoon & Co., 80 S. C. 466, 61 S. E. 973; Peeples v. Mims, 64 S. C. 226, 42 S. E. 155.

§ 495. Court may give relief in case of mistake.—The court may likewise, in its discretion, and upon such terms as may be just, allow an answer or reply to be made, or other act to be done, after the time limited by this Code of Procedure, or, by an order, enlarge such time; and may also, in its discretion and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, or other proceeding, taken against him through his mistake, inadvertence, surprise, or excusable neglect, and may supply an omission in any proceeding; and whenever any proceeding taken by a party fails to conform in any respect to the provisions of this code of procedure, the court may, in like manner, and upon like terms, permit an amendment of such proceeding, so as to make it conformable thereto.

1932 Code, § 495; Civ. P. '22, § 437; Civ. P. '12, § 225; Civ. P. '02, § 195; 1870 (14) § 197.

- I. General Consideration.
- II. The Discretion of the Court.
- III. Extension of Time Allowed by Code.
- IV. Relief from Judgment or Other Proceeding.
 - A. In General.
 - B. Grounds for Relief.
 - 1. In General.
 - 2. Representation by Attorney.
- V. Amendment for Nonconformity to Code.

I. GENERAL CONSIDERATION

The remedy provided by this section is exclusive.—This section provides an exclusive remedy, which takes the place of a petition for rehearing or a bill of review. Carolina Nat. Bank v. Homestead Bldg., etc., Ass'n, 56 S. C. 12, 33 S. E. 781; Knox v. McKee, 96 S. C. 418, 81 S. E. 12; New York Life Ins. Co. v. Mobley, 90 S. C. 552, 73 S. E. 1032.

And objection cannot be made by oral demurrer.—Where judgment is taken by default, an objection that the complaint does not state a cause of action cannot be made by oral demurrer, but the remedy is by motion to set the same aside, under this section. Gillian v. Gillian, 65 S. C. 129, 43 S. E. 386.

Nor will a direct appeal lie.—A party in default cannot appeal directly to the Supreme Court from the judgment against him. His remedy is by a motion in the cause, to vacate the judgment, under this section of the Code. Gillian v. Gillian, 65 S. C. 129, 133, 43 S. E. 386, and cases cited; Duncan v. Duncan, 93 S. C.

487, 76 S. E. 1099, 1102. De Pass v. City of Spartanburg, 190 S. C. 23, 1 S. E. (2d) 904.

It applies to parties to the action.—This section applies to parties to the action, and the words used imply knowledge of the pendency of the action or proceeding, and the failure of a party thereto to take the steps necessary to protect his rights for one of the causes stated. Jones v. Haile Gold Mining Co., 79 S. C. 47, 60 S. E. 35, 36.

It is intended for parties who may, through such cause, have lost the opportunity to be present at the trial or to be represented there; and not for parties who, represented at the trial, are only entitled to relief by application for new trial under the provisions of the law therefor. Ex parte Williams, 7 S. C. 71; Gibbes v. Elliott, 8 S. C. 50, 60; Steele v. C., C. & A. R. Co., 14 S. C. 324; Hand v. Savannah, etc., R. Co., 17 S. C. 219; Clark Bros. v. Wimberly, 24 S. C. 138; Kaminitzky v. Northeastern R. Co., 25 S. C. 53; Wright v. Barringer 160 S. C. 259, 158 S. E. 737.

And to the original action.—The bar of res adjudicata could not be avoided by pleading surprise in the former action through admission of evidence as to facts alleged not to have been put in issue by the pleadings therein; any relief upon such ground being obtainable only by application to the court in the original action, under this section. Sovereign Camp of Woodmen v. Means, 87 S. C.

127, 69 S. E. 85.

Effect of court's ruling that it had no jurisdiction.—The court's error in ruling that it had no power to entertain a motion for leave to amend the answer was harmless where it appeared that such motion should have been overruled. *Lowry v. Atlantic Coast Line R. Co.*, 92 S. C. 33, 75 S. E. 278.

Necessity of swearing to answer when complaint not sworn to.—Where a complaint is not sworn to on a proceeding to set aside a judgment on default under this section, it is unnecessary that defendant swear to the proposed answer. *Farmers', etc., Mfg. Co. v. Smith*, 70 S. C. 160, 49 S. E. 226.

Applied in *Bomar v. Means*, 47 S. C. 190, 25 S. E. 60, by allowing a supplemental complaint to be filed.

II. THE DISCRETION OF THE COURT

No relief will be granted except in the case of abuse of discretion.—Nearly all of the cases pertaining to this section state the principle that the discretion expressly vested in the circuit court by the section will not be disturbed except in a case of clear abuse. *Washington v. Heese*, 56 S. C. 28, 33 S. E. 787; *Duncan v. Duncan*, 93 S. C. 487, 76 S. E. 1099, 1101; *Parks v. McDaniel*, 75 S. C. 7, 9, 54 S. E. 801, 804, 117 Am. St. Rep. 878; *Carolina Nat. Bank v. Homestead Bldg., etc., Ass'n*, 56 S. C. 12, 33 S. E. 781; *Lowry v. Jackson*, 27 S. C. 318, 3 S. E. 473, 477; *Odom v. Burch*, 52 S. C. 305, 29 S. E. 726; *McSween v. Windham*, 77 S. C. 223, 57 S. E. 847, 848; *Buttz v. Campbell*, 15 S. C. 614; *McMahon v. Pugh*, 62 S. C. 506, 40 S. E. 961; *Johnston v. Standard Oil Co.*, 155 S. C. 179, 152 S. E. 176; *Witt v. Feyseth*, 160 S. C. 251, 158 S. E. 226.

Or unless the exercise of discretion was controlled by some error of law.—*McSween v. Windham*, 77 S. C. 223, 57 S. E. 847, 848; *Dunton v. Harper*, 64 S. C. 338, 42 S. E. 153; *Chisholm v. Propeller Towboat Co.*, 60 S. C. 457, 38 S. E. 602, 604; *British, etc., Mortgage Co. v. Strait*, 84 S. C. 141, 65 S. E. 1038.

In the *Windham* case the court's refusal to grant the relief sought was controlled by an erroneous construction of a written agreement extending the time in which to answer.

There is no imputation of abuse of discretion.—No ground exists for imputing to the county court the manifest abuse of discretion, which will alone warrant the Supreme Court in reversing an order under this section for an error of law. *Drummond v. Edwards*, 126 S. C. 435, 120 S. E. 366.

Of course, the Supreme Court would not assume that any circuit judge had been guilty of abuse of discretion confided to him by law, and hence, whenever an appeal has been taken upon this

ground, the burden rests upon the appellant to show that there has been abuse of discretion. *Baggett v. Strickland*, 158 S. C. 60, 155 S. E. 237. See *White v. Coleman*, 38 S. C. 556, 17 S. E. 21; *Duncan v. Duncan*, 93 S. C. 487, 76 S. E. 1099, 1101. See also, *American Trust Co. v. Bloom*, 148 S. C. 386, 146 S. E. 249.

Such abuse must be shown clearly.—In absence of clear showing of abuse of discretion, refusal of county court to set aside judgment on ground of surprise and excusable neglect, under this section, is not reversible error. *Hartford Fire Ins. Co. v. Sightler*, 131 S. C. 241, 127 S. E. 13.

And must be gross.—*White v. Coleman*, 38 S. C. 556, 17 S. E. 21.

There is no test to determine abuse.—Under this section no hard and fast rule for the exercise of the court's discretion can be laid down, and because some other judge might have decided in a different way does not establish an abuse of discretion. *Bishop v. Jacobs*, 108 S. C. 49, 93 S. E. 243.

But there is no abuse unless a meritorious cause of action or defense is shown.—Though there has been mistake, inadvertence, surprise, or excusable neglect, under this section, there is no abuse of discretion in refusing to open a default judgment, in absence of a satisfactory prima facie showing of meritorious cause of action or defense. *Savannah Supply Co. v. Ross*, 128 S. C. 298, 122 S. E. 772; *Duncan v. Duncan*, 93 S. C. 487, 76 S. E. 1099, 1102.

Of the two issues arising on every application to open or vacate a judgment, it is proper for court to try and determine existence and sufficiency of alleged grounds for opening or vacating judgment before trying or deciding existence of meritorious cause of action or defense. *Lucas v. North Carolina Mut. Life Ins. Co.*, 184 S. C. 119; 191 S. E. 711.

A defendant judgment will not be reopened, though defendant's attorney acted with due diligence, where plaintiff would ordinarily obtain verdict on trial before jury. *Wise v. First Nat. Ins. Co.*, 162 S. C. 53, 172 S. E. 764.

An appeal will not be entertained from an order refusing the motion, unless the grounds of the motion strike at the foundation of the cause of action, or the power of the court to pronounce judgment, because the default admits the truth of every relevant fact well pleaded. *Odom v. Burch*, 52 S. C. 305, 29 S. E. 726; *Washington v. Hesse*, 56 S. C. 28, 33 S. E. 787; *Gadsden v. Home Fert., etc., Co.*, 89 S. C. 483, 72 S. E. 15; *Duncan v. Duncan*, 93 S. C. 487, 76 S. E. 1099, 1102.

Discretion held not abused.—Discretion held not abused in denying motion to set aside judgment, where defendant's counsel had notice that case would

be called for trial at particular time and failed to appear only because waiting in own office for defendant to come in response to message sent him. *Hartford Fire Ins. Co. v. Sightler*, 131 S. C. 241, 127 S. E. 13.

The granting of the motion was not objectionable in that the surprise, if any, was as to a ruling of law, but under the facts stated in the affidavits the order was not an abuse of the trial court's discretion. *Chisholm v. Propeller Towboat Co.*, 60 S. C. 457, 38 S. E. 602. See, also, *Hunter v. Ruff*, 47 S. C. 525, 25 S. E. 65, 68, 58 Am. St. Rep. 907.

Refusal to allow answer after the time limited therefor cannot be said to be an abuse of the court's discretion, under this section; to so allow it, though a meritorious defense be shown, as where defendant says that he did not understand he was required to answer, and was unfamiliar with law practice, but called within 20 days to see a lawyer, who was away, and immediately went to see him again on receipt of letter from a person whom he had asked to inform him of return of the lawyers, would work hardship on plaintiff. *McDaniel v. Addison*, 53 S. C. 222, 31 S. E. 226.

Discretion held not abused in denying motion to set aside judgment, where defendant did not take summons to counsel but turned it over to an agency. *Bissonette v. Joseph*, 170 S. C. 407, 170 S. E. 467.

Discretion held abused.—In a partition proceeding a defendant was entitled to assume that the decree would be made upon the allegations of the complaint, and the court abused its discretion in not allowing him to answer the complaint six years after the rendition. *Witherspoon v. Witherspoon*, 108 S. C. 394, 95 S. E. 77.

III. EXTENSION OF TIME ALLOWED BY CODE

Extension may be made ex parte without notice.—This section gives to the circuit court discretionary power, upon an affidavit showing grounds therefor, to enlarge the time for serving an answer or demurrer upon an ex parte application without notice. *Fishburne v. Minott*, 72 S. C. 567, 52 S. E. 648, 649. See, also, as to amendment without notice, *Lowry v. Atlantic Coast Line R. Co.*, 92 S. C. 33, 75 S. E. 278.

But the section does not apply to extension of time for perfecting appeal.—This section does not authorize circuit courts to extend the time for perfecting an appeal, as the statute refers to circuit court procedure prior to appeal. *Rylee v. Maret*, 121 S. C. 366, 113 S. E. 483. Another section forbids the extension of the time for serving notice of appeal. *Brown v. Rogers*, 71 S. C. 512, 51 S. E.

257, 259. A decree will not be reversed for defects purely technical, which might have, upon objection, been cured by amendment. *Lanier v. Griffin*, 11 S. C. 565.

The privilege extended by the first part of this section is limited to procedure before judgment. *Roberts v. Drayton*, 121 S. C. 124, 113 S. E. 365, 116 S. E. 744, 746. It does not apply to amendment decree rendered in term time after adjournment of court. *Garlington v. Cope*, 32 S. C. 57, 10 S. E. 616.

Where a decree in which exceptions to a master's supplemental report were sustained and his original report confirmed and made to stand as the judgment of the court, it was a final judgment, and a motion at a subsequent term after expiration of time for serving notice of appeal, for leave to file exceptions to the master's original report, was too late, under this section. *Roberts v. Drayton*, 121 S. C. 124, 113 S. E. 365, 116 S. E. 744.

Nor to filing security for costs.—It does not apply to extension of time for filing security for costs. *Bomar v. Asheville, etc., Co.*, 30 S. C. 450, 9 S. E. 512. But it has been held that one circuit judge may allow absent party to file security for costs after the time to do so, fixed by another, has expired. *McMillan v. McCall*, 2 S. C. 390, 393; *Williams, Black & Co. v. Connor*, 14 S. C. 621.

But due diligence must be shown.—A motion for leave to amend the answer should have been overruled where the supporting affidavit did not show mistake or inadvertence or that due diligence had been exercised to procure the information upon which the proposed new defenses were based, but alleged merely that it was not convenient to sooner get such information. *Lowry v. Atlantic Coast Line R. Co.*, 92 S. C. 33, 75 S. E. 278.

Where two motions are made both should be considered.—Where defendant moved to open judgment by default, on the ground that the summons was not served, and also under this section, for an extension of time to answer, the court, on overruling the motion on the first ground, should not dismiss the motion without considering the second ground urged. *Vander Veen v. Wheeler*, 76 S. C. 177, 56 S. E. 679.

Effect of failure to take advantage of extension.—This section did not entitle plaintiff to file a second amended complaint, after leave had already been granted to file an amended complaint within twenty days, which had not been taken advantage of, since such complaint should have been served within twenty days, under rule 63 of the circuit court, providing that where an order

required the performance of any condition it should be performed within twenty days, unless another time was fixed in the order. *Brown v. Easterling*, 59 S. C. 472, 38 S. E. 118. See also *Jordan v. State Highway Department*, 188 S. C. 83, 198 S. E. 174.

Applications in general.—Many illustrations of the principles just announced will be found in the adjudicated cases. For example, the court has permitted exceptions to a referee's report to be filed after 10 days from notice of filing. *Brown v. Rogers*, 71 S. C. 512, 51 S. E. 257; *Odom v. Newton*, 81 S. C. 76, 61 S. E. 1071. The court has allowed the framing of issues for the jury, when a motion was not made in time. *Meier v. Kornahrens*, 113 S. C. 270, 102 S. E. 285. It has excused default in serving answer in time by mail. *Cannady v. Martin*, 72 S. C. 131, 51 S. E. 549. It has extended the time within which defendant could file an attachment bond. *Chesterfield Grocery Co. v. Birch* (S. C.) 101 S. E. 645. And, generally, it has allowed amended copies to be served after defendants had answered, giving the latter 20 days to answer and plaintiff the same time in which to reply. *Hayward v. Williams*, 48 S. C. 564, 26 S. E. 797.

Where no order of dismissal was taken, the succeeding circuit judge, under this section, was held to have authority to permit plaintiff to serve amended complaint over one year after expiration of time limited in the order, especially where defendant's attorney consented to extension for reasonable time, since original order was subject to any proper order which might be made in the case and was therefore not final. *Johnston v. Standard Oil Co.*, 155 S. C. 179, 152 S. E. 176.

Under this section the court has power to grant leave to strike out of a complaint allegations as to plaintiff's minority and appointment of a guardian. *Seigler v. So. Ry. Co.*, 85 S. C. 345, 67 S. E. 296.

A refusal to strike out answer of one defendant and allowing him to answer over was held within trial court's discretion, in view of this section. *Georgia-Carolina Gravel Co. v. Blassingame*, 129 S. C. 18, 123 S. E. 324.

Application in federal court.—Where, after the removal of a cause to the federal court, a motion to remand was made, which was determined before the hearing of a motion to make the complaint more definite and certain, which had been filed in the state court and removed with the record, and by reason of the pendency of such undetermined motion defendant filed no answer within the time required, and judgment was taken by default, such judgment will be set aside on terms, under this section,

providing that the court may allow an answer to be made after the time limited by the Code has expired. *Bryce v. So. Ry. Co.*, 129 F. 966.

IV. RELIEF FROM JUDGMENT OR OTHER PROCEEDING.

A. In General.

This statute applies only to mistakes of fact and not to mistakes of law. *Lucas v. North Carolina Mut. Life Ins. Co.*, 184 S. C. 119, 191 S. E. 711; *Anderson v. Toledo Scale Co.*, 192 S. C. 300, 6 S. E. (2d) 465.

The belief of district manager of foreign insurance company, who ignored service of legal process on company's local agent, that legal process could be served on company only through the state insurance commissioner, was a mistake of law, so that company was precluded from having default judgment taken against it vacated under statute on ground of mistake and excusable neglect. *Ibid.*

The limitation of one year is the only limitation in this State to time for motion to set aside judgment. *Thew v. Porcelain Mfg. Co.*, 5 S. C. 415; *Ex parte Carroll*, 17 S. C. 446.

The fact that defendant had no actual notice of default judgment within one year of its entry could not avail defendant an application to be relieved from the judgment. *Anderson v. Toledo Scale Co.*, 192 S. C. 300, 6 S. E. (2d) 465.

And statute must be strictly followed.—*Anderson v. Toledo Scale Co.*, 190 S. C. 300, 6 S. E. (2d) 465.

The judgment of a court of competent jurisdiction is the solemn adjudication of the law in that case and ought not to be lightly set aside, where the proceedings were regular and in accord with law and rules of procedure. *Ibid.*

But see *Gaskin v. California Ins. Co.*, 195 S. C. 376, 11 S. E. (2d) 436, which states that the power to relieve parties from judgments taken against them by reason of their mistake, in adventance, surprise or excusable neglect should be exercised by courts in liberal spirit in furtherance of justice and in order that cases may be tried and disposed of upon their merits.

It will be noted that in the *Anderson* case, the motion to set aside the default judgment was made more than one year after the judgment was entered, and the mistake relied upon was a mistake of law. In the *Gaskin* case the motion to vacate default judgment was made only two days after judgment was entered and motion was based upon grounds of excusable neglect.

Does not limit relief on other grounds.

—This section does not limit the time within which the court might grant relief from a judgment, where the ground for relief was not a mistake or inad-

vertence of the applying party, but an omission of necessary procedure by the adverse party. *Bank of Columbia v. Havird Co.*, 99 S. C. 110, 82 S. E. 1006.

No power at chambers.—A circuit judge has no power at chambers to set aside a judgment under this section. *Turner v. Foreman*, 47 S. C. 31, 24 S. E. 989; *Sarratt v. Gaffney Carpet Mfg. Co.*, 77 S. C. 85, 57 S. E. 616, 618.

After fraud or mistake.—It is not to be doubted that upon a showing of surprise or excusable neglect the court of common pleas, even after such adjudication, for fraud or mistake, could open the accounting under this section. *Sarratt v. Gaffney Carpet Mfg. Co.*, 77 S. C. 85, 57 S. E. 616, 618.

Applied to default.—This section authorizes the judge to vacate judgment by default. *Truett v. Rains*, 17 S. C. 451, 453; *LeConte v. Irwin*, 19 S. C. 554.

But there is no remedy for culpable neglect or ignorance.—In *Woodward v. Elliott*, 27 S. C. 368, 3 S. E. 477, 480, the court said: "We are unable to discover the slightest evidence that anything was done or omitted which was calculated to mislead these parties, or keep them in ignorance of their rights or interests in the premises; and if they have been so misled, it is due either to their own fault or to their ignorance, for which the law provides no remedy."

In personal injury action by bridge contractor's employee against contractor and surety, it was surety's duty to defend its rights from time service was made upon it and not depend upon contractor, as regards to right to set judgment aside for allegedly excusable neglect. *Detroit Fidelity & Surety Co. v. Foster et al.*, 170 S. C. 121, 169 S. E. 871.

Effect of denial of origin motion.—Where defendant's original motion to open a judgment for excusable neglect was denied by the trial court and the judgment affirmed, such decision is the law of the case, and is conclusive against a second motion to open the judgment on the ground of the same excusable neglect. *Sharpe v. Huggins*, 114 S. C. 40, 102 S. E. 788.

On the original motion to open judgment for excusable neglect, all the evidence should be presented, and after denial of the first motion a second on the same ground cannot be granted on the theory that different evidence was presented. *Sharpe v. Huggins*, 114 S. C. 40, 102 S. E. 788.

In magistrate's court.—In *Doty & Co. v. Duvall*, 19 S. C. 143, the court held that a trial justice (now magistrate) had no jurisdiction to entertain a motion for a new trial, unless it was made within five days from the rendering of the judgment; and that this section, which authorizes the court, in certain cases, to

relieve a party from a judgment taken against him, was not intended to apply to trial justices' courts. But the language of every decision must be read with reference to the facts of the case under consideration. And, while it is not distinctly so stated in the report of the case, it is clearly inferable that the defendant was personally served with process, and made default. Therefore she was bound to take notice that judgment would be rendered on the day set for trial, the time within which to appeal or move for a new trial began to run from that day. *O'Rourke v. Atlantic Paint Co.*, 91 S. C. 399, 74 S. E. 930, 931.

Exception must not be general.—Where the trial court granted a motion to set aside a default judgment, an exception thereto that the court should have refused the motion is too general. *Chisholm v. Propeller Towboat Co.*, 60 S. C. 457, 38 S. E. 602.

Applies to award of arbitrators.—Where a proper showing is made for relief under this section, providing that within a year the court may relieve a party from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect, the same relief could be given after the time for appeal has expired in respect of a judgment on award of arbitrators as in case of any other judgment, time to appeal from which has expired. *Rogers v. McManus*, 108 S. C. 350, 94 S. E. 732.

Where a judge, under this section, vacates an order of another circuit judge, he does not review the vacated order on the merits. *Dunton v. Harper*, 64 S. C. 338, 42 S. E. 153.

Where a default judgment goes beyond the relief asked in the complaint, the remedy of defendant is by appeal, and not by motion to open the judgment. *McMahon v. Pugh*, 62 S. C. 506, 40 S. E. 961.

Burden of proving excusable neglect, etc.—For the court in its discretion to grant relief under this section from a judgment within a year, the party must make a proper showing of judgment having been taken against him through his excusable neglect, inadvertence, mistake, or surprise. *Rogers v. McManus*, 108 S. C. 350, 94 S. E. 732.

Where such a motion is based on the ground of mistake, inadvertence, surprise, or excusable neglect, it is incumbent on the party in default to prove the grounds upon which he seeks relief, by setting out the facts in detail, under oath, so that his adversary may have an opportunity to rebut them, and the court may determine their sufficiency. *Roberts v. Pawley*, 50 S. C. 491, 27 S. E. 913; *Gillian v. Gillian*, 65 S. C. 129, 43 S. E. 386; *Duncan v. Duncan*, 93 S. C. 487, 76 S. E. 1099, 1102.

Burden of proof.—Where a claim of deficient memory and bad health is not sustained, denial of the motion will not be disturbed. *Farmers' Bank v. Talbert*, 97 S. C. 74, 81 S. E. 305.

Application in federal court.—In South Carolina, where the Code of Civil Procedure has abolished the distinction between law and equity, but where the court is authorized by this section to relieve against a judgment obtained through mistake, etc., or through fraud or duress, the supplemental proceeding provided to subject to a judgment assets which cannot be reached by execution, is a quasi equitable proceeding. *Firestone Tire, etc., Co. v. Marlboro Cotton Mills*, 278 F. 816.

B. Grounds for Relief.

I. In General.

After-discovered evidence. — In *Covington v. Covington*, 47 S. C. 263, 25 S. E. 193, 196, the court said: "Since the case of *Durant v. Philpot*, 16 S. C. 116, which was decided in the year 1881, and which has since been recognized, it seems to us a waste of time for counsel to inveigh against the practice of granting new trials in equity causes on after-discovered evidence, on motion therefor. The legislature has clothed circuit judges with the power to have and grant such matters."

A default judgment foreclosing a mortgage is properly set aside on defendant's showing that, until he discovered a fact after the judgment, he thought he had no defense to the action, while, if he had known the fact in time, he would have interposed the defense of usury. *British, etc., Co. v. Strait*, 84 S. C. 141, 65 S. E. 1038.

Where court directed verdict for defendant in action on notes on showing under plea of payment that renewal of notes had operated as payment, granting the plaintiff new trial was held not abuse of discretion, especially under this section, on showing that renewal notes had never been delivered, the court having found that receipt showing payment by renewal of notes was surprise to plaintiff. *American Trust Co. v. Bloom*, 148 S. C. 386, 146 S. E. 249.

Motion to set aside for failure to serve summons distinguished.—A motion to be relieved from a judgment taken against a party through his mistake, etc., stands upon an entirely different footing from a motion to set aside a judgment on the ground that the summons was not served on the defendant, so as to make him a party to the action. The first of these motions is based upon the conduct of the party making the motion, and is addressed to the discretion of the court, while the other is merely the assertion of a legal right, founded upon the failure of the adverse party to comply with

the requirements of the law, and is not dependent upon the discretion of the court. This section is inapplicable to the second of said motions. *New York Life Ins. Co. v. Mobley*, 90 S. C. 552, 73 S. E. 1032, 1036; *Dill-Ball Co. v. Bailey*, 103 S. C. 233, 87 S. E. 1010; *Fitzgerald v. Case Threshing Mach. Co.*, 94 S. C. 54, 77 S. E. 739.

Effect of defendant's admission.—Where defendant, on the strength of an allegation in plaintiffs' complaint, admitted that plaintiffs were administrators, where the probate records would show that such was not the fact, he could not be relieved of a judgment against him, under this section. *Martin v. Fowler*, 51 S. C. 164, 28 S. E. 312.

A sale in partition was made after due advertisements, and without objection from any of the parties interested, although the evidence tended to show that they had actual notice of the time and place of sale. Held, that plaintiffs could claim no relief against the sale under this section. *Woodward v. Elliott*, 27 S. C. 368, 3 S. E. 477.

Opening judgment in partition to allow rights of grantee of co-tenant to be determined. See *Ex parte Union Mfg. & Power Co.*, 81 S. C. 265, 62 S. E. 259, 128 Am. St. Rep. 908.

Opening judgment to add party defendant.—Where boundary line between lands covered by bank's mortgage and lands covered by mortgage of mortgagor's sister was undetermined, sister foreclosed her mortgage without making bank a party defendant, and default judgment for sister was taken as a surprise to bank and to bank's prejudice, bank was entitled to relief aside from equity under status authorizing court to afford relief. *Knotts v. Knotts et al.*, 191 S. C. 253, 1 S. E. (2d) 809.

2. Representation by Attorney.

Representation does not bar relief.—A judgment may be vacated though the party against whom the judgment was rendered was represented by counsel. *Ex parte Roundtree*, 51 S. C. 405, 29 S. E. 66. *Vaughan v. Hewitt*, 17 S. C. 442.

But attorney must suffer surprise, etc.—A party cannot invoke the provisions of this section when his attorney had full knowledge of all the facts connected with the rendition of the judgment and actually consented thereto, in open court, in the absence of facts showing mistake, surprise, inadvertence, or excusable neglect on the part of the attorney, which facts are not made to appear in this case. *Steele v. C., C. & A. R. Co.*, 14 S. C. 324; *Ex parte Roundtree*, 51 S. C. 405, 29 S. E. 66; *Dixon v. Floyd*, 73 S. C. 202, 53 S. E. 167, 169.

In determining whether judgment would be set aside for excusable neglect, party may be held excusable for relying

upon diligence of counsel, who has been neglectful, only when it appears that party himself has not been neglectful, but, has given all proper attention to litigation. *Detroit Fidelity & Surety Co. v. Foster et al.*, 170 S. C. 121, 169 S. E. 871.

See also, *Thornton v. Atlantic Coast Line Railway Co.*, 196 S. C. 316, 13 S. E. (2d) 442.

Illustrative cases.—In the following cases it was held that the facts justified the trial court in the exercise of its discretion under this section:

Affidavit showing that defendant's attorney had consented to judgment without contest under mistake due to confusion of facts. *Maybank Fertilizer Co. v. Jeffcoat*, 131 S. C. 418, 127 S. E. 835.

Where attorney withdrew, and allowed judgment to go against his client by default because his fee had not been paid. *Ex parte Roundtree*, 51 S. C. 405, 29 S. E. 66.

Where affidavit supporting motion to vacate judgment disclosed that defendants attorney engaged local counsel to investigate facts but did not inform local counsel regarding day complaint was served, that attorney narrowly escaped sunstroke and was confined to bed, that when request for extension of time to answer was made judgment has already been entered and upon learning fact defendant's attorney acted with utmost dispatch and within two days served notice of motion to open judgment, determination that sufficient grounds were shown to excuse defendant from answering complaint within 20 days was not erroneous. *Gaskin v. California Ins. Co.*, 195 S. C. 376, 11 S. E. (2d) 436.

Where, before default, a second summons and complaint were served personally, and defendant's family was so sick at the time the answer should have been served that defendant was unable to leave home to consult his attorney. *Farmers', etc., Mfg. Co. v. Smith*, 70 S. C. 160, 49 S. E. 226.

Decree set aside giving claim of undertaker and physician against estate of mortgagor priority over mortgagee in proceeds derived from sale of mortgaged premises, the mortgagee not being notified of such error over 12 months before she instituted action to correct decree; although her attorney had notice of decree over 12 months from time of her action. *McGee et al. v. F. W. Poe Mfg. Co.*, 176 S. C., 235; 180 S. E., 43.

There are, however, a few cases which hold that the evidence presented did not bring the case within the grounds enumerated in the section. These will be presented in more detail.

The alleged mistake of petitioner's attorneys "because of the unauthorized act and mistake of the attorneys sub-

ordinating petitioner's lien to junior liens," is not such a mistake as would warrant a court to relieve from a judgment, under this section. *Ex parte Jones*, 47 S. C. 393, 25 S. E. 285, 286.

The court should not open a judgment passing on accounts and discharging a receiver, where attorneys of creditors had ample notice of the hearing, and were in possession of the accounts for a sufficient time to file exceptions, because one counsel for creditors was in Europe when the accounting was had, but there was a local counsel in the case at all times. *Sarratt v. Gaffney Carpet Mfg. Co.*, 77 S. C. 85, 57 S. E. 616.

Where it appears that plaintiff was duly summoned to appear and show cause why a judgment should not be revived against him nearly a year before the order of renewal was granted, and he sent the summons to his attorneys, but never furnished them with any facts on which to proceed, he is not entitled to any relief, under this section, providing for relief against judgments taken by "mistake, inadvertence, surprise, or excusable neglect." *Sullivan v. Shell*, 36 S. C. 578, 15 S. E. 722, 31 Am. St. Rep. 894.

Where defendant was informed of pendency and nature of action by summons duly served and by letter from plaintiff, but served no notice of appearance or demand for copy of complaint, fact that upon defendant's visit to clerk's office within period allowed for notice of appearance clerk told defendant no complaint had been filed is no ground to set aside default judgment for surprise and excusable neglect under statute. *Kerr v. Cleveland*, 182 S. C. 29; 188 S. E. 370.

It is error to set aside a judgment under this section, for mistake, excusable neglect, etc., in a case where the moving party was represented and defended the action, on the ground that the judgment relied on in the case and received without objection was afterwards set aside by the court as fraudulent. *Peeples v. Ulmer*, 64 S. C. 496, 42 S. E. 429.

Where at the time of trial plaintiffs' attorney was engaged at another place, and the case was tried in his absence, his request for a continuance being received during the trial, plaintiffs are not on that account entitled to relief under this section, providing that the court may relieve a party from a judgment taken against him through his mistake, inadvertence, surprise or excusable neglect. *Claussen v. Johnson*, 32 S. C. 86, 11 S. E. 209.

That, before suit was brought, defendants had possession of and presumably knew contents of statement on which plaintiff's attorney based complaint, in which he did not demand all of interest to which such statement showed plain-

tiff was entitled, did not entitle plaintiff to relief from judgment under this section. *Wilson v. Wilson*, 153 S. C. 472, 150 S. E. 897.

Where plaintiff's counsel had a written statement before him at the time he prepared complaint, in which he failed to claim amount of interest to which such statement showed plaintiff was entitled, because counsel, "in some way inexplicable to himself, neglected to so allege," and defendants made offer in writing, under § 665, to allow judgment to be taken against them for sum specified, and judgment for this amount was entered by plaintiff, there was no mistake, inadvertence, surprise, or excusable neglect entitling plaintiff to relief from judgment under the present section. *Wilson v. Wilson*, 153 S. C. 472, 150 S. E. 897.

Failure of plaintiff's counsel to comply with trial judge's order to amend complaint by deleting certain allegations instead of serving amended complaint, containing allegations not in original complaint or authorized by such order as of course, did not deprive plaintiff of

right to trial of cause of action stated in original deleted complaint, which was still before court. *Jordan v. State Highway Department*, 190 S. C. 397, 3 S. E. (2d) 201.

V. AMENDMENT FOR NONCONFORMITY TO CODE

The court can correct any mistake or clerical error in its own process to make it conform to the record. *Carrol v. Tompkins*, 14 S. C. 223.

But it has no authority to make such alteration as would contradict the record and change the whole scope of the judgment. *Trimmier v. Thomson*, 19 S. C. 247.

Under this section, permitting an amendment of a proceeding for nonconformity to the code, the court, in an action to recover real property, on plaintiffs' motion to amend the complaint, to make one a party, learned by plaintiffs since commencement of the action to be in possession under an unrecorded agreement, may in its discretion allow an amended and supplemental complaint for such purpose. *Taylor v. Strauss*, 91 S. C. 559, 75 S. E. 175.

§ 496. Suing party by fictitious name.—When the plaintiff shall be ignorant of the name of the defendant, such defendant may be designated in any pleading or proceeding by any name; and when his true name shall be discovered, the pleading or proceeding may be amended accordingly.

1932 Code, § 496; Civ. P. '22, § 438; Civ. P. '12, § 226; Civ. P. '02, § 196; 1870 (14) § 198.

§ 497. No error or defect to be regarded unless it affect substantial rights.—The court shall, in every stage of action, disregard any error or defect in the pleadings or proceedings, which shall not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect.

1932 Code, § 497; Civ. P. '22, § 439; Civ. P. '12, § 227; Civ. P. '02, § 197; 1870 (14) § 199.

See §§ 490 thru 494, as to variances and amendments, and the note thereto.

This section precludes the allowance of a nonsuit on the ground of informality alone. *Bowden v. Winsmith*, 11 S. C. 409.

Under this section, where a complaint in an action against a copartnership makes no allegation as to the partnership between the defendants to correspond with the captain and defendants answer to the merits, going to trial without demurring, or asking that the complaint be made more definite and certain, the objection can not be raised by motion for a nonsuit, for this section provides that harmless errors shall be disregarded. *Davis v. Barwick & Son*, 88 S. C. 355, 70 S. E. 1007.

A failure of plaintiff to allege his readiness to perform his part of the contract

did not affect the substantial rights of the defendant and was properly disregarded by the circuit judge. *Cheraw, etc., R. Co. v. Garland*, 14 S. C. 63.

Judgment may be rendered on account stated, although no allegation of account stated was made. *Sloan v. Westfield*, 17 S. C. 589.

Demurrer will not lie against incomplete complaint.—Under this section and sec. 477, providing that pleadings are to be liberally construed, the "right to sue as executors of J," as against a demurrer, is shown by complainants alleging that J. died, and plaintiffs were "duly appointed the lawful executors, by the surrogate court of New York City, of his will, and have duly qualified as such executors in the probate court of Darlington, S. C." *Jerkowski v. Marco*, 56 S. C. 241, 34 S. E. 386.

Order of trial after appeal from ruling on demurrer.—Under this section any error in ordering the case to trial after defendant gives notice of appeal from an order sustaining a demurrer to the answer is harmless to defendant, where trial on the merits shows plaintiffs' right to recover. *Liles v. Harris-Grimes Co.* (S. C.), 76 S. E. 115.

Clerical errors will not invalidate judgment.—Under this section where the indorsement of an order for judgment omits the words "have judgment" or "do recover," but its terms indicate that such is the purport, and the calendar contains an entry of "judgment for plaintiffs," the omission is an inadvertent clerical error, and not a ground for impeaching the validity of the judgment. *Henlein v. Graham*, 32 S. C. 303, 10 S. E. 1012.

Failure to have security for costs witnessed and approved.—This section will not relieve a party of the responsibility of having the security for his costs witnessed and approved by the clerk. *Cummings v. Wingo*, 31 S. C. 427, 10 S. E. 107; *Bomar v. Asheville, etc., R. Co.* 30 S. C. 450, 9 S. E. 512.

Reversal not authorized for misnomer in pleading.—When suit is brought against the "county commissioners" where suit should have been brought

against the "county," the error, under this section, and sec. 494, providing for amendments by the court, is not grounds for reversal. *Commissioners v. Bank of Commerce*, 97 U. S. 374, 24 L. Ed. 1060.

To same effect, *Citizens Saving Bank v. Efird*, 96 S. C. 18, 79 S. E. 637, where a complaint brought in the name of the "C. Savings Bank" was amended to be in the name of the "C. Trust & Savings Bank," and *Pieper v. Shahid*, 101 S. C. 364, 85 S. E. 905, where action for personal injuries to infant, improperly brought in guardian's name, allowed to be amended to style action in name of ward by guardian ad litem.

If a party wishes to take advantage of any irregularity in the pleadings he must move in due time before trial for such order as he deserves. *Blakely v. Frazier*, 11 S. C. 122.

Amendment during trial to conform complaint to evidence supported by this section. *Pool v. Carolina Traction Co.*, 101 S. C. 387, 85 S. E. 897.

Magistrate sustained without regard to technical defects or errors not affecting the merits, in *Stephens v. Wheeler*, 167 S. C. 522, 166 S. E. 727.

Amendment to complaint after 20 Days, *McCoy v. State Highway Department*, 169 S. C. 436, 169 S. E. 174.

§ 498. Supplemental complaint, answer, and reply.—The plaintiff and defendant, respectively, may be allowed, on motion, to make a supplemental complaint, answer, or reply, alleging facts material to the case occurring after the former complaint, answer, or reply, or of which the party was ignorant when his former pleading was made, and either party may, by leave of the court, in any pending or future action, set up by a supplemental pleading the judgment or decree of any court of competent jurisdiction rendered since the commencement of such action, determining the matters in controversy in said action, or any part thereof; and if said judgment be set up by the plaintiff, the same shall be without prejudice to any provisional remedy theretofore issued, or other proceedings had in said action on his behalf.

1932 Code, § 498; Civ. P. '22, § 440; Civ. P. '12, § 228; Civ. P. '02, § 198; 1870 (14) § 200.

See §§ 493 thru 494 as to amendments of course and by the court, and the notes thereto.

Supplemental pleadings are in the discretion of the court.—The refusal of a motion to file a supplemental answer is ordinarily within the discretion of the circuit court, and will not be reversed by the Supreme Court except for abuse of discretion, or unless the circuit court's action was controlled by some error of law, or unless some substantial right is thereby lost or impaired. *Bernard v. Bernard*, 79 S. C. 364, 60 S. E. 700, 128 Am. St. Rep. 852; *Pickett v. Fidelity &*

Casualty Co., 60 S. C. 477, 38 S. E. 160, 162.

But should be allowed only in the interest of justice.—A supplemental pleading under this section is in the nature of an amendment, and a motion to be allowed to make such supplemental pleading will not be granted, unless the court, in the exercise of its discretion, is satisfied that it would be in the interest of justice. *Porter v. Dixie Fire Ins. Co.*, 107 S. C. 393, 93 S. E. 141; *Copeland v. Copeland*, 60 S. C. 135, 38 S. E. 269.

Where, in an action for partition, defendant's answer alleging sole title has

been found against by a master at reference proceedings, the court may refuse to allow an after-discovered deed to be pleaded by supplemental answer for insufficiency, such supplemental answers being at the discretion of the court. *Copeland v. Copeland*, 60 S. C. 135, 38 S. E. 269.

Facts must have occurred after commencement of suit or must have been unknown to pleader.—The motion for leave to file a supplemental pleading under this section must, at least, make a prima facie showing of facts material to the case or defense which have occurred after the former pleading, or of which the party was ignorant when the former pleading was made. *Pickett v. Fidelity & Casualty Co.*, 60 S. C. 477, 38 S. E. 160, 163; *Matthews v. Cantey*, 48 S. C. 588, 26 S. E. 894; *McCaslan v. Latimer*, 17 S. C. 123.

Thus, a stipulation of counsel may be set up in supplemental answer.—Under this section where the case was pending at the time attorneys entered into a stipulation concerning a release relied on by defendant, defendant in order to get the benefit of the release should make a motion for leave to file a supplemental answer. *Rish v. Seaboard Air Line Ry.*, 108 S. C. 30, 93 S. E. 250.

Where submission was agreed to and plaintiff opposes the award, the defendant has the right to plead by supplemental answer. *McCrary v. Jones*, 36 S. C. 136, 15 S. E. 430.

And plaintiff cannot in action to recover real estate set up a legal title acquired after action brought. *Moon v. Johnson*, 14 S. C. 434.

Notice should be given or rule to show cause issued.—A supplemental complaint in the original cause, should recite the proceedings up to the time of filing, and then proceed with the allegations of the new matter which justify the filing of such complaint, and notice should be given, or rule to show cause issued and served. *Marion County Lumber Co. v. Tilghman Lumber Co.*, 84 S.

C. 505, 66 S. E. 124, 126.

And where notice is required and not given, it is ground to refuse the supplemental pleading.—Under this section providing that defendant may be allowed, "on motion," to make a supplemental answer, it is not error to refuse a supplemental answer, where defendant does not give four days' notice of such motion required by the court. *Avery v. Wilson*, 47 S. C. 78, 25 S. E. 286.

A motion to make supplemental pleadings may be made at chambers with notice to opposite party.—*Edwards v. Edwards*, 14 S. C. 11.

Decision on original complaint is res adjudicata of same matter alleged in supplemental complaint.—An opinion of this court to the effect that the defendant had not acquired the ownership of certain stock of a corporation, and, therefore, had not converted it, renders that question res adjudicata upon a second appeal after trial upon a supplemental complaint and substantially the same evidence. *Haselden v. Hamer*, 107 S. C. 164, 92 S. E. 387.

Erroneous designation of pleading is not fatal.—See this catchline under sec. 493.

A bill in equity prior to 1870 had to be revived and amended by supplemental complaint and summons. *Arthur v. Allen*, 22 S. C. 432.

See generally. *Knight v. Union Mfg., etc., Co.*, 81 S. C. 539, 62 S. E. 789; *Wieters v. Gideon*, 76 S. C. 458, 57 S. E. 193; *Sparks v. Green*, 69 S. C. 198, 225, 48 S. E. 61; *Parnell v. Maner*, 16 S. C. 348.

Cited, in the dissent to *Hunt Co. v. Wulbern Fertilizer Co.* (S. C.), 122 S. E. 28, in support of the contention that, in a suit against a corporation, an order permitting an amendment to the answer, by adding that since serving the answer defendant has surrendered its charter, and its assets and affairs are now in liquidation, and the liquidating trustees are necessary parties, is improper. *Taylor v. Strauss*, 91 S. C. 559, 75 S. E. 175.

TITLE 9

Provisional Remedies in Civil Actions

- CHAPTER 24. Arrest and Bail, § 499.
 CHAPTER 25. Attachment, § 527.
 CHAPTER 26. Claim and Delivery of Personal Property, § 552.
 CHAPTER 27. Injunction, § 565.
 CHAPTER 28. Receivership and Other Provisional Remedies, § 584.

CHAPTER 24

Arrest and Bail

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| 499. Code provisions exclusive method. | 513. Undertaking of the bail. |
| 500. Grounds for arrest. | 514. New bail. |
| 501, 502, 504. Order for arrest. | 515 thru 517. Qualification, justification |
| 503. Security by plaintiff. | and allowance of bail. |
| 505, 506. Making arrest. | 518 thru 521. Deposit in lieu of bail. |
| 507, 508. Bail by defendant. | 522 thru 524. Liability of sheriff. |
| 509. Surrender of defendant. | 525, 526. Motion by arrested defendant. |
| 510 thru 512. Power and liability of bail. | |

§ 499. No person to be arrested in civil action, except as prescribed.—No person shall be arrested in a civil action, except as prescribed by this code of procedure; but the same shall not apply to proceedings for contempt.
 1932 Code, § 499; Civ. P. '22, § 441; Civ. P. '12, § 229; Civ. P. '02, § 199; 1870 (14) 201.

This section abolished the writ of ne S. C. 285, 61 S. E. 445.
 exeat republico. Ex parte Messervy, 80

§ 500. Arrest in civil actions in what cases.—The defendant may be arrested, as hereinafter prescribed, in the following cases:

(1) In an action for money received, or property embezzled or fraudulently misapplied, by a public officer, or by an attorney, solicitor, or counsellor, or by an officer or agent of a corporation or banking association, in the course of his employment as such, or by any factor, agent, broker, or other person in a fiduciary capacity, or for any misconduct or neglect in office, or in a professional employment.

(2) In an action to recover the possession of personal property fraudulently detained, or where the property, or any part thereof, has been fraudulently concealed, removed, or disposed of, so that it cannot be found or taken by the sheriff or constable, and with intent that it should not be so found or taken, or with intent to deprive the plaintiff of the benefit thereof.

(3) When the defendant has been guilty of a fraud in contracting the debt, or incurring the obligation for which the action is brought, or in concealing or disposing of the property for the taking, detention, or conversion of which the action is brought, or when the action is brought to recover damages for fraud or deceit.

(4) When the defendant has removed or disposed of his property, or is about to do so, with intent to defraud his creditors. But no female shall be arrested in any action.

(5) Whenever a person domiciled in this State, indebted by bond, note, or otherwise, is about to remove or abscond from the limits of this State, and the said debt is not yet due, but payable at some future date, it shall and may be lawful for the obligee, payee, or holder of said demand, or his assignee, or endorsee, as the case may be, upon swearing that such person is indebted to him, and that the demand is just and owing, but not yet due, and that the debtor is about to abscond or remove without the limits of this State, and that such creditor was not aware that the debtor had any intention to remove from the State at the time when the original contract was made, or at the time of such assignment, or endorsement, as the case may be, to commence an action by issuing a summons and complaint and shall have power to arrest and hold to bail in such manner as is now prescribed in this chapter in cases of debts actually due.

(6) In an action for the recovery of damages in a cause of action not arising out of contract, when the defendant is a nonresident of the State or is about to remove therefrom, or when the action is for an injury to person or character, or for injury or for wrongfully taking, detaining or converting property.

1932 Code, § 500; Civ. P. '22, § 442; Civ. P. '12, § 230; Civ. P. '02, § 200; 1870 (14) § 202.

- I. General Considerations.
- II. Subdivision (1).
- III. Subdivision (3).
 - A. Fraud in Contracting Dept.
 - B. Fraud in Disposition of Property.
- IV. Subdivision (4).
- V. Subdivision (6).

Cross References

See sec. 502 and the note thereto. As to execution against person of debtor after return of execution against his property if returned unsatisfied, see sec. 741 and the note thereto. As to proceedings for relief of persons arrested in civil actions, see secs. 851 et seq.

I. GENERAL CONSIDERATIONS.

Section not in conflict with const. art. 1, sec. 24.—This section does not conflict with the provision of const. 1895, art. 1, sec. 24, that "no person shall be imprisoned for debt except in cases of fraud," and is constitutional. *Kimbrell v. Berry*, 85 S. C. 243, 67 S. E. 225, 20 Ann. Cas. 1344; *Blackmon v. Kirven*, 173 S. C. 322, 175 S. E. 814.

As an arrest for tort is not for "debt."—An order of arrest arising out of an action of tort under this section is not for a "debt," within the meaning of const. 1895, art. 1, sec. 24, providing that "no person shall be imprisoned for debt except in cases of fraud." *Stidham v. DuBose*, 128 S. C. 318, 121 S. E. 791, 33 A. L. R. 645; *Kimbrell v. Berry*, 85 S. C. 243, 67 S. E. 225, 20 Ann. Cas. 1344.

Nor is section unconstitutional as an insolvency law in conflict with Federal Bankruptcy Act.

Authority of sheriff ends upon decision on appeal that arrest was illegal.—

The authority of a sheriff to arrest and hold a debtor under this section is at an end when it is found on appeal that the order for arrest was erroneously issued by the lower court. *Martin v. Hodge*, 87 S. C. 214, 69 S. E. 225.

As to liability of sureties on bail bond after such finding by Supreme Court, see sec. 507 and the note thereto.

Return of execution against property unsatisfied is a prerequisite to arrest under this section.—See sec. 741 and note thereto.

Order refusing to vacate order of arrest is not reviewable on appeal from final judgment.—See sec. 26, analysis line V, B, 1, b, (2).

Party causing one to be arrested and put in prison for debt, should strictly follow the law, otherwise such party is liable to respond in damages. *Cannon v. Haverty Furniture Co.*, 179 S. C., 1; 183 S. E., 469.

Defective proof of service in action resulting in judgment under which debtor is arrested, makes judgment invalid and arrest and bail proceedings had thereon subject judgment creditor to action for false arrest and imprisonment. *Cannon v. Haverty Furniture Co.*, 179 S. C. 1, 183 S. E. 469.

And the judgment for arrest and imprisonment of debtor being void, court having not acquired jurisdiction, debtor can maintain action for illegal arrest and imprisonment without first instituting suit to set such judgment aside. *Cannon v. Haverty Furniture Co.*, 179 S. C., 1; 183 S. E., 469.

II. SUBDIVISION (1).

Defendant selling whole crop pending action for division within terms of sub-

division.—Under this section a defendant in an action for division of crops who disposes of the whole crop pending the action is guilty of a breach of a fiduciary relationship, within the meaning of subd. 1 of this section. *Maxwell v. Horton*, 107 S. C. 380, 93 S. E. 4.

Unsatisfied judgment for named portion of crop may justify arrest.—Under subd. 1 of this section providing for arrest where property is embezzled by a person acting in a fiduciary capacity, a judgment given for "one-third of the crop . . . the amount of the judgment being" is not an ordinary money judgment but a judgment whereby the plaintiff is entitled to execution against the person of the defendant on the return of an unsatisfied execution against the property. *Maxwell v. Horton*, 107 S. C. 380, 93 S. E. 4. See *Malcolm Mercantile Co. v. Britt*, 102 S. C. 499, 87 S. E. 142, 143.

But a landlord is not subject to arrest on demand of one holding unpaid mortgage on crops.—Under this section, where a landlord consents to the mortgage by his tenant of the tenant's share in crops on the land, and releases all his right and interest to the tenant's share in such crops and then subsequently takes possession of the entire crop against the unpaid mortgagee's demands, he is not liable to arrest on the mortgagee's demand, and an order for his arrest so issued will be reversed. *Malcolm Mercantile Co. v. Britt*, 102 S. C. 499, 87 S. E. 143.

In the dissenting opinion in the case of *Malcolm Mercantile Co. v. Britt*, 102 S. C. 499, 87 S. E. 143, the case of *Segars v. Segars*, 82 S. C. 196, 63 S. E. 891, was mentioned to uphold the view that there is nothing in this section of the Code antagonistic to the general principle that an action of claim and delivery is not dependent upon the fact that the defendant should be in possession of the property when the action is commenced, as an essential element of the cause of action.

Upon breach of trust defendant may be guilty of breach of both subd. 1 and subd. 3 of this section.—Where, under this section, a partner and manager of defendant firm, undertook to collect moneys due on choses in action pledged to plaintiff to secure a debt but left with the defendant for collection, he voluntarily assumed a trust which he was bound to perform, and when he misapplied the money intrusted to him in such fiduciary capacity, he not only received money in a fiduciary capacity, within the meaning of subd. 1, but also was guilty of fraud in contracting the debt, within the meaning of subd. 3, of this section. *National Bank v. Jennings*, 38 S. C. 372, 17 S. E. 16.

Where action is against partnership plaintiff may select particular member for arrest.—Under this section, where plaintiff's action is against a partnership firm, he may select for arrest a single member of such firm, who was mainly responsible for the fraudulent misappropriation of plaintiff's money for the use of such firm. *National Bank v. Jennings*, 38 S. C. 372, 17 S. E. 16.

III. SUBDIVISION (3).

A. Fraud in Contracting Debt.

Fraud after the inception of the contract is not within the meaning of this subdivision.—Under this section an affidavit stating that defendant had bought lumber to be paid for on the receipt of installments paid on the building of a house, and after such purchase had resorted to misrepresentations concerning such payments, does not state sufficient facts to secure his arrest as being guilty of fraud in contracting the debt, within the meaning of subd. 3 of this section. *Davis v. Cardue*, 38 S. C. 471, 17 S. E. 247, 252.

Therefore inducing plaintiff to accept worthless order after sale does not subject defendant to arrest.—An allegation that the defendant, after executing a conditional sales agreement induced the plaintiff to accept a worthless order on another party by false representation is not sufficient to support an action for fraud and justify an arrest under subd. 3 of this section. *Palmetto Motor Car Co. v. Brooks*, 156 S. C. 137, 152 S. E. 763.

Resorts to evasions and subterfuges by a debtor in order to escape the payment of a just debt do not bring him within the provisions of this subdivision of the section. *Davis v. Cardue*, 38 S. C. 471, 17 S. E. 247, 252.

Breach of this subdivision in conjunction with subdivision 2—See ante, analysis line II, subdivision (1).

B. Fraud in Disposition of Property.

Subdivision applies although transfer is to pay valid obligation.—Under this section a defendant who transfers property to defraud his creditors is liable to arrest though the property is transferred to pay a valid obligation. *Bonnette v. Clow*, 118 S. C. 376, 110 S. E. 794.

And although only one creditor is defrauded.—This subdivision is not limited to and does not refer to creditors as a class; and a transfer with intent to defraud an individual creditor suffices to bring the defendant within its terms. *Bonnette v. Clow*, 118 S. C. 376, 110 S. E. 794.

Fraud is question for jury.—Under this subdivision the question of fraud in the disposition of property is for the jury. *Bonnette v. Clow*, 118 S. C. 376, 110 S. E. 794; *Hurst v. Samuels*, 29 S. C. 476, 7 S. E. 822, 826.

IV. SUBDIVISION (4).

Statement of defendant held insufficient to bring him within subdivision.—Under this subdivision the mere statement by a debtor that as soon as he gets certain moneys he intends to leave the state will not support an order for his arrest. *Davis v. Cardue*, 38 S. C. 471, 17 S. E. 247, 252.

Provision exempting females is constitutional.—The provision of subd. 4 of this section, that "no female shall be arrested in any action," is not unconstitutional as class legislation. *Harrison v. Caudle*, 141 S. C. 407, 139 S. E. 842.

V. SUBDIVISION (6).

Applies where only negligence is alleged.—Under subd. 6 of this section the defendant may be arrested and held to bail in cases of personal injury where only negligence is alleged. *Stidham v. DuBose*, 128 S. C. 318, 121 S. E. 791, 33 A. L. R. 645.

But in the dissenting opinion in the case of *Stidham v. DuBose*, supra, Mr. Justice Fraser said, "I do not think that injury from mere negligence will warrant an arrest. To arrest a party to secure the payment of a debt that arises from mere negligence is, I think, in violation of the Constitution. * * * The civilized world has revolted from imprisonment for debt, which may mean life imprisonment for a mere act of inadvertence."

Subdivision contemplates arrest of non-resident guilty of fraud on citizen of state.—The provision of subd. 6 of this section pertaining to the remedy in case of injury to persons contemplates the arrest of a non-resident temporarily

in the state, who sold to a resident of the state timber on lands within the state and then subsequently sold the same timber to a second purchaser, fraudulently concealing his knowledge of the first sale, not recorded. *Davis v. Reynolds*, 77 S. C. 255, 57 S. E. 850.

Order for arrest issuable in action against defendant for wrongfully causing plaintiff's discharge from his employment.—Under this section and sec. 741 the court may issue an order providing that execution shall issue against the defendant's person, if execution against his property is returned unsatisfied in an action for damages for wrongfully causing plaintiff's discharge from his employment. *Castle v. South Carolina Law & Collection Agency*, 104 S. C. 81, 88 S. E. 273.

Section does not permit attachment in action for slander.—The provision of subdivision 6 of this section, pertaining to the remedy in case of injuries to person, would seem to support the conclusion that attachment does not lie in an action for slander. See *Addison v. Sujette*, 50 S. C. 192, 27 S. E. 631, 636, where the provisions of this section were cited in support of the foregoing conclusion.

Pendency of proceedings in execution.—Where debtor conveyed his property to wife and daughter shortly after action brought against him for assault and after judgment creditor brought action to set the conveyances aside and had receiver appointed, debtor might be arrested under this section despite pendency of proceedings in execution. *Blackmon v. Kirven*, 173 S. C. 322, 175 S. E. 814.

§ 501. Order for arrest—by whom to be made.—An order for the arrest of the defendant must be obtained from a judge, magistrate, or clerk of the court, in which or before whom the action is brought.

1932 Code, § 501; Civ. P. '22, § 443; Civ. P. '12, § 231; Civ. P. '02, § 201; 1870 (14) § 203.

See section 500 and notes thereto.

Before an order should be issued for the arrest and imprisonment of a citizen regarding a debt, the record should

clearly show that the law of service has been complied with. *Cannon v. Haverty Furniture Co.*, 179 S. C., 1; 183 S. E. 469.

§ 502. Affidavit to obtain order for arrest.—The order may be made where it shall appear to the proper officer by the affidavit of the plaintiff, or of any other person, that a sufficient cause of action exists, and that the case, from the facts stated, is one of those mentioned in section 500.

1932 Code, § 502; Civ. P. '22, § 444; Civ. P. '12, § 232; Civ. P. '02, § 202; 1870 (14) § 204.

Cross reference.—See sec. 741 providing for the issuance of execution against the person, and the note thereto. As to power of clerk of court to take affidavits in civil action for arrest, see sec. 5044-5 of the Civil Code, and the note thereto.

Affidavit and security must precede

order of arrest.—A judgment decreeing that a person shall be arrested, where the plaintiff did not make an affidavit and give security as provided for in this and following sec. 503, will be reversed. *Palmetto Motor Car Co. v. Brooks*, 156 S. C. 137, 152 S. E. 763.

Affidavits showing vital facts are sufficient to warrant an order of arrest.—Under this section affidavits are sufficient to warrant an order of arrest when showing that the defendant was fully cognizable of all the facts in the case, had admitted that he had misappropriated moneys of the plaintiff which he held in a fiduciary relationship, and had stated that he expected to repay them when able. *National Bank v. Jennings*, 38 S. C. 372, 17 S. E. 16.

And they need not formally allege that "sufficient cause of action exists."—The provision of this section that it must appear by affidavit "that a sufficient cause of action exists" is satisfied where the affidavit contains a statement of facts showing that a cause of action exists, without a formal allegation to that effect in the language of the statute. *National Bank v. Jennings*, 38 S. C. 372, 17 S. E. 16.

But an affidavit incorporating a complaint is deficient where complaint contains no matter founded on belief.—Under this section an affidavit incorporating an attached complaint and verifying all matters therein "except the statement and allegations therein made on information and belief" is fatally insufficient where no allegations or statements are made in the complaint on information or belief. *Addison v. Sujette*, 50 S. C. 192, 27 S. E. 631, 634.

And an unverified complaint may not be considered on appeal where the issue relates to insufficient affidavits.—Where the inquiry on appeal is whether the affidavits relied upon state sufficient facts to come within this section, the complaint cannot be considered as an affidavit unless it has been verified. *National Bank v. Jennings*, 38 S. C. 372, 17 S. E. 16.

§ 503. Security by plaintiff before obtaining order for arrest.—Before making the order, the judge or other officer, shall require a written undertaking on the part of the plaintiff, with or without sureties, to the effect that, if the defendant recover judgment, the plaintiff will pay all costs that may be awarded to the defendant and all damages which he may sustain by reason of the arrest, not exceeding the sum specified in the undertaking, which shall be at least one hundred dollars. If the undertaking be executed by the plaintiff, without sureties, he shall annex thereto an affidavit that he is a resident and householder or freeholder within the State, and worth double the sum specified in the undertaking, over all his debts and liabilities.

1932 Code, § 503; Civ. P. '22, § 445; Civ. P. '12, § 233; Civ. P. '02, § 203; 1870 (14) § 205.

§ 504. Order for arrest—when it may be made, and its form.—The order may be made to accompany the summons, or at any time afterwards before judgment. It shall require the sheriff or constable of the county where the defendant may be found forthwith to arrest him, and hold him to bail in a specified sum, and to return the order, at a place and time therein mentioned, to the plaintiff or attorney by whom it shall be subscribed or endorsed. But said order of arrest shall be of no avail, and shall be vacated or set aside, on motion, unless the same is served upon the defendant, as provided by law, before the docketing of any judgment in the action; and the defendant shall have twenty days, after the service of the order of arrest, in which to answer the complaint.

1932 Code, § 504; Civ. P. '22, § 446; Civ. P. '12, § 234; Civ. P. '02, § 204; 1870 (14) § 206.

§ 505. Original affidavit and order delivered to sheriff, and copy to defendant.—The affidavit and order of arrest shall be delivered to the sheriff or constable, who, upon arresting the defendant, shall deliver to him a copy thereof.

1932 Code, § 505; Civ. P. '22, § 447; Civ. P. '12, § 235; Civ. P. '02, § 205; 1870 (14) § 207.

§ 506. Arrest—how made.—The sheriff or constable shall execute the order by arresting the defendant and keeping him in custody until discharged by law, and may call the power of the county to his aid in the execution of the arrest, as in case of process.

1932 Code, § 506; Civ. P. '22, § 448; Civ. P. '12, § 236; Civ. P. '02, § 206; 1870 (14) § 208.

§ 507. Defendant to be discharged on giving bail or making a deposit.—The defendant, at any time before execution, shall be discharged from the arrest, either upon giving bail or upon depositing the amount mentioned in the order of arrest, as provided in this chapter, or he may be discharged under provisions of sections 863 thru 869.

1932 Code, § 507; Civ. P. '22, § 449; Civ. P. '12, § 237; Civ. P. '02, § 207; 1870 (14) § 209.

As to whether the provisions of secs. 863-869 are in conflict with the National Bankruptcy Act, see the case of *Rayborn v. Reid*, 139 S. C. 529, 138 S. E. 294,

treated under sec. 851, catchline "Provisions of section suspended by National Bankruptcy Act."

§ 508. Bail—how given.—The defendant may give bail by causing a written undertaking to be executed by two or more sufficient bail, stating their places of residence and occupations, to the effect that the defendant shall, at all times, render himself amenable to the process of the court, during the pendency of the action, and to such as may be issued to enforce the judgment therein; or if he be arrested for the cause mentioned in the second subdivision of section 500, by an undertaking to the same effect as that provided by section 558.

1932 Code, § 508; Civ. P. '22, § 450; Civ. P. '12, § 238; Civ. P. '02, § 208; 1870 (14) § 210.

Bond not complying with provisions of section may be good as common law undertaking.—Where a bond, given under the provisions of this section, fails to meet the requirements of this section, and is not therefore good as a statutory construction, it may nevertheless be good as a common law undertaking. See *General Motors Acceptance Corporation v. Hutto*, 136 S. C. 207, 134 S. E. 232.

Omission to name obligee will not vitiate bond.—The omission, in a bond given under this section, to designate a person as obligee will not render the bond void, where the identity of the obligee may be gathered from the whole instrument. *General Motors Acceptance Corporation v. Hutto*, 136 S. C. 207, 134

S. E. 232.

As to liability of sureties on appeal, see sec. 864 and the note thereto, and as to the prohibition on excessive bail, see const., art. 1, sec. 19.

Finding by Supreme Court of illegal commitment releases sureties on bail bond.—Where, under this section, a bond was given to secure the appearance of a judgment debtor incarcerated in accordance with sec. 500, subd. 1, if the Supreme Court found that such debtor had been illegally committed, and the court found the order erroneously issued, the sureties on the undertaking were immediately released from liability. *Martin v. Hodge*, 87 S. C. 214, 69 S. E. 225.

§ 509. Surrender of defendant.—At any time before a failure to comply with the undertaking, the bail may surrender the defendant in their exoneration, or he may surrender himself to the sheriff of the county where he was arrested, in the following manner:

(1) A certified copy of the undertaking of the bail shall be delivered to the sheriff or constable, who shall, by a certificate in writing, acknowledge the surrender.

(2) Upon the production of a copy of the undertaking and sheriff's or

constable's certificate, a judge or clerk of the court may, upon notice to the plaintiff of eight days, with a copy of the certificate, order that the bail be exonerated; and on filing the order and papers used on said application, they shall be exonerated accordingly. But this section shall not apply to an arrest for cause mentioned in subdivision 2 of section 500, so as to discharge the bail from an undertaking given to the effect provided by section 558.

1932 Code, § 509; Civ. P. '22, § 451; Civ. P. '12, § 239; Civ. P. '02, § 209; 1870 (14) § 211.

Under this and following sec. 510, the defendant, when released on bail, remains in the custody of the bail, subject to arrest by the bail, and surrender into the custody of the court at the option of the bail, the bail being substituted for the sheriff or marshal. *The Bremena v. Card*, 38 F. 144.

§ 510. The bail may themselves, or in writing authorize arrest of defendant—when.—For the purpose of surrendering the defendant, the bail, at any time or place, before they are finally charged, may themselves arrest him, or by a written authority, endorse on a certified copy of the undertaking, may empower any person of suitable age and discretion to do so.

1932 Code, § 510; Civ. P. '22, § 452; Civ. P. '12, § 240; Civ. P. '02, § 210; 1870 (14) § 212.

§ 511. Bail—how proceeded against.—In case of failure to comply with the undertaking, the bail may be proceeded against by an action only.

1932 Code, § 511; Civ. P. '22, § 453; Civ. P. '12, § 241; Civ. P. '02, § 211; 1870 (14) § 213.

§ 512. Bail—how exonerated.—The bail may be exonerated, either by the death of the defendant, or his imprisonment in a state prison, or by his legal discharge from the obligation to render himself amenable to the process, or by his surrender to the sheriff or constable of the county where he was arrested, in execution thereof, within twenty days after the commencement of the action against the bail, or within such further time as may be granted by the court.

1932 Code, § 512; Civ. P. '22, § 454; Civ. P. '12, § 242; Civ. P. '02, § 212; 1870 (14) § 214.

§ 513. Delivery of undertaking of bail to plaintiff, and its acceptance or rejection by him.—Within the time limited for that purpose, the sheriff or constable shall deliver the order of arrest to the plaintiff, or attorney by whom it is subscribed, with his return endorsed, and a certified copy of the undertaking of the bail. The plaintiff, within ten days thereafter, may serve upon the sheriff or constable a notice that he does not accept the bail, or he shall be deemed to have accepted it, and the sheriff or constable shall be exonerated from liability.

1932 Code, § 513; Civ. P. '22, § 455; Civ. P. '12, § 243; Civ. P. '02, § 213; 1870 (14) § 215.

§ 514. Notice of justification—new bail.—On the receipt of such notice, the sheriff or constable, or defendant, may, within ten days thereafter, give to the plaintiff or attorney by whom the order of arrest is subscribed, notice of the justification of the same or other bail (specifying the places of residence and occupation of the latter) before a judge or clerk

of the court, at a specified time and place; the time to be not less than five or more than ten days thereafter. In case other bail be given, there shall be a new undertaking in the form prescribed in section 508.

1932 Code, § 514; Civ. P. '22, § 456; Civ. P. '12, § 244; Civ. P. '02, § 214; 1870 (14) § 216.

§ 515. Qualification of bail.—The qualification of bail must be as follows:

(1) Each of them must be a resident and householder, or freeholder, within the State.

(2) They must each be worth the amount specified in the order of arrest, exclusive of property exempt from execution; but the judge or clerk of the court, on justification, may allow more than two bail to justify severally in amounts less than that expressed in the order, if the whole justification be equivalent to that of two sufficient bail.

1932 Code, § 515; Civ. P. '22, § 457; Civ. P. '12, § 245; Civ. P. '02, § 215; 1870 (14) § 217.

§ 516. Justification of bail.—For the purpose of justification, each of the bail shall attend before the judge or clerk of the court at the time and place mentioned in the notice, and may be examined, on oath, on the part of the plaintiff, touching his sufficiency, in such manner as the judge or clerk of the court, in his discretion, may think proper. The examination shall be reduced to writing, and subscribed by the bail, if required by the plaintiff.

1932 Code, § 516; Civ. P. '22, § 458; Civ. P. '12, § 246; Civ. P. '02, § 216; 1870 (14) § 218.

§ 517. Allowance of bail.—If the judge or clerk of the court find the bail sufficient, he shall annex the examination to the undertaking, endorse his allowance thereon, and cause them to be filed in the office of the clerk; and the sheriff shall thereupon be exonerated from liability.

1932 Code, § 517; Civ. P. '22, § 459; Civ. P. '12, § 247; Civ. P. '02, § 217; 1870 (14) § 219.

§ 518. Deposit in lieu of bail.—The defendant may, at the time of his arrest, instead of giving bail, deposit with the sheriff or constable the amount mentioned in the order. The sheriff shall thereupon give the defendant a certificate of the deposit, and the defendant shall be discharged out of custody.

1932 Code, § 518; Civ. P. '22, § 460; Civ. P. '12, § 248; Civ. P. '02, § 218; 1870 (14) § 220.

§ 519. Payment of deposit into court.—The sheriff or constable shall, within four days after the deposit, pay the same into court and shall take from the officer receiving the same two certificates of such payment, the one of which he shall deliver to the plaintiff, and the other to the defendant. For any default in making such payment, the same proceedings may be had on the official bond of the sheriff or constable, to collect the sum deposited, as in other cases of delinquency.

1932 Code, § 519; Civ. P. '22, § 461; Civ. P. '12, § 249; Civ. P. '02, § 219; 1870 (14) § 221.

§ 520. Substituting bail for deposit.—If money be deposited, as provided in sections 518 and 519, bail may be given and justified upon notice, as pre-

scribed in section 514, any time before judgment; and thereupon the judge, before whom the justification is had, shall direct, in the order of allowance, that the money deposited be refunded by the sheriff or constable to the defendant, and it shall be refunded accordingly.

1932 Code, § 520; Civ. P. '22, § 462; Civ. P. '12, § 250; Civ. P. '02, § 220; 1870 (14) § 222.

§ 521. Deposit—how disposed of after judgment in the action.—Where money shall have been so deposited, if it remain on deposit at the time of an order or judgment for the payment of money to the plaintiff, the clerk shall, under the direction of the court, apply the same to the satisfaction thereof, and, after satisfying the judgment, shall refund the surplus, if any, to the defendant. If the judgment be in favor of the defendant, the clerk shall refund to him the whole sum deposited and remaining unapplied.

1932 Code, § 521; Civ. P. '22, § 463; Civ. P. '12, § 251; Civ. P. '02, § 221; 1870 (14) § 223.

§ 522. Sheriff—when liable as bail.—If, after being arrested, the defendant escape or be rescued, or bail be not given or justified, or a deposit be not made instead thereof, the sheriff or constable shall himself be liable as bail. But he may discharge himself from such liability by the giving and justification of bail, as provided in sections 514, 515, 516 and 517, at any time before process against the person of the defendant to enforce an order or judgment in the action.

1932 Code, § 522; Civ. P. '22, § 464; Civ. P. '12, § 252; Civ. P. '02, § 222; 1870 (14) § 224.

§ 523. Proceedings on judgment against sheriff.—If a judgment be recovered against the sheriff or constable, upon his liability as bail, and an execution thereon be returned unsatisfied, in whole or in part, the same proceedings may be had on the official bond of the sheriff or constable, to collect the deficiency, as in other cases of delinquency.

1932 Code, § 523; Civ. P. '22, § 465; Civ. P. '12, § 253; Civ. P. '02, § 223; 1870 (14) § 225.

§ 524. Bail liable to sheriff.—The bail taken upon the arrest shall, unless they justify, or other bail be given or justified, be liable to the sheriff or constable by action for damages which he may sustain by reason of such omission.

1932 Code, § 524; Civ. P. '22, § 466; Civ. P. '12, § 254; Civ. P. '02, § 224; 1870 (14) § 226.

§ 525. Vacating order of arrest or reducing bail.—A defendant arrested may, at any time before judgment, apply, on motion, to vacate the order of arrest, or to reduce the amount of bail.

1932 Code, § 525; Civ. P. '22, § 467; Civ. P. '12, § 255; Civ. P. '02, § 225; 1870 (14) § 227.

§ 526. Affidavits on motion to vacate order of arrest or reduce bail.—If the motion be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits, or other proofs, in addition to those on which the order of arrest was made.

1932 Code, § 526; Civ. P. '22, § 468; Civ. P. '12, § 256; Civ. P. '02, § 226; 1870 (14) § 228.

Matter in the plaintiff's affidavits not in reply to the defendant's affidavits will not be considered. *Myers v. White heart*, 24 S. C. 196; *Davis v. Cardue*, 38 S. C. 471, 17 S. E. 247, 252.

Malicious prosecution.—Whether circumstances relied on to rebut implication of malice are to be regarded as being conclusive is issue for jury. *Jen-*

nings v. Clearwater Mfg. Co., 171 S. C. 498; 172 S. E. 870.

It is a matter for jury to pass on sufficiency of facts and circumstances relied on by plaintiff to show lack of probable cause for the prosecution of criminal action. *Jennings v. Clearwater Mfg. Co.*, 171 S. C., 498; 172 S. E. 870.

CHAPTER 25

Attachment

- 527. Foreign corporations, non-residents or absconding defendants.
- 527-1. Libel and slander actions.
- 528, 529, 531. Warrant of attachment.
- 530. Security.
- 532. Property attached.
- 533, 534. Sheriff's duties as to property seized.
- 535. Claim of third persons.
- 536. When debt not due.
- 537. Shares in corporations, etc.
- 538. Property incapable of manual delivery.
- 539. Certificate of defendant's interest.
- 540. Satisfaction of judgment.

- 541. Prosecution of action in which attachment issued.
- 542. Bond to sheriff.
- 543. Return of property to defendant.
- 544. Defendant's undertaking.
- 545. Return of warrant by sheriff.
- 546. Action for purchase money.
- 547. Undertaking.
- 548. Making of attachment.
- 549. Appraisalment.
- 550. Trial by jury.
- 551. Form and procedure.
- 551-1. Bond in attachment and claim and delivery.

§ 527. Property of foreign corporations, and of non-resident, absconding, or concealed defendants, may be attached.—In any action arising for the recovery of money, or for the recovery of property, whether real or personal, and damages for the wrongful conversion and detention of personal property, or an action for the recovery of damages for injury done to either person or property, or against a corporation created by or under the laws of any other State, government or country, or against a defendant who is not a resident of this State, or against the master, captain or agent of any sailing vessel entering any of the ports of this state for pilotage services rendered such vessel, or against a defendant who has absconded or concealed himself, or whenever any person or corporation is about to remove any of his or its property from this State, or has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete, any of his or its property, with intent to defraud creditors, as hereinafter mentioned, the plaintiff, at the time of issuing the summons, or any time afterwards, may have the property of such defendant or corporation attached, in the manner hereinafter prescribed, as a security for the satisfaction of such judgment as the plaintiff may recover; and for the purposes of this section an action shall be deemed commenced when the summons is issued: *provided, however, that personal service of such summons shall be made or publication thereof commenced within thirty days.*

1932 Code, §527; Civ. P. '22, § 500; Civ. P. '12, § 279; Civ. P. '02, § 248; 1870 (14) § 250; 1879 (17) 23; 1897 (22) 450.

- I. General Considerations.
- II. Nature of Attachment and When Issued.

- III. Relation of Attachment to Main Suit.
- IV. Property Subject to Attachment.

V. Service on Non-Resident Defendants.

Cross Reference

As to where and by whom actions against foreign corporations are brought, see section 826 and note thereto.

I. GENERAL CONSIDERATIONS.

In general.—This and the following sections provide not only legal remedies of attachment and garnishment, but methods of actual seizure, service of writ, etc., quasi ownership, and appropriate suits to subject any kind of property involved, equitable as well as legal, to the attachment. *Pelzer Mfg. Co. v. Pitts*, 76 S. C. 349, 358, 57 S. E. 29, 11 Ann. Cas. 665.

Section not repealed or regulated by laws pertaining to foreign corporations.

—The statute regulating the terms and conditions on which a foreign corporation can locate and carry on business within this state does not expressly or impliedly repeal the attachment act relative to attaching the property of a foreign corporation. As it was not expressly repealed, it could only be repealed by implication, and repeals by implication are not favored. *Williamson v. Eastern Bldg., etc., Ass'n*, 54 S. C. 582, 32 S. E. 765, 71 Am. St. Rep. 822, citing approvingly *Scurry v. Coleman*, 14 S. C. 166, 169.

Construed with sec. 432.—This section and sec. 432 must be read together when they refer to one matter common to both, to wit, an action to recover land, or, what is the same thing, an action where title to land comes into controversy. *Armstrong v. Carwile*, 56 S. C. 463, 35 S. E. 196, 197.

"Subject of action" does not include property seized under attachment proceedings.—See this catchline under section 826.

"Any cause of action" includes one arising out of state.—See this catchline under section 826.

Where jurisdiction may be acquired without attachment this section does not apply.—The section was doubtlessly enacted because, the defendant being a non-resident, the court could not obtain jurisdiction of the person of the defendant, and his creditors would be without remedy unless jurisdiction could be acquired over his property in some way. Hence the attachment. It would seem, therefore, where jurisdiction may be acquired without an attachment, the reason for the rule ceasing, the rule itself would not exist. *Whitfield v. Hovey*, 30 S. C. 117, 8 S. E. 840.

Nonresident upon becoming resident cannot claim homestead in property attached while nonresident.—Nonresident who was sued as such could not return to South Carolina after absence of ten years and after attachment of her prop-

erty as nonresident which she did not contest, and establish homestead which would be prior to attachment lien, notwithstanding that nonresident may have been the head of a family. *Bonebrake v. Morrow*, 183 S. C. 170; 190 S. E. 506.

II. NATURE OF ATTACHMENT AND WHEN ISSUED.

Purpose of attachment is to conserve the property of the debtor for eventual execution.—The purpose of attachment is to conserve the property of the defendant debtor for eventual execution after the execution shall have proceeded to judgment, unless the debtor procures its release in the manner provided by law. 2 R. C. L. 802, quoted in *Lester v. Fox Film Corporation*, 114 S. C. 414, 103 S. E. 775.

The procedure by attachment to secure jurisdiction of the defendant under the provisions of this section is permissible in six cases, all referring to the absence or concealment of the defendant or the concealment or disposal of his property, and applies only when the summons is issued, and the service thereof is affected within thirty days after the attachment, the express object of which is security for the satisfaction of such judgment as the plaintiff may recover. *Stephens v. Ringling*, 102 S. C. 333, 86 S. E. 683.

Affidavit executed February 22, 1932, not sufficient for warrant of attachment issued May 31, 1933. *Stricklin v. Hodgen*, 172 S. C., 37; 172 S. E. 770.

But for attachment to issue the named requirements must exist.—Attachments are statutory proceedings, and they are intended to summarily dispossess a party of his property, and to hold it subject to the result of an action in progress; and being in direct conflict with that dominion and right which every one has at common law over his own, and which government is constructed to protect, statutes authorizing such proceedings have always been strictly construed, and all of their requirements absolutely demanded to be present. True, they are efficient and useful remedies, and very advantageous to commerce and trade, but still they are harsh and summary and are only allowed upon the conditions found in the statute, which must be made to appear in the affidavit submitted. *Wando Phosphate Co. v. Rosenberg*, 31 S. C. 301, 9 S. E. 969; see also the authority therein cited.

The legislature did not intend that the remedy by attachment could be resorted to in any action brought for any purpose against any one of the persons designated in the subsequent portions of the section, for, if such had been the intention, it would have been very easy and much more simple to say so in plain words. The very fact, therefore, that the

legislature has chosen to specify actions brought for certain purposes as those in which the remedy by attachment could be resorted to affords an irresistible inference that there were actions for other purposes in which it was not intended that the remedy by attachment should be allowed. *Addison v. Sujette*, 50 S. C. 192, 27 S. E. 631.

An action must be commenced in regular form before attachment is available.—An attachment is merely a provisional remedy in aid of an action and hence to make it available, an action must be commenced in regular form. *Williamson v. Eastern Bldg., etc., Ass'n*, 54 S. C. 582, 32 S. E. 765, 71 Am. St. Rep. 822. See, also, *Stevenson v. Dunlap*, 33 S. C. 350, 11 S. E. 1017; *Campbell v. Home Ins. Co.*, 1 S. C. 158.

An attachment will not lie against an absent administrator or executor. *Weyman v. Murdock*, Harp. 125, 126.

An attachment will not lie in an action by a resident administrator against a non-resident guardian of infants residing in another state.—*Stevenson v. Dunlap*, 33 S. C. 350, 11 S. E. 1017.

III. RELATION OF ATTACHMENT TO MAIN SUIT.

Attachment is a collateral proceeding.—The attachment is a collateral proceeding and its sufficiency or regularity is not necessarily involved in the trial of the case. *Savings Bank v. Sprunt & Son.*, 86 S. C. 8, 67 S. E. 955, 956; *Lester v. Fox Film Corporation*, 114 S. C. 414, 418, 103 S. E. 775, 776; *Cleveland v. Canady*, 112 S. C. 477, 100 S. E. 147, cited in the dissenting opinion in the case of *Hall v. Locke*, 118 S. C. 267, 110 S. E. 385.

Which operates only on the interest of the debtor.—The attachment can operate only on the interest of the debtor. It cannot divest any lien, incumbrance, or title of a third party or affect his interest in any way. If the debtor has no interest the proceeding is futile and its results will be fruitless. *Metts v. Piedmont, etc., Ins. Co.*, 17 S. C. 120, 123.

And its invalidity will not affect the main suit.—Formerly an action could be commenced by attachment, but now it is only a provisional remedy in aid of the action, and if the attachment proceedings should be set aside for some irregularity or other ground, it would not deprive the magistrate of jurisdiction to try the case on its merits, but if the plaintiff should fail to recover judgment, the attachment proceedings would become inoperative. *Mims v. Garvin*, 106 S. C. 381, 91 S. E. 289.

Because the two proceedings are separate and distinct.—The right of the plaintiff to recover judgment on the alleged indebtedness and his right to attach the property of the defendant are

entirely separate and distinct. *Mims v. Garvin*, 106 S. C. 381, 91 S. E. 289.

However, on a hearing of a motion to dissolve an attachment, the court may decide whether the plaintiff has a cause of action, but the merits of the cause cannot be considered. *Williamson v. Eastern Bldg., etc., Ass'n*, 54 S. C. 582, 32 S. E. 765, 71 Am. St. Rep. 822.

But failure of the main suit causes the provisional remedy to fail.—Attachment now is only a provisional remedy in aid of an action; it follows necessarily that if such action fails for want of jurisdiction, the provisional remedy by attachment in aid of such action must fall with it. *Central Railroad, etc., Co. v. Georgia Constr., etc., Co.*, 32 S. C. 319, 11 S. E. 192, cited in *Hunter v. Ruff*, 47 S. C. 525, 25 S. E. 65, 58 Am. St. Rep. 907. See also § 826 and note thereto.

And the dismissal of the complaint upon which the attachment is based likewise causes the attachment to fail.—*Skalowski v. Joe Fisher Inc.*, 152 S. C. 108, 149 S. E. 340, 65 A. L. R. 1427.

And failure to bring action within section 826 causes provisional remedies to fail.—Reference should be made to this catchline under the above cited section.

After the appearance of the defendant the jurisdiction of the court over the defendant is independent of the attachment proceedings. *Light v. Isear*, 28 S. C. 440, 6 S. E. 284.

But plaintiff is entitled to attach property of foreign corporation at any time prior to judgment.—A plaintiff is entitled to attach the property within the state of a defendant foreign corporation at any time during the pendency of the action and prior to the judgment, notwithstanding the defendant may have submitted his person to the jurisdiction of the court by appearance or answer. *Lester v. Fox Film Corporation*, 114 S. C. 414, 103 S. E. 775.

Unverified complaint may be considered where there is a variance between cause stated in complaint and the affidavit.—Where a motion is made to dissolve an attachment because the cause of action alleged in the complaint is not the same as that set forth in the affidavit, the complaint may be considered with the affidavit though not verified nor made a part thereof. *Fleming v. Byrd*, 78 S. C. 20, 58 S. E. 965.

But complaint must be verified in order to supplement an affidavit insufficient to sustain an attachment.—Where the motion to dissolve an attachment is on the grounds that the affidavit is not sufficient to sustain an attachment, the plaintiff cannot supplement the defective affidavit by facts stated in the complaint unless it is verified and made a

part of the affidavit. *Addison v. Sujette*, 50 S. C. 192, 27 S. E. 631; 51 S. C. 305, 28 S. E. 948; *Chitty v. Penn. Ry. Co.*, 62 S. C. 526, 40 S. E. 944, cited in *Fleming v. Byrd*, 78 S. C. 20, 58 S. E. 965.

IV. PROPERTY SUBJECT TO ATTACHMENT.

It is not necessary that the order of attachment be for the recovery of money only.—It is not necessary, in order to obtain an attachment, that the action be for the recovery of money only, but it may be obtained in many other cases. *Nat. Exch. Bank v. Stelling*, 31 S. C. 360, 9 S. E. 1028, cited in *Carolina Agency Co. v. Garlington*, 85 S. C. 114, 67 S. E. 225.

The property of a foreign corporation may be attached in an action for unliquidated damages, sounding in tort. *Chitty v. Pennsylvania Ry. Co.*, 62 S. C. 526, 40 S. E. 944.

But attachment will not be granted in an action for slander. *Addison v. Sujette*, 50 S. C. 192, 27 S. E. 631; 51 S. C. 305, 28 S. E. 948; *Sargent v. Helmbold*, *Harp.*, 219, cited in *Carolina Agency Co. v. Garlington*, 85 S. C. 114, 67 S. E. 225.

Attachment may be issued in suit in equity for accounting against property of non-resident.—The authority may be found under this section to authorize an attachment in a suit in equity against an agent for an accounting and to recover money only, pursuant thereto. *Carolina Agency Co. v. Garlington*, 85 S. C. 114, 67 S. E. 225.

Attachment may be issued in action by creditor to set aside assignment by non-resident debtor. — An attachment may be issued under this section in an action by a creditor to set aside an assignment by his non-resident debtor because of fraudulent preferences. *Nat. Exch. Bank v. Stelling*, 31 S. C. 360, 9 S. E. 1028; *Ferst v. Powers*, 58 S. C. 398, 36 S. E. 744.

Interest of a non-resident partner in the firm's assets cannot be attached.—In an action against a partnership on a firm debt, which is a joint debt in South Carolina, it was held that the interest of a non-resident partner in the firm assets could not be attached under this section. *Whitfield v. Hovey*, 30 S. C. 117, 8 S. E. 840; see also the authority therein cited.

A railroad freight car which is being used in interstate commerce is not subject to attachment. *Seibels v. Northern Central Co.*, 80 S. C. 133, 61 S. E. 435, 16 L. R. A. (N. S.) 1026.

Funds forwarded by telegraphic transmission beyond the limits of this state, before execution of attachment warrant not subject to attachment. *Stricklin v. Hodgen*, 172 S. C. 37; 172 S. E. 771.

Mortgage of property may be assignment authorizing attachment to issue.—

A mortgage by a creditor on his stock of goods, having the effect, after a condition is broken, to divest him of the title, and vest it in the mortgagee, is such an assignment of his property as would authorize the issue of an attachment under this section for disposing of property with the intent to defraud creditors. *Tabb & Jenkins Hardware Co. v. Gelzer*, 43 S. C. 342, 21 S. E. 261.

Partnership creditors may attach partnership assets though a member of the firm be bankrupt.—The assets of partnership may be attached by the creditors of the partnership though one of the members of the partnership has been declared a bankrupt. *Pelzer Mfg. Co. v. Pitts*, 76 S. C. 349, 57 S. E. 29, 11 Ann. Cas. 665.

Property of principal cannot be attached because of unknown acts of agent. — Acts, made by this section ground for attachment if done by an agent without the knowledge of the principal will not support the statutory remedy of attachment against the property of the principal. *Myers v. Whiteheart*, 24 S. C. 196.

Action commenced by attachment of property of non-resident who does not appear is a proceeding in rem.—An action commenced by attachment of property against a non-resident, in which the defendant is not personally served, and does not appear, is a proceeding in rem. *Stanley v. Stanley*, 35 S. C. 94, 14 S. E. 675; *Gibson v. Everett*, 41 S. C. 22, 19 S. E. 286.

A non-resident creditor may proceed by attachment on a cause of action arising out of the state. *Sheldon v. Blauvelt*, 29 S. C. 453, 7 S. E. 593, 1 L. R. A. 685; *Ex parte Perry Stove Co.*, 43 S. C. 176, 20 S. E. 980; *Gibson v. Everett*, 41 S. C. 22, 23, 19 S. E. 286.

Attachment of a non-resident against a foreign corporation is valid to the extent that the cause of action arose in this state. *Central Railroad, etc., Co. v. Georgia, etc., Co.*, 32 S. C. 319, 11 S. E. 192.

Deposit in bank.—See *McManus v. Bank*, 171 S. C. 84; 171 S. E. 473.

V. SERVICE ON NON-RESIDENT DEFENDANTS.

As to summons and service, see secs. 427, et seq. and notes there found.

Action is commenced when summons is issued in good faith. — Reference should be made to this catchline under section 357.

Residence and domicile are not identical terms.—In the case of *Munroe v. Williams*, 37 S. C. 81, 16 S. E. 533, 19 L. R. A. 665, the Supreme Court said that "residence" and "domicile" are not identical and convertible terms, citing with approval *Drake on Attachments*, (7th Ed.) secs. 58, 59. The court said: "In

determining whether a debtor is a resident of a particular state, the question as to his domicile is not necessarily always involved, for he may have a residence which is not in law his domicile. Domicile includes residence with an intention to remain; while no length of residence, without the intention of remaining, constitutes domicile. A resident and an inhabitant mean the same thing. A person resident is defined to be one 'dwelling or having his place of abode in any place.' These terms are therefore used synonymously."

This section contains no limitation as to the character of persons, so far as residence is concerned, who may sue out an attachment. *Central Railroad, etc., Co. v. Georgia, etc., Co.*, 32 S. C. 319, 11 S. E. 192.

Proceedings as to publication of summons before attachment are void.—The proceedings for publication of a summons to a non-resident before attachment of his property under this section are void. *Little v. Christie*, 69 S. C. 57, 48 S. E. 89.

Personal service out of state is as efficacious as a service by publication.—It is not necessary that there should be a service of summons by publication, or a deposit of papers in the post office, in order to establish an effective service. They are but two of the methods to effect a service. A personal service out of the state may be quite as efficacious as a service by publication and deposit in the post office. *Norris Co. v. S. H. Levin's Sons*, 81 S. C. 36, 61 S. E. 1103.

Acceptance of service in an action involving an attachment does not waive irregularities of the attachment.—The acceptance of service in an action involving an attachment does not waive irregularities relative to formalities of the attachment, but merely gives jurisdiction of the person of the defendant and is no waiver of any failure on the plaintiff's part to comply with the statute. *Lester v. Fox Film Corp.*, 114 S. C. 414, 103 S. E. 775.

And such acceptance may be by a

duly authorized attorney.—A written admission of service of summons by a duly authorized attorney for the defendant is binding on the defendant. *Sullivan v. Susong*, 40 S. C. 154, 18 S. E. 268, 272. And such acceptance need not be in the firm's name, nor need it be in the name of each member thereof. *Id.*

Mistake as to residence of defendant in mailing summons does not render the judgment absolutely void.—In an attachment of real property of a non-resident defendant, where a copy of the summons was not mailed to him at his correct place of residence but to a place where the judgment creditor was informed was his residence, such fact did not render the judgment absolutely void but at most only rendered the judgment voidable by subsequent proceedings instituted for that purpose. *Hunter v. Ruff*, 47 S. C. 525, 25 S. E. 65, 58 Am. St. Rep. 907.

Attachment is not void because it bears date before date of summons.—The attachment is not void because it bears a date before the date of the summons; the existence of the summons at the date of the attachment may be shown aliunde. *Smith v. Walker*, 6 S. C. 169.

Nor is it void when the summons bears the same date but shows service the next day.—An attachment is not void when the summons bears the same date as the attachment, but the sheriff's endorsement shows service the next day. *Cureton v. Dargan*, 12 S. C. 122.

Contractor remaining in state a year owning property therein and expecting to stay not a non-resident under this section.—In a case where a railroad contractor from another state takes a contract within the state and stays for at least a year to finish such contract, and expects to remain permanently, and owns valuable property within the jurisdiction of the court, he is not a non-resident under this section. *Munroe v. Williams*, 37 S. C. 81, 16 S. E. 533, 19 L. R. A. 665.

§ 527-1. Attachment in actions for libel and slander against non-residents or foreign corporations.—Any and all attachments hereafter to be issued, made or levied in any of the courts of this state of the property, goods or credits of any non-resident of this State, or of any foreign corporation, in actions for libel and slander, if otherwise good and valid, shall stand as if the suit had been brought upon any other cause of action, mentioned in § 527 or provided by the law.

1932 (37) 1116.

§ 528. Attachment—by whom granted.—A warrant of attachment must be obtained from a judge, or clerk of the court, or magistrate, in which

or before whom the action is brought, or from a circuit judge.

1932 Code, § 528; Civ. P. '22, § 501; Civ. P. '12, § 280; Civ. P. '02, § 249; 1870 (14) § 251.

§ 529. In what cases attachments may be issued—affidavit to be filed.—The warrant may be issued whenever it shall appear by affidavit that a cause of action exists against such defendant, specifying the amount of the claim and the grounds thereof, and that the defendant is either a foreign corporation or not a resident of this State, or that the defendant is the master, captain, or agent of any sailing vessel entering any of the ports of this State, and is about to take such vessel out of any port of this State, without paying the pilotage fees provided by law, or that the defendant has departed from the State with intent to defraud his or its creditors, or to avoid service of a summons, or keeps himself concealed therein with the like intent, or that such corporation or person has removed, or is about to remove, any of his or its property from this State, with intent to defraud his or its creditors, or has assigned, disposed of or secreted, or is about to assign, dispose of or secrete, any of his or its property with the like intent, whether such defendant be a resident of this State or not. It shall be the duty of the plaintiff procuring such warrant at the time of the issuing thereof, to cause the affidavits on which the same was granted to be filed in the office of the clerk of the court of common pleas, or with the magistrate, in which or before whom the action is to be tried, within forty-eight hours after the issuance of the attachment. He shall also cause copies thereof to be served on the defendant with the summons, if he can be found within the county: *provided, however*, that in cases where the defendant is the master, captain or agent of any vessel entering any of the ports of this State, it shall only be necessary that the affidavit show that a cause of action exists against such defendant for pilotage services, specifying the amount of the claim and the grounds thereof, and that the defendant is about to take such vessel out of any port of this State, and refuse to pay or has not paid the fees provided by law for such pilotage services.

1932 Code, § 529; Civ. P. '22, § 502; Civ. P. '12, § 281; Civ. P. '02, § 250; 1870 (14) § 252; 1897 (22) 451; 1899 (23) 31.

See sec. 527 and the note thereto.

Editor's note.—Prior to the amendment of 1899, XXIII, 30, this section provided for the filing of the affidavits within ten days from the issuance of the warrant, and unless so filed the attachment would be discharged on motion. See *Ketchin v. Landecker*, 32 S. C. 155, 10 S. E. 936. Nor would service of copies on the defendant within that time suffice. *Id.* This requirement as to the time within which the affidavits must be filed still governs in proceedings to enforce agricultural liens. *Doty v. Boyd*, 46 S. C. 39, 24 S. E. 59; *Townsend v. Sparks*, 50 S. C. 380, 27 S. E. 801; *Blair v. Morgan*, 59 S. C. 52, 37 S. E. 45; but the time within which the affidavits in attachment must now be filed has been reduced by the said amendment to 48 hours. See *Ferst v. Powers*, 58 S. C. 398, 36 S. E. 744.

This section does not apply to the attachment of automobiles under section 8792.—An automobile causing injury or damage while operated negligently or carelessly or in violation of law may be attached under section 8792, though none of the conditions required by this section are shown by affidavit. *Richbourg v. Ragin*, 140 S. C. 250, 138 S. E. 801.

"Cause of action" consists of a right in plaintiff and violation thereof by defendant.—The cause of action which under this section is necessary to authorize attachment, consists in a right in the plaintiff, a correlative duty or obligation resting on the defendant, and some act of omission done by the latter in violation of that right. *Skalowski v. Joe Fisher, Inc.*, 152 S. C. 108, 149 S. E. 340, 65 A. L. R. 1427.

Affidavit defined.—An affidavit is: "A written or printed declaration or state-

ment of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before an officer having authority to administer such oath." Black's Law Dictionary quoted in *Town of Mayesville v. Clamp*, 149 S. C. 346, 147 S. E. 455.

Affidavit to be sufficient must show particular person.—There is no requirement that the affidavit must be made by a particular person; so an affidavit need not be made by the plaintiff but may be made by an agent or attorney on information and belief; and the same affidavit may be used in several cases. *Grollman v. Lipsitz*, 43 S. C. 329, 21 S. E. 272; *Guckenheimer v. Libbey*, 42 S. C. 162, 19 S. E. 999.

And the jurat thereto need not be signed by the officer administering the oath.—While the affidavit must be signed by the affiant, the jurat thereto need not be signed by the officer administering the oath. *Doty v. Boyd*, 46 S. C. 39, 24 S. E. 59.

Affidavit to be sufficient must show existence of cause of action.—The affidavit is sufficient if it states a cause of action, or if it states facts from which, as a legal conclusion, it must be inferred that a cause of action does exist. *Monday v. Elmore*, 27 S. C. 126, 3 S. E. 65; *Central R., etc., Co. v. Georgia Constr., etc., Co.*, 32 S. C. 319, 11 S. E. 192; *Roddey v. Erwin*, 31 S. C. 36, 9 S. E. 729; *Nat. Exch. Bank v. Stelling*, 31 S. C. 360, 9 S. E. 1028; *Ketchin v. Landecker*, 32 S. C. 155, 10 S. E. 936.

Thus an affidavit which alleges that the defendant has committed certain acts, from which a fraudulent intent may be inferred, and states admissions on the part of the defendant tending to prove such intent, is sufficient upon its face. *Grollman v. Lipsitz*, 43 S. C. 329, 21 S. E. 272.

But the bare allegation of a wicked intent will not support the process of attachment; the affidavit must positively state the facts from which the inference of wicked intent may be drawn; or, if stated upon information and belief, the sources of that information. *Smith v. Walker*, 6 S. C. 169; *Brown v. Morris*, 10 S. C. 467; *Claussen v. Fultz*, 13 S. C. 476, 478; *Burch v. Brantley*, 20 S. C. 503, 506; *Ivy v. Caston*, 21 S. C. 583, 588; *Myers v. Whiteheart*, 24 S. C. 196; *Mixson v. Holley*, 26 S. C. 256, 2 S. E. 385; *Monday v. Elmore*, 27 S. C. 126, 3 S. E. 65; *Wando Phosphate Co. v. Rosenberg*, 31 S. C. 301, 9 S. E. 969; *Roddey v. Erwin*, 31 S. C. 36, 9 S. E. 729; *Sharp v. Palmer*, 31 S. C. 444, 10 S. E. 98; *Virginia-Carolina Chemical Co. v. Wilkins*, 105 S. C. 291, 297, 89 S. E. 659, 661; *Witherspoon Co. v. Bell*, 132 S. C. 303, 128 S. E. 503; *Skalowski v. Joe Fisher, Inc.*, 152 S. C. 108, 149 S. E. 340, 65 A. L. R. 1427.

Affidavit failing to state claim and grounds thereof is fatally defective.—It must appear in the affidavit that a cause of action exists against the defendant. And an affidavit which fails to state the amount of the claim and the grounds thereof is fatally defective. *Williams v. Carlson*, 118 S. C. 46, 110 S. E. 69.

An affidavit setting forth the fact that the plaintiff has sustained damages to an extent specified, because of a breach of contract, and that the defendant is a non-resident, shows the plaintiff entitled to a writ of attachment, under this section, where the complaint states a cause of action for breach of contract as set out in the affidavit, though the facts are mixed up with allegations appropriate to a different cause of action. *Fleming v. Byrd*, 78 S. C. 20, 58 S. E. 965.

And an indefinite statement of claim renders affidavit defective.—An affidavit to obtain a warrant of attachment, which states that the claim of the plaintiff is about \$325 "according to his best information and belief," is not a sufficient compliance with this section, which provides that the affidavits shall specify the amount of the claim and the ground thereof. *Ketchin v. Landecker*, 32 S. C. 155, 10 S. E. 936.

It might be conceded that the affidavit is, of itself, insufficient in form, by the reason of the omission of the statement that a cause of action existed, with the amount and grounds thereof as required by statute. *Josey v. Reynolds*, 152 S. C. 339, 150, S. E. 67.

But if non-residence of defendant is ground for attachment the affidavit need only show that fact.—Where the ground of attachment is the non-residence of the defendant the affidavit is sufficient if it state that fact without other facts or circumstances. *Smith v. Walker*, 6 S. C. 169; *Roddey v. Erwin*, 31 S. C. 36, 9 S. E. 729.

Sufficiency of affidavit may be ruled on at chambers.—In a motion to vacate an attachment made under this section it is competent for the court to decide at chambers whether the affidavit shows that a cause of action exists against the defendant. *Williamson v. Eastern Bldg., etc., Ass'n*, 54 S. C. 582, 32 S. E. 765, 71 Am. St. Rep. 822, cited approvingly in *Seibels v. Northern Central Ry. Co.*, 80 S. C. 133, 61 S. E. 435, 16 L. R. A. (N. S.) 1026.

Allegation that property sought is not part of defendant's homestead is unnecessary.—An affidavit that the property which the defendant is alleged to have fraudulently disposed of, was not a part of the defendant's homestead, was not necessary for the issuing of an attachment. *Grollman v. Lipsitz*, 43 S. C. 329, 21 S. E. 272.

Affidavit alleging a cause of action on a money demand against an assignor is sufficient.—An affidavit alleging a cause of action on a plain money demand against the assignor is sufficient to sustain an attachment over his objection though the facts stated are not sufficient to sustain an action to set aside the conveyance to his co-defendant, the assignee. *Nat. Exch. Bank v. Stelling*, 31 S. C. 360, 9 S. E. 1028.

Where there is a verified complaint stating all of the facts necessary, it may take the place of an affidavit. *Ferst v. Powers*, 58 S. C. 398, 36 S. E. 774, cited approvingly in *Josey v. Reynolds*, 152 S. C. 339, 150 S. E. 67.

Where the affidavit in attachment purports to incorporate a verified complaint which is attached to and made a part of such affidavit, the complaint may be resorted to for the purpose of supplying any omissions in the affidavit. *Addison v. Sujette*, 50 S. C. 192, 27 S. E. 631; *Chitty v. Pennsylvania Ry. Co.*, 62 S. C. 526, 40 S. E. 944, cited approvingly in *Josey v. Reynolds*, 152 S. C. 339, 150 S. E. 67.

A verified complaint attached to the affidavit may be used to augment the affidavit for the purpose of furnishing grounds for issuing the warrant of attachment. *Josey v. Reynolds*, 152 S. C. 339, 150 S. E. 67.

In an attachment case, it is sufficient that the complaint of affidavit set out a cause of action. The writ is not founded on the formal complaint but on the plaintiff's affidavit as to the facts upon which the writ is prayed. *Josey v. Reynolds*, 152 S. C. 339, 150 S. E. 67.

But an unverified complaint may not be used to augment the affidavit.—An unverified complaint attached to the affidavit may not be used to augment the affidavit for the purpose of furnishing grounds for issuing the warrant of attachment. *Josey v. Reynolds*, 152 S. C. 339, 150 S. E. 67; *Addison v. Sujette*, 50 S. C. 192, 27 S. E. 631.

Defects in plaintiff's affidavit cannot

be supplied by admissions in defendant's affidavit submitted at hearing.—On a motion to vacate an attachment because issued upon an affidavit fatally defective, the defects in such affidavit cannot be supplied by the statements and admissions in the defendant's affidavit submitted at the hearing, but which was not before the clerk at the time of the issuance of the attachment. *Addison v. Sujette*, 50 S. C. 192, 27 S. E. 631.

New affidavits do not have to be filed on successive warrants being issued, none but the last being served. *Hall v. Lemmond*, 105 S. C. 154, 89 S. E. 545.

Finding of circuit court of residence of defendant is final.—On appeal from a refusal to vacate an attachment against a non-resident, the finding of the trial court as to the residence of the defendant is conclusive since it is a question of fact. *Norris Co. v. S. H. Levin's Sons*, 81 S. C. 36, 61 S. E. 1103.

Personal service out of State is as efficacious as a service by publication or deposit in the Post Office.—See this catchline under section 527.

Failure to file affidavit within 48 hours is fatal to attachment.—Where the affidavit on which the warrant of attachment was issued was not filed within the meaning of the statute in the clerk's office within 48 hours, the defendant was entitled to vacate and set aside the warrant of attachment and the levy made thereunder. *Lester v. Fox Film Corp.*, 114 S. C. 414, 103 S. E. 775.

The affidavit is filed when delivered to the clerk and by him received to be kept on record. *Townsend v. Sparks*, 50 S. C. 380, 27 S. E. 801.

The question as to whether copies of the affidavit will suffice was raised in the case of Wagener v. Booker, 31 S. C. 375, 9 S. E. 1055, but was not settled, as such settlement was unnecessary to the decision of the said case.

Contractor remaining in State a year owning property therein and expecting to stay not a non-resident under this section.—See this catchline under section 527.

§ 530. Security on obtaining attachment.—Before issuing the warrant, the judge, clerk, or magistrate shall require a written undertaking, on the part of the plaintiff, with sufficient surety, to the effect that if the defendant recovered judgment, or the attachment be set aside by order of the court, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking, which shall be at least two hundred and fifty dollars, except in case of a warrant issued by a magistrate, when it shall be at least twenty-five dollars.

1932 Code, § 530; Civ. P. '22, § 503; Civ. P. '12, § 282; Civ. P. '02, § 251; 1870 (14) § 253.

Cross References.—As to the deposit of money with the officer of court in lieu of bond, see sec. 397 and note thereto. As to when the defendant is entitled to redelivery in claim and delivery, see sec. 558 and note thereto. See sec. 558 dealing with undertakings in claim and delivery. As to amount of bond in attachment and claim and delivery proceedings, see sec. 557 and note thereto.

This section is inconsistent with circuit court rule 65.—Circuit court rule 65, providing that there must be a subscribing witness to all undertakings is inconsistent with this section. *Grollman v. Lipsitz*, 43 S. C. 329, 21 S. E. 272.

The word "undertaking" as used in this section manifestly means engagement or obligation. *Nat. Exch. Bank v. Stelling*, 31 S. C. 360, 9 S. E. 1028.

The undertaking need not be under seal.—The undertaking provided for under this section need not be under seal. *Grollman v. Lipsitz*, 43 S. C. 329, 340, 21 S. E. 272, cited with approval in *Furness v. Calhoun*, 70 S. C. 537, 50 S. E. 194; *Ferst v. Powers*, 58 S. C. 398, 36 S. E. 744.

Bond intended as additional security to the common law liability of the plaintiff.—The bond given in attachment was intended as additional security to the liability of the plaintiff at common law. *Sanders v. Hughes*, 2 Brev. 495.

And a party aggrieved is not obliged to seek redress on the bond but may proceed at common law.—A party aggrieved by the operation of an attachment, improperly sued out or conducted, is not obliged to seek redress on the bond given by the plaintiff in attachment, but may proceed at common law. *Sanders v. Hughes*, 2 Brev. 495. And this is true though the bond is a nullity. *Booker v. Smith*, 38 S. C. 228, 16 S. E. 774.

Suit on attachment undertaking must be a separate civil action. *Walker v. Preacher et al.*, 188 S. C. 60, 198 S. E. 188.

The officer before issuing the attachment should satisfy himself that the undertaking is that of the plaintiff.—The officer issuing the attachment, before issuing it, should have such facts before him as satisfy him that the undertaking is that of the plaintiff. *Grollman v. Lipsitz*, 43 S. C. 329, 340, 21 S. E. 272, cited with approval in *Furness v. Calhoun*, 70 S. C. 537, 50 S. E. 194. See, also, *Copeland Co. v. Brown*, 103 S. C. 177, 87 S. E. 1002.

And such undertaking must be signed by the plaintiff.—The written undertaking required must be signed by the plaintiff before the warrant is issued, or the attachment based thereon will be set aside. *Nat. Exch. Bank v. Stelling*, 31 S. C. 360, 9 S. E. 1028; *Wagener v. Booker*, 31 S. C. 375, 9 S. E. 1055. Unless

signed by the plaintiff it is a nullity. *Booker v. Smith*, 38 S. C. 228, 16 S. E. 774.

Which means all the plaintiffs.—The undertaking must be signed by all of the plaintiffs before a writ of attachment is issued or the attachment will be set aside. *Guckenheimer v. Dryfus*, 43 S. C. 443, 21 S. E. 331.

But the undertaking may be signed by the authorized agent of the plaintiff. *Nat. Exch. Bank v. Stelling*, 31 S. C. 360, 369, 9 S. E. 1028, cited with approval in *Furness v. Calhoun*, 70 S. C. 537, 50 S. E. 194.

Whose authority may appear by telegram.—The names of the plaintiffs may be signed by agents under the authority of telegrams from the plaintiffs which are attached to the undertaking. *Ferst v. Powers*, 58 S. C. 398, 36 S. E. 744.

An undertaking as provided for by this section may be signed by an attorney of record on authority of a telegram from an associate attorney that the plaintiff authorizes the signature of such undertaking. *Furness v. Calhoun*, 70 S. C. 537, 50 S. E. 194.

But the agent's failure to file his authority to sign is not fatal to the judgment.—The failure to file the authority to sign the plaintiff's name to the undertaking provided for in this section is not fatal to the judgment. *Grollman v. Lipsitz*, 43 S. C. 329, 340, 21 S. E. 272, cited with approval in *Furness v. Calhoun*, 70 S. C. 537, 50 S. E. 194; see, also, *Copeland Co. v. Brown*, 103 S. C. 177, 87 S. E. 1002.

A partnership may be bound by the signature of the name of the firm or the signatures of the individual members.—A partnership may bind itself by its signature to an undertaking in attachment either by the name of the firm or by the signatures of the individual members composing such firm, provided it appears in the instrument that the intention is to bind the partnership. *Grollman v. Lipsitz*, 43 S. C. 329, 21 S. E. 272; *Hampton v. Bogan*, 55 S. C. 547, 33 S. E. 581.

And one member of the firm can bind the firm by signing for the firm without special authority.—One member of a firm can bind the firm by signing for the firm without special authority so to do. *Grollman v. Lipsitz*, 43 S. C. 329, 21 S. E. 272.

Surety.—Not necessary that personal surety be a resident of county in which attachment issued, or that he own property therein. Properly licensed under sections 901 and 7989 a surety company may become surety. Under sections 347, 348, and 349, plaintiff may deposit cash, in lieu of a personal surety, or the undertaking of a surety company. *Prevost v. Post*, 172 S. C. 228; 173 S. E. 628.

Failure of clerk to endorse approval on the undertaking does not invalidate it.—A bond in attachment without the approval of the clerk endorsed thereon is valid. *Watson v. Paschall*, 73 S. C. 413, 53 S. E. 646.

Where the undertaking is insufficient the remedy is by motion to increase it.—Where the undertaking filed by the plaintiff is insufficient in amount, the remedy is by motion to increase it, and the fact that the said undertaking is insufficient is not a ground for the dissolution of the attachment predicated thereon. *Copeland Co. v. Brown*, 103 S. C. 177, 87 S. E. 1002.

But an insufficient bond may be waived by answering on the merits.—Where an attachment was irregularly issued on inadequate allegations and insufficient statutory bond, such irregularity was waived by answering on the merits. *Carter Grocery Co. v. Wilson*, 156 S. C. 546, 153 S. E. 566.

Effect of dissolution of attachment pending motion to amend defective bond.—Equity will not enforce liability on a bond in attachment when it appears that the plaintiff in the attachment

suit, after he had discovered that the bond was irregular, moved to amend it so as to have it perfected according to law, which motion the defendant in the said suit opposed, and the attachment was dissolved and judgment entered for the defendant in that suit for costs and disbursements, which judgment was paid. *Booker v. Smith*, 38 S. C. 228, 16 S. E. 774.

Defendant is entitled to damages under attachment bond, where defendant recovered judgment, or where judgment was set aside, dissolved or vacated. *Frick Co., Inc. v. Deiter et al.*, 168 S. C. 289, 167 S. E. 499.

And plaintiff need not show that attachment was improperly or maliciously sued out; mere fact that attachment was set aside being sufficient. *Ibid.*

Actual compensatory damages, including depreciation in value of attached property, and costs and expenses proximately resulting from attachment may be recovered. *Ibid.*

See generally, as to actions for wrongful attachment, *Forrest v. McBee*, 72 S. C. 189, 193, 51 S. E. 675.

§ 531. Attachment—to whom directed and what to require.—The warrant shall be directed to any sheriff or constable of any county in which property of such defendant may be, and shall require him to attach and safely keep all the property of such defendant within his county, or so much thereof as may be sufficient to satisfy the plaintiff's demand, together with costs and expenses, the amount of which must be stated in conformity with the complaint, together with costs and expenses. Several warrants may be issued at the same time to the sheriffs or constables of different counties.

1932 Code, § 531; Civ. P. '22, § 504; Civ. P. '12, § 283; Civ. P. '02, § 252; 1870 (14) § 254.

Amendment of warrant after issuance quare.—The question whether a warrant may be amended by the insertion therein of the amount claimed was raised in the case of *Ex parte Perry Stove Co.*, 43 S. C. 176, 20 S. E. 980, but the question was not settled therein as its decision was unnecessary to the holding of the case.

The affidavits and warrant need not be served on the defendant in attaching

personalty. *Grollman v. Lipsitz*, 43 S. C. 329, 21 S. E. 272.

The writ of attachment need not be served except in case of attachment of real property. See the treatment of this subject under § 532.

As to what property may be attached see section 532 and note thereto.

See generally, as to moneys received on execution, in hands of sheriff, *Blair v. Cantey*, 2 Speers 34, 13 Am. Dec. 360.

§ 532. Property attach.—The sheriff or constable to whom such warrant is directed and delivered shall immediately attach all the real estate of such debtor, and all his personal estate, including money and bank notes, except such real and personal estate as is exempt from attachment, levy, or sale, by the Constitution, and shall take into his custody all books of account, vouchers and papers relating to the property, debts, credits, and effects of such debtor, together with all evidences of his title to real estate, which he shall safely keep, to be disposed of as hereinafter directed.

When real estate is attached, a true and attested copy of such attachment, together with a description of the real estate attached, shall be, by the officer serving the same, delivered to the party whose real estate is attached, or left at his last and usual place of abode; and the officer making such service shall also leave a true and attested copy of such attachment, together with a description of the real estate so attached, in the office where, by law, a deed of such estate is required to be recorded; and, if the party whose estate is attached does not reside in this State, then such copy shall be delivered to his tenant, agent, or attorney, if any be known; and, if no such agent, tenant, or attorney be known, then a copy of such warrant of attachment, with the officer's return thereon lodged in the office where, by law a deed of such real estate ought to be recorded, shall be deemed sufficient service. It shall be the duty of the clerk or register of the office wherein said warrant of attachment is required to be lodged, to receive the same, and enter in a book kept for that purpose the names of the parties, the date of the warrant of attachment, the sum demanded, and the officer's return thereon. Said attachment shall be a lien subject to all prior liens, and bind the real estate attached from the date of lodgment: *provided*, that all attachments lodged upon the same day shall take rank together.

1932 Code, § 532; Civ. P. '22, § 505; Civ. P. '12, § 284; Civ. P. '02, § 253; 1870 (14) § 255.

As to attachments of shares in corporations, vessels, etc., see sec. 537 and note thereto.

Object of the section.—It is obvious that the intention of the statute was to subject to attachment process every property interest of the debtor—not only that which is legal and that capable of actual seizure, but that which is equitable, and that requiring actions either at law or in equity to make it available for the payment of the attachment debt. *Pelzer Mfg. Co. v. Pitts*, 76 S. C. 349, 57 S. E. 29, 33, 11 Ann. Cas. 665, 9 L. R. A. (N. S.) 118.

There is no priority of lien where two attachments are levied the same day but at different hours.—Where two attachments are levied upon the personal property of the same debtor at different hours of the same day, the one first levied has no priority of lien but the two rank together. *Steffens v. Wanboeker*, 17 S. C. 475.

The writ of attachment need not be served except in case of attachment of real property.—Under this section the writ of attachment need not be served except in case of an attachment of real estate. *Stephens v. Ringling*, 102 S. C. 333, 86 S. E. 683.

Warrant need not be served on defendant in the attachment of personalty.—See § 531 and note thereto.

The attachment will be dissolved if the property levied upon does not belong to the defendant.—Where the defendant is a nonresident the attachment levied to obtain jurisdiction will be dissolved if

the property attached is not the property of the defendant. *Greenwood Gro. Co. v. Canadian, etc., Elevator Co.*, 72 S. C. 450, 52 S. E. 191, 110 Am. St. Rep. 627, 2 L. R. A. (N. S.) 79, 5 Ann. Cas. 261. See, also, *LaVarre v. International Paper Co.*, 37 F. (2d) 141, 152.

Personal property defined.—For a definition of personal property as used herein, see sec. 898 and note thereto.

All property interest of the debtor either legal or equitable is subject to attachment.—*Pelzer Mfg. Co. v. Pitts*, 76 S. C. 349, 356, 57 S. E. 29, 11 Ann. Cas. 665, 9 L. R. A. (N. S.) 118.

The equitable interest of a firm in a certificate of stock, security the note of a partner given as a contribution to the partnership capital, is subject to an attachment for a firm debt. *Pelzer Mfg. Co. v. Pitts*, 76 S. C. 349, 57 S. E. 29, 11 Ann. Cas. 665, 9 L. R. A. (N. S.) 118.

Formerly a claim for damages was not subject to attachment.—Under the former attachment act a claim for damages was held not to be the subject of attachment. See *Burrill v. Letson*, 2 Speers 378.

Property in hands of receiver cannot be attached.—*Regenstein v. Pearlstein*, 30 S. C. 192, 8 S. E. 850.

And this is true of money levied in execution upon fieri facias.—Money levied in execution by the sheriff upon fieri facias and in his hands is not subject to attachment. *Blair v. Cantey*, 2 Speers 34, 13 Am. Dec. 360.

Where an attachment is set aside after sale, the proceeds of the sale may be at-

tached for the same debt, while in the sheriff's hands. *Roddey v. Erwin*, 31 S. C. 36, 9 S. E. 729.

Neither can alcoholic liquors kept contrary to the law be attached.—Alcoholic liquors kept contrary to the law cannot be attached, since it would defeat the State's right of forfeiture. *Lanahan v. Bailey*, 53 S. C. 489, 31 S. E. 332, 69 Am. St. Rep. 884, 42 L. R. A. 297.

Nor can a sheriff attach the automobile of the defendant in a county other than his own. *Whitworth v. Wing*, 125 S. C. 146, 118 S. E. 177.

Interest of a nonresident partner in the firm's assets cannot be attached.—See the above catchline under sec. 527.

But a debt due the defendant by another person may be attached. *McKelvey v. South Carolina R. Co.*, 6 S. C. 446; *Campbell v. Home Ins. Co.*, 1 S. C. 158; *LaVarre v. International Paper Co.*, 37 F. (2d) 141.

And this is true of debts evidenced by notes and bonds. *Williamson v. Eastern Bldg., etc., Ass'n*, 54 S. C. 582, 32 S. E. 765, 71 Am. St. Rep. 822. As well as by books of account. *Reily v. Middleton*, *Dud.* 21; *Waddle v. Cureton*, 2 *Speers* 53.

So also as to a debt due by the plaintiff to nonresident defendant.—Indebtedness due by the plaintiff to a nonresident defendant is subject to an attachment in a suit by the plaintiff on the same basis as an attachment of such indebtedness by a third party. *LaVarre v. International Paper Co.*, 37 F. (2d)

141, 152.

Property levied upon under execution may also be attached under process against the same defendant.—Where goods have been levied on by a sheriff under an execution in his hands and before they are sold, a writ of foreign attachment against the same defendant is lodged in his office, he may levy the attachment also on the goods. *Day v. Becher*, 1 *McMull.* 92.

Prisoner's money.—Money properly taken from prisoner by superintendent of penitentiary to which prisoner, charged with robbing bank, was taken for safekeeping, was not in prisoner's possession or custody, but was sequestered and subject to attachment at bank's instance, notwithstanding money did not constitute part of identical bills stolen. *Palmetto State Bank v. English*, 181 S. C. 69; 186 S. E. 638.

Nonresident who was sued as such could not return to South Carolina after absence of ten years and after attachment of her property as nonresident which she did not contest, and establish homestead which would be prior to attachment lien, notwithstanding that nonresident may have been the head of a family. *Bonebrake v. Morrow*, 183 S. C. 170; 190 S. E. 506.

Applied, as to attachment of books of account, in *Reily v. Middleton*, *Dud.* 21; *Waddle v. Cureton*, 2 *Speers* 53; *Burrill v. Leston*, 2 *Speers* 378.

§ 533. Sheriff's duties in case of seizure.—He shall, immediately on making such seizure, with the assistance of two disinterested freeholders, make a just and true inventory of all the property so seized, and of the books, vouchers, and papers taken into custody, stating therein the estimated value of the several articles of personal property, and enumerating such of them as are perishable, which inventory, after being signed by the sheriff and appraisers, shall, within ten days after such seizure, be returned to the officer who issued the warrant; and the sheriff or constable shall, under the direction of such officer, collect, receive, and take into his possession, all debts, credits, and effects of such debtor, and commence such suits, and take such legal proceedings, either in his own name or in the name of such debtor, as may be necessary for that purpose, prosecute and discontinue the same at such times, and on such terms, as the court may direct. The property so seized, or the proceeds of such as shall have been sold and debts collected, shall be kept to answer any judgment which may be obtained in such action.

1932 Code, § 533; Civ. P. '22, § 506; Civ. P. '12, § 285; Civ. P. '02, § 254; 1870 (14) § 256.

Intention of section. See this catchline under sec. 532.

The sheriff under this section acts as a "quasi receiver."—The sheriff under this section acts as a "quasi receiver"

under the direction of the officer who issued the warrant. *Pelzer Mfg. Co. v. Pitts*, 76 S. C. 349, 57 S. E. 29, 11 Ann. Cas. 665, 9 L. R. A. (N. S.) 118.

An action on a note may be brought

while a motion to vacate the judgment is pending.—An action may be brought by the sheriff on a note seized under this section while a motion to vacate the judgment is pending. *Nicholls v. Hill*, 42 S. C. 28, 19 S. E. 1017.

And all of the defenses which existed against the defendant in attachment

may be interposed.—In an action by a sheriff on a note seized under this section the note is subject to all of the defenses which could be set up in an action by the defendant in the attachment suit. *Nicholls v. Hill*, 42 S. C. 28, 19 S. E. 1017.

§ 534. Sell attached personal property likely to deteriorate, or keeping thereof expensive, before judgment when not replevied.—Whenever any officer of this State shall have taken possession of any personal property under process of attachment and the defendant or other intervening party claiming the same fails to replevy such property within sixty (60) days after such property has been attached or seized by said officer, and such property remains in the hands of such officer and is either, of a perishable nature, liable to deteriorate in value or where the keeping of the same is attended with considerable expense as compared to the value of the property, such property may be sold by such officer under the direction of the court after giving not less than ten (10) days' advertisement of the manner, time and place of sale in three public places in the county, one of which shall be on the court house door and the court in its discretion may cause such additional notice or manner of advertisement as in its judgment the circumstances demand, the money after the payment of the legal expenses to be turned over to the clerk of court to await the judgment of court.

1932 Code, § 534; Civ. P. '22, § 507; Civ. P. '12, § 286; Civ. P. '02, § 255; 1870 (14) 257; 1883 (18) 491; 1933 (38) 63, 445.

Court may order sale on refusal to vacate attachment from which appeal is taken.—Where a motion to vacate the attachment was made and refused, and appeal was taken to the Supreme Court and a stay of proceedings asked for, it was held that the court had a right to order the sale of personal property.

Southern Ry. Co. v. Sheppard, 42 S. C. 543, 20 S. E. 481.

See generally, as to the attachment of car, *Seibels v. Northern Central R. Co.*, 80 S. C. 133, 138, 61 S. E. 435, 16 L. R. A. (N. S.) 1026; *Shore & Bro. v. Baltimore, etc., R. Co.*, 76 S. C. 472, 57 S. E. 526, 11 Ann. Cas. 909.

§ 535. Claim of third persons—proceedings on.—If the person in whose possession such property shall be attached shall appear at the return of the writ and file his answer thereto, and deny the possession or control of any property belonging to the defendant, or claim the money, lands, goods and chattels, debts and books of account as creditor in possession, or in his own right, or in the right of some third person, or if any of the said property be claimed by any other person than such defendant, then, if the plaintiff be satisfied therewith, the party in possession shall be dismissed and the plaintiff may pay the cost of his action. But if the plaintiff shall contest the said return or the claim of said third person, an issue shall be made up under the direction of the judge to try the question, and the party that shall prevail in said issue shall recover the costs of such proceeding of the opposite party, and judgment shall be given accordingly. If the party in possession, or the third person claiming the property, as the case may be, resides in a different county from that in which the action is brought, and an issue be made up between him and the plaintiff, the action shall be tried in the county where the party in possession resides. In case the property is claimed by a third person, the plaintiff shall execute to such person the same undertaking that he is now required to

give under section 530; the said undertaking to be executed within ten (10) days after notice of such claim.

1932 Code, § 535; Civ. P. '22, § 508; Civ. P. '12, § 287; Civ. P. '02, § 255a; 1883 (18) 491.

Cross reference.—As to claim of property by third persons in claim and delivery actions, see sec. 563 and note thereto. As to when the court may give relief in case of mistake, see sec. 495 and note thereto. As to enlarging time for proceeding in an action, see sec. 820 and note thereto.

Judge given broad discretionary powers.—The clause "an issue shall be made up under the direction of the judge to try the question" implies discretion in the circuit judge, the liberal exercise of which may be very important in view of the infinite variety of relations the parties may sustain to the property in controversy. *Pelzer Mfg. Co. v. Pitts*, 76 S. C. 349, 57 S. E. 29, 31, 11 Ann. Cas. 665, 9 L. R. A. (N. S.) 118.

Which includes the placing of the burden of proof.—It is within the discretion of the court under the authority given by this section to make the plaintiffs take the position of actors, thus placing upon them the burden of proof. *Pelzer Mfg. Co. v. Pitts*, 76 S. C. 349, 57 S. E. 29, 31, 11 Ann. Cas. 665, 9 L. R. A. (N. S.) 118.

This section applies only to attachments.—The provisions of this section apply only to proceedings by attachment and not to proceedings for the enforcement of an agricultural lien, or a landlord's lien for rent. *Southern Ry. Co. v. Sarratt*, 58 S. C. 98, 36 S. E. 504, 506. See, also, the authority therein cited. As to motions to vacate warrant of a seizure under the Agricultural Lien Law, see section 8777 and note thereto.

Section applies where special property interest is claimed.—The object of the statute was not merely to allow an intervention by one in possession of the property claiming absolute ownership in his own right, but also by one in possession claiming a right to such possession, a special property interest being affected by the attachment. *Shore & Bro. v. Baltimore, etc., R. Co.*, 76 S. C. 472, 57 S. E. 526, 527, 11 Ann. Cas. 909.

Therefore, where a car loaded with interstate freight belonging to a foreign railroad was shipped into this state, and here attached, it was held that the railroad company in this state in whose possession the car was, could intervene under the authority of this section. *Shore & Bro. v. Baltimore, etc., R. Co.*,

76 S. C. 472, 57 S. E. 526, 11 Ann. Cas. 909.

The third party claimant may not move to vacate the attachment.—This section does not provide that a third person who claims the attached property may move to vacate the attachment but simply provides a mode by which such third person may retain or regain possession of the said property unless the person attaching gives the undertaking in the time prescribed by this section. *Ford v. Calhoun*, 53 S. C. 106, 30 S. E. 830, 832.

Under this section, assignee of defendant's property, under deed of assignment, must establish his right to the property before he can move to discharge the attachment under section 544. *Bryce & Co. v. Foot*, 25 S. C. 467.

Failure to give the required undertaking serves as admission of claim of third person.—If the plaintiff should fail to give the undertaking to the third party as provided for under this section within the specified time, he shall be held to have conceded the rightfulness of the claim. *Ex parte Sales*, 126 S. C. 155, 117 S. E. 350, 351; *Ford v. Calhoun*, 53 S. C. 106, 110, 30 S. E. 830, cited with approval in *First Nat. Bank v. McSwain*, 93 S. C. 30, 75 S. E. 1106, 1109, Ann. Cas. 1914D, 809.

But such failure to give bond within the prescribed time may be remedied in certain cases.—In the case of *Chesterfield Grocery Co. v. Birch* (S. C.), 101 S. E. 645, it was said that where the failure to file the bond as provided for under this section within the prescribed time, was due to mere inadvertence and excusable neglect, and that where justice would be better subserved by permitting the filing of the bond, the court may give relief by extending the time under the authority of sections 495, 820.

Failure to give notification of ownership of property does not waive right to intervene.—The owner of property attached and sold as the property of the defendant in an attachment suit is not precluded from intervening and recovering from the plaintiff because of his failure to notify the sheriff and the plaintiff that he owned the property. *First Nat. Bank v. McSwain*, 93 S. C. 30, 75 S. E. 1106, 1109, Ann. Cas. 1914D, 809.

§ 536. Attachment when debt is not due.—Whenever a debt is not yet due, and it appears to the satisfaction of a circuit judge, the clerk of the court of common pleas, or magistrate, by affidavit, that the debtor has departed from the State with intent to defraud his creditors, or to avoid the

service of a summons, or keep himself concealed therein with a like intent, or that such person has removed or is about to remove any of his property from this State with intent to defraud his creditors, or has assigned, disposed of or secreted, or is about to assign, dispose of or secrete, any of his property with like intent, it shall be lawful for the plaintiff forthwith to institute suit upon such debt or cause of action, and for the said circuit judge, clerk, or magistrate to issue his warrant of attachment as if said debt were then due and payable: *provided*, that no judgment shall be had thereon till after the maturity of the debt: *and provided, further*, that the plaintiff pay the costs in case the debtor pays the debt on or before its maturity.

1932 Code, § 536; Civ. P. '22, § 509; Civ. P. '12, § 288; Civ. P. '02, § 255b; 1883 (18) 491.

Cross References.—As to the attachment of the property of foreign corporation, and of nonresident, absconding or concealed defendants, see § 527 and note thereto. As to what must appear in the affidavit necessary for the issuance of attachment, see § 529 and note thereto.

Compliance with requirements is a condition precedent to action.—It is manifest that these requirements as set out by this section were intended to be conditions precedent, and that they were to be complied with before the action could issue on the debt not due. *Correll v. Georgia Const., etc., Co.*, 37 S. C. 444, 16 S. E. 156, 158, cited in *Skalowski v. Joe Fisher, Inc.*, 152 S. C. 108, 149 S. E. 340, 345, 65 A. L. R. 1427.

And such compliance must appear by affidavit.—It must first appear by affidavit to the satisfaction of the court that the debtor has removed or is about to remove any of his property from the state with the intent to defraud his creditors. *Skalowski v. Joe Fisher, Inc.*, 152 S. C. 108, 149 S. E. 340, 345, 65 A. L. R. 1427.

If nothing appears in the affidavit to show that part of the debt is not yet due or that the defendant was attempting any of the acts set out in this section, the case cannot be brought within this section. *Correll v. Georgia Const., etc., Co.*, 37 S. C. 444, 16 S. E. 156, 158, cited in *Skalowski v. Joe Fisher, Inc.*, 152 S. C. 108, 149 S. E. 340, 345, 65 A. L. R. 1427.

The showing for an attachment is not necessarily identical with that for leave

to sue on a debt not due. *Correll v. Georgia Const., etc., Co.*, 37 S. C. 444, 16 S. E. 156, 159.

Nor does the existence of one prove the other.—*Correll v. Georgia Const., etc., Co.*, 37 S. C. 444, 16 S. E. 156, 159.

Neither are the said showings dependent upon each other.—The showing necessary under this section to support an attachment is not necessarily dependent upon the showing necessary to authorize a suit for debt not due. *Light v. Isear*, 28 S. C. 440, 6 S. E. 284, 285.

Thus the abatement of warrant of attachment does not affect the suit for a debt not due.—The sequent abatement of a warrant of attachment issued under the authority of this section does not affect a suit for a debt not due, as there is no necessary dependence of one upon the other. *Light v. Isear*, 28 S. C. 440, 6 S. E. 284, 285.

Causes of action are not destroyed by amendment of complaint.—In an attachment proceeding under this section when amendments to the complaint were made alleging that the debt sued for was incurred by the defendant through his having obtained the property by fraud, fake pretenses and representations, such amendments do not destroy the causes of action and create new ones, so as to destroy the attachments as incidents to the original causes of action. *Ex parte Chase*, 62 S. C. 353, 38 S. E. 718, 722.

As to amendments in general, see § 494 and note thereto.

§ 537. Shares in corporations, vessels, etc.—The rights or shares which such defendant may have in any vessel, or in the stock of any association or corporation, together with the interest and profits thereon, and all other property in this State of such defendant, except that exempt from attachment by the Constitution, shall be liable to be attached and levied upon and sold to satisfy the judgment and execution.

1932 Code, § 537; Civ. P. '22, § 510; Civ. P. '12, § 289; Civ. P. '02, § 256; 1870 (14) § 258; 1883 (18) 491.

Cross reference.—As to what property may be attached, see § 532 and note thereto.

The exemption referred to in this section is doubtless the homestead exemption. *Lanahan v. Bailey*, 53 S. C. 489, 31 S. E. 332, 334, 69 Am. St. Rep. 884, 42 L. R. A. 297.

Interest of a nonresident partner in the firm's assets cannot be attached.—See this catchline under § 527.

The interest of a nonresident corporation in the stock of a South Carolina corporation, pledged to it as security for a debt, is property located in South Carolina and under this section can only be attached and reached by a levy on the offices of the said South Carolina corporation in South Carolina. *La Varre v. International Paper Co.*, 37 Fed. (2d) 141, 152.

§ 538. Attachment—how executed on property incapable of manual delivery.—The execution of the attachment upon any such rights, shares, or any debts or other property incapable of manual delivery to the sheriff or constable, shall be made by leaving a certified copy of the warrant of attachment with the president or other head of the association or corporation, or the secretary, cashier, or managing agent thereof, or with the debtor or individual holding such property, with a notice showing the property levied on.

1932 Code, § 538; Civ. P. '22, § 511; Civ. P. '12, § 290; Civ. P. '02, § 257; 1870 (14) § 259.

Cross references.—As to the delivery of a true and attested copy of attachment to the party whose real estate is attached, see § 532 and note thereto. As to what property may be attached, see § 532 and note thereto. As to cases in which attachment may be issued, see § 259 and note thereto.

Section applies to any property incapable of manual delivery.—The provisions of this section are broad enough by a liberal construction to cover the execution of an attachment on any property incapable of manual delivery to the sheriff, by leaving with the individual holding such property a certified copy of the warrant with a notice showing the property levied upon; and the section may be well construed to em-

brace such a bulky and unmanageable thing as a freight car. *Seibels v. Northern Central R. Co.*, 80 S. C. 133, 61 S. E. 435, 439, 16 L. R. A. (N. S.) 1026.

Failure to serve affidavit and warrant does not vitiate attachment.—An attachment made under this section and § 532 cannot be set aside merely because the affidavit and warrant were not served upon the defendant. *Grollman v. Lipsitz*, 43 S. C. 329, 21 S. E. 272, 276.

This statute does not require that "notice" shall be served at instant of delivery of warrant, but service of attachment and notice showing property levied on within two days thereafter was sufficient. *Prevost v. Post*, 172 S. C. 228, 173 S. E. 628.

§ 539. Certificate of defendant's interest to be furnished.—Whenever the sheriff or constable shall, with a warrant of attachment or execution against the defendant, apply to such officer, debtor, or individual, for the purpose of attaching or levying upon such property, such officer, debtor, or individual shall furnish him with a certificate, under his hand, designating the number of rights or shares of the defendant in the stock of such association or corporation, with any dividend or encumbrance thereon, or the amount and description of the property held by such association, corporation or individual, for the benefit of or debt owing to the defendant. If such officer, debtor, or individual refuses to do so, he may be required by the court or judge to attend before him, and be examined on oath concerning the same, and obedience to such order may be enforced by attachment.

1932 Code, 539; Civ. P. '22, § 512; Civ. P. '12, § 291; Civ. P. '02, § 258; 1870 (14) § 260.

§ 540. Judgment—how satisfied.—In case judgment be entered for the plaintiff in such action, the sheriff or constable shall satisfy the same out of

the property attached by him, if it shall be sufficient for that purpose.

(1) By paying over to such plaintiff the proceeds of all sales of perishable property, and of any vessel or share or interest in any vessel, sold by him, or of any debts or credits collected by him, or so much as shall be necessary to satisfy such judgment.

(2) If any balance remain due, and an execution shall have been issued on such judgment, he shall proceed to sell, under such execution, so much of the attached property, real or personal except as provided in subdivision four of this section, as may be necessary to satisfy the balance, if enough for that purpose shall remain in his hands; and in case of the sale of any rights or shares in the stock of a corporation or association, the sheriff or constable shall execute to the purchaser a certificate of sale thereof, and the purchaser shall thereupon have all the rights and privileges in respect thereto which were had by such defendant.

(3) If any of the attached property belonging to the defendant shall have passed out of the hands of the sheriff or constable without having been sold or converted into money, such sheriff or constable shall repossess himself of the same, and for that purpose shall have all the authority which he had to seize the same under the attachment; and any person who shall wilfully conceal or withhold such property from the sheriff or constable, shall be liable to double damages, at the suit of the party injured.

(4) Until the judgment against the defendant shall be paid, the sheriff or constable may proceed to collect the notes and other evidences of debt, and the debts that may have been seized or attached under the warrant of attachment, and to prosecute any bond he may have taken in the course of such proceedings, and to apply the proceeds thereof to the payment of the judgment.

At the expiration of six months from the docketing of the judgment, or forthwith upon the docketing of the judgment in cases in which an automobile has been attached under section 8792, the court shall have power, upon the petition of plaintiff accompanied by an affidavit setting forth fully all the proceedings which have been had by the sheriff or constable since the service of the attachment, the property attached, and the disposition thereof, and also the affidavit of the sheriff or constable that he has used diligence and endeavored to collect the evidences of debt in his hands so attached, and that there remains uncollected of the same any part or portion thereof, to order the sheriff or constable to sell the same, upon such terms and in such manner as shall be deemed proper. Notice of such application shall be given to the defendant, or his attorney, if the defendant shall have appeared in the action. In the case the summons has not been personally served on the defendant, the court shall make such rule or order, as to the service of notice and the time of service, as shall be deemed just. When the judgment and all costs of the proceedings shall have been paid, the sheriff or constable, upon reasonable demand, shall deliver over to the defendant the residue of the attached property, or the proceeds thereof.

1932 Code, § 540; Civ. P. '22, § 513; Civ. P. '12, § 292; Civ. P. '02, § 259; 1870 (14) § 261; 1935 (39) 151.

If the attachment is a foreign attachment, it is only a proceeding in rem, unless the defendant appear; and if he fail to appear, the court cannot render

a judgment that would have any effect beyond the property attached and so subjected to a lien. *Stanley v. Stanley*, 35 S. C. 94, 14 S. E. 675.

§ 541. Prosecution of action to recover notes, etc., in action in which attachment issued.—The actions herein authorized to be brought by the sheriff or constable may be prosecuted by the plaintiff, or under his direction, upon the delivery by him to the sheriff or constable of an undertaking executed by two sufficient sureties, to the effect that the plaintiff will indemnify the sheriff or constable from all damages, costs, and expenses on account thereof not exceeding two hundred and fifty dollars in any one action. Such sureties shall, in all cases, when required by the sheriff or constable, justify by making an affidavit that each is a householder, and worth double the amount of the penalty of the bond, over and above all demands and liabilities.

1932 Code, § 541; Civ. P. '22, § 514; Civ. P. '12, § 293; Civ. P. '02, § 260; 1870 (14) § 262.

The word "undertaking" and the word "bond" are used synonymously.—In this section and § 542 and also in other sections of the code the word "undertaking" and the word "bond" are used synonymously. *Grollman v. Lipsitz*, 43 S. C. 329, 21 S. E. 272, 275.

§ 542. Bond to sheriff on attachment—how disposed of on judgment for defendant.—If the foreign corporation, or absent or absconding or concealed defendant, recover judgment against the plaintiff in such action, any bond taken by the sheriff or constable, except such as are mentioned in the last section, all the proceeds of sales and moneys collected by him, and all the property attached remaining in his hands, shall be delivered by him to the defendant, or his agent, on request, and the warrant shall be discharged and the property released therefrom.

1932 Code, § 542; Civ. P. '22, § 515; Civ. P. '12, § 294; Civ. P. '02, § 261; 1870 (14) § 263.

§ 543. Discharge of property and return of property or proceeds on defendant's appearance.—Whenever the defendant shall have appeared in such action, he may apply to the officer who issued the attachment, or to the court, for an order to discharge the same; and, if the same be granted, all the proceeds of sales and moneys collected by him, and all property attached remaining in his hands, shall be delivered or paid by him to the defendant or his agent, and released from the attachment. And where there is more than one defendant, and the several property of either of the defendants has been seized by virtue of the order of attachment, the defendant whose several property has been seized may apply to the officer who issued the attachment for relief under this section.

1932 Code, § 543; Civ. P. '22, § 516; Civ. P. '12, § 295; Civ. P. '02, § 262; 1870 (14) § 264.

Editor's note.—This section should be read and considered in connection with § 544, to which it bears a very important relation. The present section seems to be merely introductory to § 544 and consequently very few annotations have been placed hereunder; and such annotations deal mostly with the subject of appearance, which is preliminary to

the giving of the undertakings and the motions for the discharge of attachments which are provided for by § 544.

The appearance of the defendant as provided for by this section may be either general or special.—*Able v. Hall*, 101 S. C. 24, 85 S. E. 165, 166.

But it must precede the execution of the bond.—It is a necessary inference

that the appearance provided for in this section must precede the giving of the bond as provided for in the following section. *Stephens v. Ringling*, 102 S. C. 333, 86 S. E. 683, 686.

The property attached may be released by the agreement of the parties

without an order of the court. *Sullivan v. Williams*, 43 S. C. 489, 21 S. E. 642.

See generally, *Greenwood Gro. Co. v. Canadian, etc., Elevator Co.*, 72 S. C. 450, 457, 52 S. E. 191, 110 Am. St. Rep. 627, 2 L. R. A. (N. S.) 79, 5 Ann. Cas. 261.

§ 544. Undertaking on part of defendant.—Upon such application, the defendant shall deliver to the court or officer an undertaking executed by at least two sureties, who are residents and freeholders or householders in the State, approved by such court or officer, to the effect that such sureties will, on demand, pay to the plaintiff the amount of judgment that may be recovered against the defendant in the action, not exceeding the sum specified in the undertaking which shall be at least double the amount claimed by the plaintiff in his complaint. If it shall appear by affidavit that the property attached be less than the amount claimed by the plaintiff, the court, or officer issuing the attachment, may order the same to be appraised, and the amount of the undertaking shall then be double the amount so appraised. And in all cases the defendant, or any person who establishes a right to the property attached, may move to discharge the attachment, as in the case of other provisional remedies.

And where there is more than one defendant, and the several property of either of the defendants has been seized by virtue of the order of attachment, the defendant whose several property has been seized may deliver to the court or officer an undertaking, in accordance with the provisions of this section, to the effect that he will, on demand, pay to the plaintiff the amount of judgment that may be recovered against such defendant. And all the provisions of this section applicable to such undertaking shall be applied thereto.

1932 Code, § 544; Civ. P. '22, § 517; Civ. P. '12, § 296; Civ. P. '02, § 263; 1870 (14) § 265.

Cross references.—As to the discharge of property and the return of property or proceeds on the appearance of the defendant, see sec. 543. As to the claim of third parties upon the property attached, see sec. 535 and note thereto. As to the written undertaking of the defendant before re-delivery in claim and delivery actions, see sec. 558 and note thereto. As to the undertaking of the plaintiff for security in claim and delivery see sec. 555 and note thereto. As to undertaking of plaintiff as security on obtaining attachment, see sec. 530 and note thereto. As to motions and orders in general, see sec. 816 and note thereto, et seq. As to the filing of the undertaking provided for by this section, see circuit court rule 68. As to amount of bond required of defendant see sec. 557.

Purpose and intent of section.—There can be no doubt but that the relief provided for by this and the foregoing section was intended primarily to meet the cases where the attachments are regular and valid, yet where it would be a hardship to the debtor to be deprived of the use of his property during the pend-

ency of the action. *Bates v. Killian & Bros.*, 17 S. C. 553, 555.

This remedy respects the rights and interests of both creditor and debtor and while it releases the property to the use of the debtor, it gives the creditor a security in the undertaking which it requires to be equally as reliable as the lien which it displaces. *Bates v. Killian & Bros.*, 17 S. C. 553, 555.

The proceeding under this and the foregoing section is a prompt proceeding, by which the defendant may at once release his property. *Bates v. Killian & Bros.*, 17 S. C. 553, 557.

Proceeding hereunder does not forfeit right to impeach legality of attachment.—When the purpose and intent of the proceeding under this section are considered, there is no good reason why the adoption of the proceeding provided for should forfeit the right on the part of the defendant to impeach the legality of the attachment afterwards. *Bates v. Killian & Bros.*, 17 S. C. 553, 557.

And giving of bond does not waive right to move to vacate the attachment.—The giving of such a bond as provided

for by this section does not amount to waiver of the right to move to vacate the attachment. *Bates v. Killian & Bros.*, 17 S. C. 553, cited with approval in *Able v. Hall*, 101 S. C. 24, 85 S. E. 165, 166; *Skalowski v. Joe Fisher, Inc.*, 152 S. C. 108, 149 S. E. 340, 343, 65 A. L. R. 1427; *Kennedy v. Dunbar*, 46 S. C. 517, 24 S. E. 383, 385.

Nor does acceptance of service and appearance waive irregularities in the attachment.—The acceptance of service of summons and complaint and appearance by the defendant does not waive irregularities in the procurement of the attachment or destroy his right under this section to move to vacate and discharge the attachment of his property on account of such irregularities. *Lester v. Fox Film, Corp.*, 114 S. C. 414, 103 S. E. 775, 776.

Language of section is broad and comprehensive.—The language of this section is broad and comprehensive, and includes expressly all cases. *Bates v. Killian & Bros.*, 17 S. C. 553, 558, cited in *Skalowski v. Joe Fisher, Inc.*, 152 S. C. 108, 149 S. E. 340, 343, 65 A. L. R. 1427.

And includes motions to discharge attachment on the grounds of irregularity or invalidity.—The clause "and in all cases the defendant may move to discharge the attachment as in the case of other provisional remedies," includes, beyond doubt, the motion to discharge an attachment on the grounds of invalidity or irregularity, and refers to the general rules for the rules governing such an application. *Cureton v. Dargan*, 12 S. C. 122, 124, cited with approval in *Darby & Co. v. Shannon*, 19 S. C. 526, 531. See, also, *Kerchner v. McCormac*, 25 S. C. 461; *Claussen v. Fultz*, 13 S. C. 476; *Brown v. Morris*, 10 S. C. 467; *Smith v. Walker*, 6 S. C. 169.

And judge should indicate what affidavits were considered on motion to vacate attachment.—Where defendants moved on affidavits to vacate the attachment, and plaintiffs offered affidavits in reply, the judge should indicate what affidavits were considered by him, the weight to be given the affidavits being determined by the circuit court. *Grollman v. Lipsitz*, 43 S. C. 329, 21 S. E. 272.

But such motions apply only to those who are parties to the proceeding.—The provision under this section providing for motions to discharge an attachment on account of irregularities applies only to those who are parties to the proceeding. *Copeland v. Piedmont, etc., Ins. Co.*, 17 S. C. 116, 119, citing with approval *Kincaid v. Neall*, 3 McC. 201.

It, however, was said in a concurring opinion by Justice Cothran in the case of *Eaves v. Sales*, 126 S. C. 155, 117 S. E. 350, that where a person by petition,

establishes a right to the property attached, and shows that such property does not belong to the defendant in attachment, then such claimant should be given relief in the attachment proceeding proper, and should not be made to resort to an action of claim and delivery for the recovery of the property.

And a subsequent attachment creditor is not such a party.—The privilege to move for a discharge of the attachment as given by this section is not so extended as to allow a subsequent attachment creditor to move to vacate the prior attachment on the grounds that it was irregularly issued. *Darby & Co. v. Shannon*, 19 S. C. 526, 530.

But he may make such a motion when the prior attachment is founded on a fraud.—But a subsequent attaching creditor may move to vacate a prior attachment when such prior attachment is founded on fraud, or what amounts to fraud. *Darby & Co. v. Shannon*, 19 S. C. 526, 530.

Nor is an assignee under a deed of assignment a party to the proceeding.—The assignee under a deed of assignment cannot by motion before judgment vacate an attachment levied upon the assigned property after the recording of the assignment, he being no party to the action. *Copeland v. Piedmont, etc., Ins. Co.*, 17 S. C. 116. See, also, *Sheldon v. Blauvelt*, 29 S. C. 453, 7 S. E. 593, 1 L. R. A. 685; *Bryce & Co. v. Foot*, 25 S. C. 467.

Nor may a third party move for a discharge of the attachment on the grounds of ownership of the land.—A third party has no right to intervene and move to set aside an attachment upon the ground that the attached lands belong to him and not the defendant. Title to land cannot be so summarily tried. *Metts v. Piedmont, etc., Ins. Co.*, 17 S. C. 120, 123. See, also, *Central R., etc., Co. v. Georgia Constr., etc., Co.*, 32 S. C. 319, 11 S. E. 192.

Pendency of another action for same cause is sufficient to vacate.—*Ferst v. Powers*, 58 S. C. 398, 36 S. E. 744.

Regularity of another attachment on the same property cannot be questioned by attaching creditor.—A creditor attaching his debtor's property but not claiming it except under the attachment cannot question the regularity of another attachment against the said property. *Ex parte Perry Stove Co.*, 43 S. C. 176, 20 S. E. 980, 984.

A motion, without notice, to vacate an attachment after the impaneling of the jury should be denied.—A motion, without notice, to vacate an attachment made after the jury are impaneled and sworn and the pleadings read should be refused. *Savings Bank v. Sprunt & Son*, 86 S. C. 8, 67 S. E. 955. The foregoing conclusion was based on a construction of

sec. 573, dealing with motions to vacate and modify injunctions.

Notice that a motion will be made to vacate an attachment levied on the interest of a non-resident partner, on the affidavits and papers served therewith, sufficiently shows the grounds on which the motion will be made, where the affidavits and papers show that the attachment defendant was sued on a partnership debt with his copartner, that he owned no property in the state except his interest in the partnership effects, and that this interest had been attached. *Whitfield v. Hovey*, 30 S. C. 117, 8 S. E. 840. And the notice need not expressly state that the motion will be made "on the ground" that the interest of a non-resident copartner in the partnership effects is not attachable. *Id.*

Discharge of attachment may be granted at chambers.—A circuit judge on motion upon notice may discharge an attachment at chambers. *Cureton v. Dargan*, 12 S. C. 122. See, also, *Bray Clothing Co. v. Shealy*, 53 S. C. 12, 14, 30 S. E. 620.

As to power of judges at chambers, see sec. 37 and note thereto.

And in so doing the judge may decide whether or not the plaintiff has a cause of action.—*Williamson v. Eastern Bldg.*, etc., Ass'n, 54 S. C. 582, 32 S. E. 765, 71 Am. St. Rep. 822.

But he cannot decide questions of fact determining the merits of the case.—*Williamson v. Eastern Bldg.*, etc., Ass'n, 54 S. C. 582, 32 S. E. 765, 71 Am. St. Rep. 822; *Moore v. Rountree*, 57 S. C. 75, 77, 35 S. E. 386.

Refusal to discharge attachment is res adjudicata as to party making motion.—The refusal to discharge the attachment is res adjudicata as to the party making the motion for such discharge and he cannot afterwards raise the question

again in a formal suit. *Darby & Co. v. Shanon*, 19 S. C. 526, 532.

Appearance must precede execution of bond.—This section contemplates the appearance as provided for by the foregoing section before the execution of the bond provided for by this section. *Stephens v. Ringling*, 102 S. C. 333, 86 S. E. 683, 686.

But execution of bond does not constitute an appearance.—The execution of the undertaking as provided for by this section does not constitute an act of appearance as contemplated by the foregoing section. *Stephens v. Ringling*, 102 S. C. 333, 86 S. E. 683, 686.

Bankruptcy of the defendant does not release sureties on the bond.—The subsequent bankruptcy of the defendant after the giving of the undertaking as required by this section does not release the sureties on such undertaking. *Straus v. Fidelity & Deposit Co.*, 143 S. C. 422, 141 S. E. 683, 684.

An invalid statutory bond may be sued upon as a common law bond.—In the case of *Sullivan v. Williams*, 43 S. C. 489, 21 S. E. 642, 647, it was held that a bond given for the release of attached property, while it did not possess the necessary requisites for a statutory bond such as provided for by this section, might be sued upon as a common law bond.

Extent of liability.—Where a bond to dissolve an attachment is conditioned to satisfy any judgment recovered against the defendant, the judgment recovered in the attachment suit fixes the amount to be paid under the bond, although it may exceed the value of the property, up to the amount of the penalty of the bond. *Kimbrell v. Heffner et al.*, 163 S. C., 35, 161 S. E., 175. The bond must be couched in the language of the statute; if it is not, the terms of the statute will be read into the bond. *Ibid.*

§ 545. When sheriff to return attachment, with his proceedings thereon.

—When the warrant shall be fully executed or discharged, the sheriff or constable shall return the same, with his proceedings thereon, to the court in which the action was brought.

1932 Code, § 545; Civ. P. '22, § 518; Civ. P. '12, § 297; Civ. P. '02, § 264; 1870 (14) § 266.

§ 546. Attachment in action for purchase money—warrant—issuance.

In an action arising for the recovery of the purchase money, which is past due, for any real or personal property, it shall be lawful for the plaintiff, at the time of the issuing of the summons, or any time afterwards, to cause the property of such defendant for which the purchase money is payable to be attached in the manner hereinafter prescribed as a security for the satisfaction of such judgment as the plaintiff may recover, and for the purposes of this section an action shall be deemed commenced when the summons is issued. This warrant of attachment must be obtained from a

judge or clerk of the court, or magistrate in which or before whom the action is brought, or from a circuit judge. The warrant of attachment may be issued whenever it shall appear by affidavit that a cause of action exists against such defendant, specifying the amount of the claims and the grounds thereof, that the same is due, and that the action is brought for the purchase money of real estate or personal property which has been sold to the defendant, and which he has refused or failed to pay. It shall be the duty of the plaintiff at the time of procuring such warrant of attachment to file the affidavit upon which the same is granted, in the office of the clerk of court of common pleas, or with the magistrate in which or before whom the action is to be tried.

1932 Code, § 546; Civ. P. '22, § 519; Civ. P. '12, § 298; 1904 (24) § 452.

Cross references.—As to cases in which attachment may be issued, see sec. 529 and note thereto. As to the property to be attached, see sec. 532 and note thereto. As to attachment when debt is not due, see sec. 536 and note thereto. See sec. 557 for amount of defendant's bond.

The terms of this section are plain and mandatory. *Hambright & Co. v. Team Co.*, 124 S. C. 500, 117 S. E. 717.

Warrant of attachment may be set aside for failure to file affidavit at time of issuance.—The affidavit must be filed at the time of the issuance of the warrant and for failure to do so the warrant may be set aside. *Hambright & Co. v. Team Co.*, 124 S. C. 500, 117 S. E. 717.

Effect of exchange of property.—Where the buyer of a black mule, who had given a note providing that title should remain in the seller until the price was paid, exchanged the said mule with the seller for a roan mule, paying the difference in the price in cash, and agreeing to execute another similar note for the balance, which he failed to do, the debt due was for the purchase price of the roan mule; and in an action for the amount so due such mule could be attached and sold to satisfy the judgment. *Hartzog-Hagood Live Stock & Vehicle Co. v. Wilson*, 97 S. C. 475, 81 S. E. 180.

Sale of property by sureties and payment of proceeds on debt. — Where

sureties on bond took possession of property and sold it, and paid proceeds on debt, it was held that that did not relieve sureties from liability on their bond if proceeds from sale were not sufficient to pay entire debt. *Plumley v. Stewart*, 165 S. C., 316, 163 S. E. 777.

Validity.—Sureties on bond given hereunder cannot attach its validity after principal, defendant, answered and went to trial. *Plumley v. Stewart*, 165 S. C. 316, 163 S. E. 777. See also *Moody v. Dudley*, 138 S. C., 478; 137 S. E., 141; *Skalowski v. Fisher*, 152 S. C., 108; 149 S. E., 340, 65 A. L. R., 1427.

Lien.—There is no lien under this statute until judgment is obtained, execution issued, and levy made. *State v. McCary*, 120 S. C. 361, 113 S. E. 275. *Maxwell v. Greene*, 171 S. C. 253; 172 S. E. 146; *Ross v. Eddins*, 187 S. C. 29, 196 S. E. 375.

The right to an attachment is not limited to the nominal grantor or vendor, but was intended to protect the person who was the actual owner of the property and to whom the purchase money is due. *Ross v. Eddins*, 187 S. C. 29, 196 S. E. 375.

Purchase money attachment against goods of deceased in charge of executor will not lie. *Maxwell v. Greene*, 171 S. C. 253; 172 S. E. 146.

Applied.—*Twin City Motor Co. v. Fal-law*, 173 S. E. 353, 175 S. E. 809.

§ 547. Undertaking—direction.—Before issuing the warrant of attachment, the judge, clerk or magistrate shall require a written undertaking on the part of the plaintiff, with sufficient surety to the effect that if the plaintiff shall fail to prove that the action is brought to recover the purchase money for the property which is about to be attached, or if the defendant recovers judgment, or the attachment be set aside by the order of the court, the plaintiff will pay all cost that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking, which shall be at least two hundred and fifty dollars (\$250.00), except in case of a warrant issued by a magistrate, when it shall be at least twenty-five (\$25.00). The warrants

shall be directed to any sheriff or constable of any county in which the said property of such defendant may be, and shall plainly describe the same, and shall require such officer to attach and safely keep such property of the defendant, or so much thereof as may be sufficient to satisfy plaintiff's demand, together with costs and expenses.

1932 Code, § 547; Civ. P. '22, § 520; Civ. P. '12, § 299; 1904 (24) 452.

As to undertaking of plaintiff as security and note thereto.
rity on obtaining attachment, see sec. 530

§ 548. How attachment made.—The sheriff or constable to whom such warrant is directed and delivered shall immediately attach the real estate or personal property of the defendant which is described in the warrant, and hold the same until further order of the court. When real estate is attached, a true and attested copy of such warrant shall be, by the officer serving the same delivered to the defendant, or left at his last or usual place of residence, and the officer making such service shall also leave a true and attested copy of such warrant or attachment in the office where, by law, a deed of such estate is required to be recorded, and if the party whose estate is attached does not reside in this State, then such copy shall be delivered to his tenant, agent or attorney, if any be known, and if no such agent, tenant or attorney be known, then a copy of such warrant of attachment, with the officer's return thereon, lodged in the office where, by law, a deed of such real estate ought to be recorded, shall be deemed sufficient service. It shall be the duty of the clerk or register of the office wherein said warrant of attachment is required to be lodged, to receive the same and enter in a book kept for that purpose the names of the parties, the date of the warrant of attachment, the sum demanded, and the officer's return thereon. Said attachment shall be a lien subject to all prior liens, and bind the real estate attached from the date of lodgment, and shall be a lien upon the personal property attached from the date of the levy thereon.

1932 Code, § 548; Civ. P. '22, § 521; Civ. P. '12, § 300; 1904 (24) 452.

§ 549. Appraisement.—Such further proceedings on the part of the sheriff or constable in reference to the appraisement of the personal property attached, or the sale of such personal property as may be perishable, shall be the same as now required by sections 533 and 534, and such further proceedings in reference to the disposition of the bond given by the plaintiff in case of judgment for defendant, and the discharge of the attachment and return of property or its proceeds to defendant. And the undertaking on the defendant's part shall be the same as now required by sections 542, 543 and 544.

1932 Code, § 549; Civ. P. '22, § 522; Civ. P. '12 § 301; 1904 (24) 452.

See sec. 533 and the note thereto.

§ 550. Trial by jury.—In all actions tried by a jury, where the plaintiff claims that the action is brought for the recovery of the purchase money for the property attached, if the jury find for the plaintiff they shall also state in their verdict whether or not the amount found is for the purchase money of the property attached; and in all cases tried by the judge, if he decides in favor of the plaintiff he shall certify whether or not the debt so found by him is for the purchase money of the property seized under

the warrant of attachment; and in such cases he shall direct that the attached property shall be sold by the sheriff or constable, and the proceeds arising from such sale be applied in payment of the plaintiff's debt and cost, and if there should be a surplus left the same to be paid over to the defendant.

1932 Code, § 550; Civ. P. '22, § 523; Civ. P. '12, § 302; 1904 (24) 452.

§ 551. Form and procedure in attachment.—

(1) In all cases of attachments in this State the following forms, affidavits, and bond shall be sufficient, to-wit:

State of South Carolina, } Court of _____
_____ }

_____ }
Plaintiff, } Affidavit.
against }
_____ }
Defendant. }

Personally appeared before me _____
who on oath says:

That _____ is justly and truly indebted
to _____ in the sum of
_____ (\$ _____) dollars,
and that _____ is entitled to an attachment
against _____ upon the grounds:

Sworn to before me this the _____ }
day of _____ 19 _____ }

State of South Carolina, } Court of _____
County of _____ }

_____ }
Plaintiff, } Bond
against }
_____ }
Defendant. }

We, _____ principal, and _____
_____ surety, acknowledge ourselves bound unto the
defendant in the sum of _____ dollars,
subject to the following conditions: That the plaintiff is seeking an at-
tachment against the defendant, which is now about to be sued out, returna-
ble to the court above named; now, if the plaintiff shall pay all damages
that the defendant may sustain, and also all costs that may be incurred
by him in consequence of the suing out such attachment, in the event that
the plaintiff shall fail to recover in said case, then this bond to be void.

Done this _____ day of _____ 19____

Signed, sealed and delivered in the
presence of: _____ } _____ (Seal)

_____ } _____ (Seal)

_____ }

State of South Carolina,
County of _____

_____ being first duly sworn, says:
that he saw the above named _____, plaintiff,
and _____, surety, sign, seal, and as their
act and deed, deliver the foregoing instrument for the uses and purposes
therein expressed, and that he with _____
witnessed the execution thereof.

Sworn to before me this the _____ }
day of _____ 19____ } _____

_____ (Seal)

The foregoing bond filed and approved this _____ day of
_____ 19____

(2) When the above affidavit and bond is filed with the clerk of court of
any county of this State or with the magistrate, when the amount involved
is within his jurisdiction, he shall issue his warrant of attachment in the
following form:

South Carolina
_____ County.

Attachment.

To all and singular the sheriffs and constables of said State and county:
You are hereby commanded to attach and seize _____
or so much of the property of _____
as will make the sum of _____ dollars
and all costs, and also to serve such summons as may be placed in your
hands, and that you make return of this attachment, with your actings and
doings entered thereon, to this court. Hereof fail not.

Witness my hand and seal this _____ day of _____ 19____
_____ (L. S.)

(3) Immediately upon the issuance of the warrant of attachment as pro-
vided for in subsection 2 of this section the sheriff or constable shall exe-
cute same and the plaintiff shall, within ten days after being required by
the defendant, if not served with the summons serve a copy of the com-
plaint in the action on the defendant or his attorney at the address given in
the notice requiring the complaint, and said defendant shall have twenty
days thereafter to answer same, if in the court of common pleas, or appear
if before a magistrate.

(4) The defendant in any proceedings hereunder may replevy and take
the property back, as now provided by law under the attachment pro-
ceedings.

(5) The grounds of attachment shall be only those now provided by law and may be contested as now provided by law.

1932 Code, § 551; 1929 (36) 201; 1931 (37) 205.

§ 551-1. Amount of bond in attachment and claim and delivery proceedings.—In actions in claim and delivery where the purpose is to collect a debt and in actions for the purchase price of any property where the same, or any part thereof, is attached, and in all actions where property is permitted to be attached to secure the payment of a debt claimed to be due, the undertaking required of the defendant shall in no case be in excess of double the amount of the debt claimed by the plaintiff to be due in the said action: *provided*, if there is an appeal, the court from which any appeal is taken may increase the bond.

1932 Code, § 557; 1930 (36) 1347.

CHAPTER 26

Claim and Delivery of Personal Property

552. Claim of immediate possession.

553. The affidavit.

554. Requisition to sheriff.

555. Security by plaintiff.

556. Exceptions to sureties.

558. Re-delivery to defendant.

559. Defendant's sureties.

560. Qualification and justification of sureties.

561. Taking concealed property.

562. Custody of property.

563. Claim by third person.

564. Notice and affidavit.

564-1. Joint owners of personalty.

§ 552. Claim and delivery of personal property.—The plaintiff, in an action to recover the possession of personal property, may, at the time of issuing the summons, or at any time before answer, claim the immediate delivery of such property, as provided in this chapter.

1932 Code, § 552; § Civ. P. '22, § 469; Civ. P. '12, § 257; Civ. P. '02, § 227; 1870 (14) § 229.

See § 564-1 for action by one of joint owners of personalty.

Cross references.—As to specific section covering judgments in action for recovery of personal property, see Civ. Proc., § 661, and note thereto. As to section covering verdicts in action for recovery of personal property, see Civ. Proc., § 602, and note thereto.

Editor's note.—In view of the fact that the subsequent sections of this chapter treat largely the procedure to be followed in an action of claim and delivery, it has been thought wise to put those constructions of a rather general nature under this section.

Claim and delivery is a legal action.—The action of claim and delivery is not a chancery proceeding, but an action to take property from one who wrongfully withholds it, and to give it to another who has a plain legal right thereto. Clerks' Benevolent Union v. Knights of Columbus 70 S. C. 543, 50 S. E. 206, 207; Cannon v. Dean, 80 S. C. 557, 61 S. E. 1012. See, also, Sparks v. Green, 69 S. C. 198, 226, 48 S. E. 61.

And it must be tried in township of the defendant.—The action of claim and delivery is a civil action, and must be tried in the township where the defendant resides. Jones v. Brown, 57 S. C. 14, 35 S. E. 397, 398.

As to specific section covering trial of civil actions, see Civ. Proc., § 421, and note thereto.

Actions of trover and replevin are combined in claim and delivery.—Reynolds v. Philips, 72 S. C. 32, 51 S. E. 523, 524.

Punitive damages can now be recovered.—See section 661 and notes thereto.

Unsevered crops are regarded in this state as realty, except in such cases that fall within sections 1172, 8996 and 8717, and claim and delivery will not lie for such crops. Claim and delivery is especially to obtain possession of personal property which is unlawfully withheld from person entitled thereto. Hence it is not proper remedy for landlord to get from share cropper unsevered crops jointly of landlord and sharecropper in their lawful possession. Norwood v. Carter, 176 S. C., 472; 180 S. E., 453.

See generally, *Jaro v. Holstein*, 73 S. C. 111, 52 S. E. 870. As to action by pledgor against pledgee, see *Gregg v. Bank of*

Columbia, 72 S. C. 458, 52 S. E. 195, 110 Am. St. Rep. 633.

§ 553. Affidavit and its requisites.—Where a delivery is claimed, an affidavit must be made by the plaintiff, or by some one on his behalf, showing:

(1) That the plaintiff is the owner of the property claimed (particularly describing it), or is lawfully entitled to the possession thereof, by virtue of a special property therein, the facts in respect to which shall be set forth.

(2) That the property is wrongfully detained by the defendant.

(3) The alleged cause of the detention thereof, according to his best knowledge, information and belief.

(4) That the same has not been taken for a tax, assessment, or fine, pursuant to a statute; or seized under an execution or attachment against the property of the plaintiff; or, if so seized, that it is, by statute, exempt from such seizure. And,

(5) The actual value of the property.

1932 Code, § 553; Civ. P. '22, § 470; Civ. P. '12, § 258; Civ. P. '02, § 228; 1870 (14) § 230.

Affidavit not part of complaint.—The affidavit required under this section, is in no sense a part of the complaint, and need not be executed at all unless the plaintiff desires to claim the immediate delivery of the property; it is essentially a subsidiary proceeding. *Adeimy v. Dleykan*, 116 S. C. 159, 107 S. E. 35, 36.

And defect in affidavit is objected to by motion to set aside proceedings or rule to show cause.—An objection to an affidavit, because of the omission of some essential element, should be raised by a motion to set aside the proceedings, or a rule to show cause. *Adeimy v. Dleykan*, 116 S. C. 159, 107 S. E. 35, 36.

Plaintiff does not have to set out title to property.—The plaintiff is not required, under this section, to set out evi-

dence of his title, but can prove ownership by any testimony evidencing it. *Osteen v. Lowry*, 111 S. C. 217, 97 S. E. 244, 245.

But must show right to possession at commencement of action.—The plaintiff must prove that he was entitled to the possession of the property at the time the action was commenced. *Segars v. Segars*, 82 S. C. 196, 63 S. E. 891.

But property does not have to be in possession of defendant at commencement of action.—*Segars v. Segars*, 82 S. C. 196, 63 S. E. 891.

See generally, as to description of the property, *Phoenix Furniture Co. v. Jaudon*, 75 S. C. 229, 55 S. E. 308; *Bossard v. Vaughn*, 68 S. C. 96, 46 S. E. 523.

§ 554. Requisition to sheriff to take and deliver property.—The plaintiff may, thereupon, by endorsement, in writing, upon the affidavit, require the sheriff of the county where the property claimed may be, to take the same from the defendant and deliver it to the plaintiff.

1932 Code, § 554; Civ. P. '22, § 471; Civ. P. '12, § 259; Civ. P. '02, § 229; 1870 (14) § 231.

Plaintiff's right to possession is a legal right.—Plaintiff's right to possession, under this section, is a substantial legal right, and a decree dismissing plaintiff's rule to sheriff to deliver seized property is appealable. *Guglieri v. Roman Tile, etc., Co.*, 158 S. C. 365, 155 S. E. 406, 407.

Seizure made by sheriff outside of his county is irregular.—A seizure made by a sheriff outside of his own county is, under this section, an invalid one, as a sheriff is without authority to make a seizure outside of his own county. *DuRant v. Brown Motor Co.*, 147 S. C. 88,

144 S. E. 705, 707.

As to specific section covering duties of sheriff in cases of attachment, see Civ. Proc., § 531, and note thereto.

But irregularity is waived if defendant executes a redelivery bond.—An irregularity in the seizure of property is waived by the defendant's execution and delivery of a redelivery bond. *DuRant v. Brown Motor Co.*, 147 S. C. 88, 144 S. E. 705, 707.

See generally, *Bardin v. Drafts*, 10 S. C. 493.

§ 555. Security by plaintiff.—Upon the receipt of the affidavit and notice, with a written undertaking executed by one or more sufficient sureties, approved by the sheriff, to the effect that they are bound in double the value of the property, as stated in the affidavit for the prosecution of the action, for the return of the property to the defendant, if the return thereof be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the plaintiff, including damages suffered on account of depreciation in value of the property pending the determination of the action, the sheriff shall forthwith take the property described in the affidavit, if it be in the possession of the defendant or his agent, and retain it in his custody. He shall also, without delay, serve on the defendant a copy of the affidavit, notice, and undertaking, by delivering the same to him personally, if he can be found, or to his agent, from whose possession the property is taken, or, if neither can be found, by leaving them at the usual place of abode of either, with some person of suitable age and discretion. In case the plaintiff does not execute the required undertaking, the party having possession of the property shall retain the same until the determination of the suit.

1932 Code, § 555; Civ. P. '22, § 472; Civ. P. '12, § 260; Civ. P. '02, § 230; 1870 (14) § 232; 1873 (15) 498; 1937 (40) 204.

An objection that plaintiff's undertaking lacked sheriff's formal approval is waived, under this section, by defendant's failure to except. *Guglieri v. Roman Tile, etc., Co.*, 158 S. C. 365, 155 S. E. 406, 407.

Liability of sureties.—Undertaking of sureties breached when judgment is rendered against principal, by which judgment sureties are bound. *Whisenhunt v. Sandel*, 177 S. C., 207; 181 S. E. 61.

Principal and sureties on bond liable

for payment of judgment for actual damages rendered against plaintiff for unlawful seizure and sale of property after execution of undertaking. *Ibid.*

Sureties not liable for payment of judgment rendered against principal for either actual or punitive damages for fraudulent or wrongful acts committed by principal prior to institution of action and before execution of undertaking. *Ibid.*

Liability for punitive damages.—See § 661 and notes thereto.

§ 556. Exception to sureties.—The defendant may, within three days after the service of a copy of the affidavit and undertaking, give notice to the sheriff that he excepts to the sufficiency of the sureties. If he fail to do so, he shall be deemed to have waived all objections to them. When the defendant excepts, the sureties shall justify, on notice, in like manner as upon bail on arrest. And the sheriff shall be responsible for the sufficiency of the sureties, until the objection to them is either waived, as above provided, or until they shall justify, or new sureties shall be substituted and justify. If the defendant except to the sureties, he cannot reclaim the property, as provided in section 558.

1932 Code, § 556; Civ. P. '22, § 473; Civ. P. '12, § 261; Civ. P. '02, § 231; 1870 (14) § 233.

§ 558. Defendant—when entitled to re-delivery.—At any time before the delivery of the property to the plaintiff, the defendant may, if he do not except to the sureties of the plaintiffs, require the return thereof, upon giving to the sheriff a written undertaking, executed by two or more sufficient sureties, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may, for any cause, including damages suffered

on account of depreciation in value of the property pending the determination of the action, be recovered against the defendant. If a return of the property be not so required within three days after the taking and service of notice to the defendant, it shall be delivered to the plaintiff, except as provided in section 563.

1932 Code, § 558; Civ. P. '22, § 474; Civ. P. '12, § 262; Civ. P. '02, § 232; 1870 (14) § 234; 1937 (40) 205.

See § 551-1 which limits the amount of bond in certain instances.

Cross references.—As to specific section covering judgments in actions for recovery of personal property, see Civ. Proc., § 661, and note thereto. As to specific section covering verdict in claim and delivery, see Civ. Proc., § 602, and note thereto. See section 557 which limits the amount of the bond in certain instances.

Undertaking signed by one surety after expiration of period is invalid.—A redelivery undertaking filed with only one surety, and signed by the other after the expiration of the three day period, is, under this section, an insufficient undertaking. *Guglieri v. Roman Tile, etc., Co.*, 158 S. C. 365, 155 S. E. 406, 408.

But bond does not have to be actually executed by defendant.—This section does not require that the defendant actually execute the undertaking bond himself. *Polite v. Bero*, 63 S. C. 209, 41 S. E. 305, 306.

And bond is breached when judgment is given for plaintiff.—A redelivery bond given to secure return of the property to defendant in the action, is breached, under this section, when judgment is rendered for the plaintiff. *Bolt v. Milam*, 110 S. C. 399, 96 S. E. 614, 615; *Thomson v. Joplin*, 12 S. C. 580, 581.

And sureties are bound by judgment rendered against principal.—The sureties of a defendant are, under this section, bound by whatever judgment is rendered against the principal, subject to reduction by the amount returned to plaintiff under the judgment. *Parish v. Smith*, 66 S. C. 424, 45 S. E. 16, 18; *Bolt v. Milam*, 110 S. C. 399, 96 S. E. 614, 615.

Nor are sureties discharged by plaintiff asking for damages instead of delivery.—The sureties are not discharged, under this section, by the plaintiff electing to ask a recovery in damages in place of specific delivery. *Thompson v. Joplin*, 12 S. C. 580, 581.

But sureties are not liable for amount of debt secured by mortgage.—Sureties are not liable, under this section, on a redelivery bond, where, in claim and delivery for personal property covered

by a mortgage, plaintiff recovers a judgment, not for recovery of the property or its value, with damages for detention, but for the amount of the debt secured by the mortgage. *Wilkins v. Willimon*, 128 S. C. 509, 122 S. E. 503, 504.

Nor for payment of costs.—A bond given by defendant under this section, does not include the payment of costs. *Brock v. Bolton*, 37 S. C. 40, 16 S. E. 370, 371.

"If such delivery be adjudged" means by competent authority.—*Elder v. Greene*, 34 S. C. 154, 13 S. E. 323, 325.

Only duty of surety.—On replevin bond or her principal under requirements of magistrate's judgment for possession of automobile or for \$150.00, the value thereof, was to return automobile within a measurable time and in substantially the same condition as it was in at time of trial or pay value fixed. *West et al. v. Jennings*, 192 S. C. 225, 6 S. E. (2d) 263.

Where there was no evidence in the record tending to show that, where automobile was tendered by surety, its value was substantially less than at time of trial, condition of bond was fully complied with by tender within reasonable time thereafter. *Ibid*.

Property seized delivered to plaintiff if counter undertaking not filed in period allowed.—Construing this section as a whole, the sheriff must deliver seized property to plaintiff if he has filed required undertaking, unless the defendant files the required counter undertaking within three days. *Guglieri v. Roman Tile, etc., Co.*, 158 S. C. 365, 155 S. E. 406, 408.

Parties.—Generally. *Gen Mtrs. Acceptance Corp. v. Richey*, 172 S. C., 518; 174 S. E., 469.

See generally. *Vance v. Vandercook Co.*, 170 U. S. 468, 42 L. Ed. 1111, 18 S. Ct. 645; *Miami Powder Co. v. Port Royal, etc., R. Co.*, 47 S. C. 324, 25 S. E. 153, 58 Am. St. Rep. 380; *Loeb v. Mann*, 39 S. C. 465, 18 S. E. 1; *Lipscomb v. Tanner*, 31 S. C. 49, 9 S. E. 733.

§ 559. Justification of defendant's sureties.—The defendant's sureties, upon a notice to the plaintiff of not less than two or more than six days, shall justify before a judge, clerk of court, or magistrate, in the same manner as upon bail on arrest. Upon such justification, the sheriff shall deliver

the property to the defendant. The sheriff shall be responsible for the defendant's sureties until they justify, or until justification is completed or expressly waived, and may retain the property until that time; but if they, or others in their place, fail to justify at the time and place appointed, he shall deliver the property to the plaintiff.

1932 Code, § 559; Civ. P. '22, § 475; Civ. P. '12, § 263; Civ. P. '02, § 233; 1870 (14) § 235.

§ 560. Qualification and justification of sureties.—The qualifications of sureties and their justification shall be as are prescribed by sections 515 and 516 in respect to bail upon an order of arrest.

1932 Code, § 560; Civ. P. '22, § 476; Civ. P. '12, § 264; Civ. P. '02, § 234; 1870 (14) § 236.

§ 561. Property—how taken when concealed in building or enclosure.—If the property, or any part thereof, be concealed in a building or enclosure, the sheriff shall publicly demand its delivery. If it be not delivered, he shall cause the building or enclosure to be broken open, and take the property into his possession; and if necessary, he may call to his aid the power of his county.

1932 Code, § 561; Civ. P. '22, § 477; Civ. P. '12, § 265; Civ. P. '02, § 235; 1870 (14) § 237.

§ 562. Property—how kept.—When the sheriff shall have taken property, as in §§ 552 thru 564 provided, he shall keep it in a secure place, and deliver it to the party entitled thereto, upon receiving his lawful fees for taking, and his necessary expenses for keeping the same.

1932 Code, § 562; Civ. P. '22, § 478; Civ. P. '12, § 266; Civ. P. '02, § 236; 1870 (14) § 238.

§ 563. Claim of property by third person. — If the property taken be claimed by any other person than the defendant or his agent, and such person shall make affidavit of his title thereto, and right to the possession thereof, stating the grounds of such right and title, and serve the same upon the sheriff, the sheriff shall not be bound to keep the property, or deliver it to the plaintiff, unless the plaintiff, on demand of him or his agent, shall indemnify the sheriff against such claim, by an undertaking, executed by two sufficient sureties, accompanied by their affidavit that they are each worth double the value of the property, as specified in the affidavit of the plaintiff, and are freeholders and householders within this State. And no claim to such property, by any other person than the defendant or his agent, shall be valid against the sheriff, unless made as aforesaid; and, notwithstanding such claim, when so made, he may retain the property a reasonable time to demand such indemnity.

1932 Code, § 563; Civ. P. '22, § 479; Civ. P. '12, § 267; Civ. P. '02, § 237; 1870 (14) § 239.

§ 564. Notice and affidavit—when and where to be filed. — The sheriff shall file the notice and affidavit, with his proceedings thereon, with the clerk of the court in which the action is pending, within twenty days after taking the property mentioned therein.

1932 Code, § 564; Civ. P. '22, § 480; Civ. P. '12, § 268; Civ. P. '02, § 238; 1870 (14) § 240.

No penalty is imposed for failure to comply with the provisions of this section. *Alexander v. Jamison*, 56 S. C. 409, 34 S. E. 695.

§ 564-1. One or more joint owners of personalty sue in claim and delivery for possession of such property.—Any one or more of several joint owners of personal property who can establish such partial ownership in said property shall have the right to institute an action in claim and delivery to recover possession of the property from any wrongful holder of same. In such an action the co-owners of the property who do not join plaintiff in bringing the suit may be made party defendants.

1940 (41) 1667.

CHAPTER 27

Injunction

ARTICLE 1. General Provisions, § 565.

ARTICLE 2. Injunctions to Abate Certain Nuisances, § 575.

ARTICLE 1

General Provisions

565. Order of injunction.
566. Temporary injunction.
567. When injunction granted.
568. Injunction after answer.
569. Execution or judicial sale.

570. Security.
571. Order to show cause.
572. Injunction suspending business.
573. Motion to vacate or modify.
574. Affidavits.

§ 565. Writ of injunction abolished, and order substituted.—An order of injunction may be made by the court of common pleas in which the action is brought, or by a judge thereof, and in the absence from the circuit, or inability from any cause, of a judge thereof, by a judge of any other circuit, or a justice of the Supreme Court. And by any probate judges in the cases provided in section 213.

1932 Code, § 565; Civ. P. '22, § 481; Civ. P. '12, § 269; Civ. P. '02, § 239; 1870 (14) § 241.

History of section.—This section was construed in the case of *Salinas v. C. Aultman & Co.*, 49 S. C. 325, 27 S. E. 385, to be an act restricting the power of a justice of the Supreme Court to make an order of injunction, under the Const. of 1868, art. 43, to actions brought in the court of common pleas when the judge thereof was absent from circuit, or unable to make the order. Under the Const. of 1895, art. 5, sec. 25, Supreme Court justices and circuit judges are given power to issue interlocutory injunctions at chambers as in court and by art. 4, sec. 4, the Supreme Court is vested with power to issue writs or orders of injunction, thus dispelling any doubt as to the present scope of the section.

Principles pertaining to common law writ of injunction.—The following authorities pertain to the common law writ of injunction which by this section

is abolished and an order of injunction substituted therefor.—Ed. note.

An injunction against trespass should establish accurately the line beyond which defendant must not go.—*Wood v. Pacolet Mfg. Co.*, 80 S. C. 47, 52, 61 S. E. 95.

Alleged trespasser in possession cannot be enjoined from cultivating the land.—Where defendant has possession as a tenant he cannot be enjoined from cultivating the land, under allegation that he is a trespasser. *Montague v. Hood*, 78 S. C. 222, 58 S. E. 767.

A court cannot enjoin an act already committed. *Spencer v. Mahon*, 75 S. C. 232, 233, 55 S. E. 321; *Riley v. Greenwood*, 72 S. C. 90, 91, 51 S. E. 532, 110 Am. St. Rep. 592.

An injunction against distress for rent may be refused. *Evans v. Mayes*, 81 S. C. 188, 192, 62 S. E. 207. And against

proceedings for condemnation. *Charleston, etc., R. Co. v. Garlington*, 74 S. C. 161, 54 S. E. 208; *Columbia Water Power Co. v. Nunamaker*, 73 S. C. 550, 558, 53 S. E. 996.

An injunction may be granted against criminal prosecutions under a statute clearly void, where irreparable injury would result to property rights from its enforcement. *Grant v. City Council*, 82 S. C. 268, 64 S. E. 388; *Cain v. Daly*, 74 S. C. 480, 55 S. E. 110.

A temporary injunction is proper where prima facie case is shown. *Wilder v. Alderman & Sons Co.*, 74 S. C. 178, 53 S. E. 950.

Section does not apply to action to determine right to public office. *Sanders v. Belue*, 78 S. C. 171, 178, 58 S. E. 762.

See generally, as to injunction against assessment of damages by arbitration, *City Council v. Earle*, 80 S. C. 321, 60 S. E. 1117. As to injunction against enforcing unconstitutional ordinance, *Sperry v. Columbia*, 82 S. C. 577, 64 S. E. 752. As to injunction against trespass or nuisance. *Bratton v. Catawba Power Co.*, 80 S. C. 260, 60 S. E. 673. As to injunction against continuous trespass, defenses of estoppel and purchaser for value being equitable issues, *Atlantic,*

etc., R. Co. v. Victor Mfg. Co., 79 S. C. 266, 60 S. E. 675. As to injunction against commission of crime—statutory nuisance, *State v. Riddock*, 78 S. C. 286, 58 S. E. 803. As to injunction against new county election, *Lamar v. Croft*, 73 S. C. 407, 411, 53 S. E. 540. As to injunction against state board at suit of private citizen, *Duncan v. State Board of Education*, 74 S. C. 560, 54 S. E. 760. As to injunction against illegal tax where there is no remedy at law, *Ware Shoals Mfg. Co. v. Jones*, 78 S. C. 211, 58 S. E. 811. As to injunction against taking of land by city, *Kendall v. City Council*, 74 S. C. 539, 54 S. E. 777. As to an injunction in aid of suit for alimony, *Thomason v. Thomason*, 73 S. C. 129, 52 S. E. 870. As to injunction against continuous trespass and waste, *Crawford v. Atlantic, etc., R. Co.*, 77 S. C. 81, 57 S. E. 670. See, also, *Marion County Lumber Co. v. Tilghman*, 75 S. C. 220, 224, 55 S. E. 337; *Alderman & Sons Co. v. Wilson*, 69 S. C. 156, 48 S. E. 85. As to injunction against illegal act of public officers, *Amerker v. Taylor*, 81 S. C. 163, 62 S. E. 7. As to injunction against taking land or interfering with fence under claim of highway, *Note 7 L. R. A. (N. S.) 58.*

§ 566. Temporary injunction—in what cases granted.—

(1) Where it shall appear by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of some act, the commission or continuance of which, during the litigation, would produce injury to the plaintiff; or,

(2) When, during the litigation, it shall appear that the defendant is doing, or threatens, or is about to do, or procuring or suffering some act to be done, in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act.

(3) And where, during the pendency of an action, it shall appear by affidavit that the defendant threatens or is about to remove or dispose of his property, with intent to defraud his creditors, a temporary injunction may be granted to restrain such removal or disposition.

1932 Code, § 566; Civ. P. '22, § 432; Civ. P. '12, § 270; Civ. P. '02, § 240; 1870 (14) § 242.

Cross references.—See sec. 26, as to the jurisdiction of the Supreme Court and the power of justices thereof to grant and hear appeals from temporary injunctions, and the note thereto. See sec. 570, as to the bond required on the granting of a preliminary injunction, and the note thereto. See sec. 584, as to preliminary injunctions in cases of receivership, and the note thereto. See sec. 565 immediately preceding, as to the authority of a judge of a foreign court and a judge at chambers to grant an injunc-

tion, and the note thereto. See sec. 37 as to the jurisdiction of a circuit judge at chambers, and the note thereto. Also see sec. 37, concerning the jurisdiction at chambers of a judge of a foreign circuit.

Editor's note.—Under the early standing of this section the provisions thereof contained the term "interlocutory injunction." See *Salinas v. C. Aultman & Co.*, 49 S. C. 325, 27 S. E. 385.

Temporary injunction preserves property in statu quo.—It is not the province

of a preliminary injunction to compel the transfer of property of any kind from one party to another. *Pelzer v. Hughes*, 27 S. C. 408, 3 S. E. 781; *Columbia Water Power Co. v. Columbia*, 4 S. C. 388, 402. The party asking for an injunction is assumed to be in possession of the property in respect of which he demands protection, and all the injunction can require on the part of the opposite party is that he should forbear from interfering with that possession. He cannot be required to perform any act whatever. If the plaintiff cannot enjoy his rights without compelling the defendants to perform some act, he must wait until he has established them by his judgment. *Columbia Water Power Co. v. Columbia*, supra.

Where an *ex parte* temporary injunction is granted to a railroad restraining the defendant from interfering with its agents working the road-bed, and defendant's motion for a temporary injunction to modify the restraining order until the title to the land comprising the road-bed could be decided, is refused, it is error, as deciding the merits of the case at chambers, and practically effecting a transfer of the possession of the premises in dispute from one party into the hands of another. *Northwestern R. Co. v. Colclough*, 84 S. C. 37, 65 S. E. 950. See sec. 37 and the note thereto.

In order that it may abide the result of the suit.—The sole object of a temporary injunction under this section is to preserve the subject of controversy in the condition in which it is when the order is made, until an opportunity is offered for a full and deliberate investigation. *Williams v. Jones*, 92 S. C. 342, 75 S. E. 705, 710; *State v. Rice*, 66 S. C. 1, 44 S. E. 80; *Pelzer v. Hughes*, 27 S. C. 408, 3 S. E. 781.

A complainant may be entitled to a preliminary injunction, under this section, although his right to the relief prayed may ultimately fail. *Williams v. Jones*, 92 S. C. 342, 75 S. E. 705, 710; *Pelzer v. Hughes*, supra.

And is a preventive rather than remedial process.—An injunction under this section is defined to be a judicial process, whereby a party is required to do, or to refrain from doing, a particular thing, but is generally used (always, before a decree upon the merits) to prevent a meditated wrong, for which reason it is regarded as a preventive rather than a restorative or remedial process. *Pelzer v. Hughes*, 27 S. C. 408, 3 S. E. 781.

Granting of injunction is discretionary with court.—An injunction, under this section, is not a matter of right, but of grace, resting in the sound discretion of the judge. *Williams v. Jones*, 92 S. C. 342, 75 S. E. 705, 710; *Pelzer v. Hughes*, 27 S. C. 408, 3 S. E. 781; *Sanders v. Tex-*

tile Workmens Organizing Committee 187 S. C. 66, 196 S. E. 543.

Refusal grant injunction on behalf of labor union restraining employer from paying over to representative of a labor organization certain moneys authorized under employment contract to be deducted from wages of employees was not an abuse of discretion where contract was legally entered into, plaintiffs did not ask for cancellation of contract or for revocation of authority or organization to act for employees, and complaint failed to show that plaintiffs would suffer irreparable damage. *Sanders v. Textile Workers Organizing Committee* 187 S. C. 66; 196 S. E. 543.

And should be granted or denied according to the justice of the case.—In doubtful cases the court weighs the nature and extent of the injury which will arise to either party from the granting or withholding of an injunction under this section, and determines the question of equitable relief in the manner best calculated to promote substantial justice. *Pelzer v. Hughes*, supra.

In passing upon an application for an interlocutory or preliminary injunction under this section the court satisfies itself not that the plaintiff has certainly the right, but that he has a fair question to raise as to the existence of such a right. *Williams v. Jones*, 92 S. C. 342, 75 S. E. 705, 710.

Temporary injunction does not determine final right.—A court of equity will, under this section, in many cases, interfere by injunction to preserve property in statu quo during the pendency of a suit, in which the rights to it are to be decided, without expressing, and often without the means of forming, any opinion as to such rights. *Pelzer v. Hughes*, 27 S. C. 408, 3 S. E. 781.

On an application for a temporary injunction as provided for in this section the court will not interfere if it thinks there is no real question between the parties, but where a substantial question is presented, it will preserve the property until such question can be disposed of. *Williams v. Jones*, 92 S. C. 342, 75 S. E. 705, 710.

But the complaint, return, and affidavit should be considered.—In determining whether a temporary injunction should be granted under this section, the complaint, the return, and the affidavits should be considered. *Alderman & Sons Co. v. Wilson*, 69 S. C. 156, 48 S. E. 85.

And it is error of law to refuse injunction if justified.—Where an action is for the sole purpose of an injunction, and a temporary injunction, as provided for in this section, is essential to the assertion and preservation of a legal right, if established in the complaint, it is error of law to refuse such temporary injunction.

Williams v. Jones, 92 S. C. 342, 75 S. E. 705, 710; *Wilder v. Alderman & Sons Co.*, 74 S. C. 178, 53 S. E. 950; *Alderman & Sons Co. v. Wilson*, 69 S. C. 156, 48 S. E. 85, and the cases there cited.

Where a complaint alleges an exclusive right of way over a certain road, and that the defendant threatens to trespass thereon, and the trespass is of such a nature as to render an action at law inadequate, a temporary injunction is properly granted under this section. *Alderman & Sons Co. v. Wilson*, 69 S. C. 156, 48 S. E. 85.

Nor should it be dissolved upon motion where complaint shows a meritorious case.—Where the facts of the complaint present a proper case for a temporary injunction it is error to dissolve such injunction upon a mere motion, heard upon affidavits, where such dissolution might work irreparable harm upon the plaintiff. *Cudd v. Calvert*, 54 S. C. 457, 32 S. E. 503.

It may be granted at chambers without notice.—A temporary injunction may be granted by a circuit judge at chambers on an ex parte application. *Andrews v. Sumter Commercial, etc., Co.*, 87 S. C. 301, 69 S. E. 604; *Watson v. Citizens' Sav. Bank*, 5 S. C. 159; *Ex parte Jones*, 160 S. C. 63, 158 S. E. 134.

But the judge cannot decide case on merits at chambers.—Where a circuit judge hears a motion for a temporary injunction at chambers, it is not proper for him to consider the merits of the case as a whole, except in so far as to enable him to decide as to whether a prima facie showing has been made. *Williams v. Jones*, 92 S. C. 342, 75 S. E. 705, 710; *Alderman & Sons Co. v. Wilson*, 69 S. C. 156, 48 S. E. 85; *Northwestern R. Co. v. Colclough*, 84 S. C. 37, 65 S. E. 950; *Alston v. Limehouse*, 60 S. C. 559, 568, 39 S. E. 188; *Cudd v. Calvert*, 54 S. C. 457, 473, 32 S. E. 503; *Seabrook v. Mostowitz*, 51 S. C. 433, 29 S. E. 202; *Sease v. Dobson*, 34 S. C. 345, 13 S. E. 530; *Ex parte Jones*, 160 S. C. 63, 158 S. E. 134.

See sec. 37 as to the jurisdiction at chambers of a circuit court, and the note thereto.

And questions involving title to land must be tried before a jury.—Where the question of nuisance as basis for an injunction raises a question of title to land, it should not be referred to a referee but should be tried at law, before a jury. *Lipscomb v. Littlejohn*, 63 S. C. 38, 40 S. E. 1023.

Unless property is acquired in violation of order of court.—Where a defendant acquires property in breach of an order of the court, possession may be taken from him by a temporary injunction under this section. *Columbia Water Power Co. v. Columbia*, 4 S. C. 388.

Judge of foreign circuit should enter his jurisdiction upon the record.—Where a judge of another circuit grants a temporary injunction, it should appear in the record that he took jurisdiction due to absence of any judge in the proper circuit. *Hornesby v. Burdell*, 9 S. C. 303. See the preceding section and the note thereto.

See sec. 37 as to the jurisdiction at chambers of a judge of a foreign circuit.

Bond essential to temporary injunction.—An injunction should not be granted against a going concern without bond, or until such concern has been legally determined a nuisance. *Williams v. Jones*, 62 S. C. 472, 40 S. E. 881. See *Watson v. Citizens' Sav. Bank*, 5 S. C. 159.

See sec. 570 and the note thereto.

"Until further order of the court" is a temporary injunction.—An injunction restraining certain acts "until the further order of the court," is a temporary injunction within the meaning of this section. *Andrews v. Sumter Commercial, etc., Co.*, 87 S. C. 301, 69 S. E. 604.

Section does not apply to injunction in action for receivership.—This section does not contemplate the issuance of temporary injunction prior to the appointment of receivers for insolvent companies, that situation being provided for in sec. 584 relating to receivership. *Truesdell v. Johnson*, 144 S. C. 188, 142 S. E. 343.

Injunction under subd. 2 cannot be granted without showing of endangered claim.—In an action by a wife for a separation, an injunction restraining disposition of property by defendant cannot be granted under this section where there are no allegations in the complaint, and no facts stated in affidavits submitted, to show that plaintiff's claim is in danger of being defeated by defendant's disposition of his property. *Smith v. Smith*, 51 S. C. 379, 29 S. E. 227.

An injunction will not be entered under this section against a mortgagee's disposal of other property, on mortgagor's anticipation of deficiency judgment, in absence of a showing warranting an attachment. *Palmetto Guano Corporation v. Green*, 138 S. C. 106, 136 S. E. 132.

Equity will not usually enjoin a criminal proceeding.—Equity will not enjoin a criminal proceeding under this section unless there is an equity suit to try the same right between the same parties pending, or the prosecution is instituted under an ordinance or statute which is clearly void, and irreparable injury to property will result from its enforcement. *Palmetto Golf Club v. Robinson*, 143 S. C. 347, 141 S. E. 610.

Injunction to restrain public officer must come within this section.—To be

entitled to a temporary injunction restraining a public officer from his duties pending an action of quo warranto to determine his title thereto, it must be shown that the case comes within one of the provisions of this section, since it is contrary to the established rules of equity to restrain persons from exercising the functions of public offices in such cases. *State v. Rice*, 67 S. C. 236, 45 S. E. 153; *State v. Rice*, 66 S. C. 1, 44 S. E. 80.

Executing officer is proper defendant in action to restrain attachment proceeding.—On an application for an injunction, under this section, to restrain attachment proceedings the executing officer of such attachment is a proper party defendant. *Meinhard v. Youngblood*, 37 S. C. 223, 15 S. E. 947.

Injunction will not lie against an elec-

tion where no property rights are involved and there is an adequate remedy at law. *Little v. Barksdale*, 81 S. C. 392, 63 S. E. 308.

Where damages for the future have been recovered injured party cannot claim an injunction. *Mason v. Apache Mills*, 81 S. C. 554, 62 S. E. 399.

An interlocutory injunction granted under this section is appealable to the Supreme Court under the provision of sec. 26. *Williams v. Jones*, 62 S. C. 472, 40 S. E. 881.

See sec. 26 as to jurisdiction of the Supreme Court to hear appeals from temporary injunctions.

See generally, as to granting injunctions against continuous trespasses, *Ragsdale v. Southern Ry. Co.*, 60 S. C. 381, 38 S. E. 609, 612; *McClellan v. Taylor*, 54 S. C. 430, 32 S. E. 527.

§ 567. At what time injunction may be granted—copy of affidavit to be served.—The injunction may be granted at the time of commencing the action, or at any time afterwards, before judgment, upon its appearing satisfactorily to the court or judge, by the affidavit of the plaintiff or of any other person that sufficient grounds exist therefor. A copy of the affidavit must be served with the injunction.

1932 Code, § 567; Civ. P. '22, § 483; Civ. P. '12, § 271; Civ. P. '02, § 241; 1870 (14) § 243.

Cross references.—See secs. 357, 427 as to the commencement of actions, and the notes thereto. See sec. 441 as to when jurisdiction of an action is acquired, and the note thereto.

Allowance of restraining order commences action.—The commencement of the action as mentioned in this section may take place with the issuance of a restraining order as well as by the service of the summons, according to sec. 441, providing that with the allowance of a provisional remedy, the court acquires jurisdiction of all subsequent proceedings. *Jordan v. Wilson*, 69 S. C. 256, 48 S. E. 224.

See sec. 441 as to when jurisdiction of an action is acquired, and the note thereto.

Therefore jurisdiction exists to grant injunction on commencement of ex parte application without notice.—Where it appears necessary to preserve the status quo of the property involved and the relation of the parties defendant, the court has jurisdiction, under this section, to grant an injunction on the commencement of suit on an ex parte application without notice. *Jordan v. Wilson*, 69 S. C. 256, 48 S. E. 224; *Meinhard v. Youngblood*, 37 S. C. 223, 15 S. E. 947; *Watson v. Citizens' Sav. Bank*, 5 S. C. 159; *Ex parte Jones* 160 S. C. 63, 158 S. E. 134.

See sec. 569 for exception where injunction may not be granted without notice.

But summons should be served with injunction.—This section contemplates the presentation of a summons together with the proper complaint and proofs to the judge for a reasonable time before the actual service of the summons, in order that the summons, to commence the action, and the injunction mentioned in this section, may be served together. *Jordan v. Wilson*, 69 S. C. 256, 48 S. E. 224.

The complaint need not be verified where the affidavits, as required by this section, are sufficient. *Meinhard v. Youngblood*, 37 S. C. 223, 15 S. E. 947.

Judge may consider the merits of a case in application for injunction.—Upon such application for injunction the judge may consider the merits of the case in order to determine whether it should be granted, and his refusal is not a decision upon the merits. *Sease v. Dobson*, 34 S. C. 345, 13 S. E. 530; *Ex parte Jones* 160 S. C. 63, 158 S. E. 134.

As to discretionary power of the judge in the allowance of temporary injunctions, see the next foregoing section and the note thereto.

See generally, as to injunction against nuisance, *State v. Chicco*, 82 S. C. 122, 63 S. E. 306; *State v. Union Social Club*, 82 S. C. 142, 63 S. E. 545; *State v. Columbia Water Power Co.*, 82 S. C. 181, 63 S. E. 884, 129 Am. St. Rep. 876, 17 Ann. Cas. 343, 22 L. R. A. (N. S.) 435.

§ 568. Injunction after answer.—An injunction shall not be allowed after the defendant shall have answered, unless upon notice or upon an order to show cause; but in such case the defendant may be restrained until the decision of the court or judge granting or refusing the injunction.

1932 Code, § 568; Civ. P. '22, § 484; Civ. P. '12, § 272; Civ. P. '02, § 242; 1870 (14) § 244.

Requirement of notice is mandatory.—An order enjoining defendants' receipt of certain dividends was improperly entered after commencement of the action where no notice was given to such de-

fendants as provided for in this section. *Palmetto Guano Corp. v. Green*, 138 S. C. 106, 136 S. E. 132.

See generally *Ex parte Jones*, 160 S. C. 63, 158 S. E. 134.

§ 569. Regulations for granting injunctions to stay certain sales. — An injunction to stay an execution or judicial sale shall not be allowed unless upon notice of at least four days to the adverse party or to his attorney, unless the court or judge, before whom the application is made, shall prescribe a shorter time, nor shall a motion for such an injunction be heard less than five days before the time fixed for such sale, unless the court or judge, upon cause being shown, shall order otherwise. And in all cases the decision of the court or judge upon such a motion shall be filed with the clerk of the court for the county before the time fixed for such sale, otherwise the sale shall not be stayed: *provided, however*, that when an execution or judicial sale is stayed by injunction, the time of the existence of such stay shall not be deemed or taken to be a part of the time of the existence of the active energy of such execution, or a part of the time of the existence of the lien of any judgment or decree, whether such stay be obtained before or after the passage of this section.

1932 Code, § 569; Civ. P. '22, § 485; Civ. P. '12, § 273; Civ. P. '02, § 242a; 1899 (23) § 43.

An order to stay execution cannot be made without the notice to the adverse party required by this section. *New York Life Ins. Co. v. Mobley*, 89 S. C. 189, 71 S. E. 817. See also *First Caro-*

linas Joint Stock Land Bank of Columbia v. Knotts, 191 S. C. 384, 1 S. E. (2d) 797.

Applied in *Ex parte Graham*, 54 S. C. 163, 32 S. E. 67.

§ 570. Security upon injunction — damages — how ascertained. — When no provision is made by statute as to security upon an injunction, the court or judge shall require a written undertaking on the part of the plaintiff, with or without sureties, to the effect that the plaintiff will pay to the party enjoin such damages, not exceeding an amount to be specified, as he may sustain by reason of the injunction, if the court shall finally decide that the plaintiff was not entitled thereto. The damages may be ascertained by a reference or otherwise, as the court shall direct.

1932 Code, § 570; Civ. P. '22, § 486; Civ. P. '12, § 274; Civ. P. '02, § 243; 1870 (14) § 245.

Failure of judge to require bond is not jurisdictional defect.—The failure of a judge to require the bond provided for in this section does not deprive him of jurisdiction in the motion then before him. *Watson v. Citizens' Sav. Bank*, 5 S. C. 159, 177; *Ex parte Jones* 160 S. C. 63, 158 S. E. 134.

But the undertaking is nevertheless mandatory and may not be dispensed

with.—The court cannot dispense with the undertaking provided for in this section on issuing an injunction. *New York Life Ins. Co. v. Mobley*, 89 S. C. 189, 71 S. E. 817; *Columbia Water Power Co. v. Nunamaker*, 73 S. C. 550, 53 S. E. 996; *Ex parte Zeigler*, 83 S. C. 78, 64 S. E. 513, 21 L. R. A. (N. S.) 1005; *Smith v. Smith*, 51 S. C. 379, 29 S. E. 227; *Meinhard v. Youngblood*, 37 S. C. 223, 15 S.

E. 947; *De Pass v. City of Spartanburg et al.*, 190 S. C. 22, 1 S. E. (2d) 904.

The court said in *Smith v. Smith*, supra, "we do not understand that the court, in *Watson v. Citizens' Sav. Bank*, 5 S. C. 159, 177, decided that the failure of a judge to require a written undertaking upon granting an injunction did not render the order voidable, but that the failure to do so was not jurisdictional. But, be that as it may, the words of the section are plain and mandatory; and the order herein is in that respect erroneous, and to that extent must be set aside."

In an action by a wife for a separation, the court cannot grant an injunction restraining the disposition of property by the defendant without requiring the plaintiff to give a written undertaking under this section. *Smith v. Smith*, 51 S. C. 379, 29 S. E. 227.

Where a plaintiff institutes condemnation proceedings against a company for compensation for flooding his lands and the defendant then brings action in a separate court to determine the plaintiff's right to such condemnation proceedings, procuring a temporary injunction restraining the proceedings in the lower court, the bond required by this section may not be dispensed with. *Columbia Water Power Co. v. Nunamaker*, 73 S. C. 550, 53 S. E. 996; *Heddon v. State Highway Department*, 197 S. C. 118, 14 S. E. (2d) 586.

Although filing of bond may be made a condition subsequent to continuance of injunction.—This section does not require the judge to exact an undertaking a condition precedent to the issuance of an injunction, and a limit of 14 days fixed, beyond which such undertaking is not to be filed, is a reasonable one. *Meinhard v. Youngblood*, 37 S. C. 223, 15 S. E. 947; *Ex parte Jones* 160 S. C. 63, 158 S. E. 134.

Action upon injunction bond.—Where injunction is issued, conditioned on the plaintiff's providing an undertaking under this section, and the defendant complies with the order before the plaintiff makes such a bond, the defendant may not bring an action for damages resulting from such obedience to the injunction. *Batson v. Paris Mountain Water Co.*, 73 S. C. 368, 53 S. E. 500.

Distinction between simple restraining order and injunction.—See this catchline under sec. 571.

Undertaking not required on simple restraining order.—An undertaking is not required under this section on an order simply restraining the defendant until the court can determine whether the plaintiff is entitled to an injunction. *Wright v. Columbia*, 77 S. C. 416, 57 S. E. 1096; *Creech v. Long*, 72 S. C. 25, 31, 51 S. E. 614; *Ex parte Jones*, 160 S. C.

63, 158 S. E. 134.

But may be required in judge's discretion.—The circuit judge may require a bond within his discretion from the plaintiff on a simple restraining order to abide the determination of his right to an injunction. *Wright v. Columbia*, 77 S. C. 416, 57 S. E. 1096; *Creech v. Long*, 72 S. C. 25, 31, 51 S. E. 614.

Section contemplates damages incurred from unwarranted injunction.—This section requires an undertaking on the part of the plaintiff that he will pay to the party enjoined such damages as he might sustain by reason of the injunction, if the court should finally decide that the plaintiff was not entitled thereto. *Lewis v. Jones*, 65 S. C. 157, 43 S. E. 525.

But only direct damages recoverable.—The "damages" recoverable under this section are only those arising directly and proximately from the issuance of the injunction. *Livingston v. Exum*, 19 S. C. 223.

Where the defendant is enjoined from cutting wood for two weeks and thereby loses contact with his labor and loses a contract, his damages, under this section, include only the possible profit for the time the injunction was in effect, and not the entire loss under the contract. *Moorer v. Andrews*, 39 S. C. 427, 17 S. E. 948.

On the dissolution of an order temporarily enjoining the sale of lands, which has continued for a year, it is proper to assess a year's interest on the final selling price as damages under this section. *Hill v. Thomas*, 19 S. C. 230.

And such damages are not recoverable out of bond until decision on merits of injunction.—Where plaintiffs fail to establish their claims against the defendants but it does not appear that any court has finally decided that the plaintiffs were not entitled to the temporary injunction which they obtained, it is not necessarily shown that the injunction was improperly granted in the first instance, so as to allow recovery on the undertaking as provided for in this section. *Garlington v. Copeland*, 43 S. C. 389, 21 S. E. 317.

But suit on bond is permissible where main suit is dismissed.—Where a complaint under which a temporary injunction was granted is dismissed, it carries with it a dissolution of the injunction, and it is proper, under this section, to refer the question of damages by reason of the issuance thereof. *Lewis v. Jones*, 65 S. C. 157, 43 S. E. 525; *Greenville v. Mauldin*, 64 S. C. 438, 42 S. E. 200.

Where defendant in injunction suit filed cross-complaint against codefendants for temporary injunction and attached codefendant's realty, and attach-

ment was vacated and defendant's cross-complaint dismissed without order of reference or reservation of power of reference for purpose of assessing damages sustained by codefendants, court retained jurisdiction to adjudicate question of damages caused by temporary injunction, since the order of dismissal was only an adjudication of the primary issue of the propriety of injunctive relief. *Walker v. Preacher, et al.*, 188 S. C. 60, 198 S. E. 168.

In the case of *Lewis v. Jones*, supra, it was said: "There are expressions in the case of *Garlington v. Copeland*, 43 S. C. 389, 396, 21 S. E. 317, which seem to indicate that an action could not be brought on the undertaking to recover damages sustained by reason of the injunction when it was not dissolved until the final decision on the entire case. But the language used in that case must be construed with reference to the question which was under consideration by the court, viz., * * * attorney's fee paid by defendant for the purpose of having the injunction dissolved. * * If the language of that case shall be construed to be applicable to other damages sustained by reason of the injunction, it would practically destroy the protection intended to be afforded the defendant by the statute and the undertaking."—Ed. note.

And also where injunction is only dissolved in part.—Under this section, dissolution in toto of injunction is not necessary to entitle persons restrained from recovering damages; and, where an injunction prohibits the defendant from entering a strip of land for any purpose, dissolution to the extent of permitting him to use it as a means of ingress and egress to his land, entitles him to recover attorney's fees. *Chambers v. Long*, 132 S. C. 179, 128 S. E. 853.

Referee's findings as to damages enforceable by court order.—After the decision of a referee as to damages, as provided for in this section, the court may order the damages paid by the obligors without any further action against them on the undertaking, provided they have been made parties to the reference by notice. *Hill v. Thomas*, 19 S. C. 230.

Judgment is confined to amount of bond and costs.—Where the damages recoverable as directly caused by the injunction are greater than the bond provided in accordance with this section, the judgment should include only the amount of the bond and the costs of the proceedings. *Hill v. Thomas*, 19 S. C. 230.

As to costs in civil actions, see secs. 756, 770, and the note thereto.

Security for costs differs from secur-

ity for damages hereunder.—The security for the costs of an action which may be required of a non-resident plaintiff is a totally different thing from the injunction bond required under this section, and should not be confused therewith. *Meinhard v. Strickland*, 29 S. C. 491, 7 S. E. 838, 843.

As to the security for costs which may be asked of a non-resident plaintiff, see Cir. Ct. rule 10, and the note thereto.

And non-resident plaintiff may give bond for damages without securities.—It is not improper under the provisions of this section that non-resident plaintiffs be permitted to give bond without sureties. *Meinhard v. Strickland*, 29 S. C. 491, 7 S. E. 838, 843.

Attorney's fees are recoverable as damages.—Attorney's fees for procuring the dissolution of an injunction are recoverable as "damages" under the bond provided for in this section. *Chambers v. Long*, 132 S. C. 179, 128 S. E. 853.

But are not recoverable out of bond where injunction is only ancillary.—Where the temporary injunction is merely ancillary to the principal object of the action and only dissolved as a necessary consequence of the judgment upon the main controversy, attorney's fees for procuring the dissolution of the injunction are not recoverable out of the undertaking provided for in this section. *Garlington v. Copeland*, 43 S. C. 389, 21 S. E. 317. See *Columbia Water Power Co. v. Nunamaker*, 73 S. C. 550, 53 S. E. 996.

Or where fees for dissolution are not distinguishable from those in main suit.—Where the fees incurred for the dissolution of an injunction are not distinguishable from those incurred in prosecuting the general issue, it is proper to exclude them as "damages" recoverable under this section. *Hill v. Thomas*, 19 S. C. 230.

"Damages" not recovered under bond may be recovered in subsequent action.—Where plaintiff procures a temporary injunction to prevent defendant from taking possession of land, giving bond under this section, and defendant does not recover rents and profits as "damages" out of said bond upon his prevailing in the suit, he is not precluded from recovering such "damages" in a later action. *Rabb v. Patterson*, 42 S. C. 528, 20 S. E. 540, 46 Am. St. Rep. 743.

The term "damages" in this section may cover rents and profits in some cases, but not where, to do so, would require the plaintiffs to split up their claims for rent into several actions. *Id.*

Applied in *Grant v. City Council*, 82 S. C. 268, 64 S. E. 388.

§ 571. Order to show cause why injunction should not be granted.—If the court or judge deems it proper that the defendant, or any of several

defendants, should be heard before granting the injunction, an order may be made, requiring cause to be shown, at a specified time and place, why the injunction should not be granted; and the defendant may, in the meantime, be restrained.

1932 Code, § 571; Civ. P. '22, § 487; Civ. P. '12, § 275; Civ. P. '02, § 244; 1870 (14) § 246.

Allowance of restraining order commences action.—See this catchline under sec. 567.

Distinction exists between simple restraining order and injunction.—A distinction exists, under this section, between an order granting an injunction and an order simply restraining the defendant until the court can determine whether the plaintiff is entitled to an injunction. *Wright v. Columbia*, 77 S. C.

416, 57 S. E. 1096; *Creech v. Long*, 72 S. C. 25, 31, 51 S. E. 614.

Undertaking not required on simple restraining order.—See this catchline under sec. 570.

See generally, as to power to grant temporary injunction at chambers on ex parte application, *Andrews v. Sumter Commercial, etc., Co.*, 87 S. C. 301, 306, 69 S. E. 604.

§ 572. Security upon injunction to suspend business of corporation.—An injunction to suspend the general and ordinary business of a corporation shall not be granted except by the court or a judge thereof. Nor shall it be granted without due notice of the application therefor, to the proper officers of the corporation, except where the State is a party to the proceeding, and except in proceedings to enforce the liability of stockholders in corporations and associations for banking purposes, as such proceedings are or shall be provided by law, unless the plaintiff shall give a written undertaking, executed by two sufficient sureties, to be approved by the court or judge, to the effect that the plaintiff will pay all damages, not exceeding the sum to be mentioned in the undertaking, which such corporation may sustain by reason of the injunction, if the court shall finally decide that the plaintiff was not entitled thereto. The damages may be ascertained by a reference or otherwise, as the court shall direct.

1932 Code, § 572; Civ. P. '22, § 488; Civ. P. '12, § 276; Civ. P. '02, § 245; 1870 (14) § 247.

When the undertaking herein prescribed alone need be given.—Where minority stockholders sue to restrain the corporation and majority stockholders from disposing of corporate property in fraud of plaintiffs' rights, they are only

required to give the bond mentioned in this section and not a bond based on the value of the corporate assets. *Andrews v. Sumter Commercial, etc., Co.*, 87 S. C. 301, 69 S. E. 604.

§ 573. Motion to vacate or modify injunction. — If the injunction be granted by the court, or a judge thereof, without notice, the defendant at any time before the trial, may apply, upon notice to the court, or a judge thereof, in which the action is brought, to vacate or modify the same. The application may be made upon the complaints and the affidavits on which injunction was granted, or upon affidavits on the part of the defendant, with or without the answer.

1932 Code, § 573; Civ. P. '22, § 489; Civ. P. '12, § 277; Civ. P. '02, § 246; 1870 (14) § 248.

Section applies to motion to dissolve injunction.—Under this section, it is error to refuse to entertain a motion to dissolve a temporary injunction, based on the answer of the defendant and his proposed affidavits. *Kelly v. Tiner*, 86 S. C. 160, 68 S. E. 465.

Answer and affidavits offered in support of a motion, under this section, to vacate an injunction, must be considered in determining whether the injunction issued was reasonably essential for the protection of plaintiff's rights. *Kelly v. Tiner*, 86 S. C. 160, 68 S. E. 465.

And a motion to vacate an injunction is not precluded by former motion which was bad for lack of notice.—Where a motion to vacate an ex parte temporary injunction, under this section, is refused because of the lack of proper notice, a second motion for the same purpose is not thereby precluded, and a motion for a counter injunction is considered as in effect a motion to modify the previous order. *Northwestern R. Co. v. Colclough*, 84 S. C. 37, 65 S. E. 950.

But where the defendant has been heard this section does not apply.—Where a temporary injunction is issued after a rule to show cause, at the hearing of which the defendant appears, no remedy lies under this section, any subsequent application for a reconsideration of the question being in the nature of a review, which may be had only in accordance with the provisions of sec. 771 of the Code. *Montgomery v. Robinson*, 93 S. C. 247, 76 S. E. 188; *Jordan v. Wilson*, 69 S. C. 52, 48 S. E. 37.

Nor does section allow appeal after

trial is begun.—This section, when construed with sec. 544 as to the undertaking on the part of the defendant in attachment proceedings, and providing that the defendant may move to discharge as in "other provisional remedies," does not allow a motion to discharge after the jury is impaneled and sworn and the pleadings read. *Savings Bank v. Sprunt & Son*, 86 S. C. 8, 67 S. E. 955.

New party to action may procure dissolution.—Where one circuit judge has issued a temporary injunction until further order of the court, with leave to other persons interested to become parties and move for a dissolution thereof under this section, another circuit judge has jurisdiction to dissolve the injunction upon motion of such new party, as to whom the injunction was without notice. *Smith v. Thomason*, 26 S. C. 607, 12 S. E. 96.

Applied, in *Northrop v. Simpson*, 69 S. C. 551, 48 S. E. 613.

§ 574. Affidavits on motion.—If the application be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other proofs, in addition to those on which the injunction was granted.

1932 Code, § 574; Civ. P. '22, § 490; Civ. P. '12, § 278; Civ. P. '02, § 247; 1870 (14) § 249.

Succeeding judge may dissolve temporary injunction.—A circuit judge can dissolve a temporary injunction granted by his predecessor until the further or-

der of the court. *Bouknight v. Davis*, 33 S. C. 410, 12 S. E. 96. As to when it should not be dissolved, see *Cudd v. Calvert*, 54 S. C. 457, 32 S. E. 503.

ARTICLE 2

Injunctions to Abate Certain Nuisances

575. Place for prostitution.

576. Who may sue.

577. Trial.

578. Violation of injunction.

579. Abatement.

580. Officer's duty after conviction in criminal case.

581. Release of building.

582. Notice to owner.

583. Immunity of witness.

§ 575. Use of buildings or places for lewdness declared a nuisance.—Whosoever shall erect, establish, continue, maintain, use, own, occupy, lease, or re-lease any building, erection or place used for the purpose of lewdness, assignation, or prostitution in the state of South Carolina, is guilty of a nuisance, and the building, erection, or place, or the ground itself in or upon which such lewdness, assignation, or prostitution is conducted, permitted or carried on, continued, or exists, and the furniture, fixtures, musical instruments and movable property used in conducting or maintaining such nuisance, are also declared a nuisance, and shall be enjoined and abated as hereinafter provided.

1932 Code, § 575; Civ. P. '22, § 491; 1918 (30) 814.

§ 576. Attorney general, solicitor, or citizen may bring suit for injunction.—Whenever a nuisance is kept, maintained, or exists, as defined in this article, the attorney general of the State, or the solicitor of the judicial district where such nuisance is kept, or any citizen of the State may maintain an action in equity in the name of the State, upon the relation of such attorney general of the State, or solicitor, or citizen, to perpetually enjoin said nuisance, the person or persons conducting or maintaining the same, and the owner or agent of the building or ground upon which said nuisance exists. In such action the court, or the judge in vacation, shall, upon the presentation of a petition therefor, alleging that the nuisance complained of exists, allow a temporary writ of injunction, without bond, if the existence of such nuisance shall be made to appear to the satisfaction of the court or judge by evidence in the form of affidavits, depositions, oral testimony, or otherwise, as the complainant may elect, unless the court or judge by previous order shall have directed the form and manner in which it shall be presented. Three days' notice in writing shall be given the defendant of the hearing of the application, and if then continued at his instance the writ as prayed shall be granted as a matter of course. When an injunction has been granted it shall be binding on the defendant throughout the State, and any violation of the provisions of injunction herein provided shall be a contempt as herein-after provided.

1932 Code, § 576; Civ. P. '22, § 492; 1918 (30) 814.

§ 577. Trial.—The action, when brought, shall be triable at the first term of court, after due and timely service of the notice has been given, and in such action evidence of the general reputation of the place shall be competent for the purpose of proving the existence of said nuisance. If the complaint is filed by a citizen or corporation, it shall not be dismissed, except upon a sworn statement made by the complainant and his or its attorney, setting forth the reason why the action should be dismissed, and the dismissal approved by the attorney general of the State, or by said solicitor, in writing or in open court. If the court is of the opinion that the action ought not to be dismissed, he may direct the attorney general, or solicitor, to prosecute said action to judgment, and if the action is continued more than one term of court, any citizen of the State may be substituted for the complaining party, and prosecute said action to judgment. If the action is brought by a citizen or a corporation, and the court finds there was no reasonable ground or cause for said action, the costs may be taxed to such citizen or corporation.

1932 Code, 577; Civ. P. '22, § 493; 1918 (30) 815.

§ 578. Violation of injunction.—In case of the violation of any injunction granted under the provisions of this article, the court, or, in vacation, a judge thereof, may summarily try and punish the offender. The proceeding shall be commenced by filing with the clerk of the court a complaint, under oath, setting out the alleged facts constituting such violation, upon which the court or judge shall cause a warrant to issue, under which the defendant shall be arrested. The trial may be had upon affidavits or either party may at any stage of the proceedings demand the production and

oral examination of the witnesses. A party found guilty of contempt under the provisions of this section shall be punished by a fine of not less than \$200.00 nor more than \$1,000.00, or by imprisonment in the county jail or state penitentiary not less than three months nor more than six months, or by both fine and imprisonment.

1932 Code, § 578; Civ. P. '22, § 494; 1918 (30) 815.

§ 579. Abatement.—If the existence of the nuisance be established in an action, as provided in this article, or in a criminal proceeding, an order of abatement shall be entered as part of the judgment in the case, which order shall direct the removal from the building or place of all fixtures, furniture, musical instruments, or movable property used in conducting the nuisance, and shall direct the sale thereof in the manner provided for the sale of chattels under execution, and shall direct the effectual closing of the building or place against its use for any purpose, and so keeping it closed for a period of one year, unless sooner released. If any person shall break and enter or use a building, erection, or place so directed to be closed, he shall be punished as for contempt, as provided in section 578.

1932 Code, § 579; Civ. P. '22, § 495; 1918 (30) 816.

§ 580. When county attorney or solicitor to enforce. — In case the existence of such nuisance is established in a criminal proceeding in a court not having equitable jurisdiction, it shall be the duty of the county attorney or solicitor of the district to proceed promptly under this article to enforce the provisions and penalties thereof, and the finding of the defendant guilty in such criminal proceedings, unless reversed or set aside, shall be conclusive as against such defendant as to the existence of the nuisance. The proceeds of the sale of the personal property, as provided in section 579, shall be applied in the payment of the costs of the action and abatement, and the balance, if any, shall be paid to the defendant.

1932 Code, § 580; Civ. P. '22, § 496; 1918 (30) 816.

§ 581. Owner may secure release of building.—If the owner appears and pays all costs of the proceeding and files a bond, with sureties to be approved by the court, in the full value of the property, to be ascertained by the court, or, in vacation, by the county auditor's records, conditional that he will immediately abate said nuisance and prevent the same from being established or kept therein within a period of one year thereafter, the court, or, in vacation, the judge, may, if satisfied of his good faith, order the premises closed under the order of abatement to be delivered to said owner, and said order of abatement cancelled so far as the same may relate to the said party; and if the proceeding be an action in equity and said bond be given, and costs therein paid before judgment and order of abatement, the action shall be thereby abated as to said building only. The release of the property under the provisions of this section shall not release it from judgment, lien, penalty or liability to which it may be subject by law.

1932 Code, § 581; Civ. P. '22, § 497; 1918 (30) 816.

§ 582. Notice to owner before action against him.—No proceeding against the owner of the real estate shall be commenced hereunder except ten

days written notice be given to the said owner, or his agent, by the prosecuting attorney, and upon his failure thereafter to abate the nuisance. 1932 Code, § 582; Civ. P. '22, § 498; 1918 (30) 817.

§ 583. Immunity of witnesses.—The solicitor, attorney general, or other attorney representing the prosecution for violation of this statute, with the approval of the court, may grant immunity to any witness called to testify in behalf of the prosecution.

1932 Code, § 583; Civ. P. '22, § 499; 1918 (30) 817.

CHAPTER 28

Receivership and Other Provisional Remedies

§ 584. Powers of courts as to receivers.

(1) **Appointment**—A receiver may be appointed by a judge of the circuit court, either in or out of court:

(1) Before judgment, on the application of either party, when he establishes an apparent right to property which is the subject of the action, and which is in the possession of an adverse party, and the property, or its rents and profits, are in danger of being lost, or materially injured or impaired; except in cases where judgment upon failure to answer may be had without application to the court.

(2) After judgment, to carry the judgment into effect.

(3) After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or when an execution has been returned unsatisfied, and the judgment debtor refuses to apply his property in satisfaction of the judgment.

(4) When a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights; and, in like cases, of the property within this State of foreign corporations. Receivers of the property within the State of foreign or other corporations shall be allowed such commissions as may be fixed by the court appointing them, not exceeding five per cent. on the amount received and disbursed by them.

(5) In such other cases as are now provided by law, or may be in accordance with the existing practice, except as otherwise provided in this code of procedure.

(2) **Not appointed without notice.**—No receiver of the property of any person or corporation shall be hereafter appointed by any court or judge, either in term time or at chambers, without notice of the application for such appointment to the party or parties to the action whose property is sought to be put in the hands of a receiver, and to the party or parties to the action in possession of such property claiming an interest therein under any contract, lease or conveyance thereof from the alleged owner. At least four days' notice of the application must be given, unless the court shall, upon it being made to appear that delay would work injustice, prescribe a shorter time.

(3) **Notice to non-resident—on whom served.**—Where the party whose

property is sought to be placed in the hands of a receiver cannot be found within the State, then notice of the application to the party in possession of such property shall be sufficient; and where the property is abandoned and not in possession of any one, and the party claiming the same cannot be found within the State, then the appointment may be made without the notice of the application: *provided*, that whenever a receiver is appointed and the party claiming the property cannot be found within the State, notice of such appointment shall be forthwith given by publication or personal service without the State, as prescribed by law in the case of a summons in a civil action.

(4) Temporary injunction may be granted without notice.—The court or judge may by temporary injunction, without notice, pending the hearing of such application, restrain the delivery of the property, or any part thereof, sought to be put in the hands of a receiver to any other person whomsoever, and the court shall be deemed to have taken jurisdiction over such property from the time of the issuance of such temporary injunction: *provided*, that no such temporary injunction shall issue so as to interfere with the use and disposition of such property by any person or corporation in the usual and customary mode and course of business and use of the same without the court or judge first requiring from the party applying for such injunction a bond, with security, in a sufficient sum, not less than two hundred and fifty dollars, to pay all damages arising from said temporary injunction should no receiver be appointed on the hearing of the application.

(5) No receiver to be appointed before judgment where bond offered.—No receiver of the property of any person or corporation shall be appointed before final judgment in the cause if the party claiming the property so sought to be placed in the hands of a receiver or the party in possession thereof shall offer a bond, in the penalty of double the value of the property, with sufficient security, approved by the clerk of the court of common pleas of the courts in which the action is brought, to fully account for and deliver over, whenever thereafter required by any final adjudication in the cause, the property sought to be placed in the hands of a receiver, and to meet and satisfy any decree or judgment or order that may be made in the cause.

(6) Court to fix value of property to be affected.—Whenever the court or judge before whom such application is made shall appoint a receiver before final judgment in the cause, there shall be inserted in the order of appointment a clause fixing the value of the property for which the bond may be given, as prescribed in subdivision nine of this section; and upon the due execution and filing of such bond thereafter before final judgment in the cause, the court or judge shall vacate the appointment of such receiver and direct the redelivery of the property to the party from whose possession it was taken: *provided*, that where, under the orders of the court or judge, the receiver has incurred any lawful charges and expenses in the care and custody of the property put into his hands, the court or judge, before directing the redelivery, may require sufficient security to be given in addition for the payment of such lawful charges and expenses should they be thereafter finally adjudged to be chargeable against the property.

(7) How damages ascertained if receiver is improperly appointed.—Whenever a receiver shall have been appointed of any property against the opposition of any party to the cause, and shall have taken possession of the same, and thereafter by any final adjudication such receiver shall be held to have been improperly appointed, the costs, charges and expenses of such receivership shall not be charges upon the property as a whole, but only upon the interests therein of the party or parties procuring the appointment; and any party to the cause having opposed such receivership may apply to the court after final adjudication, as aforesaid, and have it referred to a master, referee or jury, as the practice in the case presented may be proper, to have his actual damages by reason of such receivership ascertained and assessed and for judgment therefor against the party or parties having procured such receiver.

(8) Bonds to be made payable to clerk of court, etc.—The several bonds required by this chapter shall be made payable to the clerks of the respective courts in which the action is pending in which the bonds shall be made, and shall be conditioned as required by this chapter, and shall, upon execution and approval as to form and sufficiency by the court or judge, or such other officer as the order shall prescribe, be filed in the office of the clerk of court, who shall, upon demand of any party to the cause and payment of the legal fees therefor, give certified copies of such bonds, on which any party entitled to the benefit thereof may sue the parties liable thereon in any court of competent jurisdiction; and the production of such certified copy shall be prima facie evidence of the bond. Should the security become insufficient upon any of such bonds after the same have been given and approved, the court or judge may, upon application, after notice, require the security to be made sufficient, and on default therein may proceed as if no bond had been given, but without prejudice to the right of any party entitled to the benefit of such bond, to enforce it according to the terms and conditions thereof.

(9) Deposit of money, etc., in court.—When it is admitted by the pleading or examination of a party, that he has in his possession, or under his control, any money or other thing capable of delivery, which, being the subject of litigation, is held by him as trustee, for another party, or which belongs or is due to another party, the court may order the same to be deposited in court, or delivered to such party, with or without security, subject to the further direction of the court.

(10) Other provisional remedies.—Whenever in the exercise of its authority, a court shall have ordered the deposit, delivery, or conveyance of money or other property, and the order is disobeyed, the court, besides punishing the disobedience as for contempt, may make an order requiring the sheriff or constable to take the money or property, and deposit, deliver, or convey it, in conformity with the direction of the court.

(11) Judgment for sum admitted due.—When the answer of the defendant expressly, or by not denying, admits part of the plaintiff's claim to be just, the court on motion, may order such defendant to satisfy that part of the claim and may enforce the order as it enforces a judgment or provisional remedy.

1932 Code, § 584; Civ. P. '22, § 524; Civ. P. '12, § 303; Civ. P. '02, § 265; 1870 (14) § 267; 1897 (22) 510.

Cross References.

See sec. 751 as to the appointment of receivers in supplementary proceedings, and the note thereto. See secs. 13, 14, 25, of art. 5 of the state constitution and sec. 37 of the Code, as to the powers of a circuit judge of chambers, and secs. 817, 818, as to when a nonresident judge may hear a notice upon motion, and the notes thereto. See sec. 7712 as to the appointment of a receiver on the dissolution of a corporation, and the note thereto. See sec. 566, as to temporary injunctions generally, and the note thereto.

- I. General Considerations.
- II. Subdivision (1).
- III. Subdivision (2).
- IV. Subdivision (4).
- V. Subdivision (5).
- VI. Pleading and Practice.
 - A. General Principles.
 - B. Notice.
 - C. Who May Be Appointed.
- VII. Subdivision (7).
- VIII. Subdivision (8).
- IX. Subdivision (9).
- X. Subdivision (10).
- XI. Subdivision (13).
- XII. Subdivision (14).
- XIII. Subdivision (15).

I. GENERAL CONSIDERATIONS.

Appointment of receiver is stronger remedy than injunction.—The appointment of a receiver under the provisions of this section is a stronger remedy than that of a temporary injunction alone. *Pelzer v. Hughes*, 27 S. C. 408, 3 S. E. 781. This case was decided before subd. 7 (now subd. 8), providing for the issuance of temporary injunctions in conjunction with receivership proceedings, was enacted in 1897.—Ed. note.

Since such appointment transfers possession of property.—The effect of the appointment of a receiver, under this section, is to take property at the instance of the moving party, out of the possession of the person in whose possession it is found and place it in the hands of a third party pending litigation. *Truesdell v. Johnson*, 144 S. C. 188, 142 S. E. 343; *Pelzer v. Hughes*, 27 S. C. 408, 3 S. E. 781.

Receivership is in the nature of a sequestration.—The appointment of a receiver, under this section, is not so much in the nature of an attachment as of a sequestration. *Pelzer v. Hughes*, 27 S. C. 408, 3 S. E. 781.

And is a drastic remedy.—The appointment of a receiver, under this section, is a drastic remedy, to be exercised with great circumspection. *Truesdell v. Johnson*, 144 S. C. 188, 142 S. E. 343; *Pelzer v. Hughes*, 27 S. C. 408, 3 S. E. 781.

To be granted with caution.—As a rule, a receiver will not be appointed

under this section during the progress of a cause, unless there is the strongest reason to believe that the plaintiff is entitled to the relief demanded in his complaint, and that there is danger that the property will be materially injured before the case can be determined. *Pelzer v. Hughes*, 27 S. C. 408, 3 S. E. 781.

An application for a receiver is not entitled to favorable consideration when the plaintiff has lain for a long period of years and quietly acquiesced in a condition of affairs which he seeks to change by obtaining a receiver. *Brookshire v. Farmers' Alliance Exchange*, 73 S. C. 131, 52 S. E. 867.

Appointment.—It was error to appoint receiver on application of plaintiff who had a claim of \$3,000.00 against defendant, who in his return gave the value of his property at \$800,000 with liabilities of about one-half thereof, which was not contradicted by plaintiff, and for further due to the depression. *Southern Trust Co. v. Cudd*, 166 S. C. 108, 164 S. E. 428.

In application for appointment of receiver pendente lite the court should take in consideration the depression. *Ibid.*

Where, on the vote of the stockholders, a solvent corporation is being dissolved, a stockholder's application for a receiver on the ground that certain transactions of the directors, long acquiesced in, were ultra vires, will be denied, where no fraud, mismanagement, or neglect is charged. *Brookshire v. Farmers' Alliance Exchange*, 73 S. C. 131, 52 S. E. 867.

Section 7712 applied with this section.—Under sec. 7712 of the Civil Code, the appointment of a receiver must be according to the provisions of this section. *In re Citizens' Exchange Bank*, 140 S. C. 471, 139 S. E. 135.

See sec. 7712 as to appointment of receivers on the dissolution of a corporation, and the note thereto.

II. SUBDIVISION (1).

"Apparent right" means title.—A receiver may not be appointed under subd. 1 of this section to manage mortgaged property on the request of the mortgagee or person holding under the mortgagee without notice to mortgagor, since legal title is always in the mortgagor, or person claiming under him, precluding one claiming under the mortgagor from establishing an "apparent right" to the property, unless the mortgagor is insolvent or the mortgaged premises insufficient. *Greenwood Loan, etc., Ass'n v. Childs*, 67 S. C. 251, 45 S. E. 167.

III. SUBDIVISION (2).

Appointment of receiver to secure execution of judgment.—The provisions of this section as to receivers do not apply to receivers appointed, under sec. 751, to secure the fruits of a judgment, such being governed by the provisions of secs.

746-755. *Deer Island Lumber Co. v. Virginia-Carolina Chemical Co.*, 111 S. C. 299, 97 S. E. 833.

This section prescribes a remedy toward the prosecution of a civil action in the procurement of a judgment, as distinguished from secs. 746-755 which prescribe a remedy toward the execution of a judgment. *Id.*

Receiver in proceedings supplementary to execution may take charge of property conveyed by debtor to defraud creditor after commencement of action. *Gardner v. Kirven*, 173 S. C. 302, 175 S. E. 637.

Powers of receiver in proceeding supplementary to execution.—The following in 27 C. J. 487, section 126, quoted with approval: "Under statutes providing for the appointment of a receiver in proceedings supplementary to execution, the general rule is that such receiver is not the mere agent or representative of the debtor, but occupies the relation of a trustee for the creditors, and may institute actions in his own name to set aside fraudulent conveyances made by the debtor with a view to defeating his creditors."

See generally, as to appointment of receivers in supplementary proceedings, *Dilling v. Foster*, 21 S. C. 334; *Dauntless Mfg. Co. v. Davis*, 22 S. C. 584; *Sparks v. Davis*, 25 S. C. 381.

IV. SUBDIVISION (4)

"Insolvency" only where assets will not meet liabilities.—The "insolvency" provided for in subd. 4 of this section is that condition of the debtor where his entire property and assets are insufficient to pay his debts. *Miller v. Southern Land, etc., Co.*, 53 S. C. 364, 31 S. E. 281, and the cases therein cited. In this case it was said: "We are quite prepared to adopt the definition of 'insolvency' as given in the recent bankrupt act of congress. * * *"

Where the assets of a corporation as shown, were about three times the stated indebtedness of a corporation, and there was no showing that the corporation's property was seriously depreciated; but, on the contrary, it was shown that large additions had been recently made to its plant; and it was not found that the corporation was endeavoring to dispose of its property in defraud of its creditors, it was error to provide for a receiver under subd. 4 of this section. *Miller v. Southern Land, etc., Co.*, 53 S. C. 364, 31 S. E. 281.

"Imminent danger of insolvency" defined.—"Imminent danger of insolvency" as used in subd. 4 of this section means danger of insolvency from the standpoint of preserving the assets of the involved corporation. In *re Maplecroft Mills*, 218 F. 659.

Where a corporation has ceased to be

a "going concern," the assets are scant, there exist some creditors, with the possibility of others, and the main asset is an uncertain claim at law involving the expense of litigation, there is such "imminent danger of insolvency" as to warrant the appointment of a receiver under subd. 4 of this section. *Chisolm v. Carolina Agency Co.*, 88 S. C. 438, 70 S. E. 1035.

A court of equity may order receivership when a corporation is insolvent, or in imminent danger of insolvency, when such receivership is for purpose of bona fide liquidation of affairs of corporation, and protection of rights of creditors, according to their respective priorities. *Montgomery & Crawford v. Arcadia Mills*, 173 S. E. 464, 176 S. E. 589.

Action must be instituted against corporation.—Under this section the court has no authority to appoint a receiver in a proceeding instituted without institution of action against corporation for which the receiver is sought. *Porter v. Brown*, 149 S. C. 151, 146 S. E. 810.

Receivership brings corporation within terms of federal bankruptcy act.—Where receiver is appointed for a corporation under this section on the grounds of imminent danger of insolvency, such appointment brings the corporation within the terms of the Federal Bankruptcy Act. In *re Maplecroft Mills*, 218 F. 659.

Mere lapse of time after the appointment of an equity receiver by a state court will not oust the federal court of its jurisdiction to receive a petition for reorganization under Bankruptcy Act. *Old Fort Improvement Co. v. Lea*, 89 F. (2d) 286.

A receiver should not be appointed under subd. 4 of this section where the appointment is opposed by all creditors except one, to whom the amount due has been tendered and refused. *Miller v. Southern Land, etc., Co.*, 53 S. C. 364, 31 S. E. 281.

Securities deposited with state insurance commissioner by foreign insurance corporation which became insolvent constituted "trust fund" for benefit of policyholders, so as to entitle policyholder in state to institute proceedings in circuit court for appointment of receiver to take charge of fund. *Petition of State*, 182 S. C. 369; 189 S. E. 475.

Appointment of receiver take over qualification bond of casualty company.—*Boynton v. Consolidated Indemnity & Ins. Co.*, 180 S. C. 279; 185 S. E. 731.

See generally, as to the commissions being under the control of the court. In *re Rock Hill Cotton Factory Co.*, 68 S. C. 436, 47 S. E. 728.

V. SUBDIVISION (5).

Insolvency alone not sufficient.—Proof of insolvency, and nothing more, is not

sufficient to warrant the appointment of a receiver under this section. *Virginia-Carolina Chemical Co. v. Hunter*, 84 S. C. 214, 66 S. E. 177; *Whilden v. Chapman*, 80 S. C. 84, 61 S. E. 249.

It must appear that property is in danger of injury or loss.—No receiver will be appointed under this section to take over property assigned and sold to third persons by the insolvent where it does not appear that there is any danger of loss or injury to the property during litigation. *Pelzer v. Hughes*, 27 S. C. 408, 3 S. E. 781.

But receiver may be appointed for solvent fraudulent debtor.—If a solvent debtor adopts a course of conduct showing a fraudulent intent to defeat or hinder his creditors, a receiver may be appointed. *Virginia-Carolina Chemical Co. v. Hunter*, 84 S. C. 214, 66 S. E. 177.

And receivership where debtor has assigned property does not require plaintiff to recover judgment and exhaust remedies.—It is not necessary, under the provisions of this section, and sec. 9108, that the plaintiff recover judgment and exhaust his legal remedies, to have a receiver appointed over property assigned by the debtor, it only being necessary to prove that the assignee is insolvent or incompetent. *Regenstein v. Pearlstein*, 30 S. C. 192, 8 S. E. 850.

The court in the above case said: "There is certainly nothing in the case of *Pelzer v. Hughes*, 27 S. C. 408, 3 S. E. 781, to warrant the view that seems to be contended for by appellants. * * * It will be seen from what is said by Mr. Justice McGowan, in delivering the opinion in that case, at page 414, that the main object and real gravamen of that action was to set aside the transfer of certain choses in action to a third person, who claimed the same as a bona fide purchaser for value, to which the provisions of the section above quoted (sec. 9108) would not apply; but in speaking of the section of the General Statutes above quoted, (sec. 9108) he says expressly: 'So far as concerns a violation of that special act, the circuit judge undoubtedly had jurisdiction to consider the subject of appointing a receiver,' although the fact that the creditors had not obtained judgments, and, of course, had not exhausted their legal remedies, had just been mentioned immediately before using the language above quoted." *Regenstein v. Pearlstein*, 30 S. C. 192, 8 S. E. 850, 853.—Ed. note.

Insolvency of both firm and partners prerequisite for receiver of partnership.—Where a creditor seeks to have a receiver appointed over partnership assets, he must show that he cannot enforce payment of his debt by judgment and execution, either against the firm or the individual partners. *Whilden v.*

Chapman, 80 S. C. 84, 61 S. E. 249.

The insolvency of a partnership is sufficiently averred in an action for a receiver, under this section, where it is shown that an execution against one partner has been returned nulla bona, and that the other has no attachable property. *Allen v. Cooley*, 53 S. C. 414, 31 S. E. 634.

Retiring partner may procure receiver against remaining partner who has assumed firm debts.—Where the remaining partner on the dissolution of a partnership, retains the assets and assumes the liabilities of the firm, the retiring partner becomes a surety for such liabilities, and may, on showing that the assets are being dissipated by the remaining partner, have a receiver appointed under this section. *Allen v. Cooley*, 53 S. C. 414, 31 S. E. 634.

Answer of partner showing collusion of copartner to deprive him of assets calls for receiver.—Where, on a complaint by a creditor against a partnership, it does not appear that he is entitled to such receiver, but on the answer of one of the partners it appears that he has a good cause for a receiver under subd. 1 of this section by prima facie case of fraudulent management and collusion to deprive him of his share in the assets, the answer stated a cause which justified the court in appointing a receiver. *Whilden v. Chapman*, 80 S. C. 84, 61 S. E. 249.

Where complaint and answer present primary question of title receiver should not be appointed.—A claim of title in the complaint, together with an allegation of defendant's insolvency and of danger of loss of rents, all of which are denied in the answer, present a question of title triable by jury, and not a case warranting the appointment of a receiver. *DeWalt v. Kinard*, 19 S. C. 286.

But where insolvent party claims entire property on partition suit receiver should be appointed for rents.—Where one of the alleged tenants in common claims the right to the entire property in fee simple, is seeking to collect all the rents thereof on a bill of partition, and is insolvent, it is proper to appoint a receiver to collect the rents and pay taxes and insurance during the litigation. *Christ Church v. Fishburne*, 83 S. C. 304, 65 S. E. 238.

Mortgagee may not procure receiver to apply rents and profits to mortgage debt pending foreclosure.—A mortgagee, having only a lien on the mortgaged property, has no claim whatsoever to rents and profits, and pending foreclosure proceedings, a receiver will not be appointed to apply such rents and profits to the payment of the mortgage debt, notwithstanding the insufficiency of the land to pay the same, and the present

insolvency of the mortgagor. *Hardin v. Hardin*, 34 S. C. 77, 12 S. E. 936, 27 Am. St. Rep. 786; *Seignious v. Pate* 32 S. C. 134, 10 S. E. 880, 17 Am. St. Rep. 846.

Simple creditors may force executor into receivership.—An executor holds assets of the testator as quasi trustee for his creditors, and it is competent for the court to appoint a receiver at the instance of such creditors, upon its being shown that the executor is mismanaging the assets, and it is not essential that the creditors first obtain judgment and have their executions returned unsatisfied. *Harman v. Wagner*, 33 S. C. 487, 12 S. E. 98.

VI. PLEADING AND PRACTICE.

A. General Principles.

Equity Has Exclusive Jurisdiction.—

The jurisdiction to appoint a receiver under this section lies exclusively in equity. *Pelzer v. Hughes*, 27 S. C. 408, 3 S. E. 781.

Receiver may be appointed at chambers.—Under this section a receiver may be appointed at chambers. *Truesdell v. Johnson*, 144 S. C. 188, 142 S. E. 343; *Harman v. Wagner*, 33 S. C. 487, 12 S. E. 98; *Regenstein v. Pearlstein*, 30 S. C. 192, 8 S. E. 850; *Pelzer v. Hughes*, 27 S. C. 408, 3 S. E. 781; *Kilgore v. Hair*, 19 S. C. 486.

But it is improper to inquire into merits of case on appointment before judgment.—It is improper, in the appointment of a receiver, before judgment, to inquire into, or express any opinion as to the general merits of the case. *Pelzer v. Hughes*, 27 S. C. 408, 3 S. E. 781.

However a general view should be taken of pleadings and issue.—In view of the strict necessity required for the appointment of a receiver before judgment, under this section, it is necessary upon an application therefor, to take a general view of the scope of the pleadings, and the issues made. *Pelzer v. Hughes*, 27 S. C. 408, 3 S. E. 781.

Receiver should not be appointed on judge's motion.—A circuit judge may not, on his own motion, appoint a receiver as provided for in this section. *White v. Britton*, 72 S. C. 175, 51 S. E. 547.

Or without any application.—It is error, under this section, to appoint a receiver where no application for such is made by either party. *White v. Britton*, 72 S. C. 175, 51 S. E. 547.

Nonresident judge may appoint receiver at chambers on default or consent.—Where there is no resident judge in the circuit in which the cause arises, a nonresident judge, located in another circuit, may, in case of default, or consent of the parties, appoint a receiver within the provisions of this section. *Truesdell v. Johnson*, 144 S. C. 188, 142

S. E. 343.

But Supreme Court may not appoint new receiver on appeal.—Where, on appeal, the Supreme Court finds that an appointment of a receiver by the circuit court was an abuse of discretion, it has no jurisdiction to appoint a new receiver, but may only direct the lower court to fill the vacancy. *In re Citizens' Exchange Bank*, 140 S. C. 471, 139 S. E. 135.

Party seeking appointment need not give bond on appointment.—It is proper that when a receiver is appointed he should be required to give bond, but there is no statute or rule of law which requires that a bond should be exacted from a plaintiff before granting an order for the appointment of a receiver. *DeWalt v. Kinard*, 19 S. C. 286.

Nor need master practically appointed receiver give special bond.—Where a master, a bonded officer of the court, is practically though not nominally made a receiver, it is not necessary that he be required to give a special bond. *DeWalt v. Kinard*, 19 S. C. 286.

Receiver's commissions at discretion of court.—This section does not fix any commissions to be allowed a receiver, such commissions being left to the discretion of the court. *Mann v. Poole*, 48 S. C. 154, 26 S. E. 229, 233.

A court may order a receiver instead of a master to dispose of the assets of a bankrupt.—See this catchline under sec. 740 treating the case of *Buist v. Merchants', etc., Bank*, 65 S. C. 487, 43 S. E. 958, for a discussion of this section when construed in relation to said section 740 providing for the sale of real estate by a master.

And receivers may be appointed by the court to make sales under its orders. *Clyburn v. Reynolds*, 31 S. C. 91, 9 S. E. 973.

But a receiver was properly appointed in an action for partition where the party in possession was insolvent. *McCrary v. Jones*, 36 S. C. 136, 15 S. E. 430.

No attachment against property after receiver appointed.—After a receiver has been duly appointed and qualified, an attachment cannot be levied on the property in his possession, for it is then in the custody of the law. *Regenstein v. Pearlstein*, 30 S. C. 192, 8 S. E. 850.

Attachment will not lie against property under receiver's control even before he has filed his bond. *Regenstein v. Pearlstein*, 30 S. C. 192, 8 S. E. 850.

See sec. 529, as to cases in which attachment may be granted, and the note thereto.

Plaintiff seeking receiver is entitled to open and reply.—The plaintiff, on motion for the appointment of a receiver under this section, is entitled to open and reply, as such action comes within the provisions of Cir. Ct. Rule 59, relat-

ing to persons bringing motions on special matters. *Allen v. Cooley*, 53 S. C. 414, 31 S. E. 634.

Admissions in answer are sufficient evidence on motion for appointment of receiver. *Meinhard v. Strickland*, 29 S. C. 491, 7 S. E. 838.

B. Notice.

A receiver may not be appointed under this section without notice to any party to the cause. *White v. Britton*, 72 S. C. 175, 51 S. E. 547.

Service on wife of party litigant is sufficient.—Under the provisions of subd. 6 of this section, and sec. 444 relating to the manner of serving notice, service on the wife of the defendant, at his place of residence, is sufficient, provided he is not out of the state. *Allen v. Cooley*, 53 S. C. 414, 31 S. E. 634.

See sec. 444 as to how service of notice may be made, and note thereto.

Notice of receiver's application for instructions need not be given.—Where a receiver makes application to the court for instructions as to the disposal of the property in his hands, it is not necessary that the defendants have notice of such application. *Allen v. Cooley*, 53 S. C. 414, 31 S. E. 634.

Under subd. 6, and subd. 7 of this section, providing for notice of application for a receiver, and subd. 7 further providing for notice of appointment of receiver where the party claiming the property cannot be found within the state, the court has jurisdiction to direct a receiver in regard to his duties, where no notice has been given of his appointment, in the absence of evidence that the party claiming the property cannot be found in the state. *Allen v. Cooley*, 53 S. C. 414, 31 S. E. 634.

An order directing a receiver in the performance of his duties is not beyond the jurisdiction of the court, though notice of an appeal from the order appointing such officer has been given, where the return on appeal has not been filed. *Allen v. Cooley*, 53 S. C. 414, 31 S. E. 634.

C. Who May be Appointed.

Judge names receiver at his discretion.—Under this section the circuit judge has a large discretion in the matter of selecting and designating a receiver. In re *Citizens' Exchange Bank*, 140 S. C. 471, 139 S. E. 135.

Who should be impartial and capable.—A receiver under this section must be impartial and capable and as a general rule should not be connected in interest with any party to the cause. In re *Citizens' Exchange Bank*, 140 S. C. 471, 139 S. E. 135; *Virginia-Carolina Chemical Co. v. Hunter*, 84 S. C. 214, 66 S. E. 177.

And special fitness may be considered.—The appointment of an attorney for a bank examiner as a receiver is not an abuse of the court's discretion where

special fitness is shown and he was neither an applicant for the position nor the nominee of any interested person. In re *Citizens' Exchange Bank*, 140 S. C. 471, 139 S. E. 135.

It is improper to appoint as receiver the agent of the petitioning creditor, in absence of circumstances showing his special fitness, or the propriety of appointing one so closely connected with the parties in interest. *Virginia-Carolina Chemical Co. v. Hunter*, 84 S. C. 214, 66 S. E. 177.

An attorney actively engaged in securing or opposing receivership should not ordinarily be appointed as receiver. In re *Citizens' Exchange Bank*, 140 S. C. 471, 139 S. E. 135.

Clerk may not act as receiver.—The appointment of the clerk of the court as receiver is not permissible under this section. *White v. Britton*, 72 S. C. 175, 51 S. E. 547.

Nor may a master.—A master of the court should not be appointed a receiver, under this section, in any case. *White v. Britton*, 72 S. C. 175, 51 S. E. 547; *Kilgore v. Hair*, 19 S. C. 486.

Receiver derives entire authority from court.—A receiver is an executive officer of the court, administering the assets of the estate under the direction of the court, his authority resting only in the orders by which he is appointed. In re *Fifty-Four First Mortgage Bonds*, 15 S. C. 304; *Gadsden v. Whaley*, 14 S. C. 210.

Where the president and directors of a railroad were ordered by the court to remain in control of the property but under the direction of the court, such order made them receivers—that is, officers of the court, and not of the company. In re *Fifty-Four First Mortgage Bonds*, 15 S. C. 304; *Ex parte Brown*, 15 S. C. 518.

And has no general authority to sue or be sued.—A receiver has no general authority as a receiver to sue or be sued, or defend. In re *Fifty-Four First Mortgage Bonds*, 15 S. C. 304; *Gadsden v. Whaley*, 14 S. C. 210.

Removal of interested receiver will not invalidate his proper acts.—The removal of a receiver under this section because he is the agent of the petitioning creditor and the appointment of another receiver will not invalidate any proper act of the original receiver. *Virginia-Carolina Chemical Co. v. Hunter*, 84 S. C. 214, 66 S. E. 177.

An order made, on the discharge of a receiver, referring to the amount found by the clerk to be in the hands of the receiver, and providing for his discharge after payment of certain amounts, is res judicata of the account of the receiver. *Sarratt v. Gaffney Carpet Mfg. Co.*, 77 S. C. 85, 57 S. E. 616.

Nor affect claims arising during his control.—A change of incumbent in the

office of a receiver does not affect the status of claims against the property arising during the receivership. *Ex parte Brown*, 15 S. C. 518.

VII. SUBDIVISION (7).

Service under this subdivision must be in exact name of defendant.—Under subd. 6 (now subd. 7) of this section the styling of a corporation as “incorporated under the laws of New York” in the complaint and personal service out of the state in such style is fatally defective, where such corporation is in fact incorporated in Florida. *Porter v. Brown*, 149 S. C. 151, 146 S. E. 810.

VIII. SUBDIVISION (8).

Editor's Note.—Subd. 7 (now subd. 8) of this section was not included under its early standing, being enacted by the legislature in 1897. See *Truesdell v. Johnson*, 144 S. C. 188, 142 S. E. 343.

Section does not apply to injunction in action for receivership.—See this catch-line under sec. 566.

Bond is condition precedent to injunction.—The failure of the court to require the bond provided for in subd. 7 (now subd. 8) of this section as a condition precedent to the issuance of the temporary injunction also provided for therein renders such injunction void. *Truesdell v. Johnson*, 144 S. C. 188, 142 S. E. 343; *Roberts v. Pipkin*, 63 S. C. 252, 41 S. E. 300.

See sec. 566, as to temporary injunctions generally, and the note thereto.

IX. SUBDIVISION (9).

Protection is afforded person claiming possession of property.—This and the following subdivision of this section were enacted for the purpose of protecting the interests of the person claiming or in possession of the property for which a receiver is sought. *Truesdell v. Johnson*, 144 S. C. 188, 142 S. E. 343.

The immediate subdivision enabling such claimant to retain property before appointment.—Subdivision 8 (now subd. 9) provides a method whereby a person claiming or in possession of the litigated property may retain possession of the property and prevent the appointment of a receiver. *Truesdell v. Johnson*, 144 S. C. 188, 142 S. E. 343.

And following subdivision providing for recovery after receiver is appointed.—Subdivision 9 (now subd. 10) provides for the recovery of property pending final judgment where an order has been made appointing a receiver. *Truesdell v. Johnson*, 144 S. C. 188, 142 S. E. 343.

Thus, fixation of value of property is condition precedent to appointment of receiver.—It is a condition precedent to the issuance of an order for a receiver under subd. 9 of this section, that the value of the litigated property be fixed therein, in order that subd. 10, providing for defendant's bond after appointment

of the receiver to recover possession of the property, may be of full force and effect. *Truesdell v. Johnson*, 144 S. C. 188, 142 S. E. 343.

But order directing receiver to make an inventory is not such “fixation.”—An order of a judge directing a receiver to make an inventory of the assets of a company to which he is given possession is not equivalent to a clause fixing the value of the property, as required by subd. 9 (now subd. 10) of this section. *Truesdell v. Johnson*, 144 S. C. 188, 142 S. E. 343.

Receivership is vacated by execution of bond herein provided for.—The entering into a bond, under this and the following subdivision of this section, after appointment of a receiver, where the order appointing such receiver provides for such a bond, makes an appeal concerning the appointment unnecessary, as the entering into the bond vacates the receivership. *Brookshire v. Farmers' Alliance Exchange*, 71 S. C. 451, 51 S. E. 442; *Roberts v. Pipkin*, 63 S. C. 252, 41 S. E. 300.

X. SUBDIVISION (10).

See the foregoing subdivision and the note thereto.

It is not error for judge to correct erroneous valuation.—Where an error is made in fixing the value of the property, in the order appointing a receiver, as required by this subdivision, the circuit judge has power to correct such error. *Allen v. Cooley*, 53 S. C. 414, 31 S. E. 634.

XI. SUBDIVISION (13).

Applicable to facts existing when order is granted.—Subd. 11 (now subd. 13) of this section is only applicable to the state of facts existing when the order is granted. *American Seeding Machine Co. v. Commander*, 77 S. C. 312, 57 S. E. 1108.

Where a simple money judgment has been rendered against a trustee holding over funds it is error for a subsequent circuit judge to order the trustee to pay the funds to the plaintiff or deposit them in court, as provided for in subd. 11 (now subd. 13) of this section, without notice to trustee, or finding that the funds were in his possession at the date of the order. *Id.*

XII. SUBDIVISION (14).

A judge has the power, under subd. 14 of this section, to grant an order of attachment against an executor who has refused to turn over the assets to a receiver as ordered by the court. *Harman v. Wagner*, 33 S. C. 487, 12 S. E. 98.

XIII. SUBDIVISION (15).

This subdivision provides for a personal order.—Subd. 15 of this section provides for a personal order to the defendant to satisfy a debt which he admits, and in addition allows execution against

his property, or any other way of satisfying a debt provided by the law. *Malloy v. Douglass*, 113 S. C. 384, 101 S. E. 825.

Where the proper motion under subd. 15 of this section is for an order directing the defendant to pay admitted sum due, it is not error for the court to make such an order on plaintiff's motion for judgment, where defendant is neither misled nor surprised. *Phenix Furniture Co. v. Daggett*, 145 S. C. 357, 143 S. E. 220.

Order directing defendants to pay amount due except amount of counterclaim, and giving plaintiff leave to enter up judgment on default was proper. *Bomar v. Gantt et al.*, 167 S. C. 139, 166 S. E. 90.

But the order is not a final judgment.—An order under subd. 15 of this section is not a final judgment as to all matters set forth in the case, so as to preclude further inquiry as to issues set up in the pleadings. *Malloy v. Douglass*, 113 S. C. 384, 101 S. E. 825. It was said in this case that "The Legislature avoided and it must be presumed intentionally avoided, the word 'judgment,' lest its meaning should be misunderstood."

Subdivision applies where defendant offers to pay sum admitted in full satisfaction.—Where the defendant offers

to pay sum, deemed by plaintiff to be in full satisfaction, he may be forced to pay that amount to plaintiff without condition under subd. 15 of this section. *Phenix Furniture Co. v. Daggett*, 145 S. C. 357, 143 S. E. 220.

Pending suit, the offer to pay must be to pay into court.—If offer to pay be made, pending suit, by a debtor to his creditor, it cannot avail him, unless he follow it up with offer to pay money into court, or, at least, submit to judgment for sum admitted. *Coghlan v. South Carolina R. Co.*, 32 F. 316.

Granting of voluntary non-suit without prejudice by court under subsection 15 of this statute affirmed. *Pilot Life Ins. Co. v. Habis*, 90 F. (2d) 842.

Where, in action on life policy for face amount and double indemnity, and defendant insurer admitted liability for face amount, plaintiff applied to judge for an order directing the defendant to pay plaintiff the amount admitted to be due. *Ibid.*

Cited in the case of *Bush v. Aldrich*, 110 S. C. 491, 96 S. E. 922, in support of the contention that the constitution and statutes of the state have vested in the court of common pleas all the jurisdiction that was exercised by the courts of common law and equity prior to the adoption of the reformed procedure.

TITLE 10

Trial and Judgment in Civil Actions

CHAPTER 29. Judgment by Default, or upon Frivolous Pleading, § 585.

CHAPTER 30. Issues and Mode of Trial, § 588.

CHAPTER 31. Trial by Jury, § 599.

CHAPTER 32. Trial by the Court, § 648.

CHAPTER 33. Trial by Referee, § 652.

CHAPTER 34. Judgments, § 657.

CHAPTER 29

Judgment by Default or upon Frivolous Pleading

585. Judgment defined.

586. Judgment on default or for excess

over counterclaim.

587. Judgment on frivolous pleading.

§ 585. Judgment defined.—A judgment is the final determination of the rights of the parties in the action.

1932 Code, § 585; Civ. P. '22, § 525; Civ. P. '12, § 304; Civ. P. '02, § 266; 1870 (14) § 268.

Cross references.—As to specific section covering declaratory judgments, see Civ. Proc. § 660, and note thereto. As to specific section covering appeals from

judgments, see Civ. Proc. § 780, and note thereto. When enter judgment for costs. —see § 786 hereof. As to taxation of cost see §§ 756 and 762.

When enter judgment for costs.—See section 786 hereof.

As to taxation of cost see sections 756 and 762.

Taxation of cost.—Judgment should not be entered until all the costs are taxed and property adjusted. *Black v. Kirkland Seed Co.*, 163 S. C. 222, 161 S. E. 489.

Plaintiff who twice prevailed on appeal was entitled to have judgment entered taxing costs of appeals, though action had not been finally determined but was awaiting retrial. *Heath v. Town of Darlington*, 176 S. C. 252, 180 S. E. 52.

But such plaintiff was not entitled to enforce judgment for costs until entry of final judgment in the action. *Ibid.*

Case was distinguished from *Black* case.

Judgments at law and decrees in equity are same under this section. *Cook v. Jennings*, 40 S. C. 204, 18 S. E. 640, 643.

And judgment in confession has effect of judgment in an action.—The judgment in the case of a confession has all the attributes of a judgment obtained in an action. *Ex parte Ware Furniture Co.*, 49 S. C. 20, 27 S. E. 9, 12. For specific sections covering confession of judgment, see Civ. Proc. §§ 670 et seq.

The judgment issues from the court, not from the attorneys or the clerk. *Blohme v. Schmancke*, 81 S. C. 81, 61 S. E. 1060, 1062.

But decision of judge is not a formal judgment.—In an action at law tried by the court, the decision of the judge is not the formal judgment. *Adickes v. Allison*, 21 S. C. 245, 259.

And judgment may be made on paper separate from complaint. — *Melchers v. Moore*, 62 S. C. 386, 40 S. E. 773, 774.

Mistake in heading of judgment does not invalidate it.—A mere clerical mistake in the heading of a judgment does not invalidate it. *Woodard v. Woodard*, 36 S. C. 118, 15 S. E. 355, 356, 16 L. R. A. 743.

No "final determination" of rights where recovery of plaintiff in doubt.—A decree or judgment cannot be regarded as final that leaves in doubt the question whether the plaintiff will, in the end, be entitled to such judgment or decree. *Donaldson v. Bank*, 4 S. C. 106, 115. See, also, *Agnew v. Adams*, 24 S. C. 86. Also, *Magovern v. Richard*, 27 S. C. 272, 3 S. E. 340.

And decree ascertaining date of failure of corporation and ordering reference as to facts is not final.—In an action against a bank which had failed, and stockholders thereof, to make the latter liable, according to the terms of the charter, for the amount of the shares held by them "at the time of such failure," a decree which merely ascertains the date of the failure and orders refer-

ences as to certain facts is not a judgment under this section. *Donaldson v. Bank*, 4 S. C. 106, 116.

Nor order for deficiency in foreclosure where no sale made or amount ascertained.—Under this section, where a decree of foreclosure is rendered against a debtor in his lifetime, with an order that execution issue against him personally for any deficiency, but no sale is made nor deficiency ascertained until after his death, the claim for such deficiency does not rank as a judgment against his estate. *Cook v. Jennings*, 40 S. C. 204, 18 S. E. 640, 643.

As to specific section covering deficiency judgments, see Civ. Proc., § 487, and note thereto.

Nor is an interlocutory judgment a "final determination."—An interlocutory judgment is not a "judgment" under this section, as it needs some other adjudication by the court in order for the determination of the rights of the parties to be complete. *Cook v. Jennings*, 40 S. C. 204, 18 S. E. 640, 643.

And judgment is not entered upon order of discontinuance.—This section does not contemplate the entry of a judgment in the case of a discontinuance, as an order of discontinuance is not a final determination of any rights. *Columbia Water Power Co. v. Columbia Land, etc., Co.*, 42 S. C. 488, 20 S. E. 378, 379.

Giving two orders for judgment is not prejudicial error. *Carolina Gro. Co. v. Moore*, 63 S. C. 184, 41 S. E. 88, Ann. Cas. 18D, 440, 7 A. L. R. 42.

Award in condemnation proceedings not a judgment before condemner takes property.—Before the condemner elects to take the property, an award in condemnation proceedings is not a judgment under this section. *Haig v. Wateree Power Co.*, 119 S. C. 319, 112 S. E. 55, 59.

And state highway department could abandon condemnation proceedings where defendants refused voucher for \$6,000.00 awarded by department and on appeal to court of common pleas jury awarded \$11,500.00. *South Carolina State Highway Department v. Bobates et al*, 180 S. C. 190.

Decree for money must ascertain amount and order payment in order to rank as judgment.—In order for a decree to rank as a final judgment, under this section, for money, it must ascertain a definite sum to be paid and order its payment, and authorize execution therefor. *Ex parte Farrars*, 13 S. C. 254, 259.

And decree for deficiency directing payment before certain date is sufficient.—Under this section, a decree in a mortgage foreclosure, which, after finding defendant owed plaintiffs a certain sum, directed its payment on or before a certain date, and sale in default of payment, was sufficient as a judgment. *Barron v. Southern Scale, etc., Co.*, 106 S. C. 342,

91 S. E. 321, 322.

And reference as to calculation of interest is a final judgment.—The decision of a circuit judge disposing of all the issues, directing judgment for the balance due on a former judgment particularly stated in the record, and ordering execution to issue, but referring it to the clerk to calculate the interest and ascertain such balance, is a final judgment under this section. *Adickes v. Allison*, 21 S. C. 245, 259.

But judgment is none the less a judgment when statutory requirements refer to execution, etc.—A judgment is none the less a judgment because certain requirements of the statute have to be complied with, so as to enforce it by execution, give it a lien on real estate, and make it competent evidence or effectual for other purposes. *Blohme v. Schmancke*, 81 S. C. 81, 61 S. E. 1060, 1062; *Ball v. Trenholm*, 45 F. 588, 589.

Remedy against judgment by default where complaint is insufficient is by motion in the cause. *Gillian v. Gillian*, 65 S. C. 129, 43 S. E. 386.

In equity case plaintiff must establish case to satisfaction of court before he can get judgment by default. *Marion v. City Council*, 72 S. C. 576, 52 S. E. 418; *Cannady v. Martin*, 72 S. C. 131, 51 S. E. 549.

Court may require trustee to answer for cestui que trust after default. *Kaylor v. Hiller*, 72 S. C. 433, 52 S. E. 120.

Supreme Court cannot order judgment by default. *Marion v. City Council*, 72 S. C. 576, 52 S. E. 418.

Judgment conclusive of all matter involved whether raised or not.—A judgment

is conclusive of all matter necessarily involved, whether raised or not. *Ryan v. Southern Mut. Building, etc., Ass'n*, 50 S. C. 185, 27 S. E. 618, 619, 62 Am. St. Rep. 831.

And judgment on contract closes it and gives redress for its breach.—Under this section, a judgment granted upon a contract determines and closes it, and gives means for its enforcement or redress for its breach. *Moore v. Holland*, 16 S. C. 15, 27.

And has effect in money demand of directing payment.—A judgment rendered on an ordinary money demand has the effect of directing that such an amount be paid the plaintiff by the defendant. *Pelzer Mfg. Co. v. Cely*, 40 S. C. 430, 18 S. E. 790, 792.

Plea of res judicata in civil action not supported by judgment in criminal proceedings.—Under this section, a judgment in a criminal proceeding does not support the plea of res judicata in a civil action. *Frierson v. Jenkins*, 72 S. C. 341, 51 S. E. 862, 110 Am. St. Rep. 608, 5 Ann. Cas. 77.

Judgment of domestic court of general jurisdiction is presumed to be valid. *Pearson v. Breeden*, 79 S. C. 302, 60 S. E. 706.

Record of another judgment to which neither participant was party creates no presumption.—Record of a judgment in another action, to which neither participant was a party or privy, creates no presumption as against them, though they may introduce it in evidence in a pending action for some collateral purpose. *Cave v. Cave*, 101 S. C. 40, 85 S. E. 244.

§ 586. Judgment on failure to answer, or for excess over counterclaim—claim and delivery and other cases.

(1) **Judgment by default.**—Judgment may be had, if the defendant fail to answer the complaint, as follows: In any action on contract the plaintiff may file proof of lawful service of summons and complaint on one or more of the defendants, or of the summons, according to the provisions of section 430, and that no appearance, answer or demurrer has been served on him. It shall be the duty of the clerk to place all such cases on the default calendar, and said calendar shall be called the first day of the term. When the action is on a complaint for the recovery of money only, judgment may be given for the plaintiff by default if the demand be liquidated; and if unliquidated, and the plaintiff itemize his account, and append thereto an affidavit that it is true and correct, and no part of the sum sued for has been paid, by discount or otherwise, and a copy be served with the summons and complaint on the defendant; or if the plaintiff prove his claim in open court, whether itemized or not, and the defendant shall neither answer, demur nor serve notice of appearance, the plaintiff shall have judgment for the sum sued for as in the case of liquidated demands. But in case notice of appearance in an action has been given, by or on

behalf of a defendant, but no answer or demurrer has been, or thereafter shall be, served within the time required by law, the plaintiff, upon filing proof of such facts, shall have his judgment by default against such defendant in the same manner, and with like effect, as in cases where no notice of appearance has been given. In all other cases the relief to be afforded the plaintiff shall be ascertained either by the verdict of a jury or in cases in chancery by the judge, with or without a reference, as he may deem proper. *Provided, however,* that the court of common pleas may, upon motion of the plaintiff refer any or all issues in any default case, or hear the allegations and evidence of the plaintiff in term time, or at chambers, and upon the evidence so taken by the court, or upon hearing the report of the master, and the evidence produced before him render judgment for the plaintiff for such relief as his allegations and proof may warrant. This proviso shall not repeal or affect the law now existing as to the powers of the court, but shall be cumulative thereto. The order for judgment in such cases shall be endorsed upon or attached to the complaint. Where the defendant, by his answer in any such action, shall not deny the plaintiff's claim, but shall set up a counterclaim amounting to less than the plaintiff's claim, judgment may be had by the plaintiff for the excess of said claim over the said counterclaim in like manner in any such action, upon the plaintiff's filing with the clerk of the court a statement admitting such counterclaim, which statement shall be annexed to and be a part of the judgment roll.

Whenever an action is brought in claim and delivery in any court in this State judgment may be given for the plaintiff by default, and without a jury, for the property in question, or the value thereof as set forth in the complaint. And such judgment by default may be taken at chambers or in open court as other default judgments.

(2) When service of summons by publication.—In actions where the service of the summons was by publication, the plaintiff may, in like manner, apply for judgment, and the court must thereupon require proof to be made of the demand mentioned in the complaint, and, if the defendant be not a resident of the State, must require the plaintiff or his agent to be examined, on oath, respecting any payments that have been made to the plaintiff, or to any one for his use, on account of such demand, and may render judgment for the amount which he is entitled to recover. Before rendering judgment, the court may, in its discretion, require the plaintiff to cause to be filed, satisfactory security, to abide the order of the court, touching the restitution of any estate or effects which may be directed by such judgment to be transferred or delivered, or the restitution of any money that may be collected under or by virtue of such judgment, in case the defendant or his representatives shall apply and be admitted to defend the action, and shall succeed in such defense.

1932 Code, § 586; Civ. P. '22, § 526; Civ. P. '12, § 305; Civ. P. '02, § 267; 1870 (14) § 269; 1873 (15) 502; 1882 (18) 112; 1884 (18) 709; 1899 (23) 41; 1929 (31) 25; 1939 (41) 336.

I. Subdivision (1).

II. Subdivision (2).

I. SUBDIVISION (1).

Judgment by default not limited to defaults occurring before commencement of term.—This section does not limit

the right of a court to give judgment for want of an answer to cases, where the default has occurred previous to the day fixed for the commencement of the term. *McComb v. Woodbury*, 13 S. C. 479, 482.

Default judgment proper on failure to make appearance or demand copy of complaint when served by summons.—Defendant, who was served with summons without complaint, failed to answer or make appearance or demand copy of complaint within proper time, not permitted to open up default judgment, although complaint was not filed until after time for answering expired. *Bissonette v. Joseph*, 170 S. C. 407; 170 S. E. 467.

Right to object to complaint not stating cause of action not waived by default judgment.—A party who suffers a judgment to be taken against him by default, does not waive the right to interpose the objection that the complaint does not state facts sufficient to constitute a cause of action. *Gillian v. Gillian*, 65 S. C. 129, 43 S. E. 386, 387.

Judgment by default of answer not allowed in equity proceedings.—The plaintiff is not entitled, under this section, to a judgment by default of answer in an equity proceeding, as the right to the relief sought must be shown to the satisfaction of the chancellor. *Cannady v. Martin*, 72 S. C. 131, 51 S. E. 549.

Default judgment invalid if itemized account not served with complaint in unliquidated demand.—A default judgment, rendered in action for the recovery of an unliquidated money demand, cannot be validated by the finding of a verified itemized account of the plaintiffs with the judgment roll, where it was shown that such an account was not served with the complaint. *Roberts v. Pawley*, 50 S. C. 491, 27 S. E. 913, 918.

And directed verdict cannot be given upon default in unliquidated demand.—The court cannot direct a verdict, under this section, for plaintiff upon default in an action for unliquidated damages for breach of contract, though the evidence be undisputed. *Gadsden v. Home Fertilizer, etc., Co.*, 89 S. C. 483, 72 S. E. 15, 17.

"All other cases" includes action to cancel deed for fraud.—An action to cancel a deed for fraud, and for damages in consequence of the fraud, is an action under this section requiring relief to be afforded plaintiff in case of default, to be ascertained either by a verdict of a jury, or, in cases of chancery, by the judge. *Marion v. City Council*, 72 S. C. 576, 52 S. E. 418.

And action for recovery of real estate.—Although there is default of answer, an action to recover real estate falls within that class of cases wherein the "relief to be afforded plaintiff shall be ascertained by the verdict of a jury." *Kaylor v. Hiller*, 72 S. C. 433, 52 S. E. 120, 121.

Striking of answer filed has effect of transferring cause to default calendar.—

The striking of an answer in an action has the same effect as if no answer had been filed and the case should be transferred to the default calendar. *Burkhaltter v. Townsend*, 139 S. C. 324, 138 S. E. 34, 37.

But it has been held, in *Jones v. Garlington*, 44 S. C. 533, 22 S. E. 741, 743, 53 L. R. A. 155, that a case properly put on the jury calendar in an action on a money demand, cannot be transferred to the default calendar upon the striking of the answer.

As to specific section covering docketing of cases, see sec. 595, and note thereto.

Provision as to endorsement of order for judgment directory.—Under this section, the omission of the endorsement of the order for judgment on the complaint does not render the judgment invalid as the provision has been construed as being merely directory and not mandatory. *Henlein v. Graham*, 32 S. C. 303, 10 S. E. 1012, 1013.

Under section 269 of the Code of 1882, similar to this section, it seems as if the judgment would have been rendered invalid by the omission of the endorsement of the order for judgment on the complaint, as that section contained the provision, "and no execution shall be signed, or judgment obtained by default, in any other manner than is herein provided."—Editor's note.

As to specific section covering error or defect in pleadings, see sec. 497, and note thereto.

"In any such action" includes counterclaims arising in all actions.—The view was taken in *Burges & Co. v. Pollitzer*, 19 S. C. 451, 453, that the words "any such action" in the portion of the section providing for recovery on counterclaims, referred to actions "for the recovery of money" as well as those in "all other cases."

Excess over counterclaim may be recovered by default.—The plaintiff is, under this section, permitted to recover by a default judgment, an excess over a counterclaim, where the defendant does not deny the claim of the plaintiff in setting up the counterclaim. *Burges & Co. v. Pollitzer*, 19 S. C. 451, 454; *Bomar v. Gantt*, 167 S. C. 139, 166 S. E. 90.

But an unliquidated counterclaim must be tried before a jury.—Proof before a jury is required, under this section, as in cases of default and answer, in an action on a counterclaim. *Mallard Lbr. Co. v. Carolina Portland Cement Co.*, 134 S. C. 228, 132 S. E. 614, 616.

But right to have damages in counterclaim action tried by jury is waived by reference.—The right to have the damages, in an unliquidated counterclaim filed in action at law for the recovery of money, ascertained by a jury, is waived

where issue is referred by consent to a referee. *Gregory v. Cohen*, 50 S. C. 502, 27 S. E. 920, 924.

And time for exceptions is not allowed after report of referee.—Under this section, a circuit judge may render judgment immediately upon receiving a report from a special referee, without allowing time in which defendant might except, for the defendant had forfeited the right by not being present. *Johnson v. Masters*, 49 S. C. 525, 27 S. E. 474.

II. SUBDIVISION (2).

Questionable as to whether failure of record to show examination of plaintiff as to amount due raises jurisdictional

question.—It is doubtful, under this section, whether the failure of the record to show an examination of the plaintiff as to amount due him, would present a jurisdictional question. *Clemson Agricultural College v. Pickens*, 42 S. C. 511, 20 S. E. 401, 405.

And presumption is that examination was made.—In the absence of evidence to the contrary, it will be presumed that the plaintiff was examined, before judgment, on oath as to the amount due him on demand. *Clemson Agricultural College v. Pickens*, 42 S. C. 511, 20 S. E. 401, 405.

§ 587. Judgment on frivolous demurrer, answer or reply.—If a demurrer, answer, or reply be frivolous, the party prejudiced thereby, upon a previous notice of five days, may apply to a judge of the court, either in or out of the court, for judgment thereon, and judgment may be given accordingly.

1932 Code, § 587; Civ. P. '22, § 527; Civ. P. '12, § 306; Civ. P. '02, § 268; 1870 (14) § 270.

Whole pleading must be adjudged frivolous.—In order for an answer to be adjudged frivolous under this section, the rule seems to be well settled that the whole answer must be clearly so. *Grayson v. Harris*, 37 S. C. 606, 16 S. E. 154; *American Button-Hole, etc., Co. v. Hill*, 27 S. C. 164, 3 S. E. 82, 84; *Boylston v. Crews*, 2 S. C. 422; *Peacock, Hunt & West Co. v. Williams*, 110 F. 915, 916.

And pleading stating legal conclusion and not facts is frivolous.—An answer stating no facts, but only legal conclusions, is frivolous under this section. *Grayson v. Harris*, 37 S. C. 606, 16 S. E. 154; *American Button-Hole, etc., Co. v. Hill*, 27 S. C. 164, 3 S. E. 82, 83.

But pleading not disposed of where argument necessary to establish character.—If argument is necessary to establish the frivolous character of a pleading, the court will not dispose of it under this section. *Grayson v. Harris*, 37 S. C. 606, 16 S. E. 154; *Boylston v. Crews*, 2 S. C. 422.

And an answer denying material allegation of complaint is not frivolous.—An answer which denies a material allegation of the complaint is not frivolous. *Boylston v. Crews*, 2 S. C. 422, 426; *Standard Sewing Mach. Co. v. Henry*, 43 S. C. 17, 20 S. E. 790, 791; *Peacock, Hunt & West Co. v. Williams*, 110 F. 915, 917.

Provisions of section do not include a complaint.—This section makes no express provision for summarily disposing of a complaint that is frivolous. *Fishburne v. Minott*, 72 S. C. 567, 52 S. E. 648.

Objection to frivolous answer must embrace the whole answer.—But to make the answer frivolous the objection

must extend to and embrace the whole answer so that nothing is left of it that can entitle the party to trial. *Tharin v. Seabrook*, 6 S. C. 113.

So that answer that presents two issues material to plaintiff's case is not frivolous. *Standard Sewing Mach. Co. v. Henry*, 43 S. C. 17, 20 S. E. 790; *Hall v. Woodward*, 30 S. C. 564, 9 S. E. 684.

When an answer has been stricken out as sham under this section, and the cause is in court, it may render judgment thereon as in case of default or for want of a plea. *Interstate Chemical Corp. v. Farmington Corp.*, 100 S. C. 196, 84 S. E. 710.

When motion for judgment premature.—Where defendants filed motions for a more definite and certain complaint and demurrers, plaintiffs' motion for judgment on pleadings was premature, especially when court granted defendants' motions and gave defendants right to demur or otherwise plea to amended complaint. *Wilson et al. v. Gibbes Machinery Co. et al.*, 189 S. C. 426, 1 S. E. (2d) 490.

Judgment on action sued on not authorized under section.—This section does not authorize a judgment on a debt sued on after the answer has been stricken out as being frivolous. *Bridgeman v. Southern Bell Telephone, etc., Co.*, 100 S. C. 204, 84 S. E. 711.

Demurrer made before issues are adjudicated does not prevent plaintiff from striking answer.—A demurrer filed to an answer before issues are adjudicated does not militate against the right of the plaintiff to strike out the answer as frivolous. *Badham v. Brabham*, 54 S. C. 400, 32 S. E. 444, 445.

But motion to strike whole answer cannot be converted into one to strike portions.—A motion to strike out the answer as frivolous cannot, without notice to the defendant, be converted into

a motion to strike out specific portions as irrelevant and redundant. *Manufacturers' Finance Co. v. Boyd*, 128 S. C. 339, 122 S. E. 496.

CHAPTER 30

Issues and Mode of Trial

588. Kinds of issues.

589. Issue of law.

590. Issue of fact.

591. Issues of law and fact.

592. Trial defined.

593. Trial of issues.

594. Issues tried by court.

595. Filing summons and complaint and docketing case.

596. Stenographers.

597. Special stenographers.

598. Order for disposing of issues.

§ 588. The different kinds of issues.—Issues arise upon the pleadings when a fact or conclusion of law is maintained by the one party and controverted by the other. They are of two kinds:

(1) Of law; and

(2) Of fact.

1932 Code, § 588; Civ. P. '22, § 528; Civ. P. '12, § 307; Civ. P. '02, § 269; 1870 (14) § 271.

Allegation as to title of real property raises an issue.—An issue arises on the pleadings, under this section, when the question of title is raised in an action for the recovery of real property. *Walsh v. Evans*, 112 S. C. 131, 99 S. E. 546, 547.

Action establish boundary line and enjoin trespasses was not solely in equity, and case properly docketed on calendar

of court of common pleas, where pleadings clearly raised issue of title as to lands lying within disputed boundary lines. *Cooper River Timber Co. v. Cone*, 181 S. C. 288; 187 S. E. 341.

As to specific sections providing for recovery of real property, see § 374, and note thereto.

§ 589. Issue of law—An issue of law arises:

Upon a demurrer to the complaint, answer, or reply, or to some part thereof.

1932 Code, § 589; Civ. P. '22, § 529; Civ. P. '12, § 308; Civ. P. '02, § 270; 1870 (14) § 272.

See generally, *Charlotte, etc., R. Co. v. Gibbes*, 23 S. C. 370.

§ 590. Issue of fact.—An issue of fact arises:

(1) Upon a material allegation in the complaint controverted by the answer or,

(2) Upon new matter in the answer controverted by the reply; or,

(3) Upon new matter in the reply except an issue of law is joined thereon.

1932 Code, § 590; Civ. P. '22, § 530; Civ. P. '12, § 309; Civ. P. '02, § 271; 1870 (14) § 273.

Allegation as to title of real property raises an issue.—An issue of fact is raised, under this section, in an action for the recovery of real property by the allegation by one party, of title. *Walsh*

v. Evans, 112 S. C. 131, 99 S. E. 546, 547.

As to specific sections providing for actions for the recovery of real property, see Civ. Proc. sec. 374, and note thereto.

§ 591. On issues of both law and fact, the issues to be tried together.—Issues, both of law and of fact, may arise upon different parts of the pleadings in the same action.

In such case the cause shall be placed on the calendar of issues of fact, and the issues shall be tried together, unless the court otherwise directs.

1932 Code, § 591; Civ. P. '22, § 531; Civ. P. '12, § 310; Civ. P. '02, § 272; 1870 (14) § 274; 1873 (15) 498.

Plea in bar.—Trial judge committed no error in requiring special defense of plea in bar be tried in advance of general trial. *Mitchell v. Bank*, 165 S. C., 457, 164

S. E., 136.

Notice of appeal from order requiring plea in bar to be tried before general trial does not operate as a stay. *Ibid.*

§ 592. Trial defined.—A trial is the judicial examination of the issues between the parties, whether they be issues of law or fact.

1932 Code, § 592; Civ. P. '22, § 532; Civ. P. '12, § 311; Civ. P. '02, § 273; 1870 (14) § 275.

Trial commenced after motion disposed of.—Under this section, a trial is not commenced until after the motions have been disposed of. *State v. Faries*, 125 S. C. 281, 118 S. E. 620, 621.

"Trial" where no issue of fact.—Where Supreme Court held that surety of county treasurer paying tax penalties accruing between time taxpayer gave check in payment of taxes and time check was deposited was subrogated to rights of county to recover penalties from taxpayer, on demand surety's motion for judgment could not be denied on ground that motion contemplated that court should order "summary judgment" where motion was based on "records"

which embraced pleadings and stipulations which left no dispute as to the facts, and issues of law raised by defendants were fully argued by counsel, and motions which left no dispute as to the hence adjudication made on motion would be after "trial" and not summary in nature. *American Surety Co. v. Hamrick Mills*, 194 S. C. 221, 9 S. E. (2d) 433.

And not until after arraignment in criminal proceedings.—In a criminal proceeding, the trial follows the arraignment, as one of the objects of such is to obtain the defendant's answer or plea to the charge and thus establish and define the issue joined. *State v. Faries*, 125 S. C. 281, 118 S. E. 620, 621.

§ 593. Issues—how tried.

(1) **Law—fact.**—An issue of law must be tried by the court, as also cases in chancery, unless they be referred as provided in chapter 33. An issue of fact, in an action for the recovery of money only, or of specific real or personal property, must be tried by a jury, unless a jury trial be waived, as provided in section 648 or a reference be ordered.

(2) **Framing of issues.**—In all equity causes now pending or hereafter instituted in the courts of common pleas of this State, the presiding judge may, in his discretion, cause to be framed an issue or issues of fact, to be tried by a jury.

(3) **Trial of issues regulated.**—Such issues shall be tried at the same term of court at which they are ordered, and, if necessary, a day shall be set for the trial of the same: *provided*, that a continuance may be ordered by the court in proper cases.

(4) **When to be ordered.**—Upon the first day of the term, immediately after the call of calendar three, the presiding judge shall call for cases in which such issues are desired, and if any are presented in which such issues are, in his judgment, proper, he shall at once call the same to be framed and placed upon the proper calendar for trial.

(5) **Force of verdict—new trials—exceptions and appeals.**—The findings of fact upon such issues by the jury shall be conclusive of the same:

provided, that the presiding judge may grant new trials therein, according to the practice in other jury trials: *and provided, further*, that exceptions to the rulings of the presiding judge upon such trials may be taken by either party, and such rulings may be reviewed by the Supreme Court upon appeal from the final judgment.

(6) **Trial and decision at same term—appeal.**—At some time during the term the presiding judge shall hear the cause out of which such issues are ordered, and shall, some time during said term or thereafter, file his decision therein as in other equity causes, from which decision there shall be the same right of appeal now existing in like causes.

1932 Code, § 593; Civ. P. '22, § 533; Civ. P. '12, § 312; Civ. P. '02, § 274; 1870 (14) § 276; 1890 (20) 696.

I. Trial by Jury.

A. General Consideration.

B. Cases When Jury Trial Not Required.

C. Cases When Jury Trial Is Required.

II. Framing Issues.

III. Regulation of Trial of Issues.

IV. Force of Verdict.

I. TRIAL BY JURY.

A General Consideration.

This section is not affected by the master's act (16 Stat. 608). *Chapman v. Lipscomb*, 15 S. C. 470.

Specified classes of cases entitled to jury trial exclusive.—This section specifies the classes of cases in which a jury trial may be demanded as a legal right. *Pelzer v. Hughes*, 27 S. C. 408, 3 S. E. 781, 786; *Rollin v. Whipper*, 17 S. C. 32, 34.

In cases other than those specified in this section, the right to a jury trial is discretionary with the circuit judge. *Pelzer v. Hughes*, 27 S. C. 408, 3 S. E. 781, 786. And from his determination no appeal lies. *Rollin v. Whipper*, 17 S. C. 32, 34.

Section limited so as to require submission of strictly legal issues to jury.—The effect of the various constructions of this section has been to limit its meaning so as to require submission to the jury of strictly legal issues. *Keenan v. Lesslie*, 79 S. C. 473, 60 S. E. 1114, 1115.

And of course equitable issues not raised by pleading cannot be submitted.—In an action to recover land, where the issue tendered by complaint and answer was strictly legal, it was proper to submit only legal issues to the jury, and to refuse to submit equitable issues not raised by the pleadings. *Keenan v. Lesslie*, 79 S. C. 473, 60 S. E. 1114, 1115.

And only issues provided for in this section may be tried as a matter of right by jury on appeal.—This section does not permit every issue of fact, presented by an appeal from a decree of a judge of probate, to be tried as a matter of right by a jury, but only those cases required by this section to be tried by a jury. In

re Shier's Estate, 35 S. C. 417, 14 S. E. 931, 933; *Hughes v. Kirkpatrick*, 37 S. C. 161, 15 S. E. 912; *Stewart v. Blease*, 4 S. C. 37; *Rollin v. Whipper*, 17 S. C. 32, 34; *Prater v. Whittle*, 16 S. C. 40; *Ex parte White*, 33 S. C. 442, 12 S. E. 5, 6. See, also, *Lucken v. Wichman*, 5 S. C. 411.

As to specific section covering trial of issues on appeal from probate court, see Civ. Prov. sec. 233, and note thereto.

Reference preparatory to hearing merits does not interfere with section.—A reference "preparatory to the hearing of the case on the merits," made on a foreclosure to ascertain the amount due, does not interfere with the defendant's rights as to another mode of trial of the issues of fact provided for by this section. *Bank v. Fennell*, 55 S. C. 379, 33 S. E. 485, 486.

Order of trial of issues discretionary.

—The order in which legal and equitable issues shall be tried is discretionary with the judge. *Du Bose v. Kell*, 76 S. C. 313, 56 S. E. 968; *W. B. Bagle Co. v. Automobile Ins. Co. of Hartford, Conn.*, 168 S. C. 63, 168 S. E. 886.

But issue as to title must be tried first in suit to enjoin trespass.—Defendants are entitled to have legal issues tried first where they deny title of plaintiffs in an action brought to enjoin trespass on land. *Alston v. Limehouse*, 60 S. C. 559, 39 S. E. 188, 191. See, also, *Lipscomb v. Littlejohn*, 63 S. C. 38, 40 S. E. 1023, 1025; *Central Nat. Bank v. Duncan*, 77 S. C. 1, 57 S. E. 531, 534.

Equitable issues of fraud may be properly tried first. *Du Bose v. Kell*, 76 S. C. 313, 56 S. E. 968.

Facts tried by jury are not reviewable by court.—A verdict in an action to recover an unlawful preference by a bankrupt is not reviewable on appeal, under this section. *Hubbard v. Hollis*, 107 S. C. 325, 92 S. E. 1040.

Action to enjoin property owners violating zoning ordinance.—An action by a property owner to enjoin owners of adjoining property from using their property for a funeral home in violation of zoning ordinance, in which plaintiff al-

leged special damages, was triable as an ordinary suit in equity and was not an "action to abate a private nuisance," entitling defendants as a matter of right to a jury trial. *Momeier v. John McAlister, Inc. et al.*, 193 S. C. 422, 8 S. E. (2d) 737.

B. Cases When Jury Trial Not Required.

Jury trial not required in action for "recovery of money" unless issue of fact raised.—An action, for the recovery of money only does not require a jury trial, unless the pleadings raised an issue of fact. *Charlotte, etc., R. Co. v. Gibbes*, 23 S. C. 370, 373.

Action for recovery of money not included where fraud alleged.—This section does not apply to an action brought for the recovery of money paid thru mistake, the complaint alleging mistake and fraud and asking an injunction and recovery, as the cause was an equitable one. *Bank v. Alderman*, 106 S. C. 386, 91 S. E. 296, 297.

Nor where action attempts to subject specific property to claim.—Although a complaint may contain allegations appropriate to an action for the recovery of money only, nevertheless, if the plaintiff also seeks to subject specific property to the satisfaction of his claim, the action is equitable, and plaintiff is not entitled to a jury. *Rainwater v. Merchants', etc., Bank*, 108 S. C. 206, 93 S. E. 770, 772. See, also, *Hickson Lbr. Co. v. Stallings*, 83 S. C. 49, 64 S. E. 1015, 1017.

Nor where counterclaim for usurious interest is set up in foreclosure suit.—Under this section, in an action to foreclose a mortgage, the alleging by the defendant of usury and the setting up of a counterclaim for usurious interest, does not cause the issue to be one for recovery of money only. *McLaurin v. Hodges*, 43 S. C. 187, 20 S. E. 991, 993.

Action for recovery of real property does not include suit to set aside sheriff's deed.—An action to set aside a deed of sheriff on the ground that the judgment debtor held the land as trustee for the plaintiff is not an action to recover real property, and cannot be tried by a jury under this section. *Price v. Brown*, 4 S. C. 144, 151; *Reagan v. Bishop*, 25 S. C. 585, 589.

Nor action for removal of obstruction and damages.—An action to require removal of a highway obstruction and for damages, is not an action for the recovery of money only or of specific real or personal property. *Sloan v. Burnett*, 149 S. C. 12, 146 S. E. 601, 603.

Nor action for admeasurement of dower.—The plaintiff has no right, under this section, to submit the entire case to a jury in the admeasurement of dower, but only special issues, as the action is not one to recover possession of specific real or personal property, or for the recovery of money only. *Frierson v.*

Jenkins, 75 S. C. 471, 55 S. E. 890, 891.

As to specific section providing for admeasurement of dower, see sec. 8603, and note thereto.

Quo warranto proceedings not included.—This section does not include quo warranto proceedings. *State v. Gibbes*, 109 S. C. 135, 95 S. E. 346, 348.

Nor issues of fact as to fraud.—Issues of fact as to fraud raised in an action, do not come within the class of cases specified in this section, in which a jury trial is granted as a legal right. *Rollin v. Whipper*, 17 S. C. 32, 34. See, also, *City Council v. Ormond*, 44 S. C. 116, 21 S. E. 641.

Nor action for cancellation of a deed for fraud.—An action for the cancellation of a deed for fraud is not action entitling plaintiff to a jury trial as a matter of right. *Du Pont v. Du Bos*, 33 S. C. 389, 11 S. E. 1073, 1075.

And issues partly legal and partly equitable cannot be tried by jury.—Where issues raised by pleadings are partly legal, and partly equitable, it is not error to deny a motion to have all the issues tried by jury, though the right exists to have purely legal questions so tried. *City Council v. Ormond*, 44 S. C. 119, 21 S. E. 642.

Action seeking foreclosure of lien equitable in its nature.—An action seeking to foreclose a lien in addition to seeking a judgment for money, is equitable in its nature, and the defendants are not entitled to a trial by jury. *Pratt v. Timmerman*, 69 S. C. 186, 48 S. E. 255, 258.

And action on counterclaim in foreclosure suit not tried by jury.—The defendant, under this section, is not entitled to a trial by jury in a suit to foreclose a mortgage given to secure the purchase price of machinery, on a counterclaim for damages arising from a breach of warranty. *Sullivan Hardware Co. v. Washington*, 47 S. C. 187, 25 S. E. 45, 46.

And answer admitting indebtedness on notes raises only equitable issues.—An answer admitting indebtedness on notes, in an action seeking judgment on the notes and foreclosure of a mortgage pledged as collateral raises only equitable issues and does not entitle the defendant to a jury trial. *Bank v. Chickasaw Soap Co.*, 70 S. C. 253, 49 S. E. 845, 846.

And attempt to defeat right of dower by equitable issue.—An action for the admeasurement of dower in lands, the legal title to the lands being in the plaintiff husband during coverture, and then confessedly in the defendant, who sought to defeat the right of dower by a purely equitable issue, is not an action demanding a jury trial. *Pruitt v. Pruitt*, 57 S. C. 155, 35 S. E. 485.

Action for specific performance not

raising issue as to title not triable by jury.—It is not necessary, under this section, that an action for the specific performance of a land contract, defendant claiming it to be an option, be tried by a jury where no issue as to title is raised. *Murph v. Smoak*, 113 S. C. 168, 101 S. E. 844, 845.

Title to real estate was not involved in proceeding in nature of writ of assistance to put petitioner in possession of land purchased by him at partition sale, so that court did not err in failing to refer such issue to jury for determination, but properly determined from pleadings question raised by return of person in possession of land as to boundary between his and petitioner's lands. *Ex parte Keller*, 189 S. C. 26, 199 S. E. 909.

Equity court decrees partition if action successful.—A decree for partition of real estate, in an action for recovery of real estate and partition of same, must be granted by the equity side of the court if the action for the recovery of the real property is successful. *Reams v. Spann*, 28 S. C. 530, 6 S. E. 325, 327.

And determination of title does not leave any equitable issues to be tried.—The settlement of the issue of title in a partition suit does not leave any equitable issues to be determined. *Kimbrell v. Page*, 70 S. C. 217, 49 S. E. 477, 478.

Consent of parties to order is "a reference."—An order passed by the consent of the parties, is "a reference" under this section. *Trenholm v. Morgan*, 28 S. C. 268, 5 S. E. 721, 725.

And is waiver of a jury.—A consent to an order of reference is a waiver of a jury, and a legatee claiming under a gift causa mortis, having consented to such reference, cannot claim to have the issue tried by a jury. *Trenholm v. Morgan*, 28 S. C. 268, 5 S. E. 721, 728. See, also, *Griffith v. Cromley*, 58 S. C. 448, 36 S. E. 738, 741; *Meetze v. Charlotte, etc., R. Co.*, 23 S. C. 1, 25, 49 L. R. A. 511, 522.

C. Cases When Jury Trial Is Required.

Dispute as to title in partition suit must be tried by jury.—On an action for the recovery of real estate and for the partition of the same, the former cause of action must, under this section, be tried by a jury, and this is not a case for issues out of chancery. *Reams v. Spann*, 28 S. C. 530, 6 S. E. 325, 327; *McGee v. Hall*, 23 S. C. 388; *Carrigan v. Evans*, 31 S. C. 262, 9 S. E. 852, 853; *Brock v. Nelson*, 29 S. C. 49, 6 S. E. 899, 900. See, also, *Copeland v. Piedmont, etc., Ins. Co.*, 17 S. C. 116, 119; *Banks v. Frith*, 97 S. C. 362, 81 S. E. 677, 680; *Smith & Co. v. Bryce*, 17 S. C. 538, 544; *Cooper v. Smith*, 16 S. C. 331; *Adickes v. Lowry*, 12 S. C. 97.

And issue as to title must be tried as

a legal one.—An issue as to the title to land in a partition suit cannot be submitted to a jury as an issue out of chancery but must be tried as a legal issue. *Capell v. Moses*, 36 S. C. 559, 15 S. E. 711, 712.

But issue of title in partition suit does not go to jury where verdict would be directed against defendant.—It is unnecessary under this section, to submit an issue of title raised in a partition suit to a jury when the inevitable result would be a direction of verdict against the defendant on the general issue of paramount title. *Windham v. Howell*, 78 S. C. 187, 59 S. E. 852, 854.

Submission of issue of title to jury includes all issues raised in recovery of land.—An issue of title submitted to a jury in an equitable action, involves all issues which could properly be raised in a legal action for possession of land—fraud in the deed included. *McCreery Land, etc., Co. v. Myers*, 70 S. C. 282, 49 S. E. 848.

Disputed money demand triable on law side.—Under this section, a disputed money demand is triable by a jury on the law side of the court. *Georgia-Carolina Gravel Co. v. Blassingame*, 129 S. C. 18, 123 S. E. 324, 326.

Question as to whether plaintiff is widow of deceased entitled to go to jury in action against administration.—The defendant is entitled to a jury trial under this section, where the plaintiff claims as the widow of an intestate in an action against an administrator, who claims as sole heir, for partition of land, as the question whether plaintiff is the widow of deceased is a probative fact upon issue of title. *Osborne v. Osborne*, 41 S. C. 195, 19 S. E. 494, 495.

Claim for damages for trespass must be tried by jury.—A claim for damages is a purely legal demand triable by a jury; and the fact that an equitable demand for an injunction was united with the claim cannot deprive the action of its nature as an action at law. *Threatt v. Brewer Min. Co.*, 42 S. C. 92, 19 S. E. 1009, 1010; *Heyward v. Farmers' Min. Co.*, 42 S. C. 138, 19 S. E. 963, 968, 20 S. E. 64, 46 Am. St. Rep. 702, 28 L. R. A. 42.

Amount as to reasonable attorney's fee an "issue of fact."—In an action at law upon a note, the amount of a reasonable attorney's fee is an issue of fact and a jury question under this section. *Farmers', etc., Bank v. Whitehead*, 105 S. C. 100, 89 S. E. 657, 659.

Action to recover insurance assessments must be tried by jury.—An action to recover assessments due a mutual insurance association is an action for the collection of a definite amount of money, and the issues are such as must be tried by a jury under this section. *Ansel v. Stribling*, 152 S. C. 448, 150 S. E. 125,

126.

Issue as to payment of mortgage must be tried by jury.—In an action by a receiver of a mortgagee to recover personal property, an admission that the mortgage was properly executed but alleging payment, raises an issue which must be tried by a jury under this section. *Moss v. Burdette*, 151 S. C. 532, 149 S. E. 235, 236.

Defendant does not have to make formal demand for jury trial.—Where an issue as to title is presented, the defendant does not have to make a formal demand for a jury trial. *Capell v. Moses*, 36 S. C. 559, 15 S. E. 711, 712.

And failure to demand jury trial does not waive right.—The defendant does not waive the right to have title to land tried by a jury by failure to demand such a trial. *DeWalt v. Kinard*, 19 S. C. 286, 291.

Verdict of jury on law side does not conclude equitable issues.—The finding of a jury on the law side of the court is not conclusive as to equitable issues. *Wood v. Pacolet Mfg. Co.*, 80 S. C. 47, 61 S. E. 95, 96.

And equitable issues must be tried by that tribunal.—If any independent equitable issues remain for determination after the trying of the issue of title, they must be tried by that appropriate tribunal. *McCreery Land, etc., Co. v. Myers*, 70 S. C. 282, 49 S. E. 848, 849.

But defense in equitable action must exist separately in order to have a jury trial.—In order for a defendant to have a trial by jury in an equitable cause of action, his defense must exist as a separate and distinct matter from the plaintiff's equitable cause of action. *Sullivan Hardware Co. v. Washington*, 47 S. C. 187, 25 S. E. 45, 46; *Sale v. Meggett*, 25 S. C. 72, 79.

Common law actions are: 1. For recovery of specific real estate. 2. For recovery of specific personal property, and 3. For money only. All others are equitable. *Pratt v. Timmerman*, 69 S. C. 186, 48 S. E. 255; *Ex parte Landrum*, 69 S. C. 136, 141, 48 S. E. 47; *Brock v. Kirkpatrick*, 69 S. C. 231, 233, 48 S. E. 72; *Gregory v. Perry*, 66 S. C. 455, 45 S. E. 4.

II. FRAMING ISSUES.

As to specific provision covering trial of issues in equity cases, see Cir. Ct. Rule 28, and note thereto.

Jury trial discretionary in equity actions.—Denial of a jury trial is still discretionary, under this section, in equity actions even though the parties comply with the statute. *Erskine v. Erskine*, 107 S. C. 233, 92 S. E. 465, 468.

And section does not preclude chancellor from framing issues of fact for his enlightenment.—This section does not preclude a chancellor from framing for his enlightenment, an issue of fact

to be tried by a jury. *Land Mtg., etc., Co. v. Gillam*, 49 S. C. 345, 26 S. E. 990, 995; *Hammond v. Foreman*, 43 S. C. 264, 21 S. E. 3, 4; *Momier v. John McAlister, Inc. et al.*, 190 S. C. 529, 3 S. E. (2d) 606.

And discretion of judge not interfered with in absence of abuse.—In the absence of abuse, the Supreme Court will not, under this section, interfere with the decision of a circuit judge in refusing to frame issues for a jury. *De Loach v. Sarratt*, 55 S. C. 254, 33 S. E. 2, 10, 35 S. E. 441; *Cantey v. Summersett & Co.*, 138 S. C. 151, 135 S. E. 875, 876; *Erskine v. Erskine*, 107 S. C. 233, 92 S. E. 465, 469; *Neal v. Suber*, 56 S. C. 298, 33 S. E. 463, 465; *Hammond v. Foreman*, 43 S. C. 264, 21 S. E. 3, 4.

And refusal to refer issues of fraud in equity cause not abuse of discretion.—It is not an abuse of discretion, under this section, for a circuit judge to refuse to refer to a jury the issues of fraud and deceit arising in an equity case. *Lawrence v. Lawrence*, 82 S. C. 150, 63 S. E. 690, 691.

Framing of issues for jury allowed after time prescribed by court rules.—A circuit court may, in the exercise of the discretion vested in it by this section, allow the framing of issues for the jury, even though the motion for such had been refused because it had not been made in the proper time. *Meier v. Kornahrens*, 113 S. C. 270, 102 S. E. 285, 286.

III. REGULATION OF TRIAL OF ISSUES.

Issues framed in chancery do not survive term.—It would seem that issues in chancery cases, framed under this section, are intended for the aid of the judge who framed the issues, and that the order framing such issues would not survive the term, unless they were continued by special order. *Montague v. Best*, 65 S. C. 455, 43 S. E. 963, 964; *Momier v. John McAlister Inc. et al.*, 190 S. C. 529, 3 S. E. (2d) 606.

And rights under previous order waived if not appealed from.—Under this section, defendants waive whatever right they may have had under an order made at a previous term, submitting issues to a jury, if they do not appeal from an order made at a later term submitting the issues to a master. *Montague v. Best*, 65 S. C. 455, 43 S. E. 963, 964.

Unappealed from order of one circuit judge that reference to a master was refused, and that legal issue made by pleadings as to right to possession of realty involved be first tried by a jury without prejudice to right of either party to thereafter apply for an order of reference, was a holding that a legal issue which should be first tried by jury was raised by pleadings, after which trial parties could apply for order of reference respecting any equitable issues, and

hence the unappealed from order was "law of the case" which could not be reviewed, modified or reversed by another circuit judge, whose subsequent order that complaint raised no legal issues and that all issues should be referred to master was therefore erroneous. *Mutual Bldg. & Loan Ass'n. of Sumter v. Hewson*, 196 S. C. 181, 12 S. E. (2d) 715.

Discontinuance may be obtained after day set for trial of issue.—A plaintiff may, under this section, obtain a discontinuance after the framing of an issue for trial by jury and a day for trial fixed. *Forrest v. City Council*, 65 S. C. 500, 43 S. E. 952, 953.

Jury findings on fact issues conclusive.—Jury's findings on fact issues framed for jury trial under statute in equity case are conclusive, if supported by any evidence, and presiding judge can only affirm verdict or set it aside and order new trial, but he may withdraw case from jury before findings are made and decide issues for himself or have jury make findings on issues for his aid and enlightenment in determining judgment to be rendered. *Johnstone v. Matthews*, 183 S. C. 360; 191 S. E. 223; *Momier v. John McAlister, Inc. et al.*, 190 S. C. 529, 3 S. E. (2d) 606.

IV. FORCE OF VERDICT.

But jury may be charged upon submis-

sion of special issues that court not bound.—It is not error, under this section, for the court, in submitting special issues to a jury in a suit for specific performance to charge that the jury's findings are not binding on the court. *Mullaly v. Smyth*, 96 S. C. 14, 79 S. E. 634.

Trial judge is not bound by jury's findings on issues submitted for enlightenment of court's conscience in equitable proceeding, as in probate court for cancellation of decedent's contract to pay claimant from estate for services rendered. *In Re Nightingale's Estate*, 182 S. C. 527; 189 S. E. 890.

Motion to recommit to master is discretionary. *Halk v. Stoddard*, 62 S. C. 564, 40 S. E. 957.

See generally, as to accounting between parties on breach of contract, *Price v. Middleton*, 75 S. C. 105, 55 S. E. 156, 18 L. R. A. (N. S.) 973, 984, 1022, 1033, 1075, 1085, *Ann. Cas.* 16E, 441, 4 A. L. R. 159, 21 A. L. R. 38, 59, 70.

As to innocent purchaser and equitable issue. *Armour & Co. v. Ross*, 75 S. C. 201, 206, 55 S. E. 315, *Ann. Cas.* 16D, 1223.

As to jury trial of legal issues in equitable action. *Poston v. Ingraham*, 76 S. C. 167, 56 S. E. 780.

§ 594. **Issues triable by court.**—Every other issue is triable by the court, which, however, may order the whole issue, or any specific question of fact involved therein, to be tried by a jury, or may refer it, as provided in sections 652 and 653.

1932 Code, § 594; Civ. P. '22, § 534; Civ. P. '12, § 313; Civ. P. '02, § 275; 1870 (14) § 277.

Editor's note.—It is evident that this section deals largely with issues of an equitable nature, and is supplementary to the preceding section to a large extent.

As to provision covering trial of equity causes, see Cir. Ct. Rule 28, and note thereto.

Action for admeasurement of dower included in "every other issue."—An action for the admeasurement of dower is an issue properly triable under this section. *Frierson v. Jenkins*, 75 S. C. 471, 55 S. E. 890, 891.

As to specific section providing for admeasurement of dower, see sec. 8605, and note thereto.

There are two general modes of trial.—Construing this and preceding section together, it is conclusive that there are two general modes of trial, i. e. trials by court and trials by jury. To the court belongs all issues of law and all cases in chancery, and to the jury all questions of fact in cases at law for the recovery of money or of any specific real or personal property. *Meetze v. Charlotte, etc., R.*

Co., 23 S. C. 1, 49 L. R. A. 511, 522.

Constitutional declaration as to inviolability of jury trial does not apply to equity cases.—The constitutional declaration that "the right of jury trial shall remain inviolate" does not apply to cases within the equitable jurisdiction of the court. *Lucken v. Wichman*, 5 S. C. 411, 412, 48 Am. Dec. 188.

And jury trial must be requested as provided by circuit court rule.—A party desiring a jury trial under this section must proceed as prescribed by circuit court rule 29. *Lucken v. Wichman*, 5 S. C. 411, 412, 48 Am. Dec. 188.

And mode of trial discretionary where jury not demanded.—Where a jury is not demanded in a case triable by the court, the mode of trial, whether by the judge or a referee, is discretionary with the court. *Lucken v. Wichman*, 5 S. C. 411, 412, 48 Am. Dec. 188.

Action for recovery of real property does not include suit to set aside sheriff's deed.—See this catchline under sec. 593 wherein is treated the case of *Price v. Brown*, 4 S. C. 144, 157, *Ann. Cas.* 13B,

1024, Ann. Cas. 13C, 153, 23 A. L. R. 1513, 1524, 1538.

Action for cancellation of deed for fraud may be referred to master.—A case involving cancellation of a deed for fraud may be referred to a master. *Du Pont v. Du Bos*, 33 S. C. 389, 11 S. E. 1073, 1075.

And action for quieting title.—A complaint asking that a cloud upon the title to land be removed and the paper purporting to be a deed canceled, presents a cause for equity cognizance, and hence, where no application was made to refer any issue to a jury, the court could, under this section, refer the issues for trial to a referee. *Shute v. Shute*, 79 S. C. 420, 60 S. E. 961, 963, Ann. Cas. 12D, 1137.

An action by a property owner to enjoin owners of adjoining property from violating a zoning ordinance was tryable as an ordinary suit in equity. *Momeier v. John McAlister, Inc. et al.*, 193 S. C. 422, 8 S. E. (2d) 737.

Equitable defenses must be heard by judge or jury.—Equitable defenses set up in a law case must be tried by the judge either alone or with the aid of a jury. *Cooper v. Smith*, 16 S. C. 331, 332; *Sloan v. Westfield*, 11 S. C. 445, 447. See, also, *Adickes v. Lowry*, 12 S. C. 97, 108, 20 L. R. A. (N. S.) 625, 38 L. R. A. (N. S.) 248.

But judge not bound by verdict of jury.—Although the judge may submit issues of fact to a jury, yet he does so only that he may be aided or enlightened by their verdict; he is not to be

controlled thereby. *Flinn v. Brown*, 6 S. C. 209, 212, 32 L. R. A. (N. S.) 287, L. R. A. 1916F, 294; *Ivy v. Clawson*, 14 S. C. 267, 273, Ann. Cas. 13D, 854; *Gadsden v. Whaley*, 9 S. C. 147, 148; *Peake v. Peake*, 17 S. C. 421, 425. See, also, *Pelzer v. Hughes*, 27 S. C. 408, 3 S. E. 781, 66 Am. St. Rep. 287, 72 Am. St. Rep. 29, 118 Am. St. Rep. 203, 33 L. R. A. 546, 23 L. R. A. (N. S.) 17, L. R. A. 1918C, 633, Ann. Cas. 13B, 35; *Grierson v. Harmon*, 16 S. C. 618, 619; *Small v. Small*, 16 S. C. 64, 76.

But judgment entered on verdict without decree of judge is invalid.—A judgment entered on a verdict without a decree of the judge is erroneous and illegal. *Cooper v. Smith*, 16 S. C. 331, 334.

And findings of jury may be used in new trial.—Findings upon issues ordered before the first trial, may be used upon the new trial, where the decree is not reversed for error in the trial of the issues themselves. *Reynerson v. Allison*, 30 S. C. 534, 9 S. E. 656.

Nonsuit improper in case in chancery.—A nonsuit is improper in a case in equity, with certain legal issues triable by a jury. *Southern Ry. Co. v. Beaudrot*, 63 S. C. 266, 41 S. E. 299, 300, 2 L. R. A. (N. S.) 274, L. R. A. 1916B, 658. See, also, *Williams v. Halford*, 64 S. C. 396, 403, 42 S. E. 187.

Summons to renew execution is not case for issues out of chancery. *Adams v. Richardson*, 30 S. C. 215, 217, 9 S. E. 95, 1 A. L. R. 829.

§ 595. Summons and complaint to be filed in clerk's office—docketing cases.—In all issues to be tried by the court or a jury the plaintiff shall, at least fourteen days before court, file in the clerk's office the summons and complaint in the cause, endorsing thereon the nature of the issue and the number of the calendar upon which the same shall be placed, and if the plaintiff fail to do so the defendant, seven days before the court, may file copies of said papers with a like endorsement, and the clerk shall thereupon place said cause upon its appropriate calendar, and it shall stand for trial without any further notice of trial or notice of issue. There shall be three calendars for the court of common pleas, and the clerk shall arrange the causes thereon as follows: upon calendar one shall be placed all cases and issues to be passed upon by a jury. Upon calendar two shall be placed all cases to be passed upon by the court, including all motions and rules to show cause. Upon calendar three shall be placed all cases where judgments by default are to be taken, and on the opening of the court of common pleas this calendar shall be called first in order.

Carrying the dockets forward—forfeiture of fees.—The clerk shall, within twenty days after every adjournment of the court of common pleas, carry forward on calendars nos. one and two, for trial or hearing at the next term, all causes not finally disposed of at the preceding term, and shall enter in regular order all subsequent causes duly filed and endorsed

as above provided, and upon entering the same shall endorse upon the summons the date of filing, the number of the calendar in which the cause is entered, and its number on the calendar. In case of his failure to comply with any of the requirements of this section, the clerk shall forfeit all docketing fees for the term of the court next succeeding.

1932 Code, § 595; Civ. P. '22, § 535; Civ. P. '12, § 314; Civ. P. '02, § 276; 1870 (14) § 278; 1873 (15) 498; 1882 (18) 41; 1887 (19) 836; 1903 (24) 131.

As to specific section covering docketing of cases in appeals to Supreme Court, see sec. 781, and note thereto. As to specific section covering docketing of cases in appeals to circuit court, see sec. 802, and note thereto.

Summons and complaint when filed in the office of the clerk of court become public documents in a public office. Lybrand v. The State Co., 179 S. C. 209, 184 S. E. 580.

The filing and endorsing of the complaint and summons are prerequisite to the docketing. Bank of Camden v. Thompson, 46 S. C. 499, 24 S. E. 332, 333.

But provision does not apply when motion made preparatory to hearing.—The requirements of this section as to docketing cases have no application when a motion is made for an order "preparatory to the hearing of the case on the merits." Bank of Hampton v. Fennell, 55 S. C. 379, 33 S. E. 485, 486; State v. Gibbs, 109 S. C. 135, 95 S. E. 346, 347.

As docketing within time provided intended to give notice of trial.—The requirements of this section as to docketing cases 14 days before trial were intended to give notice of trial. Bank of Camden v. Thompson, 46 S. C. 499, 24 S. E. 332, 333; Bank of Hampton v. Fennell, 55 S. C. 379, 33 S. E. 485, 486; State v. Gibbs, 109 S. C. 135, 95 S. E. 346, 347.

And party is not put out of court by failure to docket in prescribed time.—There is nothing in this section which declares that failure to have the judgment docketed within a prescribed time after action is begun, puts a party out of court, Hagood v. Riley, 21 S. C. 143, 145.

And cause remaining undocketed for several terms may be placed on docket by defendant's attorney.—A cause having remained undocketed for several terms, may, under this section, be placed on the docket and tried, by the defendant's attorney upon notice to the attorney of the plaintiff. Claussen v. Johnson, 32 S. C. 86, 11 S. E. 209, 210, 80 Am. St. Rep. 268.

A motion in a cause already on the calendar should not be docketed anew. Ward v. Western Union Tel. Co., 62 S. C. 274, 40 S. E. 670, 672, Ann. Cas. 16D, 1261.

"Complaint for foreclosure of real property" sufficient endorsement as to nature of issue.—An endorsement on the complaint in a suit to foreclose a mortgage, "complaint for foreclosure of real property. Cal. 2," is sufficient endorse-

ment under this section. Bank of Camden v. Thompson, 46 S. C. 499, 24 S. E. 332, 333.

And endorsement by clerk in presence of plaintiff is "endorsement by plaintiff."

—The endorsement of "Cal. 2," by the clerk in the presence of and with the consent of plaintiff, is an endorsement by the plaintiff. Bank of Camden v. Thompson, 46 S. C. 499, 24 S. E. 332, 333.

Cause does not "stand for trial" if not placed on calendar within time prescribed.—A cause which the clerk failed to place on the calendar at least 14 days before court, does "not stand for trial" in view of the fact that notice of the trial is not given upon failure to docket in the time prescribed. Steffens v. Bulwinkle, 48 S. C. 357, 26 S. E. 666, 668.

Defendant has no right as to order of trial.—The defendant cannot be heard to complain that a cause properly docketed, was reached and ordered to trial before those ahead of it had been tried, where he is unable to show that he was caught unawares, as he has no right as to order of trial. Lummus Cotton Gin Co. v. Counts, 98 S. C. 136, 82 S. E. 391, 393.

Case may be put on default calendar where time expires for answer but before court opens.—Where the time fixed for answering expires after the day fixed for the opening of the court, but before such court is actually opened, the case may be put upon calendar 3 and judgment by default taken. McComb v. Woodbury, 13 S. C. 479, 480.

Docketing on calendar 1 does not waive right to insist on default.—The docketing of a case on calendar 1 is not conclusive of an intention to relinquish the right to insist that the defendant was in default. Carolina Gro. Co. v. Moore, 63 S. C. 184, 41 S. E. 88, 89, Ann. Cas. 18D, 440, 7 A. L. R. 42.

Harmless error to hear case on calendar 1 after answer stricken.—It is harmless error, under this section, to retain a case on calendar 1 after the answer has been stricken out on oral demurrer, and give a judgment thereon. Jones v. Garlington, 44 S. C. 533, 22 S. E. 741, 743, 53 L. R. A. 155.

Hearing on wrong calendar is mere irregularity. Able v. Southern Ry. Co., 73 S. C. 173, 178, 52 S. E. 962, 12 L. R. A. (N. S.) 672, 22 L. R. A. (N. S.) 1238, 25 L. R. A. (N. S.) 347, 20 A. L. R. 140.

And error in putting cause on wrong

calendar does not affect jurisdiction.—In an appeal to the Supreme Court, an error in placing a cause upon a calendar is not jurisdictional, but a mere irregularity, which cannot be considered in the absence of a ruling by the trial court. *Ward v. Western Union Tel. Co.*, 62 S. C. 274, 40 S. E. 670, 671, Ann. Cas. 16D, 1261.

Remedy for case docketed wrong is by motion to transfer.—Where a case is docketed on the wrong calendar, the remedy is by motion to transfer. *Threatt v. Brewer Min. Co.*, 42 S. C. 92, 19 S. E. 1009, 1010.

Case may be put on calendar 2 even tho motion made be withdrawn.—A case is properly retained on calendar 2, un-

der this section, when a complaint on an open account is answered by alleging a defect in article sued for and resulting damages, and the plaintiff later withdraws his demurrer and admits damages, as the damages were only a matter of computation. *Melchers v. Moore*, 62 S. C. 386, 40 S. E. 773, 774.

Judgment in case on calendar 2 need not be written on complaint.—A judgment on a law case on calendar 2 need not be written on the complaint, but may be written on a separate piece of paper. *Melchers v. Moore*, 62 S. C. 386, 40 S. E. 773, 774.

See generally as to placing cause on calendar. *Schroeder v. O'Neill et al.*, 166 S. C. 515, 165 S. E. 175.

§ 596. Court stenographers.

(1) **Number—appointment—duties.**—There shall be fourteen court stenographers, one for each judicial circuit of the State, who shall be appointed by the circuit judge of the respective circuits for a period not exceeding the term for which the circuit judge making the appointment was elected, and such court stenographer shall be subject to removal by the circuit judge making the appointment. It shall be the duty of every stenographer so appointed, under the direction of the presiding judge of his circuit, to take full stenographic notes of all proceedings, including the rulings and charge of the court in every trial there at; and in case the presiding judge, or the solicitor, for use in criminal cases, shall require a transcript of said stenographic notes, the stenographer shall furnish the same written out in full.

(2) **Compensation.**—Each circuit court stenographer shall receive an annual salary of twenty-one hundred (\$2,100.00) dollars: *provided*, that this provision shall not apply to the stenographers of the court of general sessions of the fifth and seventh judicial circuits. The said salaries shall be payable monthly upon warrants of the comptroller general. The said stenographers shall also receive a fee of five cents per hundred words for all transcripts furnished litigants, except in the second, fifth, sixth seventh and twelfth circuits and in the third and eleventh circuits in civil cases, where the fees for transcripts shall be ten cents per folio of one hundred words, which fees shall be paid by the parties litigant, except in criminal cases where the defendant satisfies the court that he is unable to pay for such transcript, when the same shall be furnished without fee by the court stenographer: *provided*, that any failure on the part of the court stenographer, to furnish a transcript of any case, or any part thereof, within thirty days from the time a demand be made, shall forfeit his right to any pay for said transcript. Any sum so paid by any party shall be considered a necessary disbursement in the taxation of costs.

1932 Code, § 596; Civ. P. '22, § 536; Civ. P. '12, § 315; Civ. P. '02, §§ 277, 278; 1906 (25) 7; 1910 (26) 713; 1912 (27) 767, 774; 1919 (31) 101.

The stenographer is an appointee and ministerial officer of the court. *State v. Campbell*, 131 S. C. 357, 127 S. E. 439, 440.

And taking of testimony by stenogra-

pher is within discretion of trial judge.—In prosecution for larceny, failure of court to have testimony and charge taken by stenographer is not error under this section, but a matter within the dis-

cretion of the trial judge. *State v. Campbell*, 131 S. C. 357, 127 S. E. 439, 440. But the stenographer should be used where provided for by the section. *Id.*

But transcript of testimony may be required on appeal.—The court, under

this section, may require the stenographer to furnish the appellant with a transcript of the testimony, where a case is submitted to the court on appeal for settlement. *Outlaw v. Nat. Council of J. O. U. A. M.*, 104 S. C. 331, 88 S. E. 801.

§ 597. Appoint special stenographers when stenographer is disabled.—

The circuit judges of this State are hereby authorized to appoint a special court stenographer to act in the place and stead of the regular court stenographer in case of sickness, absence or inability to act at any term or part of a term of either the court of common pleas or general sessions; and such stenographer, when so appointed, shall receive not more than the sum of seven and one-half dollars per day for each day he may be in attendance upon said court. It shall be the duty of the presiding judge to certify the number of days any such special stenographer may be engaged in the courts as such; upon this certificate the comptroller general shall draw his warrant upon the state treasurer for the amount due said stenographer for his services, and the said state treasurer is authorized to pay the same.

1932 Code, § 597; Civ. P. '22, § 537; Civ. P. '12, § 316; 1908 (25) 1012.

Special stenographer can only be paid by state treasurer upon warrant of comptroller general predicated upon the cer-

tificate of presiding judge; and only \$7.50 per day. *Cherokee County v. Stack*, 171 S. C., 298, 172 S. E. 506.

§ 598. Order of disposing of issues on the calendar.—The issues on the calendar shall be disposed of in the following order, unless, for the convenience of parties or the dispatch of business, the court shall otherwise direct:

- (1) Issues of fact to be tried by a jury.
- (2) Issues of fact to be tried by the court.
- (3) Issues of law.

1932 Code, § 598; Civ. P. '22, § 538; Civ. P. '12, § 317; Civ. P. '02, § 279; 1870 (14) § 281.

Order of trial of issues discretionary with court.—It is within the discretion of the trial judge as to whether legal or equitable issues shall be tried first under this section. *Knox v. Campbell*, 52 S. C. 461, 30 S. E. 485, 486; *Du Bose v. Kell*, 76 S. C. 313, 56 S. E. 968, 969.

And action may be transferred to calendar 2 in order to try equitable defense.—A legal action to which an equitable defense has been interposed, which was docketed on calendar 1, may be transferred to calendar 2 in order to have the equitable defense tried by the

court. *Knox v. Campbell*, 52 S. C. 461, 30 S. E. 485.

Demurrer heard on wrong calendar does not affect jurisdiction.—Although ordinarily a demurrer should be heard, under this section, on a different calendar from that on which issues of fact to be tried by a jury are placed, a demurrer heard without a transfer to calendar 2 is a mere irregularity, and does not affect the jurisdiction. *Able v. Southern Ry.*, 73 S. C. 173, 52 S. E. 962, 963, 12 L. R. A. (N. S.) 672, 22 L. R. A. (N. S.) 1238, 25 L. R. A. (N. S.) 347, 20 A. L. R. 140.

CHAPTER 31

Trial by Jury

- ARTICLE 1. General and Special Verdicts, § 599.
 ARTICLE 2. Drawing and Summoning Jurors, § 607.
 ARTICLE 3. Qualification, Exemption, Empaneling and Pay of Jurors, § 627.
 ARTICLE 4. Objection to Jurors, § 637.
 ARTICLE 5. Miscellaneous Provisions, § 643.

ARTICLE 1

General and Special Verdicts

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| 599. Separate trials as to different defendants. | special findings. |
| 600. Copy of pleadings for court. | 603. Special finding controls general verdict. |
| 601. General and special verdicts defined. | 604. Assessment of damages. |
| 602. General or special verdict and | 605. Verdict and new trial. |
| | 606. Hearing of motions. |

§ 599. Trial—separate trials.—Either party complying with the requirements of section 595 may bring the issue to trial, and, in absence of the adverse party, unless the court for good cause otherwise direct, may proceed with his case, and take a dismissal of the complaint, or a verdict or judgment, as the case may require. A separate trial between a plaintiff and any of the several defendants may be allowed by the court whenever, in its opinion, justice will thereby be promoted.

1932 Code, § 599; Civ. P. '22, § 539; Civ. P. '12, § 318; Civ. P. '02, § 280; 1870 (14) § 282.

Severance is in the discretion of the trial court.—Under this section, severance being in the wise discretion of the trial court, it may deny separate trials in an action against a city and a railroad company for injuries caused by insufficient clearance between a railroad and a trestle at an overhead crossing. *Brown v. Southern R. Co.*, 111 S. C. 140, 96 S. E. 701.

§ 600. Court to be furnished with copy of pleadings.—When the issue shall be brought to trial by the plaintiff, he shall furnish the court with a copy of the summons and pleadings, with the offer of defendant, if any shall have been made. When the issue shall be brought to trial by the defendant, and the plaintiff shall neglect or refuse to furnish the court with a copy of the summons and pleadings and the offer of the defendant, the same may be furnished by the defendant.

1932 Code, § 600; Civ. P. '22, § 540; Civ. P. '12, § 319; Civ. P. '02, § 281; 1870 (14) § 283.

§ 601. General and special verdicts defined.—A general verdict is that by which the jury pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant. A special verdict is that by which the jury finds the facts only, leaving the judgment to the court.

1932 Code, § 601; Civ. P. '22, § 541; Civ. P. '12, § 320; Civ. P. '02, § 282; 1870 (14) § 284.

§ 602. When jury may render special or general verdict—directing special findings. (1) Actions permit—entry.—In an action for the recovery of specific personal property, if the property have not been delivered to the plaintiff, or if it have, and the defendant, by his answer, claim a return thereof, the jury shall assess the value of the property, if their verdict be in favor of the plaintiff, or if they find in favor of the defendant, and that he is entitled to a return thereof, and may at the same time assess the damages, both actual and punitive, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the detention or taking and withholding such property. In every action for the recovery of money only, or specific real property, the jury in their discretion may render a general or special verdict. In all other cases the court may direct the jury to find a special verdict in writing upon any or all of the issues, and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact to be stated in writing, and may direct a written finding thereon. The special verdict of finding shall be filed with the clerk, and entered upon the minutes.

(2) Action for recovery of personal property—what jury may find.—In every action for the recovery of personal property which has been pledged in any way to secure credit or debt, the defendant may plead his counterclaim arising out of the same transaction, and the jury in such case may find, in addition to the verdicts now provided by law, the amount due to the plaintiff if any; and in such case the defendant shall have the right to pay said amount, and costs, and the property shall thereafter be free from the encumbrance.

1932 Code, § 602; Civ. P. '22, § 542; Civ. P. '12, § 321; Civ. P. '02, § 283; 1870 (14) 285; 1909 (26) 161.

- I. Assessment of Property and Sufficiency Thereof.
 - A. In General.
 - B. Effect of Return of Property.
- II. When Provision as to Assessment Mandatory.
- III. Damages.
- IV. Special Verdicts.

Cross References.

As to actions of claim and delivery in the magistrates' courts see sec. 263, and note thereto. In other cases, see sections 552, 555 and 661 and notes thereto. For the limitations of actions other than real property see sec. 388, and note thereto.

I. ASSESSMENT OF PROPERTY AND SUFFICIENCY THEREOF.

A. In General.

An alternative verdict is required in actions to recover specific personal property.—As to assessing the value of the property in actions for the recovery of specific personal property the real object of the code is first, to protect the rights of the true owner to regain possession of his property in specie, if practicable; second, to save the party who may be innocently, but illegally, in the possession of the property of another from being compelled to pay such value as a jury may see fit to place upon the property, by giving him the alternative of re-

turning the property to its rightful owner, and only paying such damages for its detention as may be determined to be proper. See *Finley v. Cudd*, 42 S. C. 121, 20 S. E. 32, 34, L. R. A. 1915 E, 199.

And plaintiff has right to exhaust every available remedy to gain possession before accepting alternative verdict for value.—Defendant against whom judgment is rendered in action in claim and delivery is not entitled to pay value personally except in event possession of property cannot be had, and prevailing party has right to first exhaust every available and appropriate remedy in effort to locate and gain possession of property before he is required to accept alternative verdict for value assessed by jury. *Charlotte Barber Supply Co. v. Branham*, 184 S. C. 184; 191 S. E. 891.

Not applicable in proceedings to enforce agricultural liens. *Plumley v. Steward*, 165 S. C. 316, 163 S. E. 777.

For the possession of the property or its value.—In an action for the recovery of personal property, the verdict must be in the alternative for the possession of the property or for its value in case such possession cannot be had. *Thompson v. Lee*, 19 S. C. 489.

Such as "for return of property or \$507.95."—In a claim and delivery action

for the recovery of personal property a verdict "for the return of the property or \$507.95" is an alternative verdict and valid. *Bardin v. Drafts*, 10 S. C. 493.

Every reasonable presumption must be made in favor of the verdict, and that would render it necessary to construe it as conformable to the requirements of the law where such construction is possible. See *Bardin v. Drafts*, 10 S. C. 493.

And "for three of the chairs or \$59.70."—In an action to recover the furniture of a barber shop, including four chairs valued in the complaint for \$59.70, a verdict "for three of the chairs or \$59.70" is not so indefinite that judgment thereon cannot be enforced. *Phoenix Furniture Co. v. Jaudon*, 75 S. C. 229, 55 S. E. 308.

But not "we find for plaintiff, patterns the value of \$100."—In an action for recovery of patterns at a foundry, a verdict "we find for plaintiff, patterns the value of \$100" (which could not have included all the patterns at the foundry) does not identify the property, and is therefore void. *Eason v. Miller*, 18 S. C. 381. See also *Robbins v. Slattery*, 30 S. C. 328, 9 S. E. 510; *Lockhart v. Little*, 30 S. C. 326, 9 S. E. 511.

Formerly a motion to set aside a judgment for being erroneous, as for the reason mentioned in the above paragraph, and for a new trial, could be made any time within 2 years. See *Robbins v. Slattery*, 30 S. C. 328, 9 S. E. 510. But see secs. 605, 606, post, and notes thereto.

And must be given separately against two defendants not jointly liable.—In claim and delivery against co-defendants not jointly liable, a verdict for plaintiff for certain property, valued at a certain sum, with damages for detention, is too indefinite, as it should in such case be against each defendant separately for the specific property, or its value, wrongfully in his possession. *Norris v. Clinkscales*, 47 S. C. 488, 25 S. E. 797, Ann. Cas. 13E, 796.

Also an assignee in assignment for creditors must be included if he owns the property.—When by his answer the defendant admits that his assignee for the benefit of creditors is the owner of the goods, the plaintiff in a claim and delivery action cannot be adjudged to return the goods or pay the value to defendant, but the court, of its own motion, should compel the assignee to intervene. *Wilkins v. Lee*, 42 S. C. 31, 19 S. E. 1016.

But an alternative verdict is necessary only when defendant is entitled to a return of the property.—The provisions of this section, as to the assessing of the value of the property in an action for the recovery of specific personal property, requires an alternative verdict only where the defendant is entitled to a return of the property. *Finley v. Cudd*, 42 S. C. 121, 20 S. E. 32, L. R. A. 1915E, 199.

See also dissenting opinion in *Davis-McGee Mule Co. v. Marett*, 129 S. C. 36, 123 S. E. 323.

Amount of unpaid purchase price cannot be credited on a verdict in claim and delivery.—Where in an action for claim and delivery to recover possession of property, a verdict is rendered for the return of the property the amount of the purchase money unpaid cannot be credited on the verdict. *Murdouch v. Tuten*, 76 S. C. 502, 57 S. E. 547.

A verdict may be for a part of the property sought or a sum equal to the value of the whole.—In a claim and delivery action, defendant cannot complain of a verdict for plaintiff for a part of the property sought or a sum equal to the value of the whole as described in the complaint. *Phoenix Furniture Co., v. Jaudon*, 75 S. C. 229, 55 S. E. 308.

A verdict should not be set aside as too indefinite if in itself or taken in connection with the pleadings it so identifies the property that a judgment based on it could be enforced with reasonable certainty. *Phoenix Furniture Co. v. Jaudon*, 75 S. C. 229, 55 S. E. 308.

Sureties of defendant are bound by the judgment against him if they have the property.—If the property attached by a plaintiff in a claim and delivery action is taken by the sureties of the defendant, they are bound for whatever judgment is rendered against the principal subject to reduction by the amount returned to plaintiff under the judgment. *Parish v. Smith*, 66 S. C. 424, 45 S. E. 16.

As to liability of sureties, see sections 555 and 661 and notes thereto.

B. Effect of Return of Property.

Return of property will satisfy judgment.—If the plaintiff returns the chattels adjudged to be the property of the defendant, within a reasonable time in as good condition as they were at the time the judgment was rendered, and pays whatever damages have been assessed, together with the cost of the action, the judgment will thereby become inoperative and satisfaction should be entered on the record. *Archer v. Long*, 47 S. C. 556, 25 S. E. 84, Ann. Cas. 12B, 308.

And a return of part of the property will be credited on the judgment.—When a part of the property is returned, but not within a reasonable time, nor in as good a condition as when the judgment was rendered, the property so returned marks satisfaction of the judgment in the proportion which the value of the returned property bears to the value of all the property as assessed by the jury. *Archer v. Long*, 47 S. C. 556, 25 S. E. 84, Ann. Cas. 12B, 308.

In which case plaintiff may show value of property not returned.—Where there is a judgment in favor of a defendant, in claim and delivery for the return

of property, and in the alternative for its value, in a specific sum, and plaintiff returns only part of the property, he will be permitted to show the value of the property not returned. *Archer v. Long*, 47 S. C. 556, 25 S. E. 84, Ann. Cas. 12B, 308. But see the dissenting opinion in this case.

Also a payment of plaintiff's interest will work a satisfaction of the judgment.—Under this section authorizing the answering of particular questions, a jury may be directed to find the property's real value and also the plaintiff's interest therein and the judgment may be ordered satisfied upon payment of plaintiff's interest. *Greene v. Washington*, 105 S. C. 137, 89 S. E. 649.

Value of property is concluded by the verdict.—The value of the property is concluded by the verdict of the jury and is the standard by which to determine the proportionate amount that should be credited on the judgment. *Archer v. Long*, 47 S. C. 556, 25 S. E. 84, Ann. Cas. 12B, 308.

II. WHEN PROVISION AS TO ASSESSMENT MANDATORY.

Provision as to assessment mandatory when plaintiff has the property and defendant claims a return.—This section requiring jury to assess the value of the property becomes mandatory, whether the verdict be in favor of plaintiff or defendant, when the plaintiff has taken possession of the property and defendant, not having exercised his right of redelivery under section 558, claims a return thereof. *Wilkins v. Willimon*, 128 S. C. 509, 122 S. E. 503. See also *Archer v. Long*, 32 S. C. 171, 11 S. E. 86, 92, 32 Am. St. Rep. 446, 36 L. R. A. 356, 37 L. R. A. 358, and cases cited therein.

Or when verdict is for plaintiff and defendant has the property.—This section requiring jury to assess the value of the property becomes mandatory, if the verdict be in favor of the plaintiff when the property remains in the possession of the defendant. *Wilkins v. Willimon*, 128 S. C. 509, 122 S. E. 503.

But not when verdict is for defendant and he has the property.—If the defendant remain in possession of the property, and the verdict is in his favor, the jury is not required to assess the value of the property. *Wilkins v. Willimon*, 128 S. C. 509, 122 S. E. 503. See also *Finley v. Cudd*, 42 S. C. 121, 20 S. E. 32, L. R. A. 1915E, 199.

And a verdict void for failure to assess is not cured by defendant's failure to take advantage of it.—A verdict which finds "for the defendant the property in dispute," without assessing its value, as provided for in this section, is void, and the defect is not cured by a waiver on the part of defendant of the right to take advantage of it. *Archer v. Long*, 32 S. C. 171, 11 S. E. 86, 32 Am.

St. Rep. 446, 36 L. R. A. 356, 37 L. R. A. 358.

It is not plaintiff's duty to prove value when he has the property.—It is no more the duty of the plaintiff, who gives bond and acquires the possession of the property, to prove the value of the property in an action of claim and delivery than it is the duty of the defendant, who seeks to regain possession. *Archer v. Long*, 32 S. C. 171, 11 S. E. 86, 32 Am. St. Rep. 446, 36 L. R. A. 356, 37 L. R. A. 358.

III. DAMAGES.

Language as to damages is permissive only.—The language in the branch of this section relating to the form of the verdict in respect to the value of the property sued for is imperative, but in the branch relating to the damages sustained by the taking or detention of the property, the language is permissive only. *Archer v. Long*, 32 S. C. 171, 11 S. E. 86, 92, 32 Am. St. Rep. 446, 36 L. R. A. 356, 37 L. R. A. 358.

So jury is not required to assess such damages as may be proved.—The provisions of this section relating to the recovery of specific personal property necessarily imply that property sued for in an action of this kind always has a value which must be assessed by the jury, but that there may or may not be damages in a given case, and hence the jury is not required, but is permitted, to assess such damages as may have been proved. *Archer v. Long*, 32 S. C. 171, 11 S. E. 86, 92, 32 Am. St. Rep. 446, 36 L. R. A. 356, 37 L. R. A. 358.

But cannot assess damages for defendant when instructed to find for plaintiff.—The jury having been instructed that they must find for the plaintiff in an action to recover the possession of personal property, a verdict for damages for defendant cannot be cured by defendant's release of the property claimed. *Thompson v. Lee*, 19 S. C. 489.

The jury are bound to take the law of the case from the court, and whenever they disregard their instructions as to the law, their verdict should be promptly set aside and a new trial granted. See *Thompson v. Lee*, 19 S. C. 489.

Damages not limited to purchase price of personalty taken.—In an action of claim and delivery the measure of damages is not limited to the purchase price of the personalty taken. *Murdough v. Tuten*, 76 S. C. 502, 57 S. E. 547. See, also, *Miami Powder Co. v. Port Royal, etc., R. Co.*, 47 S. C. 324, 25 S. E. 153, 58 Am. St. Rep. 880, 6 L. R. A. (N. S.) 1059; *Loeb v. Mann*, 39 S. C. 465, 18 S. E. 1; *Brock v. Bolton*, 37 S. C. 40, 16 S. E. 370, 30 L. R. A. (N. S.) 373; *Buford v. Fannin*, 1 Bay 273; *Banks v. Hatton*, 1 N. & Mc. 221; *Kid v. Mitchell*, 1 N. & Mc. 334.

But damages must be proven or verdict for damages cannot stand.—While

it may not be necessary, in a suit for claim and delivery, to allege damages, but only to claim them in the demand for relief (see *Levi v. Legg*, 23 S. C. 282, 109 Am. St. Rep. 451), it is indispensable to prove damages; otherwise a verdict for them cannot stand. *Norris v. Clinkscals*, 47 S. C. 488, 25 S. E. 797, Ann. Cas. 13 E. 796; *Andrews v. Hurst*, 163 S. C. 86, 161 S. E. 331.

Damages must be from direct and proximate injury of property or reduction in value.—The damages contemplated in this section are such damages as may have been sustained by reason of the seizure and detention of the property itself; that is to say, by direct and proximate injury to the property in question, or in reducing its value, and not for the purpose of allowing a party to reimburse himself, as to consequential losses alleged to have been sustained in the prosecution of the case, in respect to the speculative value of time lost, and the payment of the bills of railroads and hotels, lawyers' fees, etc. *Loeb v. Mann*, 39 S. C. 465, 18 S. E. 1, 2.

And not such as an agent's commissions or auditor's expenses.—This section does not authorize a counterclaim for a company's auditor's expenses, and for agent's commissions in an action in claim and delivery for pianos against the agent. *Weaver Piano Co. v. Curtis*, 158 S. C. 117, 155 S. E. 291.

Or destruction of a business.—Damages for destruction of a business are not recoverable as a counterclaim in an action for claim and delivery. *Sizer & Co. v. Dopson*, 89 S. C. 535, 72 S. E. 464; cited with approval in *Weaver Piano Co. v. Curtis*, 158 S. C. 117, 155 S. E. 291, 301.

For example, damages for repossessing pianos, destroying agent's equity and business, are not recoverable as a counterclaim. *Weaver Piano Co. v. Curtis*, 158 S. C. 117, 155 S. E. 291.

Or damages caused by a storm while goods in defendant's possession.—Damages for detention of property does not include damage caused by a storm while the property was in the possession of a bailee as it is not the necessary result of the detention, and to recover for such damages the plaintiff must specifically allege them. *Lipscomb v. Tanner*, 31 S. C. 49, 9 S. E. 733.

And the condition of goods may be shown at any time before judgment.—In an action for claim and delivery, and for damages for the wrongful detention of goods by a carrier, it is competent to show the condition of the goods at any time before judgment; such condition being a result of unlawful detention. *Miami Powder Co. v. Port Royal*, etc., R. Co., 47 S. C. 324, 25 S. E. 153, 58 Am. St. Rep. 880, 6 L. R. A. (N. S.) 1059.

New trial may be granted if defendant refuse to remit all or part of damages in

plaintiff's favor.—It is within the province of a trial judge to grant to plaintiff a new trial, conditioned upon the refusal of defendant to remit from the verdict all or part of the damages found in his favor. *Joiner v. BeVier*, 155 S. C. 340, 152 S. E. 652.

And should be when jury's verdict is not clear.—A jury's verdict should be upheld when it is possible to do so and carry into effect what was clearly the jury's intentions, but when the verdict is so confused that it is not clear what the jury intended to do, the court should order a new trial. *Lorick v. Walker & Co.*, 153 S. C. 309, 150 S. E. 789; cited with approval in *Joiner v. BeVier*, 155 S. C. 340, 152 S. E. 652, 655.

But judge may require reconsideration by jury when verdict is ambiguous as to damages.—Before the final discharge of a jury from their consideration of a cause, the trial judge has the power to require reconsideration by the jury when the verdict is clearly erroneous as to form, and therefore can require reconsideration when verdict in claim and delivery is ambiguous as to amount of damages. *Joiner v. BeVier*, 155 S. C. 340, 152 S. E. 652.

Damages for taking car if arising out of same state of facts may be allowed as counterclaim.—In an action of claim and delivery to get possession of an automobile, a counterclaim for damages in taking the automobile arose out of the same state of facts and was allowed, as the main issue arose out of the right to possession and both had seized the car. *Bennett Cadillac Co. v. Slater*, 120 S. C. 202, 112 S. E. 918.

Damages for detention of property must necessarily result from defendant's detention.—Under this section providing for damages for the wrongful detention of property, an instruction that the plaintiff is entitled to such damages as necessarily result from the defendant's detention of his property is proper. *Jones v. Hiers*, 57 S. C. 427, 35 S. E. 748.

And a verdict for return of property or a sum of money cannot be taken to include damages for detention.—Upon a verdict for return of the property or a sum of money, payment is conditioned upon the non-return of the property, and, therefore, cannot be taken to include damages for the taking and detention, for a claim to such damages would be independent of whether the property was returned in specie or its equivalent in money paid. *Bardin v. Drafts*, 10 S. C. 493.

Counterclaim by defendant in claim and delivery.—The defendant may counterclaim for damages he may have sustained by reason of the taking and withholding of the property under the proceedings in the action. *Columbia National Bank et al v. Reynolds*, 166 S. C.

426, 164 S. E. 911.

The earlier standing of this section did not authorize the assessment by the jury of punitive damage in action for claim and delivery and as a consequence thereof punitive damages were not allowed in such actions. See *Tittle v. Kennedy*, 71 S. C. 1, 50 S. E. 544, L. R. A. 1917C, 46, 4 Ann. Cas. 68, Ann. Cas. 18C, 53; *Brayton v. Beall*, 73 S. C. 308, 53 S. E. 641, 26 L. R. A. (N. S.) 1167, Ann. Cas. 17A, 438.—Ed. Note.

IV. SPECIAL VERDICTS.

Party desiring question of fraud to go to jury must request a special verdict.—Under the provisions of this section declaring that the court may direct the jury to find a special verdict, it is the duty of the party desiring the question of fraud to be submitted to the jury to request the court for a special verdict, and the court will not be in error for not directing a special verdict in the absence of such request. *Castles v. South Carolina, etc., Agency*, 104 S. C. 81, 88 S. E. 273.

Court is not bound to direct jury to find special verdict, this being discretionary.—The court is not bound to direct the jury to find a special verdict upon any or all of the issues, but the jury is bound to follow the direction, if given. *Floyd v. New York Life Ins. Co.*, 110 S. C. 384, 96 S. E. 912; *Key v. Carolina & N. W. Ry Co.*, 165 S. C. 43, 162 S. E. 582. See, also, *Palmetto Fertilizer Co. v. Columbia, etc., R. Co.*, 99 S. C. 187, 197, 83 S. E. 36.

But might find it advisable when title to real property is claimed by adverse possession.—The circuit court might find it advisable to direct the jury to find a special verdict as to the manner in which the appellants had title to the land, when they deny title derived as a gift and set up an independent title by adverse possession. *Williams v. Halford*, 67 S. C. 296, 45 S. E. 207.

And may submit special issues and direct written findings thereon whether for damages or recovery of property.—Under the provisions of this section providing for general or special verdicts in actions to recover money only or specific real property, and a finding in special verdicts of particular questions of fact in writing, the court may submit special issues and direct written findings thereon whether the action was to recover damages only for trespass or to recover specific real property. *Manson v. Dempsey*, 88 S. C. 193, 70 S. E. 610, 12 A. L. R. 1467.

General verdict may precede special finding of fact.—Even though logically the special findings of fact should precede the general verdict based thereon, to reverse the order could not be a matter of any consequence or prejudice, especially when the special findings and

general verdict are perfectly consistent. *Singletary v. Seaboard, etc., Ry. Co.* 88 S. C. 565, 71 S. E. 57, Ann. Cas. 13B, 845.

Mortgagor's interest may be determined though defendant pleaded no counterclaim.—This section authorizing the jury to find the amount due the plaintiff is the defendant's authority to have the amount of a mortgagee's interest determined even though he pleaded no counterclaim. *Greene v. Washington*, 105 S. C. 137, 89 S. E. 649.

Finding of amount due plaintiff in action on mortgaged property is not a personal judgment.—The finding of the amount due a plaintiff in an action to recover personal property pledged for debt is limited to the finding in order to permit a mortgagor to pay and save further expense, and no authority is given by this section for the entry of a personal judgment, against the mortgagor for that amount. *Gibbes Mach. Co. v. Rivers*, 94 S. C. 342, 78 S. E. 21.

And does not authorize entry of judgment for that amount.—A finding in a claim and delivery action of the amount due on some notes, under this section providing for such finding in actions to recover personal property pledged for debt, is not intended to and does not authorize the entry of judgment for that amount. *Gibbes Mach. Co. v. Rivers*, 94 S. C. 342, 78 S. E. 21.

As such finding is only to permit mortgagor to pay and save further expense.—The purpose of this section, providing for the recovery of personal property pledged for a debt, is to ascertain the amount due in the claim and delivery action (which could not have been done prior to this section), so that a mortgagor may pay it and save further expense and cost. *Gibbes Mach. Co. v. Rivers*, 94 S. C. 342, 78 S. E. 21.

Satisfaction of judgment with such finding does not bar action to recover balance of debt.—The satisfaction of a judgment in an action to recover personal property pledged for debt which finds the amount of the debt due to plaintiff and damages sustained, does not bar an action for the balance of the debt. *Gibbes Mach. Co. v. Rivers*, 94 S. C. 342, 78 S. E. 21.

One verdict should embrace and decide all issues including counterclaim.—The subdivision of this section providing for counterclaims in actions for the recovery of personal property does not contemplate a separate judgment on the counterclaim, but the counterclaim should be considered in the trial of the right to the possession of the property, and one verdict should embrace and decide all issues. *Cable Piano Co. v. Duncan*, 92 S. C. 371, 75 S. E. 552.

Unless the damages in a counterclaim are unliquidated and not proved.—If the damages set up in a counterclaim in an

action to recover personal property are unliquidated, a judgment cannot be granted thereon, on default, for the amount demanded, without proof of the facts on which the damages depend. *Cable Piano Co. v. Duncan*, 92 S. C. 371, 75 S. E. 552.

In an action for damages against railroad company it was held proper to submit to jury as special issues whether

plaintiff was the statutory beneficiary of decedent, and also, the legal liability of defendant. *Armitage v. Seaboard A. L. R. Co.*, 165 S. C. 21, 164 S. E. 169.

Special finding of fact by jury in prosecution for breach of trust with fraudulent intent at court's request, to specify misappropriated items, is not error. *State v. Wells*, 162 S. C. 509, 161 S. E. 177.

§ 603. On special finding with a general verdict, former to control.—Where a special finding of facts shall be inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly.

1932 Code, § 603; Civ. P. '22, § 543; Civ. P. '12, § 322; Civ. P. '02, § 284; 1870 (14) § 286.

The special verdict is the premise, the general verdict the conclusion.—The special verdict is the premise; the general verdict is the conclusion; the former controls the latter if the two shall be inconsistent. *Palmetto Fertilizer Co. v. Columbia, etc.*, R. Co., 99 S. C. 187, 83 S. E. 36.

So a refusal to find a special verdict when ordered casts doubt on sequence of general verdict.—When the court has, of right, ordered a special verdict, and in a case of peculiar need for such a verdict, the jury ought to be required to find the special verdict; and a refusal to do so casts doubt upon the logical sequence of the general verdict. *Palmetto Fertilizer Co. v. Columbia, etc.*, R. Co., 99 S. C. 187, 83 S. E. 36, 38, cited with approval in *Joiner v. BeVier*, 155 S. C. 340, 152 S. E. 652, 656.

Special verdict controls when general verdict is written in "blank" dollars.—A special finding of fact that a party is entitled to damages in a certain sum controls as against the finding in the general verdict that that party is entitled only to "blank" dollars as damages. *Joiner v. BeVier*, 155 S. C. 340, 152 S. E. 652.

A judgment on a special finding inconsistent with general verdict is not a judgment non obstante veredicto.—A judgment upon the special findings of a jury, but against their general verdict, is not really a judgment non obstante ve-

redicto, although often inaccurately so called. 11 Enc. Pl. & Pr. 924, 925, quoted and approved in *Ellison v. Greenville, etc.*, R. Co., 94 S. C. 425, 77 S. E. 723, 726, 78 S. E. 231.

Inconsistency of general and special verdicts.—Where the jury found as a special verdict that there was no fraud in defendant's procurement of a right of way, and a general verdict of \$1250 for plaintiff, stating that it included a sum of \$750, agreed upon as defendant's debt to plaintiff for the right of way, the verdict was not inconsistent as to the \$750, and hence defendant would not be entitled to judgment under this section. *Ellison v. Greenville, etc.*, R. Co., 94 S. C. 425, 77 S. E. 723, 78 S. E. 231.

In an action for damages for defendant's alleged trespass in procuring a right of way, where the jury returned a special verdict of no fraud and a general verdict for plaintiff for a sum in excess of the amount agreed upon as the consideration for the right of way, recovery could be had only for the amount of the consideration. *Ellison v. Greenville, etc.*, R. Co., 94 S. C. 425, 77 S. E. 723, 78 S. E. 231.

Under this section, a special verdict controls on appeal, where the record presents no ground for setting it aside, and judgment must be rendered accordingly. *Ellison v. Greenville, etc.*, R. Co., 94 S. C. 425, 77 S. E. 723, 78 S. E. 231.

§ 604. Jury to assess defendant's damages in certain cases.—When a verdict is found for the plaintiff in an action for the recovery of money, or for the defendant when a set-off for the recovery of money is established, beyond the amount of the plaintiff's claim as established, the jury must also assess the amount of the recovery; they may also, under the direction of the court, assess the amount of the recovery when the court gives judgment for the plaintiff on the answer. If a set-off, established at the trial, exceed the plaintiff's demand so established, judgment for the defendant

must be given for the excess; or if it appear that the defendant is entitled to any other affirmative relief, judgment must be given accordingly.

1932 Code, § 604; Civ. P. '22, § 544; Civ. P. '12, § 323; Civ. P. '02, § 285; 1870 (14) § 287.

The ordinary proceeding contemplates striking a balance and awarding accordingly in one judgment.—The ordinary procedure contemplates a single judgment—a judgment for the plaintiff upon his claim, reduced by what may be awarded defendant upon his counterclaim, or a judgment for the defendant upon his counterclaim, reduced by what may be awarded plaintiff on his claim; in other words, striking a balance and awarding accordingly. *Adair v. First Nat. Bank*, 139 S. C. 1, 137 S. E. 192, 51 A. L. R. 1269 (dissenting opinion).

The balance allowed is the assignable interest.—The balance allowed either party after the set-off of counterclaim against claim, or claim against counterclaim, as permitted in this section, is the assignable interest of the parties respectively. *Adair v. First Nat. Bank*, 139 S. C. 1, 137 S. E. 192, 51 A. L. R. 1269 (dissenting opinion).

But attorneys, assignees of a judgment to secure fees, will be protected in their interest.—A judgment against defendants assigned to plaintiff's attorneys to secure their fees should not be set off, in full, against a judgment previously obtained by defendant against plaintiff, as this would deprive the attorneys of their lien for fees. See *Adair v. First Nat.*

Bank, 139 S. C. 1, 137 S. E. 192, 51 A. L. R. 1269. But note the dissenting opinion therein.

A judgment may be reformed after expiration of time to apply for new trial or correction.—A judgment may be reformed to correct a mistake of a clerical error by the jury, or by one of the jurors, after the expiration of the time within which a new trial may be had, or a correction of error may be made, if the party seeking reformation neither has an adequate remedy at law, nor has been guilty of such laches or negligence as to deprive him of the right to relief against the mistake. See *Pelzer Mfg. Co. v. Hamburg-Bremen Fire Ins. Co.*, 71 F. 826.

And testimony of jurors may be received to reform a judgment.—In an action to reform a judgment, the testimony of jurors may be received when the object sought is not to show any error or misconduct in the consultation of the jury, or in the mode in which the verdict was made up, but only to show a mistake in the nature of a clerical error in making the record of the verdict actually agreed on. *Pelzer Mfg. Co. v. Hamburg-Bremen Fire Ins. Co.*, 71 F. 826.

§ 605. Entry of verdict—motion for new trial.—(1) Upon receiving a verdict, the clerk shall make an entry in his minutes, specifying the time and place of trial, the names of the jurors and witnesses, the verdict, and either the judgment rendered thereon or an order that the cause be reserved for argument or further consideration. If a different direction be not given by the court, the clerk must enter judgment in conformity with the verdict. (2) If an exception be taken, it may be reduced to writing at the time, or entered in the judge's minutes, and afterwards settled as provided by the rules of court, and then stated in writing in a case, or separately, with so much of the evidence as may be material to the questions to be raised, but it need not be sealed or signed nor need a bill of exceptions be made. (3) If the exceptions be, in the first instance, stated in a case, and it be afterwards necessary to separate them, the separation may be made under the direction of the court, or a judge thereof. (4) The judge who tries the cause may, in his discretion, entertain a motion, to be made on his minutes, to set aside a verdict and grant a new trial upon exceptions, or for insufficient evidence, or for excessive damages; but such motions, if heard upon the minutes, can only be heard at the same term at which the trial is had. When such motion is heard and decided upon the minutes of the judge and an appeal is taken from the decision,

a case or exceptions must be settled or agreed upon in the usual form, upon which the argument of the appeal must be had.

1932 Code, § 605; Civ. P. '22, § 545; Civ. P. '12, § 324; Civ. P. '02, § 286; 1870 (14) § 288.

Cross reference.—As to the power of magistrate to grant new trial see § 274, subd. 17, ante, and note thereto.

Editor's Note.—A large majority of the cases citing this and the following section as a basis for their rulings on new trials cited also, § 34. It has been deemed expedient to place these annotations under § 34, to which section and note thereto the practitioner is referred. See also section 602 and notes thereto.

Judgment may be entered at instance of either party.—If the party in whose favor the verdict is rendered does not enter, or cause to be entered, any judgment thereon, the other party desiring to appeal, may cause judgment to be entered thereon. *Mauldin v. City Council*, 64 S. C. 444, 42 S. E. 202.

And without formal direction from judge.—Under this section providing for the entry in the clerk's minutes of the judgment in conformity with the verdict, unless otherwise ordered by the judge, a tacit understanding that a judgment would be entered up against only one defendant, a verdict having been returned against all, as this one defendant was the only one served, was acquiesced in by the judge and was a sufficient direction to the clerk to enter such judgment. *Brown v. Wilson*, 45 S. C. 519, 23 S. E. 630, 55 Am. St. Rep. 779, 21 L. R. A. (N. S.) 853.

But it must conform to the verdict or order of judge.—A judgment not entered up in conformity with the verdict, or by the order of the judge is void. *Eason v. Miller*, 15 S. C. 194, 46 L. R. A. (N. S.) 208.

An order of a judge, transferring a case, after verdict is rendered by the jury, to calendar 2 and giving leave to plaintiff to apply for judgment thereon, is "a different direction" given by the court, as set out in subd. 1 of this section; and judgment can not be entered on the verdict. *Whitesides v. Barber*, 22 S. C. 47.

It is proper to withhold a judgment until a motion for a new trial is heard, but if the motion is refused and the judge declines to give a different direction, a judgment may be entered in conformity with the verdict. *Kaminitsky v. Northeastern R. Co.*, 25 S. C. 53, 25 Am. St. Rep. 885, 62 Am. St. Rep. 172, 14 L. R. A. 585, 15 L. R. A. 429, 55 L. R. A. 837, 9 L. R. A. (N. S.) 390, 33 L. R. A. (N. S.) 1165, 1214.

Except that in chancery cases it can not be based solely on verdict of jury.—A judgment based solely upon the verdict of a jury in cases in chancery, and

not upon the decision of the judge, is void and must be set aside. *Gadsden v. Whaley*, 9 S. C. 147. See, also, *Sloan v. Westfield*, 11 S. C. 445; *Cooper v. Smith*, 16 S. C. 331.

In cases in chancery, the verdict of a jury on issues of fact submitted to them is not to be accepted as the conclusion which is to govern and control the case, and through the medium of which the judgment is to be pronounced in favor of the one side or the other. The judgment in such case must be the result of the conclusions of the judge both on the law and on the facts. *Gadsden v. Whaley*, 9 S. C. 147.

In cases in chancery the parties have a right to the opinion of the circuit judge, notwithstanding his right to refer issues of fact to a jury for the purpose of enlightening his conscience. *Gadsden v. Whaley*, 9 S. C. 147.

It may be entered on verdict of jury on appeal from assessment by arbitration.—Under this section providing for entry of judgment in conformity with the verdict, judgment may be entered on the verdict of a jury on appeal from assessment by arbitration for altering the grade of a street under special statutory proceedings and appeal therefrom. *Mauldin v. City Council*, 64 S. C. 444, 42 S. E. 202.

The design of this section providing for entry of judgment by the clerk was to give a summary and expeditious mode of securing compensation, and it is not at all probable, in the absence of specific language indicating such intent, that this section merely intended the verdict of the jury in the court of common pleas to operate simply as an award upon which another action must be brought to make it effective. *Mauldin v. City Council*, 64 S. C. 444, 42 S. E. 202, 205.

But not if verdict be rendered under condemnation statute.—This section providing for entry of the verdict in the clerk's minutes is only applicable to a verdict rendered in a civil action in the court of common pleas, and does not apply to a verdict rendered by a jury under the condemnation statute. *Haig v. Wateree Power Co.*, 119 S. C. 319, 112 S. E. 55.

Only errors of law in law trial can support an appeal while in chancery the whole case is subject to review.—In a trial at law, errors of law only can support an appeal to the supreme court, while in chancery the whole case is subject to review, the evidence might be examined and the correctness of the finding subject to the judgment of the

Supreme Court, *Sloan v. Westfield*, 11 S. C. 445.

Bill of exception is dispensed with.—By this section of the code, the use of the bill of exceptions is dispensed with, in terms, and the practice is substituted of stating the exception that had been taken at the trial in a case containing so much of the evidence as might be necessary to show the hearing and force of the exceptions there taken. *Caston v. Brock*, 14 S. C. 104.

And now a motion for new trial may be made on exceptions taken at the trial.—A motion in the circuit court for a new trial, after a verdict on an action in the nature of a suit at law, may be made either upon exceptions taken at the trial or without any such exceptions on certain other familiar grounds. *Caston v. Brock*, 14 S. C. 104.

Term "exceptions" implies an error of law.—The term "exceptions" as used in subd. 4 of this section has a technical meaning, and it implies that some error of law has been committed by the judge in the progress of the trial, either in some ruling during the trial, or in the charge to the jury. *Eason v. Miller*, 18 S. C. 381.

Such as a judge's refusal to charge a particular proposition of law when requested.—A failure to charge a particular proposition of law cannot be assigned as error in an appeal from an order refusing a new trial unless the judge, on request declined to so charge. *Fox v. Savannah*, etc., R. Co., 4 S. C. 543. See, also, *Godbold v. Vance*, 14 S. C. 458, L. R. A. 1915B, 1037, Ann. Cas. 12A, 13; *Coleman v. Heller*, 13 S. C. 491; *South Carolina R. Co. v. Wilmington*, etc., R. Co., 7 S. C. 410, 416.

And an exception to judge's charge to jury must be taken before jury retires.—An error of law in the judge's charge to the jury cannot be made a ground for appeal from an order refusing a new trial unless the charge be excepted to before the jury retire to their room. *Fox v. Savannah*, etc., R. Co., 4 S. C. 543. See, also, *Clarke v. Harper*, 8 S. C. 256.

"Insufficient evidence" and "excessive damages" involve errors of fact.—The terms "insufficient evidence" and "excessive damages" involve errors of fact to wit, as matter of fact that the verdict is not supported by the evidence, or that the damages are excessive and beyond the testimony. *Eason v. Miller*, 18 S. C. 381. See § 34 and the note thereto.

A new trial cannot be had under this section unless based on one of the above grounds.—A motion for a new trial which is not upon exceptions involving errors of law occurring at the trial, or for insufficient evidence, or for excessive damages is not governed by this and the following section. *Eason v. Miller*, 18 S. C. 381.

Motion for new trial does not have to be decided at same term of court.—The provision of subd. 4 of this section requires that the motion for a new trial shall be "heard" at the same term, but does not require that it shall be "decided" at that term. *Calhoun v. Port Royal*, etc., Ry. Co., 42 S. C. 132, 20 S. E. 30.

But must be heard at same term.—A motion for a new trial cannot be heard after the adjournment of the court, though notice of the motion was given during the term. *Molair v. Port Royal*, etc., R. Co., 31 S. C. 510, 10 S. E. 243, 15 L. R. A. 39; *Parks v. Blue Ridge Lumber Co.*, 170 S. C. 217, 170 S. E. 156.

And cannot be marked "heard", so as to enable trial court to retain jurisdiction after sine die adjournment, unless both attorneys consent. *King v. Western Union Telegraph Co.*, 167 S. C. 500, 166 S. E. 629.

But if attorneys present and do not object, consent inferred. *Ibid.*

Notice of motion not equivalent to marking "heard".—Although plaintiff's attorney in absence of defendant's attorney notified court of intention to move for new trial before court adjourned sine die and court noted motion but did not mark it "heard," court had no jurisdiction after it adjourned sine die to hear motion for new trial, notwithstanding defendants' attorney was called on and resisted motion. *Altman v. Efid Bros. Co.*, 180 S. C., 205; 195 S. E., 543.

And must be made at same term if on facts occurring at the trial and known to moving party.—A motion for a new trial on the ground of facts occurring at the trial, or circumstances immediately connected therewith known to the party moving or his counsel during the trial, cannot be made at a subsequent term, but must be presented to the trial judge before the expiration of the term at which the trial was had. *State v. Thompson*, 122 S. C. 407, 115 S. E. 326; Expressly overruling *State v. Weldon*, 91 S. C. 29, 74 S. E. 43, 39 L. R. A. (N. S.) 667, Ann. Cas. 13E, 801, as to this point.

Even though party was unable to prove the facts.—Facts which were within the knowledge of a party at the time of the trial cannot be made the foundation of a motion for a new trial on the ground of after-discovered evidence, though he was unable to prove them. *Hinson v. Catoe*, 10 S. C. 311.

The granting of a motion for a new trial lies in discretion of court.—See this catchline in note to § 34.

And its decision on such motion will not be disturbed on appeal.—From the decision of a circuit judge on a motion for a new trial, based upon error in fact, as for insufficient evidence or excessive damages, there is no appeal. *Stuckey v. Atlantic*, etc., R. Co., 57 S. C. 395, 35 S.

E. 550. See, also, *Sams v. Hoover*, 33 S. C. 401, 12 S. E. 8.

Unless the court committed an error of law.—See this catchline in note to § 34.

Such as a refusal when the court thought the evidence greatly preponderated against the verdict.—Where a circuit judge thought the evidence greatly preponderated against the verdict but refused to grant a new trial, because he thought the constitution did not give him that authority, he underrated his power as a circuit judge and committed error of law. *Wood v. Atlantic, etc., R. Co.*, 19 S. C. 579.

Or unless abuse of discretion is apparent.—See this catchline in note under § 34.

And the burden is on the appellant to show an abuse of discretion.—See this catchline in note to § 34.

A mistake in verdict as to parties may be corrected under discretion of the judge. *King v. Lane*, 68 S. C. 430, 47 S. E. 704.

New trial may be granted where verdict is excessive.—The authority of a circuit judge to grant a new trial is not limited to cases where the jury were governed by improper motives which affect the whole verdict, and consequently the judge may grant a new trial on the general ground that the verdict was excessive. *Stuckey v. Atlantic, etc., R. Co.*, 57 S. C. 395, 35 S. E. 550.

Unless plaintiff enters a remittitur for the excess.—Under motion for new trial on the minutes upon the ground of excessive damages, the circuit judge has power to order a new trial, unless the plaintiff enter a remittitur for a certain specified amount. *Warren v. Lagrone*, 12 S. C. 45. See § 34 and note thereto.

A rule to show cause why a remittitur should not be entered is the proper mode of relief where the record shows that the verdict is for more than the amount due. *Charles v. Jacobs*, 5 S. C. 348.

Or where the verdict gives inadequate damages.—See this catchline in note to § 34.

Facts as basis for new trial under this section must occur at trial.—This and the section immediately following manifestly relate only to motions for a new trial upon grounds arising out of something which occurred at the trial, and therefore a circuit court cannot entertain an appeal from a justice's court on a motion for a new trial brought in the justice court. *Sams v. Hoover*, 33 S. C. 401, 12 S. E. 8. See, also, *Clawson v. Hutchinson*, 14 S. C. 517; *State v. David*, 14 S. C. 428.

But for after-discovered evidence three facts must be established.—To justify the granting of a motion for a new trial upon the ground of after-discovered evidence, the moving party must establish, to the satisfaction of

the court before which the motion is made, at least three facts: (1) That the proposed new evidence was discovered after the former trial. (2) That it could not, by the use of due diligence, have been discovered in time to be offered at the former trial. (3) That it is material. *State v. Workman*, 15 S. C. 540, 18 L. R. A. (N. S.) 777; *Durant v. Philpot*, 16 S. C. 116, L. R. A. 1916C, 1193, cited with approval in *Sams v. Hoover*, 33 S. C. 401, 12 S. E. 8.

Judge can interfere with verdict only by granting new trial.—The authority of a circuit judge to correct, modify, or interfere with the verdict of a jury in a case properly triable by jury is embraced in and limited to the power to grant a new trial as set out here. *Gwathmey v. Foor Hotel Co.*, 121 S. C. 237, 113 S. E. 688.

To amend verdict, must lay proper foundation therefor by motion for new trial. *Anderson v. Aetna Casualty & Surety Co.*, 175 S. C. 254, 178 S. E. 819.

And the amount of the verdict cannot be reduced without allowing option of a new trial nisi.—See this catchline in note to § 34.

Trial court may amend verdict, but amendment must be accompanied with option of new trial nisi to party against whom amendment militates. *Anderson v. Aetna Casualty & Surety Co.*, 175 S. C. 254, 178 S. E. 819.

Where verdict should have been directed for defendant, order overruling motion for new trial and directing entry of verdict for defendant, is proper. *Jenkins v. Pilot Life Ins. Co.*, 186 S. C. 518, 197 S. E. 28.

But trial judge may not reserve decision on motion for directed verdict until after jury has rendered its verdict, unless counsel agreed. *Ibid.*

Overruling of motion for new trial may operate to sustain verdict.—The overruling of a motion for a new trial may operate to sustain the verdict upon both the legal issues and the equitable contentions. See *Sovereign Camp v. Means*, 87 S. C. 127, 69 S. E. 85.

A judge cannot grant a new trial at chambers.—As a judge can entertain a motion for a new trial on the merits in open court only, he is without authority to grant a new trial on the merits at chambers. *Charles v. Jacobs*, 5 S. C. 348; *Clawson v. Hutchinson*, 14 S. C. 517.

A motion for a new trial, made in term, cannot be heard in vacation over the objection of either party, unless an order is taken for that purpose, or it is so directed in the rule nisi. See *Charles v. Jacobs*, 5 S. C. 348.

The provision of § 37 unquestionably changes the rule announced in the above cases.—Ed. note.

Nor transfer the hearing to another judge.—Since a judge at chambers has

no jurisdiction to hear a motion for a new trial on the grounds of newly discovered evidence, an order by him transferring the hearing by him to another judge is of no effect. *Donly v. Fort*, 42 S. C. 200, 20 S. E. 51.

As to power of judges at chambers, see § 37 and the note thereto.

A new trial may be granted of an issue emanating from chancery.—A new trial will sometimes be granted in equity, where the verdict is against preponderance of evidence, or rather against the weight of the testimony, especially, it is said, where the judge intimates in his report that he is not satisfied with the verdict; while in law it is granted either because the verdict is against the evidence or is without any evidence to sustain it, or for excessive damages, etc. *Sloan v. Westfield*, 11 S. C. 445.

The reason which would demand a new trial in the court of law upon the ground, for instance, that the verdict is directly

contrary to the evidence, would render another trial of the issue totally unnecessary before the chancellor or judge sitting in equity. The conclusiveness of the evidence furnishes all that equity needs. Thus the strongest reason for a new trial at law is the best reason why it would be denied on an issue emanating from a case in equity. See *Sloan v. Westfield*, 11 S. C. 445.

But not on the law side of the court.—A motion on the law side of the court before the judge presiding, for a new trial on the minutes of an issue ordered out of chancery, upon the ground that there was no evidence to sustain the verdict of the jury is irregular and properly refused. *Sloan v. Westfield*, 11 S. C. 445.

A case must be settled or agreed on before considered on appeal.—Where a case for appeal has not been settled or agreed on, it must be returned to the circuit court for settlement. *Chalk v. Patterson*, 4 S. C. 98.

§ 606. Motion for new trial, or for judgment on special verdict—where to be heard.—A motion for a new trial on a case or exceptions, or otherwise, and an application for judgment on a special verdict or case reserved for argument or further consideration, must, in the first instance, be heard and decided at the same term, except that when exceptions are taken, the judge trying the cause may, at the trial, direct them to be heard at some subsequent term, and the judgment in the meantime suspended; and in that case they must be there heard in the first instance, and judgment there given. And when, upon a trial, the case presents only questions of law, the judge may direct a verdict.

1932 Code, § 606; Civ. P. '22, § 546; Civ. P. '12, § 325; Civ. P. '02, § 287; 1870 (14) § 289.

Editor's note.—The majority of cases citing this section as a basis for granting new trials also cite, sec. 34. It has been deemed expedient to place these annotations under that section (sec. 34), to which the practitioner is hereby referred. See also preceding section and notes thereto.

"Same term" means the term at which the trial was had. *Hinson v. Catoe*, 10 S. C. 311.

A motion for a new trial on the minutes must be heard at the term at which the trial was had; it cannot be heard at a term held 2 years afterwards. *Hinson v. Catoe*, 10 S. C. 311.

Every appealable order granting a new trial must involve the fact that a ruling or decision made by the circuit court has been reversed by the same court, and, in fact, by the same judge who gave such ruling or decision, according to the general provisions of this section. *Caston v. Brock*, 14 S. C. 104.

And cannot be heard at chambers.—This section expressly provides that a

motion for a new trial cannot be heard at chambers, as provision is made therein for hearing such motions on the minutes of the court and also upon a case stated for the appellate court. *Molair v. Port Royal, etc., Ry. Co.*, 31 S. C. 510, 10 S. E. 243, 15 L. R. A. 39. See also, *Caston v. Broch*, 14 S. C. 104.

As to power of judges at chambers, see sec. 37 and the note thereto. The above case was decided prior to the amendment in 1925 of sec. 37.—Ed. Note.

But a decision on such a motion may be filed nunc pro tunc.—Under this section a decision on a motion for a new trial may be filed after the term, nunc pro tunc, where it has been heard and argued during the term, though pending the decision a judgment has been entered on the verdict. *Calhoun v. Port Royal, etc., Ry. Co.*, 42 S. C. 132, 20 S. E. 30; see *Thornton v. Atlantic Coast Line R. Co.*, 196 S. C. 316; 13 S. E. (2d) 442.

Where the delay in rendering a judgment or a decree arises from the act of the court,—that is, where the delay has

been caused, either to suit the court's convenience, or by the multiplicity or press of business, the intricacy of the question involved, or by any other agency not attributable to the laches of the parties, the judgment or the decree may be entered retrospectively, as of the time when it should or might have been entered up. In such cases, upon the maxim "actus curiae neminem gravabit," which has been well said to be founded in right and in good sense, and to afford a safe and certain guide for the administration of justice, it is the duty of the court to see that the parties shall not suffer by the delay. *Mitchell v. Overman*, 103 U. S. 62, 26 L. Ed. 369, cited with approval in *Calhoun v. Port Royal, etc.*, Ry. Co., 42 S. C. 132, 20 S. E. 30, 31.

A motion for a new trial cannot pend in supreme and circuit courts at same time.—By bringing an appeal for a new trial on a case and exceptions to the Supreme Court, an appellant waives whatever right he had to move for a new trial in the circuit court, as such a motion cannot pend in the circuit and Supreme Courts at the same time. *Murdock v. Courtenay Mfg. Co.*, 52 S. C. 428, 29 S. E. 856, 30 S. E. 142.

Equitable relief might be granted to

correct a verdict though new trial cannot be had.—Under this section a party who has the right to move for a new trial loses it as soon as the court adjourns, but equitable relief may be granted to him to correct a mistake in a verdict. See *Pelzer Mfg. Co. v. Hamburg-Bremen Fire Ins. Co.*, 71 F. 826, 832.

An extension of time for serving case and exceptions does not necessarily avoid the judgment.—It is not necessarily true that a judge's order extending the time for serving case and exceptions on a motion for a new trial is a direction that the motion should be heard at a subsequent term, or that a judgment entered before the hearing of the motion for a new trial be suspended or become void. See *Murdock v. Courtenay Mfg. Co.*, 52 S. C. 428, 29 S. E. 856, 30 S. E. 142.

Facts as basis for new trial under this section must occur at trial.—See this catchline under sec. 605, wherein are treated the cases of *Sams v. Hoover*, 33 S. C. 401, 12 S. E. 8; *Clawson v. Hutchinson*, 14 S. C. 517; *State v. David*, 14 S. C. 428.

See generally, Charles v. Jacobs, 5 S. C. 348, 349.

ARTICLE 2

Drawing and Summoning Jurors

- 607. Jury commissioners.
- 608. Jury list.
- 609. Jury box.
- 610, 617, 618. Drawing and summoning jurors.
- 611. Place and manner of drawing jurors.
- 612 and 613. Method of selection.
- 614. Additional jurors.
- 615. Drawing jurors from tales box.
- 616. Number of jurors drawn.
- 619. Special jury list.

- 620. Irregularities.
- 621. Special juries.
- 622. Vacancy in jury commissioners.
- 623. Remedy when commissioners fail to prepare list.
- 624. No compensation for commissioners.
- 625. Term of jurors.
- 626. Grand jury may employ accountant.
- 626-1 and 626-2. Alternate jurors.
- 626-3. Jury commissioners disqualified.

§ 607. Jury commissioners—personnel.—The county auditor, the county treasurer and the clerk of the court of common pleas of each county in this State shall perform the duties hereinafter set forth: *provided*, that in each county in this State containing a city having more than seventy thousand (70,000) population, according to the official United States census, such duties shall be performed by the county auditor, the county treasurer, and the judge of the county court, or other court in the county inferior to the circuit court, having both civil and criminal jurisdiction, who shall be known as the jury commissioners.

1932 Code, § 607; Civ. P. '22, § 547; Civ. C. '12, § 4016; Civ. C. '02, § 2909; G. S. 2254; R. S. 2373; 1871 (14) 690; 1874 (15) 638; 1893 (21) 524; 1896 (22) 16; 1902 (23) 1066; 1939 (41) 27; 1941 (42) 70.

A mere irregularity is not grounds for quashing the array of jurors.—The fact

that the clerk of the board of commissioners prepared a list of electors from

the tax books which were canvassed and revised by the proper officers, was a mere irregularity, and therefore insufficient grounds for quashing the array of jurors. *Rhodes v. Southern Ry. Co.*, 68 S. C. 494, 47 S. E. 689, Ann. Cas. 13C, 436, cited in *Hutto v. Southern Ry. Co.*, 75 S. C. 295, 55 S. E. 445, 19 L. R. A. (N. S.) 1008, Ann. Cas. 12C, 631. See also, *State v. Smalls*, 73 S. C. 516, 53 S. E. 976.

In general.—Statutes prescribing the time and manner of selecting jurors are merely directory, and venirees will not be quashed for mere irregularities. *State v. Washington*, 82 S. C. 341, 64 S. E. 386; *State v. Smalls*, 73 S. C. 516, 53 S. E. 976; *Hutto v. Southern Ry. Co.*, 75 S. C. 295, 55 S. E. 445, 19 L. R. A. (N. S.) 1008, Ann. Cas. 12C, 631; *State v. Smith*, 77 S. C. 248, 57 S. E. 868.

Purpose of law.—The purpose of our jury laws is to obtain fair and impartial jurors of good citizens who possess the constitutional qualifications of jurors and to have in the courts, when needed, the proper number of such jurors. *State v. Wells*, 162 S. C. 509, 161 S. E. 177.

Order directing jury panel be made up from box filled before plaintiff commenced his action sustained, although clerk of court was related to plaintiff. *Turner v. Southern Ry. Co.*, 179 S. C., 38; 183 S. E. 579.

For a case dealing with the prior standing of this section, see *State v. Powers*, 59 S. C. 200, 37 S. E. 690.

This section is not inconsistent with sec. 622. *State v. Nelson*, 80 S. C. 373, 61 S. E. 897, 898.

§ 608. Preparation of jury list—place electors on—when prepared.—The said county auditor, county treasurer, and the clerk of court of common pleas of each county shall in the month of December of each year, prepare from the official enrollment books of qualified electors, a list of such qualified male electors, under the provisions of the Constitution, between the ages of twenty-one and sixty-five years, of good moral character, of their respective counties, as they may deem otherwise well qualified to serve as jurors, being persons of sound judgment and free from all legal exceptions, which list shall include not less than two from every three of such qualified electors under the provisions of the Constitution, between the ages of twenty-one and sixty-five years, and of good moral character, to be selected without regard to whether such persons live within five miles or more than five miles from the court house: that the names of the persons on the list so prepared shall be written each on a separate paper or ballot, which paper or ballot shall be of like kind and weight, so as to resemble each other as much as possible, without any distinguishing marks, and so folded that the name thereon shall not be visible on the outside, and each such paper or ballot shall be placed in a separate capsule or container and placed in substantial box of such size and weight that they may be easily shaken up and about and well mixed therein. *Provided, further*, that the presiding judge shall at each term of court, ascertain the qualifications of jurors by having them present to the clerk of court their registration certificates or other satisfactory evidence that they are qualified electors: *provided, further*, that when the name of a person is drawn from the jury box for jury service by the jury commission, such person shall serve as a juror, unless it be known at the time to the jury commission that the person is dead, disqualified or removed from the county and the names of such, as have been drawn and not notified to attend, shall be entered on a list and certified to the court, together with the reasons why such jurors have not been selected for jury service: *provided*, that in each county in this State containing a city having more than seventy thousand (70,000) population, according to the official United States census, such list shall include not less than one from every three of such qualified electors, and such duties shall be performed by the county auditor, the county treasurer, and the judge of the county court, or other court in the county

inferior to the circuit court, having both civil and criminal jurisdiction, who shall prepare said list during the month of July in each year.

1932 Code, § 608; Civ. P. '22, § 548; Civ. C. '12, § 4017; 1902 (23) 1066; 1915 (29) 76; 1933 (38) 446; 1939 (41) 27, 332, 543; 1941 (42) 70.

Cross references.—As to special jury lists in certain cases, see sec. 619 and note thereto. As to when objection to jurors must be made, see sec. 639 and note thereto. As to how grand juries are drawn, see sec. 973 and note thereto. As to who may be grand jurors and who are jurors for trials, see sec. 976 and note thereto. For constitutional provision pertaining to trial by jury, see art. 5, sec. 22, of the State Constitution of 1895.

Editor's note.—Attention is called to the fact that under the authority of section 976, grand jurors shall be drawn, summoned, and returned in the same manner as jurors for trials, as prescribed by this and the following sections of this article.

In general.—The framers of our organic law so wrote these provisions because they desired in the jury boxes, both to accuse, and to try, for criminal offenses, and for the general duties of grand jurors, so important to the welfare of the state, only men who are residents of the state and county, men who loved the commonwealth, men interested and informed enough to qualify themselves for citizenship, men of character and standing—in short, "The men who make a State"—that those whose lives, liberties, and property might be at stake would feel that their causes, if just, would be justly decided. *State v. Rector*, 158 S. C. 212, 155 S. E. 385, 396.

Constitutionality of section.—This section is not unconstitutional as giving the jury commissioners power to add qualifications which control those provided by the Constitution. *State v. Sanders*, 103 S. C. 216, 88 S. E. 10, 12, Ann. Cas. 17C, 1168.

This section simply provides for an exercise of judgment in attempting to secure competent jurors of proper qualifications. *Franklin v. South Carolina*, 218 U. S. 161, 54 L. Ed. 980, 30 S. Ct. 640, 642, see also, the authority therein cited.

Section is not discriminatory.—There is nothing in this section which discriminates against individuals on account of race or color or previous condition, or which subjects such persons to any other or different treatment than other electors who may be qualified to serve as jurors. *Franklin v. South Carolina*, 218 U. S. 161, 54 L. Ed. 980, 30 S. Ct. 640, 642; *State v. Sanders*, 103 S. C. 216, 88 S. E. 10, 11, Ann. Cas. 17C, 1168.

Competent colored men are equally eligible with others for service under this section. *Franklin v. South Carolina*, 218 U. S. 161, 54 L. Ed. 980, 30 S. Ct. 640, 642.

Any good citizen qualified under the Constitution may be drawn.—Any good citizen qualified under the constitution may be drawn under the authority of this section and § 976 to serve on the grand jury. *State v. Graham*, 79 S. C. 116, 60 S. E. 431, L. R. A. 1917A, 240.

Registration books should be consulted by commissioners in property list of jurors.—This is for the purpose of ascertaining whether persons selected are registered electors. But commissioners are not required to do so. *State v. Gregory*, 171 S. C. 535, 172 S. E. 692.

Registration certificates invalid where signed by clerk in office of board.—A grand jury returning murder indictment was not legally qualified, and defendant would be granted new trial, where five members of grand jury were not legally registered electors due to the fact that their certificates of registration were not signed by two members of county board of registration but merely by clerk in office of board placing signatures of members thereon at direction of members.—*State v. Bibbes*, 192 S. C. 231, 6 S. E. (2d) 276.

This section does not confer on the jury commissioners the right of selection. *Humphrey v. Palmer*, 89 S. C. 401, 71 S. E. 977, 978.

But they may strike from the list persons not possessing the necessary qualifications.—It was held in the case of *State v. Mills*, 79 S. C. 187, 60 S. E. 664, 37 L. R. A. (N. S.) 254, 16 L. R. A. 417, that in the drawing of a jury it was proper for the officers charged with that duty to strike from the list the names of all persons deemed by them not to possess the qualification prescribed by statute.

Such qualifications relate to the time when the juror is to serve.—It was said in the case of *State v. Williams*, 2 Hill 381, that the qualifications of a juror relate to the time when he is to serve, and a want of such qualifications is a cause of challenge to the poll.

But this is not true as to a mere failure to register prior to service.—This section is mandatory, and when construed with Const., art. 2, §§ 4, 8, and art. 5, § 22, and other sections of the Code, affords no basis for the disqualification of jurors duly registered when drawn, notwithstanding the fact that they had not reregistered prior to service the following year. *Veronee v. Charleston Consol. Ry., etc., Co.*, 152 S. C. 178, 149 S. E. 753, 755.

This section no doubt contemplates that the names placed in the box should

be considered by the jury commissioners as a body. *State v. Jones* (S. C.), 75 S. E. 449.

But the failure to give such consideration is nothing more than a mere irregularity. *State v. Jones* (S. C.), 75 S. E. 449.

A drawing for a jury list made, in the absence of the auditor, by the other two commissioners is valid. *State v. Merri-man*, 34 S. C. 16, 12 S. E. 619, 82 Am. St. Rep. 28, 95 Am. St. Rep. 771, 15 L. R. A. 672, 20 L. R. A. 615, 45 L. R. A. 689, 700, 14 L. R. A. (N. S.) 740, 30 L. R. A. (N. S.) 848, L. R. A. 1918A, 667, 694.

The fact that the supervisors and not the jury commissioners prepared the lists, from which names to fill the jury box were made up, but which lists were canvassed by such commissioners in January instead of December, as provided for by this section, does not vitiate the panel. *Hutto v. Southern Ry. Co.*, 75 S. C. 295, 55 S. E. 445, 19 L. R. A. (N. S.) 1008, Ann. Cas. 12C, 631; *State v. Smith*, 77 S. C. 248, 57 S. E. 868.

But it is otherwise where such irregularity is material.—It was held in the case of *State v. Rector*, 158 S. C. 212, 155 S. E. 385, that the court properly quashed an indictment where at least

two of seventeen grand jurors who participated in the finding of the said indictment were not registered electors and were disqualified to so act.

The objections must be made before the trial.—When the party wishes to avail himself of the failure to comply with the section, due diligence requires that he make inquiries of those who participated in the proceedings prescribed by the section and make his objections then and there before the trial. *State v. Jones* (S. C.), 75 S. E. 449. See § 639 and note thereto.

Exemption from jury duty does not disqualify one from acting as a juror. *State v. Toland*, 36 S. C. 515, 15 S. E. 599, 600, L. R. A. 1916 A, 820, Ann. Cas. 12C, 283.

Jury commissioners should place at least one from every three qualified electors in the main box. When they failed to place the required number of qualified electors of the proper ages on the jury list, and to put their names in the jury box, they omitted "to prepare the ballots of the names and place them in the boxes, at the time and in the manner required" by this section. *State v. Wells*, 162 S. C. 509; 161 S. E., 177.

§ 609. Jury box—how prepare—how secured and kept—prepare tales box.

—Of the list so prepared, the county auditor, county treasurer, and clerk of the court of common pleas shall cause names to be written, each one on a separate paper or ballot, so as to resemble each other as much as possible and so folded that the name written thereon shall not be visible on the outside, and shall place them with the said list, in a strong and substantial box, without apertures or openings when closed (to be known as the "Jury Box") to be furnished to them by the county supervisor of their county for that purpose, and of such size and shape as that, when such separate papers or ballots shall have been folded and placed therein as above required, they may be easily shaken up and about and well mixed therein, and it shall be the duty of the clerk of the court to keep said jury box in his custody. The said jury box shall be kept securely locked with three separate and strong locks, each lock being different and distinct from the other two and requiring one key peculiar to itself in order to be unlocked and the key to one of said three locks shall be kept by the county auditor himself, the key to another of said three locks by the county treasurer himself, and the key to the third of said three locks by the clerk of the court of common pleas himself, so that no two of them shall keep a similar key or similar keys to the same lock, and so that all three of them must be present together at the same time and place in order to lock or unlock and open the said jury box. At the same time they shall place in a special apartment in the said jury box (which special apartment shall be known as the "Tales Box") the names of not less than one hundred (100) nor more than eight hundred (800) of such of the persons whose names appear on said list as reside within five miles of the court

house, from which tales box shall be drawn jurors to supply deficiencies arising from any cause of emergency during the sitting of the court. The names of persons placed in said tales box shall be also placed in said jury box. *Provided*, that in each county in this State containing a city having more than seventy thousand (70,000) population, according to the official United States census, the jury commissioners in such county shall cause the names on the jury list to be written, each one on a separate paper, or ballot, which shall be white and plain, and shall resemble each other as much as possible, and shall be so folded that the name written thereon shall not be visible on the outside, and shall place each of said ballots, or separate papers, in a separate small opaque capsule, or container, which shall be uniform in size, shape and color; the said capsules or containers shall be placed, with the said list, in a strong and substantial box, without apertures or openings when closed (to be known as the "Jury Box"), which box and capsules shall be furnished to the jury commissioners by the county supervisor of their county for that purpose, and which shall be approved by the resident judge of the circuit in which the county lies. The said jury box shall be kept securely locked with three separate and strong locks, to be approved by the resident judge of the circuit, each lock being different and distinct from the other two and requiring one key peculiar to itself in order to be unlocked; the key to one of the said three locks to be kept by the county auditor himself; the key to another of the three locks to be kept by the county treasurer himself; and the key to the third of the three locks to be kept by the other jury commissioner himself, so that no two of them shall keep a similar key, or keys, to the same lock, and so that all three of them must be present, together at the same time and place in order to lock or unlock and open the said jury box. It shall be the duty of the county treasurer to keep said jury box in his custody. At the time of placing the ballots and capsules in the jury box the jury commissioners shall place in a special apartment in the said jury box (which special apartment shall be known as the "Tales Box") the names of not less than one (100) hundred, nor more than eight (800) hundred of such of the persons whose names appear on the said list as residing within five miles of the court house, from which tales box shall be drawn jurors to supply deficiencies arising from any cause or emergency during the sitting of the court. The names of the persons placed in said tales box shall be also placed in the said jury box.

1932 Code, § 609; Civ. P. '22, § 549; Civ. C. '12, § 4018; 1902 (23) 1066; 1921 (32) 276; 1939 (41) 27; 1941 (42) 70.

See section 608 and notes thereto.

Failure to comply strictly with section will not necessarily invalidate panel.—There is no provision that the failure to comply literally with the requirement that the jury commissioners place the names of 150 persons (now not less than 100 or more than 800) qualified by law to serve as jurors in the tales box will invalidate a panel composed in part of persons drawn from the said tales box. *State v. Merriman*, 34 S. C. 16, 12 S. E. 619, 625, 82 Am. St. Rep. 28, 95 Am. St. Rep. 771, 15 L. R. A. 672, 20 L. R. A. 615, 45 L. R. A. 689, 700, 14 L. R. A. (N.

S.) 740, 30 L. R. A. (N. S.) 848, L. R. A. 1918A, 667, 694.

And mere irregularities are not fatal.—The fact that one of the keys provided for by this section would open two of the three locks is a mere irregularity which is not fatal. *State v. Smith*, 77 S. C. 248, 57 S. E. 868.

Leaving the list in the clerk's office and not in the jury box as prescribed by this section, and the fact that there were two lists instead of one, are mere irregularities. *Rhodes v. Southern Ry. Co.*, 68 S. C. 494, 47 S. E. 689, Ann. Cas. 13C, 436, cited in *Hutto v. Southern Ry. Co.*, 75 S.

C. 295, 55 S. E. 445, 19 L. R. A. (N. S.), 1008, Ann. Cas. 12C, 631.

Differences between grand jury box tickets or ballots, some of which had blue lines and others red lines, and some vertical and others horizontal lines, on them, as result of cutting same sort of

white paper, on which were both red and blue ruled lines, were mere irregularities insufficient to justify quashing of indictment, found by jury drawn from such box, or petit jury venire and panel. State v. Orrs, 189 S. C. 1, 199 S. E. 865.

§ 610. Petit jurors—drawing and summoning.—Not less than ten nor more than twenty days before the first day of each week of any regular or special term of the circuit courts the said county auditor and the county treasurer, and the clerk of the court of common pleas shall proceed to draw thirty-six petit jurors to serve for such week only: *provided*, that it shall be the duty of the jury commissioners for Marlboro County to draw and issue a venire for a full complement of thirty-six jurors to serve for each week provided by law for the holding of the court of common pleas for said county: *provided, further*, that whenever a jury shall be charged with a case, such jury shall not be discharged by reason of anything in this section contained until a verdict shall be found or a mistrial ordered in such case. Immediately after such petit jurors are drawn, the clerk of the court of common pleas shall issue his writ of venire facias for such petit jurors, requiring their attendance on the first day of the week for which they have been drawn; and the said writ of venire facias shall be forthwith delivered to the sheriff of the county: *provided*, that in each county in this State containing a city having more than seventy thousand (70,000) population, according to the official United States census, the jury commissioners immediately after such petit jurors are drawn, or, in the case of the drawing of jurors from the tales box, immediately after the same have been drawn, shall certify to the clerk of court of common pleas the list of jurors so drawn and said clerk shall file in his office and shall issue his writ of venire facias for said petit jurors requiring their attendance on the first day of the week for which they have been drawn, or, if drawn from the tales box, on such day as the court may direct; the said writ of venire facias shall forthwith be delivered to the sheriff of the county.

1932 Code, § 610; Civ. P. '22, § 550; Civ. C. '12, § 4019; 1902 (23) 1066; 1916 (29) 820; 1939 (41) 27; 1941 (42) 70.

Cross reference.—As to how vacancies in the jury commission are filled, see § 622 and note thereto.

Editor's note.—Under the former standing of this section it was provided that, "if there shall be drawn from the jury box, a ballot containing the name of any person not between the ages of twenty-one and sixty-five, or not of good moral character, or who has died, or who has removed from the county, or is otherwise disqualified, such name shall be destroyed and such name struck from the list." This provision was rendered unnecessary by the provisions found in § 608, which deal with the preparation of the jury list. That section provides that a person's name shall not appear on the jury list unless such person is between the ages of twenty-one and sixty-five and of good moral character. See Humphrey v. Palmer, 89 S. C. 401, 71 S.

E. 977.

Actual drawing from box is mechanical.—The actual drawing from the box under the contrivance of this section is entirely mechanical except for the discretion lodged in the commissioners to reject or select a name after it is drawn. Humphrey v. Palmer, 89 S. C. 401, 71 S. E. 977, 978.

And the absence of clerk and county superintendent of education does not vitiate panel.—The mere absence of the clerk and the county superintendent of education does not vitiate a drawing of a venire, there being present a majority of the three officers charged with the duty of so drawing. State v. Nelson, 80 S. C. 373, 61 S. E. 897, 898. See also State v. Merriman, 35 S. C. 607, 14 S. E. 394.

Nor does the presence and assistance of the sheriff in the said drawing vitiate

the panel, where his participation is in good faith and under a mistaken construction of § 622 and it does not appear that the drawing was improperly done by the officers so charged by law with that duty, or that any prejudice resulted from the sheriff's presence and assistance. *State v. Nelson*, supra.

But close relationship of commissioner with deceased is ground to challenge the array in a murder case.—In a murder trial the fact that the jury commissioner is a near blood-relation of the deceased and that he assisted at the drawing of the jury, is a good ground of challenge to the array. *State v. McQuaige*, 5 S. C. 429, 27 L. R. A. 784.

However, this is not true where the relationship is by marriage and remote. *State v. McNinch*, 12 S. C. 89, 27 L. R. A. 784, 28 L. R. A. 369.

Venire must be issued in name of state.—If it appears anywhere in the writ of venire that it was issued in the name of the state it is a sufficient compliance with art. 5, § 31, of the state constitution providing that all writs and processes shall run in the name of the State of South Carolina. *State v. Hill*,

19 S. C. 435, 440, 3 Am. St. Rep. 283.

A writ of venire commencing "State of South Carolina, county of Spartanburg. To the sheriff of Spartanburg county" is a sufficient compliance with the constitutional requirements of article 5, § 31. *State v. Hill*, 19 S. C. 435, 440, 3 Am. St. Rep. 283.

And it must bear the seal of the court, or the judgment will be arrested.—It was said in the case, *State v. Dozier*, 2 Speers 211, 27 L. R. A. 779, Ann. Cas. 14C, 759, that, where the writs of venire by which the grand and petit jurors were summoned are without the seal of the court, the judgment will be arrested. See also, *State v. Williams*, 1 Rich. 188, 27 L. R. A. 779, Ann. Cas. 14C, 759; *State v. Stephens*, 11 S. C. 319.

And judgment will be arrested if the jury be illegally drawn. *State v. Jennings*, 15 Rich. 42.

Order directing jury panel be made up from box filled before plaintiff commenced his action sustained, although clerk of court was related to plaintiff. *Turner v. Southern Ry. Co.*, 179 S. C., 38; 183 S. E., 579.

§ 611. Draw jurors publicly.—The said drawing shall be made openly and publicly in the office of the clerk of the court of common pleas, and the county auditor, the county treasurer and the clerk of the court of common pleas shall give ten days' notice of each of said drawings by posting in a conspicuous place on the court house door, or by advertisement in a county newspaper, a notice of the place, day, and hour of such drawing: *provided*, that in each county in this State containing a city having more than seventy thousand (70,000) population, according to the official United States census, the said drawing shall be made openly and publicly in the court house in the court room in which the circuit court sits, after the giving by the jury commissioners of the notice hereinabove provided for, in the following manner: all of the containers or capsules containing ballots or separate papers provided for in the proviso to section 609, shall be taken by the jury commissioners from the jury box, or, in the case of the drawing of jurors to supply deficiencies arising from any cause or emergency during the sitting of the court, from the tales box, and the same shall be placed in a drum, cylindrical in shape, and having a handle at the end thereof, and resting upon such supports that it can be turned by means of the said handle, the said drum and other equipment to be furnished by the county supervisor and approved by the resident judge of the circuit; and when the said containers or capsules shall have been placed in the said drum, it shall be completely closed and securely fastened and rotated by means of the said handle for a sufficient length of time necessary for a complete mixing of the containers or capsules, and the required number of jurors shall then be drawn, one by one, and the containers or capsules opened and checked by the commissioners to see whether the person so drawn has already been drawn during the calendar year, and the list of the required number of jurors so drawn and found not to have al-

ready been drawn in such calendar year shall be made by one of the commissioners and duly certified by the commissioners to the clerk of the court of common pleas, as provided in section 610, as amended, and after the said jurors shall have been drawn, the containers or capsules remaining in the drum shall be returned to the jury box, or to the tales box, as the case may be, and duly locked therein.

1932 Code, § 611; Civ. P. '22, § 551; Civ. C. '12, § 4020; 1902 (23) 1066; 1939 (41) 27; 1941 (42) 22, 70.

Editor's note.—Under the early standing of this section it seems that the jurors were drawn in the presence of the clerk of the court and the sheriff of the county, and such drawing was not required to be done publicly. *State v. Merriman*, 34 S. C. 16, 12 S. E. 619, 82 Am. St. Rep. 28, 95 Am. St. Rep. 771, 15 L. R. A. 672, 20 L. R. A. 615, 45 L. R. A. 689, 700, 14 L. R. A. (N. S.) 740, 30 L. R. A. (N. S.) 848, L. R. A. 1918A, 667, 694.

Importance to give ten days' notice before a special term is not reversible error.—Where a special term of court has been ordered, rendering it impossible to give the ten days' notice before the drawing of the jury as prescribed in this section, such failure to give the ten days' notice was held not to be reversible error. *State v. Gossett*, 117 S. C. 76, 108 S. E. 290, 294, 16 A. L. R. 1299, 1307.

Parties should attend the drawing in order to ascertain regularity thereof.—As a party has a right under this section to be present at the drawing, he should ascertain whether a jury commissioner, related to another party, improperly performs his duty; and hence it is not an abuse of discretion of the trial court to overrule an objection to the entire venire, if there is nothing to show that the commissioners improperly influenced the selection. *Humphrey v. Palmer*, 89 S. C. 401, 71 S. E. 977.

A drawing behind closed doors is invalid.—A drawing in the office of the county commissioner, with closed doors and notice posted thereon that no one will be admitted, is illegal and renders a conviction by a jury so drawn invalid. *State v. Turner*, 63 S. C. 548, 41 S. E. 778.

§ 612. Jurors selected by draft.—All jurors shall be selected by drawing ballots from the said jury box, and, subject to the exceptions hereinbefore contained, the persons whose names are on the ballots so drawn shall be returned to serve as jurors.

1932 Code, § 612; Civ. P. '22, § 552; Civ. C. '12, § 4021; 1902 (23) 1066.

As to draft from tales box, see § 615.

§ 613. Disposition of names drawn.—The names of those who are drawn and actually serve as jurors shall be placed in an envelope, and shall not be put back into the said jury box until the first revision of the jury list herein provided for after they have been so drawn, to the end that no person shall serve as a juror more than once in one year. The same rule shall be observed as to drawing jurors from the said tales box: *provided*, that nothing herein contained shall be construed to be in conflict with the provisions of the law as to selecting by lot from the grand jury six members thereof to serve for the ensuing year.

1932 Code, § 613; Civ. P. '22, § 553; Civ. C. '12, § 4022; 1902 (23) 1066.

§ 614. Venires may issue in term time for additional jurors.—Nothing contained in §§ 607 thru 620 and 622 and 623 shall prevent the clerk of the court of common pleas from issuing venires for additional jurors in term time upon the order of the court, whenever it is necessary for the convenient dispatch of its business, in which case venires shall be served and returned, and jurors required to attend on such days as the court shall direct: *provided*, that in each county in this State containing a city having more than seventy thousand (70,000) population, according to the official

United States census, the clerk of the court of common pleas shall issue such venire after the drawing of the additional jurors by the jury commissioners in the manner set forth in the proviso to section 611, and the certification to him by the commissioners of the jurors so drawn, as provided in section 610, as amended.

1932 Code, § 614; Civ. P. '22, § 554; Civ. C. '12, § 4023; 1902 (23) 1066; 1939 (41) 27; 1941 (42) 70.

Where the sheriff served by mail or in person all of the 36 men named in the original venire, the court after the original panel had been exhausted in a homi-

cide case, was warranted in ordering the issuance of a venire for additional jurors. *State v. Tidwell*, 100 S. C. 248, 84 S. E. 778, 780.

§ 615. Draft from tales box.—In drawing jurors from the said tales box the same rules shall be observed as in drawing from said jury box, except that no notice of such drawing shall be necessary.

1932 Code, § 615; Civ. P. '22, § 555; Civ. C. '12, § 4024; 1902 (23) 1066.

§ 616. Number of jurors to be drawn.—No more than thirty-six persons, to serve as petit jurors, shall be drawn and summoned to attend at one and the same time at any court, unless the court shall so order.

1932 Code, § 616; Civ. P. '22, § 556; Civ. C. '12, § 4025; 1902 (23) 1066.

Whether a greater number of jurors shall be drawn is left to the discretion of the court.—*State v. Jackson*, 32 S. C. 27, 10 S. E. 769, 770, 45 L. R. A. 689, 3 L. R. A. (N. S.) 543, 4 L. R. A. (N. S.) 158, L. R. A. 1916A, 816, citing *State v. Stephens*, 13 S. C. 285, 135 Am. St. Rep. 74, 44 L. R. A. (N. S.) 346, L. R. A. 1916 A, 816.

This section does not make it necessary that the whole number of the 36 jurors should be present at the commencement of the trial. *State v. Jackson*,

32 S. C. 27, 10 S. E. 769, 770, 45 L. R. A. 689, 3 L. R. A. (N. S.) 543, 4 L. R. A. (N. S.) 158, L. R. A. 1916A, 816, citing *State v. Stephens*, 13 S. C. 285, 135 Am. St. Rep. 74, 44 L. R. A. (N. S.) 346, L. R. A. 1916 A, 816.

The fact that one venireman was over-age is not sufficient to sustain motion to quash venire. *State v. Rusou*, 168, S. C., 221; 167 S. E. 396.

§ 617. Sheriff to summon jurors—when.—The grand and petit jurors drawn, as hereinbefore prescribed from the said jury box, shall be summoned by the sheriff as provided by law, at least four days before the time fixed in the venire for them to attend the sitting of the court: *provided*, that in the county of Cherokee and in the counties of Union and Spartanburg the sheriff may summon all grand and petit jurors by sending by registered mail with request for a return card a summons directed to such juror, and also a card for written acceptance by such juror, to be signed and returned to the sheriff. The sheriff shall prepay all postage and keep an account of such as actual expenses, for which he shall be reimbursed by the county board of commissioners in the manner provided by law.

1932 Code, § 617; Civ. P. '22, § 557; Civ. C. '12, § 4026; 1902 (23) 1066; 1913 (39) 26.

In the absence of proof it will be presumed that the venires were properly served. *State v. McGraw*, 35 S. C. 283, 14 S. E. 630, 631.

A formal summons is not necessary if jurors attend.—It matters little how jurors get notice to appear in court if they be fit and rightly selected. They ought to be summoned in a formal manner, and all named in the venire, who can with reasonable diligence be found,

ought to be summoned, and all ought to attend; but a formal summons is not necessary if they attend. *State v. Crosby*, Harp. 90, 91, cited with approval in *State v. Tidwell*, 100 S. C. 248, 84 S. E. 778, 780; *State v. Jeffcoat*, 26 S. C. 114, 1 S. E. 440, 12 Am. St. Rep. 903, 27 L. R. A. 787. See also, *State v. M'Elmurray*, 3 Strob. 33, 43 Am. Dec. 83, 95 Am. St. Rep. 767, 24 L. R. A. (N. S.) 779.

And mere irregularities in the sum-

moning will not impeach the legality of the grand jury.—Mere irregularities in the summoning of jurors cannot have the effect of impeaching the legality of the grand jury who have been legally drawn by the jury commissioners and who actually attended in obedience to the summons received. *State v. Derrick*, 44 S. C. 344, 22 S. E. 337, L. R. A. 1916A, 821.

Nor will the failure to serve a petit juror who was out of the county affect

the arrays.—*State v. Derrick*, 44 S. C. 344, 22 S. E. 337, L. R. A. 1916A, 821.

Service by a deputy is good. *State v. Toland*, 36 S. C. 515, 15 S. E. 599, 600, L. R. A. 1916A, 820, Ann. Cas. 12C, 283.

And this is true of a de facto officer.—Where jurors are summoned by a de facto officer and attend, and are sworn and serve, the authority of such officer cannot be questioned by the defendant. *State v. McGraw*, 35 S. C. 283, 14 S. E. 630, 631.

§ 618. Deficiency in jurors—how supply.—Whenever it shall be necessary to supply any deficiencies in the number of grand or petit jurors duly drawn, whether caused by challenge or otherwise, it shall be the duty of the county auditor, the county treasurer, and the clerk of the court of common pleas under the direction of the court, to draw from the said tales box such number of fit and competent persons to serve as jurors as the court shall deem necessary to fill such deficiency: *provided*, that in each county in this State containing a city having more than seventy thousand (70,000) population, according to the official United States census, such duties shall be performed by the jury commissioners of the county, as prescribed in the proviso to section 607.

1932 Code, § 618; Civ. P. '22, § 558; Civ. C. '12, § 4027; 1902 (23) 1066; 1939 (41) 27; 1941 (42) 70.

Section prescribes procedure in criminal cases.—This is a plain, positive direction as to how to proceed in a criminal case, wherever it shall be necessary to supply any deficiency as to jurors. *State v. Briggs*, 27 S. C. 80, 2 S. E. 854, 857, Ann. Cas. 13D, 1100.

As well as in civil cases. *State v. Williams*, 2 Hill 381.

And a failure to follow such procedure is fatal.—In a case where the judge failed to follow the remedy provided for by this section after the panel had been exhausted by challenges, and adjourned the court until the next week, for which a new venire had been drawn, it was held that the defendant was entitled to a new trial. *State v. Briggs*, 27 S. C. 80, 2 S. E. 854, 857, Ann. Cas. 13D, 1100.

But objections must be made to each juror as he is drawn.—An objection to the mode in which the talesmen are drawn and summoned must be made to each juror as he is presented; it is too late after he is sworn. *State v. Williams*, 2 Hill, 381, 385.

The regular jurors must be exhausted before a drawing can be made under this section. *State v. Anderson*, 26 S. C. 599, 2 S. E. 699, 700.

And there can be no challenge to the array.—There can be no challenge to the array of jurors drawn to supply such deficiency, but each juror may be challenged for reason. *State v. Merriman*, 34 S. C. 16, 12 S. E. 619, 82 Am. St. Rep.

28, 95 Am. St. Rep. 771, 15 L. R. A. 672, 20 L. R. A. 615, 45 L. R. A. 689, 700, 14 L. R. A. (N. S.) 740, 30 L. R. A. (N. S.) 848, L. R. A. 1918A, 667, 694.

It is not necessary for all the parties designated to draw such jurors to see the drawing of the names; it may be done by a majority of them. *State v. White*, 15 S. C. 381, 385.

A drawing is properly made from such special compartment when, in the presence of the court, the board of jury commissioners takes from the jury box the names of the residents designated and then draws the required number. *State v. Cardoza*, 11 S. C. 195, 51 Am. Dec. 94, 27 L. R. A. 787, 52 L. R. A. 839, 53 L. R. A. 538, L. R. A. 1916A, 835.

The court has no power to issue a venire facias for talesmen.—It is said in the case of *State v. Williams*, 2 Hill 381, 384, that under the then standing jury laws of the state the court had no power to issue a venire facias for talesman. But see *State v. Coleman*, 8 S. C. 237, 18 L. R. A. 475.

And judgment will not be arrested for defects in such a writ.—There being no authority for issuing a writ of venire to summon additional jurors, drawn from the tales box, defects in such writs furnish no grounds for an arrest of judgment. *State v. Hill*, 19 S. C. 435, 439, 3 Am. St. Rep. 283; *State v. Gilreath*, 19 S. C. 603.

§ 619. Special jury lists in certain cases.—Whenever the jury list of any county shall be destroyed by fire or other casualty, or whenever it shall be held by any court of competent jurisdiction that the jury list of any county has been unlawfully prepared, or is irregular or illegal, so as to render void the drawing of jurors therefrom, it shall be the duty of the county auditor, the county treasurer, and the clerk of the court of common pleas of each county to prepare a special jury list for the said county forthwith in the manner herein prescribed, from which special list grand and petit jurors shall be drawn for the courts of general sessions and common pleas for said county until the annual jury list shall have been prepared for such county as herein provided.

1932 Code, § 619; Civ. P. '22, § 559; Civ. C. '12, § 4023; 1902 (23) 1066.

Cross reference.—As to preparation of the jury list, see sec. 608 and note there-to.

In general.—This section and §§ 620, 622 are very broad in their terms. *State v. Malloy*, 91 S. C. 429, 74 S. E. 988, 990, L. R. A. 1917C, 224.

Section prevents delay or interruption of business of court.—This section and §§ 620 and 622 are intended to prevent delay or interruption of the business of the court which would arise but for the powers conferred on the resident judge and

the court. *State v. Malloy*, 91 S. C. 429, 74 S. E. 988, 990, L. R. A. 1917C, 224.

And under the above said three sections the resident circuit judge has authority to require the drawing of a new grand jury where an indictment is quashed because found by a grand jury unlawfully drawn. *State v. Malloy*, 91 S. C. 429, 74 S. E. 988, 990, L. R. A. 1917C, 224.

See *State v. Wells*, 162 S. C. 509, 161 S. E. 177.

§ 620. Duty of circuit judge in case of irregularities.—When at any time it shall be determined by the resident circuit judge of any circuit upon complaint made to him, that an irregularity has occurred in the drawing of the juries for any circuit court within his circuit, or that any act has been done whereby the validity of any juries drawn or to be drawn may be questioned, it shall be lawful for such circuit judge to issue his order to the county auditor, the county treasurer, and the clerk of the court of common pleas for each county for which said circuit court shall be held at least five days before the sitting thereof, to proceed to draw jurors for such term, or take such measures as may be necessary to correct such error.

1932 Code, § 620; Civ. P. '22, § 560; Civ. C. '12, § 4029; 1902 (23) 1066.

The manifest object of this section was to prevent a delay of justice by supplying any deficiency or irregularity in the drawing or summoning of jurors. *State v. Toland*, 36 S. C. 515, 15 S. E. 599, 601, L. R. A. 1916A, 820, Ann. Cas. 12C, 283. See also, *State v. Malloy*, 91 S. C. 429, 74 S. E. 988, 990, L. R. A. 1917C, 224, which is annotated under section 619.

It will be observed that the mode of effecting this result is prescribed in language not mandatory, but permissive merely. *State v. Toland*, 36 S. C. 515, 15

S. E. 599, 601, L. R. A. 1916A, 820, Ann. Cas. 12C, 283.

Preparation of jury list.—This section does not confer upon judges the power to direct the preparation of an entirely new jury list; but when this section is considered with section 623 such power is authorized. *State v. Wells*, 162 S. C. 509, 161 S. E., 177.

Grand and petit jurors.—This section applicable to grand and petit jurors. *State v. Wells*, 162 S. C., 509, 161 S. E., 177.

§ 621. Special juries in certain cases.—Whenever at any term of the circuit court the array of grand and petit jurors summoned to attend is held to have been irregularly or illegally drawn or summoned, the presiding judge shall forthwith order, in either case, that the jury commissioners of the county shall immediately prepare a special list and, in open court,

draw a special venire of grand or petit jurors, or draw such special jury from the last list, prepared according to law, which special grand or petit jury so drawn and summoned shall serve instead of those discharged at such term.

1932 Code, § 621; Civ. P. '22, § 561; 1912 (27) 772.

§ 622. Jury commissioners—vacancy.—In case there shall be a vacancy in the office of the clerk of court of common pleas, county auditor or county treasurer, at the time herein fixed for preparing said jury list, or for drawing a jury, or any of said officers shall be disqualified or unable to serve for any cause, the county superintendent of education shall act in his place and stead, and in case there shall be a vacancy in two of said offices, or for any other cause, two of said officers shall be unable to serve, the county superintendent of education and the sheriff of such county shall act in their places and stead: *provided*, should any of the above commissioners be disqualified, the resident circuit judge or the presiding judge shall appoint a commissioner, or commissioners to serve in the place of such commissioner or commissioners as may be disqualified during the time of his or their disqualification, each of whom shall receive the same per diem and mileage as is paid jurors. *Provided*, that in each county in this State containing a city having more than seventy thousand (70,000) population, according to the official United States census, should there be a vacancy in the office of any of the jury commissioners in such county, as prescribed in the proviso to section 607, at the time herein fixed for preparing said jury list, or for drawing a jury, or should any one of said officers be disqualified or unable to serve for any cause, the county superintendent of education of said county, or the assistant county superintendent of education of said county, shall act in his place and stead and, in case there shall be a vacancy in two of said offices, or for any other cause two of said officers shall be unable to serve, the county superintendent of education, or the assistant county superintendent of education, and the sheriff shall act in their place and stead.

1932 Code, § 622; Civ. P. '22, § 562; Civ. C. '12, § 4030; 1902 (23) 1066; 1930 (36) 1239; 1936 (39) 1340; 1939 (41) 27; 1941 (42) 70.

In general.—This section fails to make any express provision for the substitution of the sheriff in the event that the superintendent of education is unable to serve. *State v. Nelson*, 80 S. C. 373, 61 S. E. 897.

Under a strict and literal interpreta-

tion of this section the sheriff is eligible to act only in the event that two of the three offices, namely, of county auditor, county treasurer, and clerk of the court, are vacant, or two of the said officers are unable to serve. *State v. Nelson*, 80 S. C. 373, 61 S. E. 897.

§ 623. List of juries when jury commissioners fail to prepare list.—When the jury commissioners in any county in this State shall have heretofore omitted or shall hereafter omit to prepare the list of jurors for the then ensuing year, or to prepare the ballots of the names and place them in the boxes, at the time and in the manner required in §§ 607 thru 620 and 622 and 623 the Chief Justice, any associate justice of the Supreme Court or any circuit judge shall have the authority and is required to grant an order on the application of any solicitor or attorney at law, showing such omission by affidavit, which may be on information and belief, requiring the jury commissioners in question, within ten days after such

order, to prepare said lists and ballots of names and to prepare the jury boxes (nunc pro tunc), and all juries drawn from said boxes shall be as valid and lawful as if the said omission had not occurred.

1932 Code, 623; Civ. P. '22, § 563; Civ. C. '12, § 4031; 1905 (24) 917.

Editor's note.—The reference to "this act" is to sections 607-620, and 622.

See notes to § 620.

Authority of circuit judge.—Under this section a circuit judge has authority to

direct the preparation of an entirely new jury list from which general and petit jurors may be drawn. *State v. Wells*, 102 S. C. 509, 161 S. E. 177.

§ 624. Jury commissioners serve without compensation. — The said county auditor, county treasurer and clerk of the court of common pleas and general sessions shall perform the duties required of them as jury commissioners without compensation: *provided*, that in each county of this State containing a city having a population of more than seventy thousand (70,000) population, according to the official United States census, the jury commissioners prescribed in the proviso to section 607 shall perform the duties required of them as jury commissioners without compensation.

1932 Code, § 624; Civ. P. '22, § 564; Civ. C. '12, § 4032; Civ. C. '02, § 2910; G. S. 2235; R. S. 2374; 1893 (21) 524; 1939 (41) 27; 1941 (42) 70.

§ 625. Term of jurors.—Whenever the term of the court of general sessions and common pleas in the counties of Edgefield, Barnwell, Marion, Marlboro, Cherokee, Aiken, Richland, Orangeburg, York, Greenville, Colleton, Chester, Darlington, Florence and Union shall be for two or more weeks, no petit juror shall be required to serve more than one week at any term of said courts: *provided*, that in the counties of Marlboro and Marion an extra venire shall be drawn for the spring term of each alternate year only, beginning with the year 1899 in Marlboro county and in the year 1900 in Marion; the clerks of the said counties shall receive no extra compensation for issuing such venire, and the sheriffs of said counties shall receive no compensation for serving same, except mileage shall be allowed. Thirty-six jurors shall be drawn in the manner provided by law to serve for the first week, and a like number shall be drawn for each subsequent week of each term of said courts; but whenever a jury shall be charged with a case, such jury shall not be discharged by reason of anything in this section contained until a verdict shall have been found or a mistrial ordered in such case: *provided*, that the thirty-six jurors drawn in the county of York for the second week, and in the county of Barnwell for the second week of each winter term, and in the county of Aiken for the second week of each Spring Term of said courts, and in the counties of Darlington and Florence for the second week of each fall term of said courts, and for the counties of Marion and Marlboro for the second week of each term of said courts, may be held over after the expiration of the time for which they were drawn, and until the business of the sessions docket and the business on calendar one (1) of the court of common pleas for these counties shall be disposed of. Separate writs of venire shall issue for the jurors drawn to serve for each week of said terms of court, except as provided in section 610 for the drawing and issuance of a venire for a full complement of thirty-six jurors to serve

for each week provided by law for the holding of the court of common pleas for Marlboro county.

1932 Code, § 625; Civ. P. '22, § 565; Civ. C. '12, § 4033; Civ. C. '02, § 2927; G. S. 2258; R. S. 2401; 1901 (23) 631; 1906 (25) 109; 1916 (29) 820.

§ 626. Grand jury may employ expert accountant.—Grand juries may, whenever in their judgment it becomes necessary, employ one or more expert accountants to aid them to examine and investigate the offices, books, papers, vouchers and accounts of any public officer of their respective counties, and to fix the amount of compensation or per diem to be paid therefor, upon the approval of the presiding or circuit judge given before any expert is employed.

1932 Code, § 626; Civ. P. '22, § 566; Civ. C. '12, § 4034; 1909 (26) 121.

As to how grand juries are drawn, see § 973 and note thereto.

See generally, *State v. Jennings*, 15 Rich. 42; *State v. M'Elmurray*, 3 Strob. 33, 43 Am. Dec. 83, 95 Am. St. Rep. 767, 24 L. R. A. (N. S.) 779; *State v. Smalls*, 11 S. C. 262, 58 Am. Dec. 244, 97 Am. Dec. 715, 53 L. R. A. 573, L. R. A. 1916A, 835; *State v. Stephens*, 13 S. C. 285, 135

Am. St. Rep. 74, 44 L. R. A. (N. S.) 346, L. R. A. 1916A, 816; *State v. Clyburn*, 16 S. C. 375, L. R. A. 1916A, 816; *State v. Mills*, 79 S. C. 187, 194, 60 S. E. 664, 37 L. R. A. (N. S.) 254, 16 A. L. R. 417; *State v. Graham*, 79 S. C. 116, 118, 60 S. E. 431, L. R. A. 1917A, 240; *State v. Perry*, 73 S. C. 199, 53 S. E. 169.

§ 626-1. Alternate jurors for original grand or petit jurors drawn for year's first term of criminal court.—There shall be drawn and summoned annually in the same manner and at the same time as the original twelve (12) grand jurors are drawn and summoned, three (3) additional jurors to act, first in the place and stead of any of the original (18) grand jurors who may be incapacitated, disqualified or excused; and who, when not needed for grand jury service, may likewise serve as petit jurors during the first term of criminal court for the year. The names of such three (3) alternate or substitute, jurors shall be kept separate, and numbered in the order drawn; and in such order, unless excused by the presiding judge, shall be held to serve when found necessary. Should the provisions of this section not be complied with, additional jurors shall be drawn as now provided by law, and all existing laws are declared complementary hereto.

1936 (39) 1458.

§ 626-2. Alternate jurors for circuit courts.—Whenever in the opinion of a presiding judge of a court of common pleas or general sessions of any county of this State, about to enter upon the trial of a civil or criminal case, the trial is likely to be a protracted one, the court may cause an entry to that effect to be made in the minutes of the court, and, immediately after the jury is empanelled and sworn, the court shall direct the calling of one or two additional jurors in its discretion, to be known as alternate jurors. Such jurors must be drawn from the same source and in the same manner, and have the same qualifications as the juror already sworn, and be subject to the same examination and challenge: *provided*, that in criminal cases the prosecution shall be entitled to one and the defendant to two pre-emptory challenges for each such alternate jurors; and in civil cases, each party shall have one strike for each alternate juror. Such alternate jurors shall sit near the jury panel charged with the case, and shall have

the same opportunities for seeing and hearing the proceedings in the case, and shall take the same oath as the jurors already sworn and must attend at all times the trials of the cause in company with the other jurors. They shall obey the orders of, and be bound by, the admonition of the court upon each adjournment of the court; and, if the regular jurors are ordered to be kept in custody by the court during the trial of the cause, such alternate jurors shall also be kept in confinement with the other jurors, and, except as hereinafter provided shall be discharged upon the final submission of the case to the jury. If, before the final submission of the case to the jury, a jury thereon dies or becomes so ill or disabled as to be unable, in the judgment of the court, to perform his duties thereon, the court shall order him to be discharged, and draw the name of one of the alternates (if more than one) by ballot, to serve in his place throughout the remainder of the proceedings, being subject to the same rule and regulations as applied to the remainder of jurors, just as though he had been one of the original jurors. If there be but one alternate, then he shall be placed upon the jury panel for all further proceedings in such cause.

1937 (40) 300.

§ 626-3. Jury commissioners disqualified.

(1) **Give notice of motion to quash panel of petit jurors because of disqualification of jury commissioners.**—No motion to quash any panel of petit jurors shall be made because of any relationship, connection or other disqualification on the part of the jury commissioners, or any of them, who made up the jury box, unless notice of such motion in writing be given at least ten days before the convening of any court to the adverse party, or his attorney, which notice shall set forth the ground or grounds for the making of the motion. Failure to give such notice shall be deemed a waiver of any and all rights in reference thereto.

(2) **Procedure to obtain jurors when disqualification exists.**—In case said notice be given and the party upon whom it is served shall concede or it shall be determined by the court that such relationship, connection or disqualification exists, then the moving party shall apply to the resident circuit judge, or the presiding judge of the circuit, either at chambers or in term time, setting out by way of affidavits the said facts, whereupon the said judge shall order the jury commissioners who are not related, connected or disqualified, to make up a special jury box composed of the names of two hundred and forty persons, who are qualified to serve as jurors, from which said special box there shall be drawn the names of thirty-six jurors, who shall be summoned and required to attend as extra jurors and from said extra panel a jury shall be obtained to try the case in which the regular panel is disqualified. In case all of the said jury commissioners are disqualified, then the judge shall designate three others who shall perform the said duty.

(3) **Term of extra panel.**—The said extra or special panel shall be discharged as soon as the need for it ceases.

(4) **Application.**—This section shall apply to all cases now pending or which shall hereafter be brought.

1936 (39) 1431.

ARTICLE 3

Qualification, Exemption, Empaneling and Pay of Jurors

627. County officers, and employees disqualified.

628. Convicted criminals.

629. Persons exempt enumerated.

630. No person drawn more than once a year.

630-1. Persons draw.

631. Procedure when juror excused for cause.

632. Compensation.

634. Empaneling jurors.

635. Foreman of jury.

636. Discharge of jurors.

§ 627. County officers and court employees disqualified.—No clerk, constable, or deputy of the clerk of the court, sheriff, probate judge, county commissioners, magistrates, or other county officer, or any employee within the walls of any court house, shall be eligible as a jurymen in any civil or criminal case.

1932 Code, § 627; Civ. P. '22, § 567; Civ. C. '12, § 4035; Civ. C. '02, § 2933; R. S. 2378; 1889 (20) 69; 1890 (20) 725.

As to qualifications of jurors, see § 22, art. 5, of Constitution of 1895.

A deputy sheriff is ineligible as a jurymen.—Since a "sheriff", a "constable", and a "magistrate" are expressly designated to be ineligible as jurymen, a deputy sheriff vested with like powers and charged with like duties, would seem clearly to be embraced within the term "or other county officer," as used in this section. The word "eligible" in that connection means capable of serving—legally qualified to serve. *State v. Johnson*, 123 S. C. 50, 115 S. E. 748.

And the word "jurymen" is not limited to petit jurymen.—There is no sufficient ground for limiting the word "jurymen", as used in this section, to include a member of the petit jury, and exclude a member of the grand jury. *State v. Graham*, 79 S. C. 116, 60 S. E. 431, L. R. A. 1917A, 240.

Thus a magistrate is prohibited from serving on a grand jury.—There is as

strong reason for prohibiting a magistrate from serving on a grand jury as on a petit jury, since he might have to pass on bills against persons whom he has bound over to the court of general sessions. *State v. Graham*, 79 S. C. 116, 60 S. E. 431, L. R. A. 1917A, 240; *State v. Rector*, 158 S. C. 212, 155 S. E. 385, 389.

For a severe criticism of the phrase "that defendant must show that he was prejudiced by the fact of the grand juror's disqualification," used in *State v. Graham* 79 S. C. 116, 60 S. E. 431, L. R. A. 1917A, 240, which was based upon the decision of *State v. Rafe*, 56 S. C. 379, 34 S. E. 660, see *State v. Rector*, 158 S. C. 212, 155 S. E. 385.—Ed note.

Where defendant's counsel inquired of clerk of court as to qualifications of jurors, and was not informed that one was a constable, this was exercise of diligence sufficient to authorize a new trial. *State v. Elliott*, 169 S. C. 208, 168 S. E. 546.

§ 628. Persons guilty of crime not to be drawn.—If any person whose name is placed in the jury box is convicted of any scandalous crime, or is guilty of any gross immorality, his name shall be withdrawn therefrom by the board of jury commissioners, and he shall not be returned as a juror.

1932 Code, § 628; Civ. P. '22, § 568; Civ. C. '12, § 4036; Civ. C. '02, § 2934; G. S. 2242; R. S. 2379; 1871 (14) 691.

As to the disqualification of persons convicted of certain named offenses, see art. 2, § 6, of the Constitution of 1895.

This section does not modify the standard of qualification fixed by the Constitution.—This section does not modify the standard fixed by the State Constitution; it is merely a direction to the board that makes up the list of jurymen. If the board retains on the list the name of a person whose moral character is called in question, but who is otherwise a qualified elector, the presence of that person

on the grand jury would not invalidate an indictment, since a contrary conclusion would seriously impede the administration of justice. *Christopoulos v. United States*, 230 F. 788.

Thus a person convicted of larceny is disqualified as a juror.—In view of the provisions of this section it seems plain that a person, though entitled to vote, if convicted of larceny, is not liable to be drawn or to serve as a juror, and is therefore not qualified to serve as a juror. *Garrett v. Weinberg*, 54 S. C. 127,

31 S. E. 341, 34 S. E. 70, 50 L. R. A. (N. S.) 948, 50 L. R. A. (N. S.) 977, L. R. A. 1916E, 224, Ann. Cas. 15D, 866, Ann. Cas. 16C, 1210.

See generally. State v. Williams, 35 S. C. 344, 14 S. E. 819, 27 L. R. A. 846, 28 L. R. A. 35, 198, 43 L. R. A. 39, Ann. Cas. 12C, 31.

§ 629. Persons exempt from serving as jurors.—No person shall be exempt from service as jurors in any courts of this State, except officers of the United States and of the state of South Carolina, or any county or municipal corporation while in the actual discharge of their duties as such, and all ordained ministers of the Gospel, registered practicing optometrists, practicing physicians, surgeons, dentists, licensed druggists, licensed embalmers, apothecaries, pharmacists, women, practicing attorneys at law, all men over sixty-five years of age, and all persons in actual transportation service of any railroad in this State: *provided, however*, the presiding judge may for cause shown excuse anyone from jury duty at that term of court if he deems advisable: *provided, further*, that notaries public shall not be deemed and considered state officers and shall not be exempt under this section.

1932 Code, § 629; Civ. P. '22, § 569; Civ. C. '12, § 4037; Civ. C. '02, § 2935; G. S. 2240; R. S. 2380; 1832 (8) 380; 1836 (8) 447; 1871 (14) 690; 1878 (14) 582; 1880 (17) 307; 1884 (18) 713; 1891 (20) 1124; 1896 (22) 19; 1899 (23) 44; 1902 (23) 1028; 1907 (25) 492; 1921 (32) 269, 278; 1923 (33) 95; 1925 (34) 31; 1941 (42) 96.

Exemption from jury service is a privilege and not a disqualification.—Under this section an exemption from jury service is not a disqualification to act as a juror, but is a mere personal privilege, which the juror alone may claim or waive. State v. Graham, 79 S. C. 116, 60 S. E. 431, L. R. A. 1917A, 240; State v. Merriman, 35 S. C. 607, 14 S. E. 394; State v. Toland, 36 S. C. 515, 15 S. E. 599, L. R. A. 1916A, 820, Ann. Cas. 12C, 283.

And therefore a mail carrier may serve

on jury if exemption is waived.—This section, exempting from jury service the marshals of the United States and their deputies and all the officers of the United States, is broad enough to include a rural free delivery carrier, but the parties have no right to object to him on that account, if he does not claim his privilege of exemption. State v. Graham, 79 S. C. 116, 60 S. E. 431, L. R. A. 1917A, 240.

§ 630. No persons liable to be drawn more than once each year.—No person shall be liable to be drawn and serve as a juror in any court oftener than once in every year, but he shall not be so exempt unless he actually attends and serves as a juror in pursuance of draft; nor shall he be exempt from serving on a jury in any other court in consequence of his having served before a magistrate.

1932 Code, § 630; Civ. P. '22, § 570; Civ. C. '12, § 4038; Civ. C. '02, § 2936; G. S. 2241; R. S. 2381; 1879 (16) 307.

§ 630-1. Persons who may draw jurors.—In all cases where provision is made by law, or by rule of court, for a child under ten years of age to draw the names of the jurors, for the purpose of impanelling a jury, it shall be lawful for a person who is totally blind, or for a child under the age of ten years, to draw the names of such jurors, whenever the court may so direct, with the same force and effect as a child under ten years of age can now do, under any law, rule of court, custom or usage.

1933 (38) 285.

§ 631. No juror to be excused except for cause—procedure when so excused.—No juror who has been drawn to serve at any term of the court

shall be excused except for good and sufficient cause, upon affidavits, which together with his application, shall be filed in the office of the clerk of the court, and remain on record: *provided, however*, that whenever a jury shall be so excused, unless the cause of the excuse shall be permanent physical disability of the juror, or the juror shall be a member of one of the classes of persons set forth in section 629, the name of such juror shall be placed by the jury commissioners on the succeeding panel of the same term of court, unless the panel from which the juror shall be excused shall be the last panel for the said term, in which event the name of such juror shall be placed by the jury commissioners on the first panel of the succeeding term of court. The name of such juror so placed on any panel shall be in addition to the thirty-six names now required to be placed thereon under the provisions of section 610, and it shall be the duty of such juror to attend the court on the first day of the week for which he has been so designated without the issuance or service of any further process. And he shall serve as a substitute on such panel in the stead and place of any one of the jurors drawn on such panel whose attendance cannot then be procured or who may be excused from attendance on such panel for cause as hereinabove provided. Nothing herein contained shall be construed as requiring the service of any person as a juror during any calendar year other than the calendar year for which he has been originally drawn under the provisions of section 610.

1932 Code, § 631; Civ. P. '22, § 571; Civ. C. '12, § 4039; Civ. C. '02, § 2937; R. S. 2382; 1871 (14) 690; 1930 (36) 1222.

§ 632. Compensation—per diem and mileage.—Jurors serving in the circuit courts of this State shall, in addition to mileage at the rate of five cents per mile, going to and returning from court, receive a per diem in the several counties of this State, as follows:

(a) In the counties of Abbeville and McCormick, one dollar and fifty cents;

(b) In the counties of Anderson, Berkeley, Calhoun, Clarendon, Dillon, Lancaster, Edgefield, Georgetown, Greenville, Greenwood, Hampton, Laurens, Lee, Marion, Marlboro, Newberry, Oconee, Richland, Saluda, Spartanburg, Williamsburg and York, two dollars.

Provided, that in the county of Marlboro petit jurors shall receive, in addition to the per diem, two dollars for each night when detained on jury duty after ten o'clock p. m.

Provided, further, that in the county of Calhoun compensation of constables and court criers shall be the same as that fixed by jurors. *Provided, further*, that in Calhoun County not more than two constables shall be engaged for attendance upon the court of common pleas and not more than three shall be engaged for attendance upon the court of general sessions, except that the presiding judge may provide by order for additional constables upon the necessity therefor being made to appear to his satisfaction.

(c) In the counties of Union and Pickens, two dollars and fifty cents. *Provided*, that petit jurors in Union County shall receive, in addition to the per diem, two dollars and fifty cents for each night, when detained on jury duty after ten o'clock p. m.

(d) In the counties of Aiken, Allendale, Bamberg, Barnwell, Beaufort, Cherokee, Chester, Chesterfield, Colleton, Dorchester, Fairfield, Florence, Horry, Jasper, Kershaw, Lexington, Orangeburg, Sumter, three dollars.

Provided, in the event any juror in Chester County is kept on duty after eleven o'clock at night he shall be paid for an additional day.

(e) In Charleston County, five dollars. *Provided*, that when in said county any juror serving upon any case is detained by said jury service after twelve o'clock midnight, it shall be considered that the said jury shall have entered into a new day of jury service: *provided*, that when a juror in said county is discharged from jury service before one o'clock p. m. on any day, he shall only be paid one-half of the per diem herein set forth, to-wit: the sum of two dollars and fifty cents.

(f) The pay for all jurors of Darlington County shall be as follows: foreman of grand jury, \$5.00 per day and ten cents (10c) mileage one way; all other jurors, grand and petit, \$3.00 per day and ten cents (10c) mileage one way. The county auditor of Darlington County is authorized and directed to levy, and the treasurer and the tax collector to collect sufficient funds for the purposes of this paragraph.

(g) Whenever provision is made by law for the payment of mileage of jurors, witnesses and other persons required to attend court, or to travel to perform any legal duty, said mileage shall be computed and paid for by the shortest practical route to be traveled over any regular established highway.

1932 Code, § 632; Civ. P. '22, § 572; Civ. C. '12, § 4040; Civ. C. '02, 2938; G. S. 2269; R. S. 2384; 1874 (15) 608; 1878 (16) 630; 1907 (25) 518; 1911 (27) 86; 1920 (31) 735; 1925 (34) 233; 1933 (38) 8, 14, 76, 111; 1934 (38) 1598; 1935 (39) 220; 1936 (39) 1304, 1315, 1321, 1544; 1937 (40) 36, 177, 190, 385, 209, 45; 1938 (40) 1698, 1602, 1590, 1563; 1939 (41) 415; 1940 (41) 1938.

§ 634. Empaneling jurors in court of common pleas.—In the trial of all actions at law in the courts of common pleas, and issues ordered to be framed by the judge in equity cases in said courts, it shall be the duty of the clerk to furnish the parties, or their attorneys, with a list of twenty of the jurors to be drawn and selected by ballot from the whole number of jurors who are in attendance, the names on said list to be numbered from one to twenty, and be stricken off by numbers in the same manner as the regular panels of jurors in said courts have been heretofore formed, from which said list the parties, or their attorneys, shall alternately strike, until there shall be but twelve left, which shall constitute the jury to try the case or issue. In all cases the plaintiff shall have the first strike, and, in all civil cases hereafter tried in the courts of common pleas of this State, any party shall have the right to demand a panel of twenty competent and impartial jurors from which to strike a jury. When the list aforesaid is prepared by the clerk and presented to the parties, or their attorneys, objection for cause must be made before striking, and, if any objections are sustained, the clerk must fill up the list before the same is stricken: *provided*, that after the jury has been struck, as herein provided, if it be discovered that any one or more of the jurors whose names remain upon the jury list are disqualified for any cause, the clerk shall furnish the parties, or their attorneys, with an additional list of three times as many jurors as may be found to be disqualified, to be drawn as the first list was drawn, from which the parties, or their attorneys, shall alternately strike, until there shall be left the number

necessary to empanel the panel. Should the jury, charged with any case, be delayed in rendering their verdict, so that they could not be present to be drawn from in making the list to form a second jury, then the clerk shall present to the parties, or their attorneys, a list containing the names of twenty jurors to be drawn by the clerk from the remaining jurors in the same manner as provided in this section, from which list the parties, or their attorneys, shall alternately strike, as hereinbefore provided, until twelve are left, which shall constitute the jury. In all cases of default, where it may be necessary to have the verdict of a jury, or in the trial of cases when the parties, or their attorneys, shall waive the right to strike a jury, the clerk shall, under the direction of the judge, draw and empanel a jury, who shall pass upon such matters as may be submitted to them in default cases, or the trial of such cases, when the parties have waived the right to strike the jury, as stated in this section: *provided*, that in each county in this State containing a city having a population of more than sixty thousand (60,000), according to the official United States census, the clerk shall write, or cause the names of the jurors serving to be written, each on a separate paper or ballot, which shall be white and plain, and shall resemble each other as much as possible, and shall be so folded that the name written thereon shall not be visible on the outside, and the clerk shall place each of the said ballots, or separate papers, in a separate small opaque capsule, or container, which capsules or containers shall be uniform in size, shape and color; whenever a jury panel of twenty is to be drawn in any civil case, or when jurors shall be drawn in any criminal case, said capsules or containers shall be placed in a small rotating drum, cylindrical in shape, and having a handle at the end thereof, and resting on such supports that it can be turned by means of the said handle, the said drum, capsules, and other equipment to be furnished by the county supervisor and approved by the resident judge; and when the said containers or capsules shall have been placed in the said drum, it shall be completely closed and securely fastened and rotated by means of the said handle for a sufficient length of time necessary for a complete mixing of the containers or capsules, and the required number of jurors shall then be drawn, one by one, by a child under ten years of age, in the presence of the court; the names of the jurors so drawn to be returned to the capsules and replaced in the drum when not actually engaged in service on a trial jury.

1932 Code, § 634; Civ. P. '22, § 574; Civ. C. '12, § 4042; Civ. C. '02, § 2940; 1901 (23) 633; 1902 (23) 1069; 1904 (24) 413; 1909 (26) 48; 1939 (41) 74.

This section is intended to give litigants a fair and impartial jury.—The intent of this section is to give litigants a fair and impartial jury, and to that end they are allowed to challenge any number of jurors for cause, and, in addition, each side is given the right to reject four peremptorily by striking their names from the list, without assigning cause. *Graham v. Columbia Ry., etc., Co.*, 102 S. C. 468, 86 S. E. 952; *Brown v. Kress & Co., et al.*, 170 S. C. 178; 170 S. E. 142.

But irregularities in the impaneling of the jury are not reversible error unless shown to be harmful. *Graham v.*

Columbia Ry., Etc., Co., 102 S. C. 468, 86 S. E. 952.

The state has four challenges where two claimants are on the other side.—On trial of proceeding to escheat, involving the heirship of two classes of claimants, where the cases are consolidated, the state is entitled to four challenges, and each of the two classes, two challenges under this section. *In re Percival*, 108 S. C. 39, 93 S. E. 243, Ann. Cas. 17E, 463.

See generally. *Senterfeit v. Shealey*, 71 S. C. 259, 51 S. E. 142, 50 L. R. A. (N. S.) 961, 11 A. L. R. 57.

§ 635. Foreman.—The foreman of each jury, after being thus empaneled, may be appointed by the court, or the jury may retire and choose their foreman.

1932 Code, § 635; Civ. P. '22, § 575; Civ. C. '12, § 4043; Civ. C. '02, § 2941; G. S. 2253; R. S. 2396; 1905 (24) 846.

§ 636. When petit jurors may be discharged.—All jurors summoned to serve at any term of the courts of general sessions or common pleas may be held beyond the period for which they were summoned until all cases in both of said courts to be tried by jury are disposed of, or until another jury shall have been empaneled to try such cases: *provided*, that nothing contained in this section shall apply to courts of general sessions and common pleas for York County.

1932 Code, § 636; Civ. P. '22, 576; Civ. C. '12, § 4044; Civ. C. '02, § 2942; 1896 (22) 18.

ARTICLE 4

Objection to Jurors

637. Examination by court.

638. Liability to pay taxes no objection.

639. Objections to be made before empaneling.

640. Irregularity in drawing, etc.

641. Gratuity to juror.

642. Procedure upon failure to agree.

§ 637. Jurors may be examined by court—if not indifferent, shall be set aside.—The court shall, on motion of either party in the suit, examine, on oath, any person who is called as a juror therein, to know whether he is related to either party, or has any interest in the cause, or has expressed or formed any opinion, or is sensible of any bias or prejudice therein, and the party objecting to the juror may introduce any other competent evidence in support of the objection. If it appears to the court that the juror is not indifferent in the cause, he shall be placed aside as to the trial of that cause, and another shall be called.

1932 Code, § 637; Civ. P. '22, § 577; Civ. C. '12, § 4045; Civ. C. '02, § 2944; G. S. 2261; R. S. 2403; 1797 (5) 358.

This section is mandatory.—This section is mandatory as it is the duty of the court, on motion, to apply this statutory method of ascertaining whether any juror is related to either of the parties litigant. *Robinson v. Howell*, 66 S. C. 326, 44 S. E. 931; *Senterfeit v. Shealey*, 71 S. C. 259, 51 S. E. 142, 50 L. R. A. (N. S.) 961, 11 A. L. R. 57; *State v. Henderson*, 73 S. C. 201, 53 S. E. 170.

And the question is addressed to the discretion of the circuit court.—The very language of this section shows conclusively that the question is addressed to the discretion of the circuit court, and if the judge of that court is not satisfied that the juror in question is indifferent to the cause, he should be rejected and another called in his place. *State v. Prater*, 26 S. C. 198, 613, 2 S. E. 108, 95 Am. St. Rep. 773.

For example, where plaintiff challenged the jury, and another was appointed as foreman without objection

from defendant, and both parties stated that they were satisfied with the jury, the court, in allowing plaintiff to challenge such substituted foreman, was acting within its discretion. *Curnow v. Phoenix Ins. Co.*, 46 S. C. 79, 24 S. E. 74, 51 L. R. A. 699, 714, Ann. Cas. 17A, 670.

And scope of interrogation of juror is in court's discretion.—The scope and limits of the interrogation of a juror on voir dire is within the sound discretion of the circuit judge. *State v. Carson*, 131 S. C. 42, 126 S. E. 757; *State v. Nance*, 25 S. C. 168, 86 Am. St. Rep. 656, 103 Am. St. Rep. 160, 41 L. R. A. 538, 56 L. R. A. 382, 24 L. R. A. (N. S.) 784, 29 A. L. R. 1141, 1180.

Thus it is proper for the court to refuse to allow defendant, in a criminal prosecution, to ask a juror "whether, in spite of the fact that defendant is a negro, he would be influenced thereby in passing on the evidence." *State v.*

Bethune, 86 S. C. 143, 67 S. E. 466, 134 Am. St. Rep. 731, Ann. Cas. 12B, 971, 10 A. L. R. 862, 17 A. L. R. 1120, 1136.

But it is error for the court to excuse a juror on the ground of prejudice, without first making the examination called for by this section. *State v. Williams*, 31 S. C. 238, 9 S. E. 853, 68 L. R. A. 877, 19 A. L. R. 1068.

Thus the court may order juror to stand aside because of his relation to one of the parties.—It is not an abuse of discretion for the court to order a juror to stand aside, without presenting him to the defendant, where the juror states on his voir dire that he is related to the defendant, is not sure he could be impartial, and asks to be excused. *State v. Murphy*, 48 S. C. 1, 25 S. E. 43, 82 Am. St. Rep. 28, L. R. A. 1918E, 527, Ann. Cas. 13C, 433, Ann. Cas. 16A, 1067.

The fact that a judge set aside two jurors as disqualified because related by blood or connected by marriage, within the sixth degree, to one of the parties, was not error, though the degree of such relationship was erroneously considered to be governed by statute. *State v. Brock*, 61 S. C. 141, 39 S. E. 359, 13 L. R. A. (N. S.) 813, Ann. Cas. 17D, 830, 19 A. L. R. 1484; *State v. Merriman*, 34 S. C. 16, 12 S. E. 619, 82 Am. St. Rep. 28, 95 Am. St. Rep. 771, 15 L. R. A. 672, 20 L. R. A. 615, 45 L. R. A. 689, 700, 14 L. R. A. (N. S.) 740, 30 L. R. A. (N. S.) 848, L. R. A. 1918A, 667, 694.

A party objecting on ground of relationship must use diligence to ascertain relationship before the trial. *Blassingame v. Laurens*, 80 S. C. 38, 61 S. E. 96, 50 L. R. A. (N. S.) 953.

Or because of his employment with defendant.—Excusing from the panel two jurors, who stood up when the court asked if any of them were in defendant's employ, was in the discretion of the court, though one had only a small rent account to collect for defendant, and the other a contract for advertising space with a company, of which defendant's president was an officer or stockholder. *Yarborough v. Columbia Ry., etc., Co.*, 100 S. C. 33, 84 S. E. 308, L. R. A. 1915F, 62, 305, L. R. A. 1916C, 1172, 1188.

And question of fact as to juror is not reviewable on appeal.—The decision as to whether a juror is indifferent or not, if it involves a mere question of fact, is not reviewable on appeal. *State v. Haines*, 36 S. C. 504, 15 S. E. 555, 129 Am. St. Rep. 44; *Sims v. Jones*, 43 S. C. 91, 20 S. E. 905; *State v. Robertson*, 54 S. C. 147, 31 S. E. 868, 50 L. R. A. (N. S.) 971.

Unless conclusion of circuit court is without any evidence to support it.—A decision of the trial court that a juror is indifferent will not be reviewed unless the conclusion is wholly without evidence to support it. *State v. Williamson*,

65 S. C. 242, 43 S. E. 671, 6 A. L. R. 1609; *State v. Mittle*, 120 S. C. 526, 113 S. E. 335.

Or unless there is an error of law.—This section invests the circuit judge with exclusive power to determine a juror's competency, and a finding on such an issue may not be reviewed, except for error of law, under Const. of 1895, art. 5, § 4, and, if there is any evidence tending to support the finding, there is no error of law. *State v. Faries*, 125 S. C. 281, 118 S. E. 620.

As to right of review for errors of law, see § 26 and note thereto.

Or unless there is an abuse of the court's discretion.—The question of fact whether jurors in action to enforce statutory liability of stockholders of insolvent bank were defendants in such an action, being strictly within the discretion of the trial court, cannot be reviewed by the Supreme Court, no abuse of discretion being shown. *Calhoun v. Anderson*, 148 S. C. 392, 146 S. E. 245.

And in a prosecution for murder, the trial judge's action in refusing to exclude from the jury a juror who on his voir dire stated that, if reports he had heard were true, defendant ought to be hung, but that he could give defendant a fair and square trial, was not an abuse of discretion. *State v. Faries*, 125 S. C. 281, 118 S. E. 620.

A juror who has tried the case of one who was jointly indicted with defendant is competent. *State v. Williams*, 31 S. C. 238, 9 S. E. 853, 68 L. R. A. 877, 19 A. L. R. 1068.

The court will not consider a motion for a new trial based on an affidavit of a juror, who sat as a juror in a former trial of the case, showing how he voted on such former trial. *State v. Robertson*, 54 S. C. 147, 31 S. E. 868, 50 L. R. A. (N. S.) 971; *State v. Langford*, 74 S. C. 460, 55 S. E. 120, 50 L. R. A. (N. S.) 971. See *Blassingame v. Laurens*, 80 S. C. 38, 46, 61 S. E. 96, 50 L. R. A. (N. S.) 953.

And a juror whose opinion may be changed by testimony is competent.—Where a juror, after stating that he has formed or expressed an opinion, states that it is not so fixed as not to be changed by testimony, and that he is not sensible of any bias, it is proper to accept him. *Sims v. Jones*, 43 S. C. 91, 20 S. E. 905.

A juror who admitted that he had formed, from what he had heard and read, an opinion, but that, if selected as a juror, he would absolutely leave that impression behind, and be governed solely by the testimony, was not disqualified to serve, though during a long and tedious examination he made statements in reference to the testimony necessary to efface his impression, largely in the words of the examining counsel, which, taken alone, might disqualify

him. *State v. Mittle*, 120 S. C. 526, 113 S. E. 335.

And juror is competent where he is a defendant in stockholders' liability suit.—In a suit to enforce the statutory liability of an insolvent bank, a juror is not disqualified because he is a defendant in such an action. *Calhoun v. Anderson*, 148 S. C. 392, 146 S. E. 245.

But a juror who is surety on the recognizance of defendant is not competent.—The fact that one of the jurors is surety on the recognizance of one of the defendants is proof enough that the juror is not indifferent in the cause; and the court should reject him, and another should be called in his place. *State v. Prater*, 26 S. C. 198, 613, 2 S. E. 108, 95 Am. St. Rep. 773.

Likewise a juror who is opposed to capital punishment is not competent.—*State v. James*, 34 S. C. 49, 12 S. E. 657, Ann. Cas. 12A, 787, Ann. Cas. 13A, 32 19 A. L. R. 1068; *State v. James*, 34 S. C. 579, 13 S. E. 325; *State v. McIntosh*, 39 S. C. 97, 17 S. E. 446, 76 Am. St. Rep. 88, 36 L. R. A. 727, 39 L. R. A. 744, 4 L. R. A. (N. S.) 156, Ann. Cas. 12A, 787, Ann. Cas. 12C, 236.

And a juror is disqualified where he is second cousin by marriage to either party, such relation being within the sixth degree. *State v. Byrd*, 72 S. C. 104, 51 S. E. 542, 33 L. R. A. (N. S.) 144, 38 L. R. A. (N. S.) 1099, 1 A. L. R. 587, *Clinton v. Leake*, 71 S. C. 22, 50 S. E. 541.

Competency of juror.—Juror who formed an opinion from reading part of the sworn evidence at a former trial; saying, however, that he could render a

verdict on the law and evidence is competent. *State v. Pridmore*, 163 S. C., 73, 161 S. E., 335.

Counsel may examine juror on voir dire; however it is better for the judge to make the examination. *Brown v. Kress & Co., et al.*, 170 S. C. 178; 170 S. E. 142.

Juror angry with plaintiff's counsel for former suit against defendant and thought it wrong to sue defendant not competent.—Prospective juror held not to be "impartial," who was angry with plaintiff's counsel, for suing defendant in prior case, and who was of opinion it was wrong to sue such companies as defendant, although said juror stated on voir dire he could give impartial trial. *Brown v. Kress & Co., et al.*, 170 S. C. 178; 170 S. E. 142.

Granting motion that all textile members of jury venire, whether union or non-union members, be excluded from serving as jurors in murder prosecution for killing of union member by non-union member which occurred in fight between striking and nonstriking mill employees was error, since only way to determine prejudice would be to place jurors on voir dire upon court's own motion, or upon motion of counsel for either side upon call of case for trial. *State v. Royster*, 181 S. C. 269; 186 S. E. 921.

See generally, *State v. Weaver*, 58 S. C. 106, 36 S. E. 499; *State v. Summers*, 36 S. C. 479, 15 S. E. 369, 19 L. R. A. (N. S.) 493; *State v. Perry*, 73 S. C. 199, 53 S. E. 169; *State v. Johnson*, 74 S. C. 401, 54 S. E. 601.

§ 638. In penal actions, liability to pay taxes no objection.—In indictments and penal actions for the recovery of sum of money, or other thing forfeited, it shall not be a cause of challenge to a juror that he is liable to pay taxes in any county, city or town which may be benefited by such recovery.

1932 Code, § 638; Civ. P. '22, § 578; Civ. C. '12, § 4046; Civ. C. '02, § 2945; G. S. 2264; R. S. 2405; 1871 (14) 693.

§ 639. When objections to jurors must be made.—All objections to jurors called to try prosecutions, or actions or issues, or questions arising out of actions or special proceedings in the various courts of this State, if not made before the juror is empaneled for or charged with the trial of such prosecution or action, or issue, or question arising out of actions or special proceedings, shall be deemed waived; and if made thereafter shall be of none effect.

1932 Code, § 639; Civ. P. '22, § 579; Civ. C. '12, § 4047; Civ. C. '02, § 2946; G. S. 2265; R. S. 2406; 1871 (24) 693; 1899 (23) 39.

In general.—The court will not grant relief unless it appears that the party has been prejudiced. *State v. Stephens*, 11 S. C. 319; *State v. Gill*, 14 S. C. 410, 56

L. R. A. 393, 424, 17 A. L. R. 1123, 1157.

Where party objects to juror and the court overrules the objections and the party completes his jury without ex-

hausting his right of challenge, the error of the court, if any, is cured. *State v. Price*, 10 Rich. 351, 356; *State v. McQuaige*, 5 S. C. 429, 431, 27 L. R. A. 784; *State v. Gill*, 14 S. C. 410, 412, 56 L. R. A. 393, 424, 17 A. L. R. 1123, 1157; *State v. Dodson*, 16 S. C. 453, 460; *State v. Anderson*, 26 S. C. 599, 2 S. E. 699. But this rule does not apply to grand jurors. *State v. Boyd*, 56 S. C. 382, 34 S. E. 661.

An objection that a venire facias was not sealed can not be raised for the first time on appeal, though defendant may not have discovered the defect until after verdict. *State v. Lazarus*, 83 S. C. 215, 65 S. E. 270.

But an objection that a juror is disqualified because convicted of larceny may be made after verdict, if not discovered before. *Garrett v. Weinberg*, 54 S. C. 127, 31 S. E. 341, 34 S. E. 70, 50 L. R. A. (N. S.) 948, 977, L. R. A. 1916E, 224, Ann. Cas. 15D, 866, Ann. Cas. 16C, 1210.

Objection must be taken before trial.—Objection not taken before trial, that juror's initials were improperly listed on venire and that he was agent of assignee, does not entitle to new trial. *Smith v. Oliver Motor Co.*, 174 S. C. 464, 177 S. E. 791 S. C. 345, 180 S. E. 197; *State v. Kennedy*, 177 S. C. 195, 181 S. E. 35; *Altman v. Efird Bros. Co.*, 180 S. C. 205, 185 S. E. 543.

Unless due diligence is shown.—Accused not estopped to raise objection to disqualified juror, who sat on his case, unless it be clearly shown accused did not exercise due diligence in selecting jurors. This rule applied with more lenience where human life concerned. *State v. Parsons*, 171 S. C. 449, 172 S. E. 424. *State v. Elliott*, 169 S. C. 208, 168 S. E. 546.

However, ordinary diligence must be used to discover the disqualification.—A motion in arrest of judgment, made by one who has been convicted of murder, on the ground that one of the members of the grand jury who returned the indictment was not a qualified elector, was properly denied, though defendant

did not know such fact until after the trial, where it could have been discovered by the exercise of ordinary diligence. *State v. Rafe*, 56 S. C. 379, 34 S. E. 660.

The fact that a juror sat on a former trial of the same case was not ground for setting aside the conviction at the second trial, where counsel for defendant and the juror had both forgotten such fact until after verdict. *State v. Langford*, 74 S. C. 460, 55 S. E. 120, 50 L. R. A. (N. S.) 971.

Where a juror, upon being asked if he is related to either party, says he does not know of any relationship, and after verdict, on motion for new trial, losing party shows that he is related, his relationship could not have affected him and where due diligence was not shown before trial in ascertaining relationship, verdict will not be set aside. *Senterfeit v. Shealey*, 71 S. C. 259, 51 S. E. 142, 50 L. R. A. (N. S.) 961, 11 A. L. R. 57.

"Objections" to jurors, not taken before the jury is empaneled, means such objections of which the party had knowledge, or which by the exercise of due diligence he could have known. *State v. Gregory*, 171 S. C. 535, 172 S. E. 692.

See generally, *State v. Quarrel*, 2 Bay 150, 1 Am. Dec. 637, 9 Am. Dec. 81, 18 L. R. A. 474, 50 L. R. A. (N. S.) 974; *Pearson v. Wightman*, 1 Mill 336, 40 Am. Dec. 231, 232, 77 Am. St. Rep. 476, 51 L. R. A. (N. S.) 929, L. R. A. 1916C, 1220, Ann. Cas. 14C, 905, Ann. Cas. 15A, 1208, Ann. Cas. 16D, 1105; *State v. Fisher*, 2 N. & Mc. 261, 18 L. R. A. 475, 50 L. R. A. (N. S.) 975; *State v. Billis*, 2 McC. 12, 9 Am. St. Rep. 750, 40 L. R. A. (N. S.) 974, 50 L. R. A. (N. S.) 966; *State v. Slack*, 1 Bail. 330, 78 Am. Dec. 258; *State v. Williams*, 2 Hill. 381; *State v. Blackledge*, 7 Rich. 327, 28 L. R. A. 197, 53 L. R. A. 405, 68 L. R. A. 39, 78; *State v. Clyburn*, 16 S. C. 375, L. R. A. 1916A, 816; *Todd v. Gray*, 16 S. C. 635, 19 L. R. A. (N. S.) 736, 50 L. R. A. (N. S.) 968, Ann. Cas. 12B, 749.

§ 640. Irregularity in venire, drawing, etc., not to affect verdict, except in certain cases.—No irregularity in any writ of venire facias, or in the drawing, summoning, returning or empaneling of jurors, shall be sufficient to set aside the verdict, unless the party making the objection was injured by the irregularity, or unless the objection was made before the returning of the verdict.

1932 Code, § 640; Civ. P. '22, § 580; Civ. C. '12, § 4048; Civ. C. '02, § 2947; G. S. 2266; R. S. 2407; 1797 (5) 358.

In general.—This section proceeds on the principal that a party shall not be allowed to go to trial and take for himself the possibilities of a favorable result, and, in case of disappointment, have the verdict set aside upon a bare technical

irregularity. *State v. Johnson*, 66 S. C. 23, 44 S. E. 58.

This section applies to grand jurors as well as to petit jurors.—This section does not make any distinction between grand and petit jurors, but, on the contrary, it

speaks generally of "jurors." *State v. Jeffcoat*, 26 S. C. 114, 1 S. E. 440, 12 Am. St. Rep. 903, 27 L. R. A. 787; *State v. Blackledge*, 7 Rich. 327, 28 L. R. A. 197, 53 L. R. A. 405, 68 L. R. A. 39, 78.

Failure of clerk to affix seal to venire facias is not a jurisdictional defect.—The failure of the clerk to affix the seal to the venire facias is an irregularity within the meaning of this section, and is not a jurisdictional defect which can be raised in the appellate court without objection taken below, on contention that both the grand and the petit jury were illegal and the trial a nullity. *State v.*

Lazarus, 83 S. C. 215, 65 S. E. 270; *State v. Benton*, 85 S. C. 107, 67 S. E. 143.

But defects appearing upon the record may be considered on motion in arrest of judgment.—*State v. Stephens*, 11 S. C. 319.

An indictment found by grand jury drawn under unconstitutional statute is void, and defendant does not waive his right by pleading to indictment. *State v. Edwards*, 68 S. C. 318, 47 S. E. 395.

Failure to object to jurors.—See notes to § 173.

See generally, *State v. Washington*, 82 S. C. 341, 64 S. E. 386.

§ 641. Verdict may be set aside on gratuity given to juror by party.—If either party in a case in which a verdict is returned during the same term of the court, before the trial, gives to any of the jurors who try the cause anything by way of treat or gratuity, the court may, on the motion of the adverse party, set aside the verdict and award a new trial of the cause.

1932 Code, § 641; Civ. P. '22, § 581; Civ. C. '12, § 4049; Civ. C. '02, § 2948; G. S. 2267; R. S. 2408; 1797 (5) 358.

See generally, *McGill v. Seaboard, etc.*, (N. S.) 736, Ann. Cas. 12B, 749. *Ry.*, 75 S. C. 177, 55 S. E. 216, 19 L. R. A.

§ 642. Jury failing to agree, course to be pursued.—When a jury, after due and thorough deliberation upon any cause, return into court without having agreed upon a verdict, the court may state anew the evidence, or any part of it, and explain to them anew the law applicable to the case, and may send them out for further deliberation; but if they return a second time without having agreed upon a verdict, they shall not be sent out again without their own consent unless they shall ask from the court some further explanation of the law.

1932 Code, § 642; Civ. P. '22, § 582; Civ. C. '12, § 4050; Civ. C. '02, § 2949; G. S. 2238; R. S. 2409; 1797 (5) 358.

"Due and thorough deliberation upon any cause" is determined by judge's discretion.—What constitutes "due and thorough deliberation upon any cause" by the jury is unquestionably a matter primarily for the determination of the circuit judge in the exercise of a sound discretion. *State v. Drakeford*, 120 S. C. 400, 113 S. E. 307; *State v. Simon*, 126 S. C. 437, 120 S. E. 230.

But the jury may indicate to the court when time for deliberation has elapsed.—It is the clear intentment of this section to give the jury the right to indicate to the court its own view as to when time for due and thorough deliberation has elapsed. *State v. Simon*, 126 S. C. 437, 120 S. E. 230.

And exercise of judge's discretion will not be disturbed unless obviously wrong.—If the circumstances satisfy the judge, in a wise exercise of his discretion, that the jury consent to go out again, after returning into court a second time, it is lawful to send them out, and the ex-

ercise of such discretion will not be disturbed unless obviously wrong. *State v. Freely*, 105 S. C. 243, 89 S. E. 643.

Verdicts may not be coerced by confinement of jury.—The implication of this section is that verdicts may not be coerced in this State by confinement of the jury after they have maturely deliberated upon the case and failed to agree, and that the judge is not required to remand the jury, if, after due deliberation, they come into court without agreeing upon a verdict, and without asking for further instructions. *State v. Stephenson*, 54 S. C. 234, 32 S. E. 305, 11 L. R. A. (N. S.) 178.

See generally, *State v. Kelley*, 45 S. C. 659, 24 S. E. 45, Ann. Cas. 12D, 442; *State v. Williams*, 76 S. C. 135, 56 S. E. 783, 122 Am. St. Rep. 759, 24 L. R. A. (N. S.) 785, Ann. Cas. 13C, 488; *McGill v. Seaboard, etc., Ry.*, 75 S. C. 177, 55 S. E. 216, 19 L. R. A. (N. S.) 736, Ann. Cas. 12B, 749; *State v. Haines*, 36 S. C. 504, 505, 15 S. E. 555, 129 Am. St. Rep. 44.

ARTICLE 5

Miscellaneous Provisions

643. View of place or property.

644. Penalty for non-attendance.

645. Penalty for neglect of duty in drawing jurors.

646. Power of coroners, clerks or magistrates not affected.

647. Feeding of jurors.

§ 643. Jury may view place, property or thing in question.—The jury in any case may, at the request of either party, be taken to view the place or premises in question, or any property, matter, or thing relating to the controversy between the parties, when it appears to the court that such view is necessary to a just decision: *provided*, the party making the motion advances a sum sufficient to pay the actual expenses of the jury and the officers who attend them in taking the view, which expenses shall be afterwards taxed like other legal costs, if the party who advanced them prevails in the suit.

1932 Code, § 643; Civ. P. '22, § 583; Civ. C. '12, § 4051; Civ. C. '02, § 2950; G. S. 2271; R. S. 2410; 1871 (14) 693.

Allowance of view is discretionary with court.—Under this section, it is discretionary with the trial court whether it will allow the jury to view the place in controversy, and in the absence of abuse of discretion the Supreme Court will not interfere. *Rodgers v. Hodge*, 83 S. C. 569, 65 S. E. 819, 18 Ann. Cas. 729; *State v. Suber*, 89 S. C. 100, 71 S. E. 466.

And there is no provision for the judge to view premises.—There is no statute which requires a presiding judge in a partition suit to view the premises, and his refusal to do so is not error. *Parrott v. Barrett*, 81 S. C. 255, 62 S. E. 241.

And where judge viewed the premises without knowledge of counsel and without presence of jury, and predicated refusal of motion for new trial in part upon information obtained from such view, reversible error is committed. *Ralph v. Southern Ry. Co.*, 160 S. C. 229, 158 S. E. 409.

Viewing of premises is not taking of testimony, thus not in violation of con-

stitutional right of prisoner to confront or cross-examine witnesses. *State v. Rec-tor*, 166 S. C. 335, 164 S. E. 865.

But making of experiment by jury on the scene does amount to taking of evidence.—The granting of new trial for misconduct of jurors who were sent to view scene of truck accident, in standing in position one truck was supposedly in just before collision, and observing automobile approaching from around curve at the same speed at which the other truck was supposed to have rounded curve, was not "abuse of discretion", where such experiment was made without knowledge or consent of counsel and without allowing counsel an opportunity to argue to jury the inferences to be drawn from such experiment. *Baroody v. Anderson*, 195 S. C. 422, 11 S. E. (2d) 860.

See generally, *Rodgers v. Hodge*, 83 S. C. 569, 571, 65 S. E. 819, 18 Ann. Cas. 729.

Applied in *McCarley v. Glenn-Lowry Mfg. Co.*, 75 S. C. 390, 56 S. E. 1.

§ 644. Penalty for non-attendance.—If a person duly drawn and summoned to attend as a juror in any court neglects to attend, without sufficient excuse, he shall pay a fine not exceeding twenty dollars, which shall be imposed by the court to which the juror was summoned, and shall be paid into the county treasury.

1932 Code, § 644; Civ. P. '22, § 584; Civ. C. '12, § 4052; Civ. C. '02, § 2951; G. S. 2272; R. S. 2411; 1871 (14) 694.

The provisions of this section do not mean that a juror, properly drawn and summoned to attend a session of the court, should be permitted to escape the

duty required of him upon the payment of twenty dollars, or any other sum of money. *State v. King*, 158 S. C. 251, 155 S. E. 409.

§ 645. Penalty for neglect of duty in drawing jurors.—When, by neglect of any of the duties required by this chapter to be performed by any of the

officers or persons herein mentioned, the jurors to be returned from any place are not duly drawn and summoned to attend the court, every person guilty of such neglect shall pay a fine not exceeding one hundred dollars, to be imposed by the same court, to the use of the county in which the offense was committed.

1932 Code, § 645; Civ. P. '22, § 585; Civ. C. '12, § 4053; Civ. C. '02, § 2952; G. S. 2273; R. S. 2412; 1871 (14) 694.

§ 646. Power and duty of coroners, clerks, or magistrates, to summon jurors.—Nothing contained in this chapter shall affect the power and duty of coroners, clerks, or magistrates, to summon and empanel jurors, when authorized by other provisions of law.

1932 Code, § 646; Civ. P. '22, § 586; Civ. C. '12, § 4054; Civ. C. '02, § 2953; G. S. 2274; R. S. 2413; 1871 (14) 693.

§ 647. Feeding of juries to be paid by county.—Whenever any circuit judge shall order food to be furnished by the sheriff to any jury charged with the consideration of a case, the expenses connected therewith shall be paid by the county commissioners of the county in which such case is being tried, upon presentation of the bill of the sheriff, certified as correct by the presiding judge.

1932 Code, § 647; Civ. P. '22, § 587; Civ. C. '12, § 4055; Civ. C. '02, § 2954; R. S. 2414; 1891 (20) 1053.

CHAPTER 32

Trial by the Court

648. Waiver of trial by jury.

649. Trial by court.

650. Exceptions to decision.

651. Procedure upon judgment on issue of law.

§ 648. Trial by jury—how waived.—Trial by jury in the court of commons pleas may be waived by the several parties to an issue of fact in actions on contract, and with the assent of the court in other actions, in the manner following:

(1) By failing to appear at the trial.

(2) By written consent, in person, or by attorney, filed with the clerk.

(3) By oral consent in open court, entered in the minutes.

1932 Code, § 648; Civ. P. '22, § 588; Civ. P. '12, § 326; Civ. P. '02, § 288; 1870 (14) § 290.

As to trial by jury of issues of fact in action for the recovery of money only, see § 593 and note. As to agreed case, see § 668 et seq. and the note thereto.

In general.—This section, in the term "actions on contract," includes such actions as before its adoption were recognized as actions at common law. *State v. Spartanburg, etc.*, R. Co., 8 S. C. 129, 64 Am. Dec. 431, L. R. A. 1916C, 1066.

A party may waive his right to jury trial by consenting to reference.—*Griffith v. Cromley*, 58 S. C. 448, 36 S. E. 738; *City Council v. Ryan*, 22 S. C. 339,

53 Am. Rep. 713; *Meetze v. Charlotte, etc.*, R. Co., 23 S. C. 1, 49 L. R. A. 511, 522; *Martin v. Martin*, 24 S. C. 446, Ann. Cas. 17D, 125; *Calvert v. Nickles*, 26 S. C. 304, 2 S. E. 116, 15 Am. St. Rep. 714, 17 L. R. A. 271, 20 L. R. A. 114, 31 L. R. A. (N. S.) 239; *Archer v. Ellison*, 28 S. C. 238, 5 S. E. 713; *Rhodes v. Russell*, 32 S. C. 585, 10 S. E. 828.

But a claim for damages for lynching presented to the county board of commissioners, which was refused, was not a bar to an action brought in the court of common pleas, where it was evident-

ly intended that it should be brought, under the Constitution and statutes of the state; the county board of commissioners having no jurisdiction in such cases. *Best v. Barnwell County*, 114 S. C. 123, 103 S. E. 479.

Or by consenting to trial by the court.—*Whaley v. Bank of Charleston*, 5 S. C. 189, 206; *Magruder v. Clayton*, 29 S. C. 407, 7 S. E. 844; *Griffith v. Cromley*, 58 S. C. 448, 36 S. E. 738.

Which cannot be complained of on ap-

peal.—A party requesting that the case be heard by the judge without the aid of a jury cannot complain on appeal that it was so tried. *Stepp v. Nat. Life, etc., Ass'n*, 37 S. C. 417, 16 S. E. 134, 91 Am. St. Rep. 733, 107 Am. St. Rep. 137, 137 Am. St. Rep. 732, 56 L. R. A. 305, 63 L. R. A. 868.

But a party cannot so waive such right by his conduct.—*Sale v. Meggett*, 25 S. C. 72.

§ 649. Trial by court—judgment—how given.—Upon the trial of a question of fact by the court, its decision shall be given in writing, and shall contain a statement of the facts found, and the conclusions of law, separately; and upon a trial of an issue of law, the decision shall be made in the same manner, stating the conclusion of law. Such decision shall be filed with the clerk within sixty days after the court at which the trial took place. Judgment upon the decision shall be entered accordingly.

1932 Code, § 649; Civ. P. '22, § 589; Civ. P. '12, § 327; Civ. P. '02, § 289; 1870 (14) § 291.

In general.—The judge has power upon hearing referee's report in law case to reverse, affirm or modify his finding of fact. *Meetze v. Charlotte, etc., R. Co.*, 23 S. C. 1, 49 L. R. A. 511, 522; *Griffith v. Charlotte, etc., R. Co.*, 23 S. C. 25, 55 Am. St. Rep. 1, 75 Am. St. Rep. 428, 78 Am. St. Rep. 184, 14 L. R. A. 85, 16 L. R. A. (N. S.) 405, L. R. A. 1915B, 521.

Where there is no contest as to the facts, there need be no finding of fact. *Briggs v. Winsmith*, 10 S. C. 133, 30 Am. St. Rep. 46, 34 Am. St. Rep. 253.

Requirement as to statement of facts and conclusions separately is not mandatory.—There is no doubt that the object of this section was to prevent confusion, and to promote clearness and condensation. The requirement is undoubtedly salutary, and should be followed; but this court has held in several cases that it is not mandatory, but directory merely, and that the failure of a circuit judge to state his findings of fact and conclusions of law separately is not error in the judgment. *May v. Cavender*, 29 S. C. 598, 7 S. E. 489, 490; *Joplin v. Carrier*, 11 S. C. 327, 329; *State v. Columbia*, 12 S. C. 370, 393; *Bouknight v. Brown*, 16 S. C. 155, 166, 23 L. R. A. 755, 37 L. R. A. (N. S.) 670, Ann. Cas. 17A. 912; *Harrell v. Kea*, 37 S. C. 369, 16 S. E. 42; *Aultman v. Utsey*, 41 S. C. 304, 19 S. E. 617, 81 Am. St.

Rep. 174. See also, *Briggs v. Briggs*, 24 S. C. 377, 77 Am. St. Rep. 237, 2 L. R. A. (N. S.) 955, Ann. Cas. 13D, 1136, 6 A. L. R. 51.

And a judgment will not be reversed for failure to comply therewith.—*Stepp v. Nat. Life, etc., Ass'n*, 37 S. C. 417, 16 S. E. 134, 91 Am. St. Rep. 733, 107 Am. St. Rep. 137, 137 Am. St. Rep. 732, 56 L. R. A. 305, 63 L. R. A. 868.

But the demand as to the form of the decision should be complied with. *Visanska v. Bradley*, 4 S. C. 288.

A decision overruling a demurrer should be given in writing and signed, but the requirement may be waived. *Mauldin v. Seaboard, etc., Ry.*, 73 S. C. 9, 11, 52 S. E. 677, 8 L. R. A. (N. S.) 109, 10 A. L. R. 344, 354.

A decision is valid though filed more than sixty days after court decides case. *Koon v. Munro*, 11 S. C. 139, 78 Am. St. Rep. 192, 26 L. R. A. (N. S.) 415, 44 L. R. A. (N. S.) 890.

Right of appeal.—The statute providing for appeal upon the evidence appearing at the trial has no application where the construction of the written instrument by the court was the issue under this section. *DuBose v. Kell*, 105 S. C. 89, 89 S. E. 555; *Middleton v. A. C. L. R. R. Co.*, 133 S. C. 23, 130 S. E. 552.

See generally, *Garvin v. Garvin*, 21 S. C. 83, 22 L. R. A. (N. S.) 456.

§ 650. Exceptions—how and when taken—judgment at general term.—

(1) For the purpose of an appeal, either party may except to a decision on a matter of law arising upon such trial, within ten days after written notice of the filing of the decision, order, or decree, as provided in sections 780 and 781: *provided, however*, that where the decision filed under section 649 does not authorize a final judgment, but directs further proceedings before

a referee or otherwise, either party may move for a new trial at the next term, and for that purpose may, within ten days after notice of the decision being filed, except thereto, and make a case or exceptions as above provided in cases of an appeal.

(2) And either party desiring a review upon the evidence appearing on the trial, either of the questions of fact or of law, may, at any time within ten days after notice of the judgment, or within such time as may be prescribed by the rules of the court, make a case or exceptions, in like manner as upon a trial by jury, except that the judge, in settling the case, must briefly specify the facts found by him, and his conclusions of law.

1932 Code, § 650; Civ. P. '22, § 590; Civ. P. '12, § 328; Civ. P. '02, § 290; 1870 (14) § 292.

This section controls on a hearing of referee's report in a law case on exceptions taken, and allows a review of his findings of facts as well as of law. *Meetze v. Charlotte, etc.*, R. Co., 23 S. C. 1, 49 L. R. A. 511, 522; *Griffith v. Charlotte, etc.* R. Co., 23 S. C. 25, 55 Am. Rep. 1, 75 Am. St. Rep. 428, 78 Am. St. Rep. 184, 14 L. R. A. 85, 16 L. R. A. (N. S.) 405, L. R. A. 1915B, 521.

And if exception has been taken to a decision on a matter of law arising on the trial, no further exception need be

made thereto, as required by this section. *Coleman v. Heller*, 13 S. C. 491.

But matters stated only in the exceptions are not facts in the case. *Lites v. Addison*, 27 S. C. 226, 3 S. E. 214, 22 Am. St. Rep. 433, 27 Am. St. Rep. 345, 50 L. R. A. (N. S.) 1025.

See generally, *Godbold v. Vance*, 14 S. C. 458, L. R. A. 1915B, 1037, Ann. Cas. 12A, 13; *First Nat. Bank v. Lee*, 68 S. C. 116, 46 S. E. 771; *DuBose v. Kell*, 105 S. C. 89, 89 S. E. 555.

§ 651. Proceedings upon judgment on issue of law.—On a judgment for the plaintiff upon an issue of law, the plaintiff may proceed in the manner prescribed by section 586, upon the failure of the defendant to answer, where the summons was personally served. If judgment be for the defendant, upon an issue of law, and if the taking of an account or the proof of any fact be necessary to enable the court to complete the judgment, a reference or assessment by jury may be ordered, as in that section provided.

1932 Code, § 651; Civ. P. '22, § 591; Civ. P. '12, § 329; Civ. P. '02, § 291; 1870 (14) § 293.

Applied in *American Surety Co. v. Hornrich Mills*, 194 S. C. 221, 9 S. E. (2d) 433.

CHAPTER 33

Trial by Referee

652. Issues referable by consent.

653. Compulsory reference.

654. Mode of trial and review.

655. Appointment and duty of referees.

656. Referees in Saluda and York Counties.

§ 652. All issues referable by consent.—All or any of the issues in the action whether of fact or of law, or both, may be referred upon the written consent of the parties and guardian ad litem of infants; and, in such case, the order, if taken in vacation, may be made by the clerk. The said issues may also be referred by the clerk in default cases. ,

1932 Code, § 652; Civ. P. '22, § 592; Civ. P. '12, § 330; Civ. P. '02, § 292; R. S. 1872, 180, § 15; 1925 (34) 89.

An order of reference is not vitiated because other parties are brought in.—

An order of reference, under this section, given by consent of all the parties

then in the case, is not vitiated because it thereafter becomes necessary to bring other parties in, the court having jurisdiction of the cause and of the parties before it. *Beall Co. v. Weston*, 83 S. C. 491, 65 S. E. 823.

And an order of reference may be changed by succeeding judge.—An order of reference which does not adjudge the rights of the parties is an administrative order which may be changed by a succeeding judge for cause shown. *New England Mortg., etc., Co. v. Kinard*, 43 S. C. 311, 21 S. E. 113.

See generally, *Chapman v. Lipscomb*,

15 S. C. 470, 474; *Meetze v. Charlotte, etc., R. Co.*, 23 S. C. 1, 49 L. R. A. 511, 522; *Griffith v. Charlotte, etc., R. Co.*, 23 S. C. 25, 55 Am. Rep. 1, 75 Am. St. Rep. 428, 78 Am. St. Rep. 184, 14 L. R. A. 85, 16 L. R. A. (N. S.) 405, L. R. A. 1915B, 521; *Sale v. Meggett*, 25 S. C. 72; *City Counsel v. Ryan*, 22 S. C. 339, 53 Am. Rep. 713; *Martin v. Martin*, 24 S. C. 446, Ann. Cas. 17D, 125; *Calvert v. Nickles*, 26 S. C. 304, 2 S. E. 116, 15 Am. St. Rep. 714, 17 L. R. A. 271, 20 L. R. A. 114, 31 L. R. A. (N. S.) 239; *Sloan v. Burnett*, 149 S. C. 18, 146 S. E. 601.

§ 653. When reference may be compulsorily ordered.—Where the parties do not consent, the court may, upon application of either, or its own motion, direct a reference in the following cases:

(1) In all equitable actions and of equitable issues in actions at law. The order may be general of all issues of both law and fact, or may be so limited as the court may direct: *provided*, that this section shall not be construed so as to deprive any party of a trial by jury of any case or issue upon which he is entitled to a trial by jury as a matter of right under the present practice.

(2) Where the taking of an account shall be necessary for the information of the court, before judgment, or for carrying a judgment or order into effect; or

(3) Where a question of fact, other than upon the pleadings, shall arise, upon motion or otherwise, in any stage of the action.

(4) The reference shall be made in all counties in which the office of master has been established, to a master; in all other counties the reference shall be made to such person or persons as shall be appointed as provided in section 655: *provided*, that in the counties of Anderson and Colleton the reference shall be to the judge of probate for said counties, respectively.

1932 Code, § 653; Civ. P. '22, § 593; Civ. P. '12, § 331; Civ. P. '02, § 293; Civ. C. '12, § 1372; R. S. 1872 180, § 15; 1918 (30) 833; 1928 (35) 1149.

In general.—This section must be considered in connection with § 584. *Rainwater v. Merchants', etc., Bank*, 108 S. C. 206, 93 S. E. 770.

This section does not impair the common law power of the court to submit a case, with consent of parties, to arbitration and make the award the judgment of the court. *Bollmann v. Bollmann*, 6 S. C. 29, 13 Am. Dec. 547, 132 Am. St. Rep. 159, Ann. Cas. 18C, 974.

Relation of section to constitutional right of trial by jury.—The provisions of this section must be read in subordination to the provisions of the Constitution securing the right of trial by jury in certain cases; as where, for example, one of the issues is as to title to land, as in *De Walt v. Kinard*, 19 S. C. 286, 72 Am. St. Rep. 92, 41 L. R. A. (N. S.) 813; yet where no such issue is presented, and where the case is one of equitable cognizance, this section clearly applies, un-

affected by the constitutional provision referred to. *Id.*

Section is permissive and not mandatory.—This section is permissive merely, not mandatory; and therefore neither party has the legal right to demand a reference of all the issues to the master, but it is a matter addressed somewhat to the discretion of the court. *Boulard v. Carpin*, 27 S. C. 235, 3 S. E. 219, 220.

An order of reference is a matter for the exercise of the court's discretion, and is not reviewable, except in a case of abuse of that discretion. *Farley v. Matthews*, 168 S. C. 294; 167 S. E. 502; *Momeier v. John McAlister, Inc.*, 190 S. C. 529, 3 S. E. 606.

And the granting of motion to recommend to the master is discretionary. *Halk v. Stoddard*, 62 S. C. 564, 40 S. E. 957; *Davidson v. Copeland*, 69 S. C. 47, 48 S. E. 33.

In determining necessity for reference,

the pleadings should be considered.—The judge to whom the motion is submitted must determine whether the case is such as to warrant such a reference; and this he may determine, either from an inspection of the pleadings, or from affidavits submitted as to the nature of the case, and the necessity for a long account, and whether “the investigation will require the decision of difficult questions of law.” *Bouland v. Carpin*, 27 S. C. 235, 3 S. E. 219, 220.

Compulsory reference may be had where the cause of action is deemed equitable. *Keese v. Parnell*, 134 S. C. 207, 132 S. E. 620.

Where the defendant to an equitable action sets up a claim for damages, the court may still refer the case. *Lamar v. Charlotte, etc., R. Co.*, 10 S. C. 476, 59 L. R. A. 894, 28 L. R. A. (N. S.) 78; *Bath, etc., Paper Co., v. Langley*, 23 S. C. 129, 145.

But only under the circumstances detailed in this section. *Ferguson v. Harrison*, 34 S. C. 169, 13 S. E. 332; *Newell Contracting Co. v. Blankenship*, 130 S. C. 131, 125 S. E. 420, 423; *Keese v. Parnell*, 134 S. C. 207, 132 S. E. 620; *People's Bank v. Helms*, 140 S. C. 107, 138 S. E. 622; *Keese v. Parnell*, 132 S. C. 360, 128 S. E. 172; *Farmers', etc., Bank v. Foster*, 132 S. C. 410, 129 S. E. 629.

As where an issue of fact requires the examination of a long account.—Under this section, if a cause of action be equitable in its nature, it is within the discretion of the circuit judge to order a compulsory reference where the trial of the issue of fact shall require an examination of a long account. *Sumter Hardwood Co. v. Fitchette*, 133 S. C. 149, 130 S. E. 881; *Montague v. Best*, 65 S. C. 455, 43 S. E. 963.

An action by an insurance company against an agent to recover balance due on premiums, after allowance of credits, and for an accounting for funds collected, is not an action for the recovery of money; but an action against an agent for an accounting which was properly triable before a referee, especially where defendant sought accounting from plaintiff. *Southern Home Ins. Co. v. Hardin*, 146 S. C. 175, 143 S. E. 544.

Where accounts called for in separate actions by heirs at law against administrator and his sureties are so complicated and intricate that it would be impractical for a jury to decide the issues correctly, the cases will be referred to a special referee, irrespective of whether issues at law are raised. *Witherspoon v. Stogner*, 182 S. C. 413; 189 S. E. 758.

But granting compulsory order of reference in action to set aside deeds alleged to have been executed in fraud of rights of subsequent judgment creditor is erroneous, examination of long account not being involved. *Etheredge v.*

Porter, 134 S. C. 71, 131 S. E. 768.

Or where a mutual account is involved.—Under this section each party must have a claim or demand against the other to make up a mutual account, which will support compulsory reference. *Moody v. Dudley Lumber Co.*, 136 S. C. 327, 134 S. E. 369.

But an account between a lumber company and one employed to grade and sell lumber for percentage of gross sales is not a mutual running account, as affecting company's right to compulsory reference in action for agreed percentage, notwithstanding bringing of its books into court was necessary. *Id.*

Or in partition, where the question of transfer of one interest is involved, the court may refer all issues without consent, the party denying the transfer not objecting. *Windham v. Howell*, 78 S. C. 187, 59 S. E. 852.

Or where the liability of stockholders of a bank is involved.—A judge at chambers has the power, without consent of all parties, to order issues of law and fact to the master in an action by creditors to enforce the liability of the stockholders of a bank. *Wilkes & Co. v. Arthur*, 85 S. C. 299, 67 S. E. 297.

Or where a partnership relation is involved.—Where the statement of a cause of action involved allegations of a partnership relation, a complication of parties and necessitated an examination of a long account, and the statement of another cause of action raised issues with reference to an agency, trust, and accounting, and the answer tendered issues as to a partnership and equitable issues concerning the foreclosure of a chattel mortgage, it was a proper case for a compulsory reference as authorized by this section. *Greenwood Granite, etc., Co. v. Ware Shoals Mfg. Co.*, 78 S. C. 169, 58 S. E. 765.

Where the pleadings in a case show that an accounting of partnership affairs extending over a series of years will be required, it is discretionary with the court, under this section, to direct a reference of the case to a master. *Bouland v. Carpin*, 27 S. C. 235, 3 S. E. 219.

Or where further testimony is required.—A reference simply to take and report further testimony may be made in any equity case in the discretion of the chancellor. *People's Bank v. Helms*, 140 S. C. 107, 138 S. E. 622; *Jones v. Haile Gold Min. Co.*, 79 S. C. 47, 60 S. E. 35; *Hall v. McBride*, 73 S. C. 227, 53 S. E. 368.

Or where the priority of several liens must be determined.—The reference under this section is proper in an action to foreclose a mortgage, where there has been several conveyances of the fee, the grantees in each instance assuming the indebtedness and mortgage, and where under the pleadings it is neces-

sary to determine the priority and rank of several liens, the amount due thereunder, and the validity thereof. *Trump v. Mikell*, 105 S. C. 280, 89 S. E. 645.

Where the establishment of a number of claims and the amounts due after allowing credits, as well as the establishment of liens and their priorities, was involved, a compulsory reference was proper. *Beall Co. v. Weston*, 83 S. C. 491, 65 S. E. 823.

Where a creditor, defendant, claims priority of payment out of a fund in court, through a lien on the property it represented, the case was referable under this section. *State v. Spartanburg, etc.*, R. Co., 8 S. C. 129, 64 Am. Dec. 431, L. R. A. 1916C, 1066.

Or to declare a will void because violating the statute.—*Williams v. Newton*, 84 S. C. 98, 65 S. E. 959, Ann. Cas. 13C, 857.

But the order of reference should not contain difficult questions of law.—Where the pleadings show that difficult questions of law are not involved in the case, and that an accounting may be necessary for the information of the court, it is proper to grant an order at chambers referring all issues to a master. *Green v. McCarter*, 64 S. C. 290, 42 S. E. 157; *Trump v. Mikell*, 105 S. C. 280, 89 S. E. 645.

Whether difficult questions of law are involved is a matter for the decision of the circuit judge. *Williams v. Newton*, 84 S. C. 98, 65 S. E. 959, Ann. Cas. 13C, 857.

The circuit judge may order compulsory reference in an action at law.—In an action at law, which presents a feature of equitable cognizance, as where an account is long and so complicated that it would be impractical for an ordinary jury to comprehend and decide the issues, the circuit judge may order a compulsory reference. *Sumter Hardwood Co. v. Fitchett*, 133 S. C. 149, 130 S. E. 881.

However, the parties are entitled to trial by jury.—In ordinary action at law, presenting no features of equitable cognizance, the parties are entitled to trial by jury, and compulsory reference cannot be ordered, even though the examination of a long account may be involved. *Sumter Hardwood Co. v. Fitchette*, 133 S. C. 149, 130 S. E. 881; *Peeples v. Hornik*, 153 S. C. 321, 150 S. E. 802; *Smith & Co. v. Bryce*, 17 S. C. 538.

This section is not applicable to an action for damages for breach of a contract; in which case the parties have a constitutional right to trial by jury. *Givens v. North Augusta Elec., etc., Co.*, 91 S. C. 417, 74 S. E. 1067, Ann. Cas. 17E, 414.

When a case is of such a character as to entitle the parties to a trial by jury, it can only be tried in that way, or in

some other way to which the parties have consented, and no other mode of trial can be substituted for that guaranteed by the constitution, except by consent. *State v. Pacific Guano Co.*, 28 S. C. 63, 5 S. E. 167, 170.

And an order depriving the parties of such trial is appealable.—*Sumter Hardwood Co. v. Fitchette*, 133 S. C. 149, 130 S. E. 881; *Jones v. Haile Gold Min. Co.*, 79 S. C. 47, 60 S. E. 35; *Devereux v. McCrady*, 49 S. C. 423, 27 S. E. 467; *Ferguson v. Harrison*, 34 S. C. 169, 13 S. E. 332.

Where a party is entitled to a jury trial, inconvenience of witnesses, and the length of time the case would take, if the testimony were to be taken before the jury, are not grounds for granting a compulsory order of reference. *Wilson v. Township*, 43 S. C. 299, 21 S. E. 82.

As likewise an order assailed for want of jurisdiction. *Jones v. Haile Gold Min. Co.*, 79 S. C. 47, 60 S. E. 35, 37.

In action of specific performance of contract to convey real estate, defendants not entitled to jury trial as to plaintiff's title. *Aiken Mortgage Co. v. Jones*, 197 S. C. 245, 15 S. E. (2d) 1119.

Nor to jury trial on issue of damages. *Ibid.*

An order of reference as to an issue of fact is not appealable.—An order of reference, pursuant to this section, where "an issue of fact shall require the examination of a long account," is not appealable, as it does not "involve the merits." *Devereux v. McCrady*, 49 S. C. 423, 27 S. E. 467.

As to appeal from orders "involving the merits," see § 26, and the note thereto.

Except in case of abuse of discretion.—An order of reference is a matter for the exercise of the court's discretion, and is not reviewable, except in a case of abuse of that discretion. *Newell Contracting Co. v. Blankenship*, 130 S. C. 131, 125 S. E. 420, 424.

Court may of own motion refer the cause or determine questions involved without a reference.—Where subject is one proper for reference, it is generally within the power of the court in its discretion either to refer the cause, even without consent of the parties, or to determine the questions involved without a reference; in the absence of some special rule of practice a reference is not a matter of right, but is a matter for the exercise of judicial discretion which ordinarily is not subject to review on appeal or exception. *Momeier v. John McAlister, Inc.*, 190 S. C. 529, 3 S. E. 606.

Presiding judge did not abuse his discretion in submitting fact issues to jury in equity case for his aid and enlightenment, after refusing plaintiff's motion for a general order of reference and defendants' motion for a submission of

fact issues to jury under statute. *Ibid.*

Where fact issues are framed for jury trial under statute in equity case, issues do not survive the term at which they are framed, unless continued by special order. *Ibid.*

Jury's findings on fact issues framed for jury trial under statute in equity case are conclusive, if supported by any evidence, and presiding judge can only affirm verdict or set it aside and order new trial, but he may withdraw case from jury before findings are made and decide issues for himself or have jury make findings on issues for his aid and enlightenment in determining judgment to be rendered. *Ibid.*

The chancellor may submit issues to jury in equity case for his aid and enlightenment, and is not bound to accept jury's verdict in deciding on judgment, and such right is independent of statute authorizing framing of fact issues for jury trial in equity cases. *Ibid.*

And such order is not rendered erroneous by reason that at same time judge continued case for a trial of issues until the next term of court, at which term he was not assigned to preside, although his order could not be construed as binding on judge who would try case. *Ibid.*

Judge required to grant plaintiff's motion for general order of reference for so much of cause as was not involved in issues submitted, since granting of general order of reference, whether applied to whole of case or a part, was discretionary. *Ibid.*

Not necessary to decide whether any issues involved regarding submission to jury if transferred to law calendar.—Where defendants in equity case sought submission of issues to jury under statute, it was not necessary in determining whether presiding judge abused his discretion in refusing defendant's motion to consider whether any issues of law were involved which would require issues to be submitted to jury as matter of right, if case was transferred to law calendar. *Ibid.*

See generally. *Independent, etc., Co. v. Richland Lodge*, 73 S. C. 533, 53 S. E. 993, Ann. Cas. 12D, 1137; *Fludd v. Equitable Life Assur. Soc.*, 75 S. C. 315, 318, 55 S. E. 762, 16 L. R. A. (N. S.) 1221, 26 A. L. R. 1291; *Bank of Hampton v. Fennell*, 55 S. C. 379, 33 S. E. 485; *Sullivan v. Latimer*, 32 S. C. 281, 10 S. E. 1071.

Applied.—*LaCount v. General Asbestos & Rubber Co.*, 175 S. C. 110, 178 S. E. 500.

§ 654. Trial by master or referee—effect of report—review.

(1) Mode—powers—decisions.—The trial by a master, or by referees, shall be conducted in the same manner and on similar notice as a trial by the court. Every referee appointed pursuant to this code of procedure shall have power to administer oaths in any proceedings before him, and shall have, generally, the powers vested in a referee by law. Masters and referees shall have the same power to grant adjournments, and to allow amendments to any pleadings and to the summons, as the court, upon such trial, upon the same terms, and with the like effect. They shall have the same power to preserve order and punish all violations thereof upon such trial, and to compel the attendance of witnesses before them by attachment, and to punish them as for contempt for nonattendance or refusal to be sworn or testify, as is possessed by the court. They must state the facts found, and the conclusions of law, separately; and their decision must be given, and may be excepted to and reviewed in like manner, and with like effect, in all respects, as in cases of appeal under section 650; and they may in like manner settle a case or exceptions. When the reference is to report the facts, the report shall have the effect of a special verdict.

(2) Must decide objection to evidence—and report separately.—Masters and referees to whom causes may be referred, whether to hear and decide the whole issues or to report upon any specific question of fact, or upon the facts generally, shall hear and decide any objection which may be made to the competency, relevancy, or admissibility of any testimony which may be offered; and in case, upon hearing such testimony, the master or referee shall decide the same inadmissible, he shall take the same, subject to such objection, but shall not incorporate such testimony, so held by him inadmissible with the rest of the testimony, in the body of his

report, but shall append the same separately at the end of his report.

(3) **May employ stenographer.**—The master or referee, at the request of any party to a cause who may tender the necessary expenses incident thereto, may employ a competent stenographer to take testimony in such cause: *provided*, that such expenses shall not be taxed in the costs or included in the disbursements of the same.

(4) **To be read and signed by witness—testimony taken by stenographer.**—Whenever any cause shall be referred to any master or referee by any court in this State, and testimony be taken therein, it shall be the duty of such master or referee to reduce the testimony of the witnesses to writing and require the same to be read over and signed by the witness: *provided*, however, that nothing herein contained shall be construed to prevent the use of stenographers for the purpose of taking testimony at such references, or to require that the testimony so taken by such stenographer shall be read over to or signed by such witnesses.

(5) **Time prescribed for report—penalty—extension of time.**—In all cases referred to masters and referees by the courts of common pleas, as now provided by law, the masters or referees shall make and file with the clerks of the courts of common pleas of their respective counties their reports within sixty days from the time the action shall be finally submitted to them, and in default thereof they shall not be entitled to any fees: *provided*, that nothing herein contained shall prevent parties to said action, or their attorneys, from extending the time by mutual consent in writing

See § 655.

(6) **Appeal**—When the case shall have been heard and decided upon the report of the referee and exceptions, the decision may be reviewed on appeal to the Supreme Court.

1932 Code, § 654; Civ. P. '22, § 594; Civ. P. '12, § 332; Civ. P. '02, § 294; 1870 (14) § 296; 1884 (17) 733; 1889 (20) 294.

This Section is not mandatory.—This section, requiring the referee to state the facts found and the conclusions of law separately, is directory merely and not mandatory. *Stack v. Haigler*, 90 S. C. 319, 73 S. E. 354, Ann. Cas. 13D, 605; *Bollmann v. Bollmann*, 6 S. C. 29, 13 Am. Dec. 547, 132 Am. St. Rep. 159, Ann. Cas. 18C, 974.

And where it is not complied with the remedy is by motion for recommittal.—Where the facts found and the conclusions of law are not stated separately, the remedy under this section is by motion for a recommittal, and not by exception. *Stack v. Haigler*, 90 S. C. 319, 73 S. E. 354, Ann. Cas. 13 D, 605; *Thompson v. Thompson*, 6 S. C. 279.

The referee has power to allow amendments, under this section. *Mason v. Johnson*, 13 S. C. 20, 75 Am. Dec. 740, 47 L. R. A. (N. S.) 456, Ann. Cas. 16A, 170; *Elliott v. Carroll*, 179 S. C. 329, 184 S. E. 92.

And He May Determine Objections to Testimony.—An order of reference, reserving equities, does not prevent the referee from determining objections to testimony. *Devereux v. McCrady*, 49 S. C. 423, 27 S. E. 467.

The "facts found" are the conclusions of facts drawn from the testimony. There should first be a clear statement of all material facts, and then should follow the conclusions of the referee. *Moore v. Johnson*, 7 S. C. 303.

And a party can be heard in opposition to the confirmation of the report of the referee, without having excepted thereto, when he has not been served with a copy or notice thereof ten days before court. *Fort v. Goodwin*, 36 S. C. 445, 15 S. E. 723, 6 A. L. R. 272.

A hearing of exceptions to a master's report, within ten days after notice of the decision, is error. *McGee v. Merri-man*, 43 S. C. 103, 20 S. E. 971. And the time to file additional exceptions cannot be extended beyond ten days. *Verner v. Perry*, 45 S. C. 262, 22 S. E. 888.

The conclusions are binding upon the parties in the absence of exceptions. *Townes v. Alexander*, 69 S. C. 23, 24, 48 S. E. 214.

But the referee cannot require a party to produce a deed. *Cartee v. Spence*, 24 S. C. 550.

Nor can the judge hearing the case upon the report call for a paper to be produced which was not before the referee.

Griffin v. Griffin, 20 S. C. 486.

A referee's verdict may be set aside.—While the report of the referee upon an issue of fact "shall have the effect of a special verdict," as such a verdict it may be set aside for any cause, for which verdicts may be set aside. *Fields v. Hurst*, 20 S. C. 282.

It is the duty of the judge to determine all the issues in an equity cause by his own judgment; and the report of the referee merely aids the judge in reaching his judgment. *Thorpe v. Thorpe*, 12 S. C. 154.

In equity the referee's findings of facts are only to assist the court and for its information, and may be disregarded by the court. *Fields v. Hurst*, 20 S. C. 282.

When there is a consent order of reference of all issues in a law case, the judge has power to review the findings of fact as well as of law, made by the referee, when the report, the testimony and exceptions are all before him. *Meetze v. Charlotte, etc.*, R. Co., 23 S. C. 1, 49 L. R. A. 511, 522; *Griffin v. Charlotte, etc.*, R. Co., 23 S. C. 25, 55 Am. Rep. 1, 75 Am. St. Rep. 428, 78 Am. St. Rep. 184, 14 L. R. A. 85, 16 L. R. A. (N. S.) 405, L. R. A. 1915B, 521; *Calvert Nickles*, 26 S. C. 304, 305, 2 S. E. 116, 15 Am. St. Rep. 714, 17 L. R. A. 271, 20 L. R. A. 114, 31 L. R. A. (N. S.) 239.

See generally. *Brown v. Rogers*, 71 S. C. 512, 516, 51 S. E. 257; *Kiddell v. Britton*, 67 S. C. 175, 45 S. E. 174.

§ 655. Referees—how chosen—report.—In all cases of reference to referees, the parties to the issues in the action, except when the defendant is an infant or an absentee, may agree in writing upon a person or persons, not exceeding three, and a reference shall be ordered to him or them, and to no other person or persons. And if such parties do not agree, the court shall appoint one or more referees, not more than three, who shall be free from exception. And no person shall be appointed referee to whom all parties in the action shall object. And no judge or justice of any court shall sit as referee in any action pending in the court of which he is judge or justice, and not already referred, unless the parties otherwise stipulate. The referee or referees shall make and deliver a report within sixty days from the time the action shall be finally submitted; and in default thereof, and before the report is delivered, either party may serve notice upon the the opposite party that he elects to end the reference; and thereupon the action shall proceed as though no reference had been ordered, and the referees shall not, in such case, be entitled to any fees.

1932 Code, § 655; Civ. P. '22, § 595; Civ. P. '12, § 333; Civ. P. '02 § 295; 1870 (14) § 297.

See § 654 (5).

This section permits one to file his report as referee where he was appointed referee prior to his election and qualification as a judge. *Stack v. Haigler*, 90 S. C. 319, 73 S. E. 354, Ann. Cas. 13D, 605.

A party was not legally incompetent to act as a special referee in an action for specific performance because he had

acted as a special referee in a companion case involving many of the same questions involved in instant case, where he merely took and reported testimony in companion case and did not pass on such testimony. *Spencer v. National Union Bank of Rock Hill*, 192 S. C. 355, 6 S. E. (2d) 755.

§ 656. Referees in Saluda and York Counties.—The same power and authority now given, or that may hereafter be given, to masters in equity, is hereby conferred upon special referees in Saluda and York Counties: *provided*, that the court appointing said special referees may limit their power and authority by a written order.

1932 Code, § 656; Civ. P. '22, § 596; Civ. P. '12, § 334; 1911 (27) 85; 1935 (39) 349.

CHAPTER 34

Judgments

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| 657. Judgment determines rights of parties. | 661. Action for recovery of personalty. |
| 658. Relief not to exceed demand. | 662 and 663. Abstract of judgments. |
| 659. Measure of damages. | 664. Judgment roll and docketing. |
| 660. Declaratory judgments. | 664-1. Discharge of bankrupts. |
| | 664-2. Service on judgment creditors. |

§ 657. Judgment determines rights of parties.

(1) **May be for or against any of parties to action.**—Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants, and it may determine the ultimate rights of the parties on each side, as between themselves.

(2) **Affirmative relief to defendant.**—And it may grant to the defendant any affirmative relief to which he may be entitled.

(3) **Against one or more of defendants.**—In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment may be proper.

(4) **Complaint may be dismissed for neglect to prosecute action.**—The court may also dismiss the complaint, with costs in favor of one or more defendants, in case of unreasonable neglect on the part of the plaintiff to serve the summons on other defendants, or to proceed in the cause against the defendant or defendants served.

(5) **Damages and costs against married women.**—In an action brought by or against a married woman, judgment may be given against her as well for costs as for damages, or both for such costs and for such damages, in the same manner as against other persons, to be levied and collected of her separate estate, and not otherwise.

1932 Code, § 657; Civ. P. '22, § 597; Civ. P. '12, § 335; Civ. P. '02, § 296; 1870 (14) § 298.

Cross references.—As to relief to be awarded the plaintiff, see the next following sections. As to judgment on failure to answer, or for lowering section. As to who may be de-excess over counterclaim in claim and delivery and other case, see § 586, and the note thereto. As to judgment on frivolous demurrer, answer or reply, see § 587, and not thereto.

"Judgment" is the final determination of the rights of the parties in the action.—See § 585, and note thereto.

Section prevents multiplicity of suits.—It is in the line of public policy that all the differences between interested parties be adjusted in the one litigation, and this section provides just such a remedy. *Miller v. Gulf, etc., Inc. Co.*, 132 S. C. 78, 129 S. E. 131, 132.

In an action on a sheriff's bond for damages resulting from his failure to take possession of attached property on the theory that it was incapable of manual delivery, within the meaning of § 538, the sheriff was a proper party and the court's refusal to permit him to be-

come a party on the motion of the surety and on the application of the sheriff to intervene, without good reason therefor, was an abuse of discretion and the policy of the law to prevent a multiplicity of suits. *Miller v. Gulf, etc., Ins. Co.*, 132 S. C. 78, 129 S. E. 131, 133.

As to who may be plaintiffs, see § 403, and note thereto. As to who may be defendants, see § 404, and note thereto.

A separate judgment may be rendered in favor of one defendant against a plaintiff upon a counterclaim. *Plyer v. Parker* 10 S. C. 464, 10 A. L. R. 1260.

And in action against survivor of joint obligors and the executor of deceased one, the judgment should be separate. *Trimmier v. Thomson*, 10 S. C. 164, 102 Am. St. Rep. 610.

Judgment may be given for one defendant against the other defendants.—Under this section, we see no reason why the court, having all the parties before it, may not proceed to adjudicate the rights of one co-defendant against his co-defendants, provided the same can be done without prejudice to the rights

of the plaintiff, and provided the pleadings and evidence furnish a proper basis for such adjudication. *Beattie v. Latimer*, 42 S. C. 313, 20 S. E. 53, cited with approval in *Phillips v. Anthony*, 47 S. C. 460, 25 S. E. 294. Such seems to be in accordance with the rule prevailing in the old court of equity in this state. See *Motte v. Schult*, 1 Hill Eq. 146, 26 Am. Dec. 194, and *Moss v. Bratton*, 5 Rich. Eq. 1; *Beattie v. Latimer*, 42 S. C. 313, 20 S. E. 53, 56.

The answer of a defendant in foreclosure, who is a second mortgagee, when duly served on the defendant mortgagor, against whom affirmative relief is desired, may be made a cross bill; and a foreclosure of a mortgage therein pleaded may be decreed, not only against the lands described in plaintiff's complaint, but also against other lands included in said mortgage, and a judgment rendered for a deficiency, where such relief will not prejudice the rights of the plaintiff. *Phillips v. Anthony*, 47 S. C. 460, 25 S. E. 294.

And such judgment is *res judicata* on a subsequent trial after reversal for other defendants.—In a case where the trial court has rendered judgment under the authority of this section for one of the two defendants and against the other, the judgment in favor of such defendant is *res judicata* on a subsequent trial after a reversal of the judgment as to the co-defendant. *Sparks v. Atlantic, etc., Co.*, 109 S. C. 145, 95 S. E. 344, 345.

The answer has been made to serve the purpose of the cross bill as used under the old equity practice.—Under the old equity practice, a defendant desiring affirmative relief against his co-defendant, growing out of the subject matter of the original bill, but not apparent on the face of the bill, was required to file a cross bill, upon which process issued and relief was granted. Under the Code, the answer may be made to subserve the purpose of the cross bill; and if it is duly served upon the defendant against whom affirmative relief is desired, the object of process, which is notice, is accomplished. *Phillips v. Anthony*, 47 S. C. 460, 25 S. E. 294, 295.

But the service of a cross answer is necessary only when one defendant seeks

affirmative relief against another on facts which do not appear in the complaint. *Youmans v. Youmans*, 128 S. C. 31, 121 S. E. 674, 677. See also, the authority therein cited.

This section does not apply to a partnership contract, as the obligation is joint. *Pope Mfg. Co. v. Welch*, 55 S. C. 528, 33 S. E. 787, 791, 5 A. L. R. 1541, 10 A. L. R. 1260.

Mere failure by plaintiff to proceed with his case after service of summons and docketing does not have the effect, under this section, of putting the plaintiff out of court. *Hagood v. Riley*, 21 S. C. 143.

The provision for the levy and collection out of the separate estate of a married woman is merely directory. *Clinkscapes v. Hall*, 15 S. C. 602, 100 Am. Dec. 502.

And is only intended to indicate what property of the woman can be made liable. *Habenicht v. Rawls*, 24 S. C. 461, 17 L. R. A. (N. S.) 677, Ann. Cas. 17B, 602.

This section has been cited, along with § 404, as authority for bringing in parties as defendants. See *Peurifoy v. Mauldin*, 142 S. C. 7, 140 S. E. 253, 255; and the note to § 404. And see also, *Beall Co. v. Weston*, 83 S. C. 491, 65 S. E. 823.

Surety sued by employer on bond executed by it to protect employer from shortage of employer's employees, who agreed to protect surety from loss, may bring employees short in as defendants. *C. C. Pearce & Co. v. Am. Surety Co. of N. Y.*, 173 S. C., 77; 174 S. E., 902.

See generally, as to voluntary discontinuance by plaintiff, *Forrest v. City Council*, 65 S. C. 500, 43 S. E. 952, Ann. Cas. 17A, 1189; *McCabe v. Southern Ry. Co.*, 107 F. 213; *Jordan v. Wilson*, 69 S. C. 52, 56, 48 S. E. 37; *Shelton v. Southern Ry.*, 80 S. C. 74, 61 S. E. 220; *State v. Southern Ry. Co.*, 82 S. C. 12, 62 S. E. 1116, Ann. Cas. 14D, 155.

As to evidence of dismissal, and the necessity of a formal order, see *State v. Stickley*, 80 S. C. 64, 70, 61 S. E. 211, 128 Am. St. Rep. 855, 15 Ann. Cas. 136, 16 L. R. A. (N. S.) 1059, L. R. A. 1918A, 38, Ann. Cas. 13C, 604, Ann. Cas. 18D, 214.

§ 658. Relief to be awarded plaintiff.—The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint, but in any other case, the court may grant him any relief consistent with the case made by the complaint, and embraced within the issue.

1932 Code, § 658; Civ. P. '22, § 598; Civ. P. '12, § 336; Civ. P. '02, § 297; 1870 (14) § 299.

Cross reference.—As to the affirmative relief allowed the defendant, see the next foregoing section and the note

thereto.

The prayer for relief is not essential to the complaint. *Balle v. Moseley*, 13 S.

C. 439.

Nor is relief limited by prayer of complaint, if answer is filed and relief is consistent with case made. Christopher v. Christopher, 18 S. C. 600, Ann. Cas. 17C, 662, 6 A. L. R. 1197.

If every fact necessary to the action is stated, the plaintiff may, even when no answer is put in, have any relief to which the facts entitle him, consistent with the demand in the complaint. Pom. Rem. sec. 580, cited with approval in Ross v. Carroll, 33 S. C. 202, 11 S. E. 760; McMahon v. Pugh, 62 S. C. 506, 40 S. E. 961, 962.

Where complaint stated notes and credits, and demanded judgment for a certain sum, and answer admitted the allegation, it was error for the judge to

reduce the credits and give judgment for a larger sum; this was not consistent with the case made. Straub v. Screven, 19 S. C. 445, 133 Am. St. Rep. 565.

Failure to confine relief to demand in complaint may be remedied on appeal.—The failure to confine the relief granted the plaintiff to his demand in the complaint constitutes a mere error of law, remediable by appeal, but not rendering the judgment null and void. McMahon v. Pugh, 62 S. C. 506, 40 S. E. 961, 962.

The pleadings to sustain dual judgments must raise an issue.—Cook v. Jennings, 40 S. C. 204, 18 S. E. 640, 644.

See generally, as to a decree in foreclosure being within scope of pleadings, Beall Co. v. Weston, 83 S. C. 491, 65 S. E. 823.

§ 659. Rates of damages where damages are recoverable.—Whenever damages are recoverable, the plaintiff may claim and recover, if he show himself entitled thereto, any rate of damages which he might have heretofore recovered for the same cause of action.

1932 Code, § 659; Civ. P. '22, § 599; Civ. P. '12, § 337; Civ. P. '02, § 298; 1870 (14) § 300.

This section only remands such cases to the former practice, and in actions for damages not punitive the recovery is limited to the direct pecuniary loss. Sullivan & Co. v. Sullivan, 20 S. C. 509, 79

Am. Dec. 505.

See generally, Vance v. Vandercook Co., 170 U. S. 468, 474, 42 L. Ed. 1111, 18, S. Ct. 645.

§ 660. Declaratory judgments.—No action or proceeding in any court of record wherein the construction of a deed, a will or written contract is sought or involved shall be open to the objection that a merely declaratory judgment, decree or order is sought, and the court may make binding declarations of the rights of parties to such action or proceedings under such instruments whether other relief is or could be claimed or not.

1932 Code, § 660; 1922 (32) 967.

Under this section equity may entertain a bill to construe a will and codicils.—Des Portes v. Des Portes, 157 S. C. 407, 154 S. E. 426, 428.

In a case where the sole object of the plaintiff was to obtain a construction of a will, the court of common pleas was without jurisdiction and this section, subsequently enacted, was inapplicable. Ex parte Darby, 157 S. C. 434, 154 S. E. 632.

Complaint in action by state to cancel contract incorporated in statute, brought by attorney general under direction of legislature to test validity of statute, is not demurrable as being unconstitutional. State v. Broad River Power Co., 177 S. C. 240, 181 S. E. 41.

When not res judicata.—A judgment declaring automobile liability policy void and relieving insurer of all liability, in action by insurer against insured, was not res judicata of action against insurer by holder of judgment against insured for injuries received in accident involv-

ing insured automobile, which occurred before action for declaratory judgment was instituted, since holder of judgment was not a "privy" of insured. Bailey v. United States Fidelity & Guaranty Co., 185 S. C. 169; 193 S. E. 638.

In action for declaratory judgment, supreme court would not consider mandamus proceeding which plaintiffs attempted to allege, since courts are not permitted to take cognizance of any cause of action which is alleged in action for declaratory judgment other than one for declaratory judgment. Daniel v. Conestee Mills, 183 S. C. 337; 191 S. E. 76.

Supreme Court is without authority in action for declaratory judgment to determine constitutionality of unemployment act, since declaratory judgment is limited to construction of deed, will, or written contract. Daniel v. Conestee Mills, 183 S. C. 337; 191 S. E. 76.

Strike out irrelevant matter.—In action hereunder where complaint and an-

swer agree will duly probated in common form and more than four years elapsed without probate in solemn form, no disability of infancy alleged, allegation in answer held properly stricken alleg-

ing will not properly executed and application be made to probate it in solemn form despite expiration of four-year period prescribed in § 8932. *Wilkinson v. Wilkinson*, 178 S. C. 194; 182 S. E. 640.

§ 661. Judgment in action for recovery of personal property.—In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession, or for the recovery of possession, or the value thereof, in case a delivery cannot be had, and of damages, both punitive and actual, for the detention. If the property have been delivered to the plaintiff, and the defendant claim a return thereof, judgment for the defendant may be for a return of the property, or the value thereof, in case a return cannot be had, and damages, both actual and punitive, for taking and withholding the same: *provided*, that where either party gives bond for said property, as provided by law, no punitive damages shall be allowed for anything occurring after the giving of the bond.

1932 Code, § 661; Civ. P. '22, § 600; Civ. P. '12, § 338; Civ. P. '02, § 299; 1907 (25) 483.

Cross references.—As to judgments to be entered in "Abstract of Judgments" index to judgments, see §§ 662 and 663, and notes thereto. As to what the jury may find in actions for recovery of personal property, see § 602 and note thereto. As to when the jury may render a special or general verdict, see § 602 and note thereto. As to claim and delivery, see § 552 and note thereto. As to when the defendant is entitled to redelivery, see § 558 and note thereto. As to the amount of the bond in attachment and claim and delivery proceedings, see § 557 and note thereto. As to pleadings of counterclaim by defendant in actions in tort, see § 485 and note thereto.

Object of section.—The real object of this section "is of a twofold character: First, to protect the rights of the true owner to regain the possession of his property in specie, if practicable; second, to save the party who may be innocently, but illegally, in the possession of the property of another from being compelled to pay such value as the jury may see fit to place upon the property, by giving him the alternative of returning the property to its rightful owner and only paying such damages for its detention as may be determined to be proper." *Finley v. Cudd*, 42 S. C. 121, 127, 20 S. E. 32, 34, L. R. A. 1915E, 199; *Holliday v. Poston*, 60 S. C. 103, 38 S. E. 449, 452, 18 L. R. A. (N. S.) 1270.

Section is directory.—The provisions of this section are directory and optional as the circumstances may require. *Wilkins v. Willimon*, 128 S. C. 509, 122 S. E. 503, 504.

"Actual damages" include all compensatory damages whether general or special.—*Shieder v. Southern Ry. Co.*, 83 S. C. 455, 65 S. E. 631, 632.

But the damages must not be remote or speculative.—Remote or speculative

damages must be excluded and a verdict should embrace only such damages as are the proximate result of the taking and withholding of the property. *Sizer & Co. v. Dopson*, 89 S. C. 535, 72 S. E. 464, 466.

Punitive damages allowed only for wilful taking and holding.—Under this section punitive damages can only be allowed in an action to recover possession of personal property where the taking or holding of the said property is wilful. *Manley v. Bailey*, 151 S. C. 366, 149 S. E. 119, 123.

Where plaintiff suing to recover possession of personal property or its value proves her title thereto and then the defendant takes the said property and disposes of it, she shall be entitled, under this section, to recover the property or its value, and, in addition, such actual damages as she might have suffered by reason of the taking and withholding thereof. *Manley v. Bailey*, 151 S. C. 366, 149 S. E. 119.

And this applies to claim and delivery actions also.—*Shieder v. Southern Ry. Co.*, 83 S. C. 455, 65 S. E. 631. Prior to the amendment of this section in 1907 (23 St. at Large p. 483), punitive damages in action of claim and delivery were not allowed under this section. For cases dealing with that subject prior to the said amendment, see *Brayton v. Beall*, 73 S. C. 308, 53 S. E. 641, 26 L. R. A. (N. S.) 1167, Ann. Cas. 17A, 438; *Tittle v. Kennedy*, 71 S. C. 1, 50 S. E. 544, L. R. A. 1917C, 46, 4 Ann. Cas. 68, Ann. Cas. 18C, 53,—Ed. Note.

And such question of the right to punitive damages is one for the jury. *Manley v. Bailey*, 151 S. C. 366, 149 S. E. 119, 123.

But a finding of punitive damages by the jury cannot be sustained when the court instructs otherwise.—*Sizer & Co.*

v. Dopson, 89 S. C. 535, 72 S. E. 464, 466.

Counterclaim by defendant in claim and delivery.—See this title under § 602.

After plaintiff executes bond in claim and delivery actual damages may be recovered for damages occurring thereafter, however punitive damages may not be recovered. *Manley v. Bailey*, 151 S. C. 366, 149 S. E. 119. *Sandel v. Whisenhunt*, 168 S. C. 129; 167 S. E. 166.

Sureties on undertaking in claim and delivery not liable for payment of judgment against principal for punitive damages for acts done by such principal after execution of bond. *Whisenhunt v. Sandel*, 177 S. C. 207; 181 S. E., 61.

Liability of sureties.—See section 555 and notes thereto.

Under this section the judgment should conform to the verdict. *Wilkins v. Wilimon*, 128 S. C. 509, 122 S. E. 503, 505.

And each party may be entitled to enter judgment.—In such action where plaintiff takes possession of the property

and the verdict gives him a portion of it with damages, and the remainder to the defendant with damages, each party is entitled to enter judgment. *Stoney v. Bailey*, 28 S. C. 156, 5 S. E. 347.

Original status must be restored before plaintiff may discontinue the action.—Where the plaintiff in an action of replevin has taken the property from the defendant's possession, he cannot discontinue the action without first restoring the original status. *Pee Dee River Lumber Co. v. Fountain*, 90 S. C. 122, 72 S. E. 885, 887, Ann. Cas. 13A, 110, 2 A. L. R. 201. For a case giving a treatment of the early law on this subject, see *Vance v. Vandercook Co.*, 170 U. S. 438, 42 L. Ed. 1100, 18 S. Ct. 674.

This section does not apply to action for general damages. *Joplin v. Carrier*, 11 S. C. 327; *Richey v. DuPre*, 20 S. C. 6, 22 Am. St. Rep. 426, 23 L. R. A. 476, 65 L. R. A. 506.

See generally. *Robbins v. Slattery*, 30 S. C. 328, 9 S. E. 510.

§ 662. Clerk to keep "abstract of judgments."—The clerk shall keep among the records of the court a book for the entry of judgments, to be called the "Abstract of Judgments."

1932 Code, § 662; Civ. P. '22, § 601; Civ. P. '12, § 339; Civ. P. '02, § 300; 1839 (11) 103, § 8.

Editor's Note.—In view of the fact that this section is merely introductory to the two following sections, the practitioner

should consider the three sections together.

§ 663. Judgment to be entered in "abstract of judgments" index to judgments.—In this book shall be entered each case wherein judgment may be signed, including each case in dower, partition and escheat, after judgment or final order, with separate columns, showing number of enrollment, names of parties, cause of action, attorney, date of judgment, amount of judgment, time of bearing interest, how judgment obtained, costs (separating attorney, clerk, sheriff, witness and total), kind of execution, date of issuing, sheriff's return, when renewed, and satisfaction, together with an index, by the names of defendants, and a cross index by the names of plaintiffs, each alphabetically arranged and kept in separate volumes, with the number of enrollment of judgment. And whenever judgment against any party plaintiff or defendant has been entered, the names of such party, and each of them, shall appear in the index, and the name of the party plaintiff or defendant in whose favor judgment has been entered, and each of them, shall appear in cross index.

1932 Code, § 663; Civ. P. '22, § 602; Civ. P. '12, § 340; Civ. P. '02, § 301; 1897 (22) 436.

Cross reference.—As to whom judgments may be for or against, see § 657, and note thereto.

"Judgment" is the final determination of the rights of the parties in the action.—See § 585, and note thereto.

The requirements of this and the above section are merely directory and ministerial. *Connor v. McCoy*, 83 S. C. 165, 65

S. E. 257, 259, 136 Am. St. Rep. 817, Ann. Cas. 14D, 5, 1 A. L. R. 1446.

Thus, where a judgment was properly entered, but the formular lodged with the clerk was not dated and signed by him as is required by this section, it was held that such judgment was not invalidated, the provision violated being directory only, and the object of enrollment being

accomplished by the entry, which was properly made. *Hardin v. Melton*, 28 S. C. 38, 4 S. E. 805, 9 S. E. 423, 28 L. R. A. 633.

The entry of a judgment is a ministerial act, which consists in spreading upon the record a statement of the final conclusion reached by the court in the matter, thus furnishing external and incontestable evidence of the sentence given, and designed to stand as a perpetual memorial of its action. *Mason, etc., Co. v. Killough Music Co.*, 45 S. C. 11, 22 S. E. 755, 756.

But entry of judgment is necessary for creation of lien. *Reid v. McGowan*, 28 S. C. 74, 5 S. E. 215, 217.

Thus, the mere filing of a judgment roll, decree, or transcript thereof with the clerk constitutes no lien, until it is entered upon the book called the "Abstract of Judgments." *Farmers', etc., Bank v. Holliday*, 108 S. C. 116, 93 S. E. 333, 335; see also, the authority therein cited.

And such entry is constructive notice to all parties dealing with property.—By this entry a lien is created upon the real estate of the judgment debtor and such entry is constructive notice to all persons dealing with reference to the property affected by such lien. *Ex parte Graham*, 54 S. C. 163, 32 S. E. 67, 72.

The object of the act in requiring the formulated judgment to go into the clerk's office was to give notice to the world of the lien which had been established, so that third parties might deal with the property without peril, and also to enable the judgment creditor to make his money by *fi. fa.* *Hardin v. Melton*, 28 S. C. 38, 4 S. E. 805, 808, 9 S. E. 423, 28 L. R. A. 633.

Hence the entering and the filing are the essential facts. *Hardin v. Melton*, 28 S. C. 38, 4 S. E. 805, 808, 9 S. E. 423, 28 L. R. A. 633.

And entry is necessary before execution can properly issue.—The law contemplates an entry of the judgment in the book entitled "Abstract of Judgments" before the execution can be properly issued. *Mason, etc., Co. v. Killough Music Co.*, 45 S. C. 11, 22 S. E. 755, 756.

An execution issued before the judg-

ment was entered in the "Abstract of Judgments" under the authority of this section is of no effect. *Mason, etc., Co. v. Killough Music Co.*, 45 S. C. 11, 22 S. E. 755, 756.

Presumption as to entry of judgment.—Under this and the above section and circuit court rule 3, the court in the absence of evidence of special leave will presume that a judgment was not entered until five days after the last day of the term, and that the judgment defendant did not have notice of the judgment until its entry. *British, etc., Mortg. Co. v. Strait*, 84 S. C. 141, 65 S. E. 1038, 1040, *Ann. Cas.* 14D, 234.

Sale in partition cannot be impeached collaterally for failure to enter the decree according to this section.—A confirmed sale of land for partition under a duly recorded deed cannot be collaterally impeached for the clerk's failure to make up the roll and enter the decree according to this and the above section. *Connor v. McCoy*, 83 S. C. 165, 65 S. E. 257, 136 *Am. St. Rep.* 817, *Ann. Cas.* 14D, 5, 1 *A. L. R.* 1446.

Nor can parties to the action who have accepted the proceeds question the validity of the sale.—The parties to an action for partition who have accepted the proceeds of the sale made under a duly recorded decree cannot question the validity of the sale on the ground that the clerk's failure to make up and enter the judgment roll, contemplated by this and the above section, chilled the bidding. *Connor v. McCoy*, 83 S. C. 165, 65 S. E. 257, 136 *Am. St. Rep.* 817, *Ann. Cas.* 14D, 5, 1 *A. L. R.* 1446.

A judgment obtained is not a lien upon personal property until execution is issued and levy made. Before execution can issue the judgment must be entered. *Powers v. Fidelity & Deposit Co. of Maryland*, 180 S. C. 501; 186 S. E. 523.

Lien of judgment of federal court.—In order for judgment of federal court to constitute a judgment lien in the state court, it would be necessary for a transcript of the judgment to be filed and entered in some county in this state. *Powers v. Fidelity & Deposit Co. of Maryland*, 180 S. C. 501; 186 S. E. 523.

§ 664. Judgment roll—transcript of judgment filed in any other county, effect of.—Unless the party or his attorney shall furnish a judgment roll, the clerk, immediately after entering the judgment, shall attach together and file the following papers, which shall constitute the judgment roll:

(1) In case the complaint be not answered by any defendant, the summons and complaint, or copies thereof, proof of service, and that no answer has been received, the report, if any, and a copy of the judgment.

(2) In all other cases, the summons, pleadings, or copies thereof, and a copy of the judgment, with any verdict or report, the offer of the defendant, exceptions, case and all orders and papers in any way involving the

merits and necessarily affecting the judgment.

A transcript of a final judgment of any court of record of this State or of any district or circuit court of the United States within this State, directing in whole or in part, the payment of money, may be docketed with the clerk of the court of common pleas in any county, and when so docketed shall have the same force and effect as a judgment of that court. Such transcript shall set out the names of the parties, plaintiff and defendant, the attorneys of record, the date and amount of the judgment, the time from which interest is to be computed, and the amount of costs.

1932 Code, § 664; Civ. P. '22, § 603; Civ. P. '12, § 341; Civ. P. '02, § 302; 1870 (14) § 305; 1929 (36) 251.

Cross reference.—As to whom the judgment may be for or against, see § 657 and note thereto.

The word "case" refers to the case on application for new trial.—Where an appeal was dismissed by the clerk of the Supreme Court for failure of appellants to file the return within the prescribed time after the record constituting said return had been completed, and it appeared that the return was filed within 40 days after the case, as prepared for the supreme court, was finally settled, it was held that the word "case," as used in this section, referred to the case prepared on application for a new trial, addressed to the circuit court as prescribed by statute, and not to the case as prepared for argument in the Supreme Court; and, the return not having been filed within the prescribed time, the clerk properly dismissed the appeal. *Tribble v. Poore*, 28 S. C. 565, 6 S. E. 577, 22 Am. St. Rep. 615. Cited

with approval in *Cummings v. Wingo*, 28 S. C. 610, 7 S. E. 48.

Meaning of the word "papers."—The papers spoken of in subdivision 2 of this section are the papers leading up to the judgment, and not those prepared after the judgment has been entered. *Tribble v. Poore*, 28 S. C. 565, 6 S. E. 577, 579, 22 Am. St. Rep. 615.

"Final judgment" applies to the circuit court. *Garrison v. Dougherty*, 18 S. C. 486.

And a transcript of a final judgment is a copy of the entry in the judgment book. *Harrison v. Southern Porcelain Mfg. Co.*, 10 S. C. 278. But it is good although certified to be from the docket of judgments instead of the judgment book, and without the clerk's name, but with his seal. *Harrison v. Southern Porcelain Mfg. Co.*, 10 S. C. 278.

Lien of federal judgment.—See notes to section 663.

§ 664-1. Discharge of bankrupts from judgments.—Any time after one year has elapsed since a bankrupt was discharged from his debts, pursuant to the acts of Congress relating to bankruptcy, the bankrupt, his receiver, trustee or any other interested person or corporation, may apply, upon proof of the bankrupt's discharge, to the court in which a judgment was rendered against him, or if rendered in a court not of record, to the court of which it has become a judgment by docketing it therein, for an order, directing the judgment to be cancelled and discharged of record. If it appears upon the hearing that he has been discharged from the payment of that judgment or the debt upon which such judgment was recovered, an order must be made directing said judgment to be cancelled and discharged of record; and thereupon the clerk of said court shall cancel and discharge the same, by marking on the docket thereof that the same is cancelled and discharged by order of the court, giving the date of entry of the order of discharge. Notice of the application, accompanied with copies of the papers upon which it is made, must be served upon the judgment creditor, or his attorney of record in said judgment, in the same manner as provided in the rules of the circuit courts of this State for the service of process, if the residence or place of business of such creditor, or

his attorney, is known; but if unknown and cannot be ascertained after due diligence, or if such creditor is a non-resident of this state, and his attorney is dead, removed from, or cannot be found within the state, upon proof of said facts by affidavit, a judge of the court may make an order that the notice of such application be published in a newspaper designated therein, once a week for not more than three weeks, which publication shown by the affidavit of the publisher, shall be sufficient service upon such judgment creditor, of the application. *Provided, however,* that the provisions hereof shall not operate to discharge any debt, judgment or claim that is not dischargeable under the Bankruptcy Law or the law of the State.

1933 (38) 505.

§ 664-2. Serve judgment creditor in proceedings affecting real estate by serving attorney of record entering judgment—judgment creditor may appoint agent receive service.—Every judgment creditor who enters a judgment or a renewal or revival of a judgment in any court of record in this State and does not at the same time enter as part thereof the appointment of an agent upon whom process may be served in any action or proceeding affecting any real estate upon which the said judgment may at any time constitute a lien, shall be deemed thereby to have constituted the attorney of record making the entry of such judgment, renewal or revival, as the agent of such judgment creditor and of his successor in interest for the purpose of accepting service of or being served with process in any such action: *provided*, that said judgment creditor and his successor in interest may terminate such agency by enrolling and entering in the record at any time a revocation of the same or an appointment of some other competent person, whose name and address shall be clearly stated therein and who shall be a resident of South Carolina, as such process agent: *provided, further*, that in any event service of process upon the judgment creditor in any manner now provided by law shall be sufficient. The clerk of court shall forthwith enroll all appointments and revocations of appointments of attorneys filed hereunder and shall enter on the abstract of judgments a reference thereto and shall receive a fee of twenty-five cents for every such entry to be paid by the judgment creditor at the time of such filing, *provided*, that such enrollment and entry shall not affect service or process made prior thereto.

1941 (42) 222.

See § 450.

TITLE 11

Trial and Judgments, Con'd.

Witnesses and Evidence

- CHAPTER 35. Offer to Compromise, § 665.
CHAPTER 36. Agreed Case, § 668.
CHAPTER 37. Confession of Judgment, § 670.
CHAPTER 38. Admission or Inspection of Writings, § 673.
CHAPTER 39. Examination of Parties, § 674.
CHAPTER 40. Attendance of Witnesses, § 683.
CHAPTER 41. Examination of Witnesses, § 691.
CHAPTER 42. Provisions Respecting Methods of Proof, § 709.

CHAPTER 35

Offer to Compromise

665. Offer of compromise.

667. Effect of offer.

666. Offer to liquidate damages.

§ 665. Offer of compromise.—The defendant may, at any time before the trial or verdict, serve upon the plaintiff an offer in writing to allow judgment to be taken against him for the sum or property, or to the effect therein specified, with costs. If the plaintiff accept the offer, and give notice thereof in writing within ten days, he may file the summons, complaint and offer, with an affidavit of notice of acceptance, and the court shall direct judgment to be entered thereon accordingly. If the notice of acceptance be not given, the offer is to be deemed withdrawn, and cannot be given in evidence; and if the plaintiff fail to obtain a more favorable judgment, he cannot recover costs, but must pay the defendant's costs from the time of the offer; and in case the defendant shall set up a counterclaim in his answer to an amount greater than the plaintiff's claim, or sufficient to reduce the plaintiff's recovery below fifty dollars, then the plaintiff may serve upon the defendant an offer in writing to allow judgment to be taken against him for the amount specified, or to allow said counterclaim to the amount specified, with costs. If the defendant accept the offer, and give notice thereof in writing within ten days, he may enter judgment as above for the amount specified, if the offer entitled him to judgment, or the amount specified in said offer shall be allowed him in the trial of the action. If the notice of acceptance be not given, the offer is to be deemed withdrawn, and cannot be given in evidence; and if the defendant fail to recover a more favorable judgment, or to establish his counterclaim for a greater amount than is specified in said offer, he cannot recover costs, but must pay the plaintiff's costs from the time of the offer.

1932 Code, § 665; Civ. P. '22, § 686; Civ. P. '12, § 424; Civ. P. '02, § 386; 1870 (14) § 402; 1873 (15) 502; § 21.

As to relief from judgment in case of mistake, surprise, etc., see § 495 and the note thereto.

Refusal of offer precludes considera-

tion thereof on motion for nonsuit.—An offer by defendant to allow judgment for the plaintiff is, under this section deemed withdrawn when refused, and

cannot be considered on motion for non-suit. *Hunt v. Atlantic Coast Lumber Corp.*, 101 S. C. 64, 85 S. E. 229. **Applied**, in *Wilson v. Wilson*, 153 S. C. 472, 150 S. E. 897.

§ 666. Defendant may offer to liquidate damages.—In an action arising on contract, the defendant may, with his answer, serve upon the plaintiff an offer in writing that, if he fail in his defense, the damages be assessed at a specified sum; and if the plaintiff signify his acceptance thereof in writing, before trial, and on the trial have a verdict, the damages shall be assessed accordingly.

1932 Code, § 666; Civ. P. '22, § 687; Civ. P. '12, § 425; Civ. P. '02, § 387; 1870 (14) § 403.

§ 667. Effect of acceptance or refusal of offer.—If the plaintiff do not accept the offer, he shall prove his damages as if the offer had not been made, and shall not be permitted to give it in evidence. And if the damages assessed in his favor shall not exceed the sum mentioned in the offer, the defendant shall recover his costs incurred in consequence of any necessary preparation or defense in respect to the question of damages.

1932 Code, § 667; Civ. P. '22, § 688; Civ. P. '12, § 426; Civ. P. '02, § 388; 1870 (14) § 404.

CHAPTER 36

Agreed Case

668. Submitting controversy without action. 669. Judgment and appeal.

§ 668. Controversy—how submitted without action.—Parties to a matter in dispute, which may be the subject of a civil action, may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court which would have jurisdiction if an action had been brought. But it must appear by affidavit that the controversy is real, and the proceedings in good faith, to determine the rights of the parties. The court shall thereupon hear and determine the case, and render judgment thereon, as if an action were depending.

1932 Code, § 668; Civ. P. '22, § 675; Civ. P. '12, § 413; Civ. P. '02, § 374; 1870 (14) § 389.

Editor's Note.—A great number of the cases wherein this section has been cited, merely cite the section to show its application in the particular case. These cases may be found under the catchline "Applied," under which is also given a brief summary of the facts involved in each case.

Only the facts should be stated in the agreement.—All that is required or contemplated by this section is a statement of the facts (not conclusions of law), which shall be submitted to the court, and upon which the court shall render judgment as if there existed a formal action. *Southern Ry. Co. v. City Coun-*

cil, 49 S. C. 449, 27 S. E. 652, 654, Ann. Cas. 16A, 116.

And the facts alone will be considered by the court.—When considering a statement filed under this section, the court will look only to the facts therein stated, and will disregard an agreement of the parties incorporated therein. *Southern Ry. Co. v. City Council*, 49 S. C. 449, 27 S. E. 652, Ann. Cas. 16A, 116.

Where two license taxes are paid under protest, and the parties agree as to the amount of refund, if any, the court may disregard such agreement and allow legal interest with the refund. *Southern Ry. Co. v. City Council*, 49 S. C. 449,

27 S. E. 652, Ann. Cas. 16A, 116.

The "parties" themselves must agree to submission of case.—Under this section it is necessary that the parties themselves agree on the case, and there must not be merely an agreement of counsel. *Bradford v. Buchanan*, 39 S. C. 237, 17 S. E. 501.

And the agreement for submission must be signed by the parties themselves, to give the court jurisdiction. *Reeder v. Workman*, 37 S. C. 413, 16 S. E. 187, citing *Hobart College v. Fitzhugh*, 27 N. Y. 130, 134.

This section is applicable to the Supreme Court in all matters within its original jurisdiction. *Carolina Gro. Co. v. Burnet*, 61 S. C. 205, 39 S. E. 381, 382, 98 Am. St. Rep. 882, 58 L. R. A. 853. See also, *Simpson v. Willard*, 14 S. C. 191, 50 L. R. A. (N. S.) 346; *Macoy v. Curtis*, 14 S. C. 367.

Thus, under this section, proceedings in mandamus may be brought originally in the Supreme Court. *Carolina Gro. Co. v. Burnet*, 61 S. C. 205, 39 S. E. 381, 98 Am. St. Rep. 882, 58 L. R. A. 853.

As to jurisdiction of Supreme Court, see § 26, and the note thereto.

Provision as to affidavit is mandatory.—The provision of this section pertaining to the affidavit and the contents thereof is mandatory, and in the absence of such affidavit the court is without jurisdiction. *Reeder v. Workman*, 37

S. C. 413, 16 S. E. 187.

Applied in *Burwell v. South Carolina Tax Commission*, 130 S. C. 199, 126 S. E. 29, 38 A. L. R. 1256; as to adjustment of license tax, *Wingfield v. South Carolina Tax Commission*, 134 S. C. 251, 131 S. E. 421; *Piegler v. Jefferies*, 128 S. C. 254, 121 S. E. 783; as to enjoining the issuance of notes by commission of public works for construction of waterworks system, *Hyams v. Carroll*, 146 S. C. 470, 144 S. E. 153; as to the construction of a deed, *Mattison v. Mattison*, 65 S. C. 345, 43 S. E. 874; as to construction of a will, *Nicholson v. Cousar*, 50 S. C. 206, 27 S. E. 628, 25 L. R. A. (N. S.) 900, L. R. A. 1917D, 605; as to determination of liability for rent, *Stewart v. Morris*, 84 S. C. 148, 65 S. E. 1044; *Wolfe v. Bank of Anderson*, 123 S. C. 208, 116 S. E. 451; as to exemption of property from taxation, *Chester County v. White*, 70 S. C. 433, 50 S. E. 28, 32 Am. St. Rep. 319; as to right of depositor to proceeds of bonds purchased for him by bank prior to insolvency, *Kennedy v. Zimmerman*, 174 S. C. 412, 178 S. E. 496; as to enjoining construction of waterworks system, *Acker v. Cooley*, 177 S. C. 144, 181 S. E. 10; as to rights of stockholder of insolvent building and loan association, 178 S. C. 252, 182 S. E. 756; as to enjoining imposition of paving assessment, *Coward v. Nettles*, 197 S. C. 84, 14 S. E. (2d) 551.

§ 669. Judgment—entry enforced or appeal from.—Judgment shall be entered, as in other cases, but without costs for any proceeding prior to the trial. The case, the submission, and a copy of the judgment, shall constitute the judgment roll. The judgment may be enforced in the same manner as if it had been rendered in an action, and shall be subject to appeal in like manner.

1932 Code, § 669; Civ. P. '02, § 375; Civ. P. '22, § 676; Civ. P. '12, § 414; Civ. P. '02, § 376; 1870 (14) §§ 390, 391.

See the next foregoing section and the note thereto.

CHAPTER 37

Confession of Judgment

670. Confession of judgment without action.

671. Contents of written statement.
672. Judgment and execution.

§ 670. Judgment may be confessed for debt due or for contingent liability.—A judgment by confession may be entered, without action, either for money due, or to become due, or to secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed in this chapter.

1932 Code, § 670; Civ. P. '22, § 683; Civ. P. '12, § 421; Civ. P. '02, § 383; 1870 (14) § 399.

A confession of judgment entered without action in the clerk's office during vacation is valid. *Weinges v. Cash*, 15 S. C. 44, 99 Am. Dec. 278. There is no law which requires a confession of judgment to be obtained or read in open court. *Id.*

The clerk of court may take a confession of judgment in his own favor. *Trimmier v. Winsmith*, 23 S. C. 449; *Moore v. Trimmier*, 32 S. C. 511, 11 S. E. 548, 30 L. R. A. 128, 29 L. R. A. (N. S.) 1180, Ann. Cas. 13E, 796, Ann. Cas. 16D, 1121.

Remedy to correct judgment by motion to vacate or modify.—A judgment by confession has all the characteristics of an ordinary judgment and cannot be attacked collaterally; the remedy is by application to the court in which the confession is entered, to vacate or modify it, if it is insufficient in form or for any reason void. *Southern Porce-*

lain Mfg. Co. v. Thew, 5 S. C. 5, 30 L. R. A. 240. A confession of judgment against a corporation by the president thereof is invalid, if it does not appear that he had authority to make it, or that it has been confirmed by acquiescence. *Id.*

And judgment may be set aside for fraud.—A confession made with a view to protect debtor's property against debts present, or which he expects to contract, may be set aside for fraud, by the subsequent creditors. *Kohn v. Meyer*, 19 S. C. 190, 99 Am. Dec. 276.

A confession of judgment may be made by a client to his attorney, if made with entire fairness and full knowledge. *Wise v. Hardin*, 5 S. C. 325, 83 Am. St. Rep. 186, 50 L. R. A. (N. S.) 322, Ann. Cas. 16E, 437, Ann. Cas. 17A, 534, 19 A. L. R. 852.

§ 671. Statement in writing, and form thereof.—A statement in writing must be made and signed by the defendant, and verified by his oath, to the following effect:

(1) It must state the amount for which judgment may be entered, and authorize the entry of judgment therefor.

(2) If it be for money due, or to become due, it must state concisely the facts out of which it arose, and must show that the sum confessed therefor is justly due, or to become due.

(3) If it be for the purpose of securing the plaintiff against a contingent liability, it must state concisely the facts constituting the liability, and must show that the sum confessed therefor does not exceed the same.

1932 Code, § 671; Civ. P. '22, § 684; Civ. P. '12, § 422; Civ. P. '02, § 384; 1870 (14) 400.

Facts of indebtedness evidenced by note must be given.—Under this section a statement that the sum confessed is for a certain note, without mention of the indebtedness for which the note was given, is insufficient, and the judgment entered thereon is void as to third persons. *Woods v. Bryan*, 41 S. C. 74, 19 S. E. 218.

And the consideration therefor must be stated.—A description of the debt without a statement of its consideration and the facts out of which it arose is insufficient. *Ex parte Carroll*, 17 S. C. 446, 99 Am. Dec. 276; *Kohn v. Meyer*, 19 S. C. 190, 99 Am. Dec. 276.

A confession is not void merely because the value of the consideration is less than the amount of the confession. *Wise v. Hardin*, 5 S. C. 325, 83 Am. St. Rep. 186, 50 L. R. A. (N. S.) 322, Ann. Cas. 16E, 437, Ann. Cas. 17A, 534, 19 A. L. R. 852.

A confession for an amount less than what is actually due contains a sufficient

statement. *Weinges v. Cash*, 15 S. C. 44, 99 Am. Dec. 278.

Subsequent validation of void judgment.—A judgment by confession, void for insufficient statement, cannot be made valid, as to one not a party or privy, by renewals of execution thereon, or by revival of the judgment. *Woods v. Bryan*, 41 S. C. 74; 19 S. E. 218.

Consideration of question of costs in connection with void judgment.—If the trial court finds the statement given hereunder is not sufficient, the question of whether the judgment, otherwise void, could be valid to the extent of costs charged by officers for services in obtaining the judgment, and referred to in the statement, not having been brought to the attention of the court, cannot be considered on appeal. *Woods v. Bryan*, 41 S. C. 74; 19 S. E. 218.

"For goods sold and delivered" is a sufficient statement. *Ex parte Graham*, 54 S. C. 163, 32 S. E. 67.

§ 672. Judgment and execution.—The statement may be filed with the

clerk of the court of common pleas, or with a magistrate, if the amount for which judgment is confessed shall not exceed one hundred dollars, who shall enter a judgment endorsed upon the statement for the amount confessed, with five dollars, plaintiff's attorney's costs, when the confession is entered by an attorney, and the usual fees provided by law to the clerk of the court of common pleas or magistrate, as the case may be, for entering up judgments and issuing executions in any cases, together with any necessary disbursements of the plaintiff. The statement and affidavit, with the judgment endorsed, shall thereupon become the judgment roll. Executions may be issued and enforced thereon in the same manner as upon judgments in other cases in such courts. When the debt for which the judgment is entered is not all due, or is payable in installments, and the installments are not all due, the execution may issue upon such judgment for the collection of such installments as have become due, and shall be in the usual form, but shall have endorsed thereon, by the attorney or person issuing the same, a direction to the sheriff to collect the amount due on such judgment, with interest and costs, which amount shall be stated, with interest thereon, and the costs of said judgment. Notwithstanding the issue and collection of such execution, the judgment shall remain as security for the installments thereafter to become due, and whenever any further installments become due, execution may, in like manner, be issued for the collection and enforcement of the same.

1932 Code, § 672; Civ. P. '22, § 685; Civ. P. '12, § 423; Civ. P. '02, § 385; 1870 (14) § 401; 1884 (18) 693.

Place of entry of judgment is same as if formal action were pending.—In *Ex parte Ware Furniture Co.*, 49 S. C. 20, 27 S. E. 9, it is held that a judgment by confession can be entered only in the county in which judgment could have been obtained by action under § 422, requiring actions to be tried in the county where defendant resides. The case of *Martin & Co. v. Bowie*, 3 Hill 225, contains a contrary ruling but that case was decided prior to the adoption of the Code. See also, the numerous authorities discussed in the *Ware* case, *supra*.

As to place of trial of civil action, see §§ 420 et seq. and the notes there found.

The clerk of court may take a confession of judgment in his own favor.—See this catchline under section 670.

Debtor confessing judgment to clerk

himself, creditor cannot object that the clerk had no right to consider his application and statement and enroll the judgment. *Trimmier v. Winsmith*, 23 S. C. 449.

And "the clerk" is the clerk of the county where the defendant resides. *Ex parte Ware Furniture Co.*, 49 S. C. 20, 27 S. E. 9.

Entry on the abstract of judgment is sufficient. *Ex parte Graham*, 54 S. C. 163, 32 S. E. 67.

Remedy to correct judgment is by motion to vacate or modify.—See this catchline under section 670.

Subsequent validation of void judgment.—See this catchline under § 671.

Consideration of question of costs in connection with void judgment.—See this catchline under next foregoing section.

CHAPTER 38

Admission or Inspection of Writings

§ 673. Inspection and copy of books, papers, etc.—how obtained.—Either party may exhibit to the other, or to his attorney, at any time before the trial, any paper material to the action, and request an admission in writing of its genuineness. If the adverse party, or his attorney, fail to give the admission, within four days after the request, and if the party exhibiting the paper be afterwards put to expense in order to prove its genuineness, and the same be finally proved or admitted on the trial, such expense shall be paid by the party refusing the admission, unless it appear to the satisfaction of the court that there were good reasons for the refusal. The court before which an action is pending, or a judge or justice thereof may, in their discretion, and upon due notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy, of any books, papers, and documents in his possession or under his control, containing evidence relating to the merits of the action or the defense therein. If compliance with the order be refused, the court, on motion, may exclude the paper from being given in evidence, or punish the party refusing, or both.

1932 Code, § 673; Civ. P. '22, § 689; Civ. P. '12, § 427; Civ. P. '02, § 389; 1870 (14) § 405.

In general.—This section is essentially different, in several particulars, from the nine sections immediately following, relating to the examination of parties. *Fox v. Clifton Mfg. Co.*, 122 S. C. 86, 114 S. E. 700.

Condition upon which inspection is Authorized.—This section authorizes an inspection of writings only upon three conditions: (1) Due notice to the adverse party of the application for the order; (2) the issuance of the order by a court or a judge or a justice thereof; (3) the exercise of the judge's discretion in the matter. *Fox v. Clifton Mfg. Co.*, 122 S. C. 86, 114 S. E. 700, 701.

Facts must be stated showing necessity for exercise of power herein given.

—In *Jenkins v. Bennett*, 40 S. C. 393, 18 S. E. 929, 931, 41 Am. St. Rep. 393, 52 L. R. A. 36, the court speaking of this section said: "We think it clear that before this somewhat extraordinary power should be exercised, the moving party should show, at least prima facie, such fact or facts as would enable the court to exercise its discretion as to whether such a power as is invoked should be exercised." See, also, *Wenzel v. Palmetto Brewing Co.*, 48 S. C. 80, 26 S. E. 1, 97 Am. St. Rep. 34.

And the affidavit must show request for inspection and that notice was given.

—Before an order is authorized directing defendant to deposit certain books with the clerk for plaintiff's inspection, it must appear by affidavit that there was a request for inspection, and notice given as required by this section. *Wen-Bank*, 182 S. C. 357; 189 S. E. 462.

zel v. Palmetto Brewing Co., 48 S. C. 80, 26 S. E. 1, 97 Am. St. Rep. 34.

And the mere assumption of existence of writing is insufficient.—Under this section, an order to compel defendant to furnish a paper should not be granted upon an affidavit which merely assumes existence of the paper and fails to show that the persons applied to for inspection had possession at time of application, and refused to allow inspection, or that inspection is necessary for prosecution of action. *Thomas v. Spartanburg Ry., Gas, etc., Co.*, 107 S. C. 109, 91 S. E. 973.

The court alone may order production of writing.—The master is a special tribunal and has no power as a court to require the defendants to produce a deed in their possession, no such power having been conferred upon him. *Cartee v. Spence*, 24 S. C. 550. Doubtful whether a circuit judge on motion authorized to do so. *Id.*

Penalty should be imposed only where refusal to obey order is judicially determined to be without cause.—Under this section a penalty for refusing to permit an inspection of a paper where ordered, should not be imposed until it is judicially determined that such refusal was without good reason. *Jenkins v. Bennett*, 40 S. C. 393, 18 S. E. 929, 41 Am. St. Rep. 393, 52 L. R. A. 36.

Courts should carefully guard against abuse of right to inspect private books and papers in considering application for discovery. *Floyd v. Victory Sav.*

CHAPTER 39

Examination of Parties

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| 674. Action for discovery abolished. | 680. Testimony not responsive to inquiries. |
| 675. Examination of party by adversary. | 681. Person for whose benefit action is brought or defended. |
| 676. Examination before trial. | 682. Examination of co-plaintiff or co-defendant. |
| 677. Compulsory attendance. | |
| 678. Rebuttal of testimony. | |
| 679. Effect of refusal to testify. | |

§ 674. Action for discovery abolished.—No action to obtain discovery under oath, in aid of the prosecution or defense of another action, shall be allowed, nor shall any examination of a party be had on behalf of the adverse party, except in the manner prescribed by this chapter.

1932 Code, § 674; Civ. P. '22, § 690; Civ. P. '12, § 428; Civ. P. '02, § 390; 1870 (14) § 406.

Editor's Note.—The difficulty which has been incurred in connection with the general subject of discovery, is well expressed by the supreme court in the case of *People's Bank v. Helms*, 140 S. C. 107, 138 S. E. 622, 623: "We very much appreciate the observation of Judge Hand of the Circuit Court of Appeals in the case of *Texas Co. v. Cohen*, 15 F. (2d) 358, where he refers to the matter of discovery as 'a subject which, even while it was best understood, was never clear, and which entrapped the best judges and the most seasoned practitioners.'"

This section and its kindred sections create a new remedy.—This and the following sections, relating to the subject of examination of parties, created a new

remedy and operated to destroy the pre-existing remedies in equity. *United States Tire Co. v. Keystone Tire Sales Co.*, 153 S. C. 56, 150 S. E. 347, 66 A. L. R. 1264. But the rules which formerly obtained in equity and which have not been changed, are generally adhered to. *Thomas v. Spartanburg Ry. Gas., etc., Co.*, 107 S. C. 109, 91 S. E. 973.

And the present procedure takes the place of the former equitable remedy by a bill of discovery. See *Hall v. Joiner*, 1 S. C. 186, 55 Am. Dec. 188, 24 L. R. A. 188, 23 L. R. A. (N. S.) 58; *Thomas v. Spartanburg Ry. Gas., etc., Co.*, 107 S. C. 109, 91 S. E. 973, 974; *Easler v. Southern Ry. Co.*, 60 S. C. 117, 38 S. E. 258, 23 L. R. A. (N. S.) 463.

§ 675. Party may examine his adversary as a witness.—A party to an action may be examined as a witness, at the instance of the adverse party, or of any one of several adverse parties, and for that purpose may be compelled in the same manner, and subject to the same rules of examination as any other witness, to testify, either at the trial, or conditionally, or upon commission.

1932 Code, § 675; Civ. P. '22, § 691; Civ. P. '12, § 429; Civ. P. '02, § 391; 1870 (14) § 407.

As to examination before the trial, see the section immediately following and the note thereto.

The word "corporation" is not expressly used herein, but it is included in the word "party." *United States Tire Co. v. Keystone Tire Sales Co.*, 153 S. C. 56, 150 S. E. 347, 66 A. L. R. 1264.

And this is the general rule of statutory construction.—Generally, when the word "person" or "party" is used in a statute, it is broad enough to include corporations, artificial persons, unless intention to exclude such artificial persons is plainly obvious, the word "party" including all persons, natural or legal, by whom or against whom suit is brought either in law or in equity. *United States Tire Co. v. Keystone Tire Sales Co.*, 153 S. C. 56, 150 S. E. 347, 66 A. L. R. 1264.

And such legal entity testifies through its officers. *United States Tire Co. v. Keystone Tire Sales Co.*, 153 S. C. 56, 150 S. E. 347, 66 A. L. R. 1264.

But the examination must be confined to issues involved in the litigation.—The examination of officers and agents of a corporation must be limited to affairs of the corporation involved in the litigation to which the corporation is a party. *United States Tire Co. v. Keystone Tire Sales Co.*, 153 S. C. 56, 150 S. E. 347, 66 A. L. R. 1264.

One of two defendants may be examined on behalf of the plaintiff. *Devereux v. McCrady*, 46 S. C. 133, 24 S. E. 77, 39 L. R. A. (N. S.) 53.

Refreshing the memory of the witness.—Party examined on his own be-

half is entitled to the same means of refreshing his memory as are allowed to other witnesses. *Bull v. Lambson*, 5 S. C. 284, 285.

This section does not authorize the

physical examination of the plaintiff in an action for personal injuries. *Easler v. Southern Ry. Co.*, 60 S. C. 117, 38 S. E. 258, 23 L. R. A. (N. S.) 463.

§ 676. Examination of adversary before trial—proceedings therefore.—

The examination, instead of being had at the trial, as provided in section 675, may be had at any time before trial, at the option of the party claiming it, before a judge of the court, on a previous notice to the party to be examined, and any other adverse party, of at least five days, unless, for good cause shown, the judge order otherwise. But the party to be examined shall not be compelled to attend in any other county than that of his residence, or where he may be served with a summons for his attendance; nor unless it be upon the order of a judge of the court granted after four days' notice, and upon good and sufficient cause being shown therefor.

1932 Code, § 676; Civ. P. '22, § 692; Civ. P. '12, § 430; Civ. P. '02, § 392; 1870 (14) § 408; 1923 (33) 170.

The proviso added at end of § 677 hereof intended as amendment to this section also.

Showing of "Good and Sufficient Cause" is prerequisite to order for examination.—It was formerly held that this section, prior to the amendment of 1923, allowed a party the right to examine his adversary, without assigning any reason therefor, except the fact that the person sought to be examined was a party to the action. *Fox v. Clifton Mfg. Co.*, 122 S. C. 86, 114 S. E. 700. But after the amendment of 1923, Mr. Justice Cothran, speaking for the Supreme Court, properly indicated, in the opinion in *White v. Bankers' Nat. Life Ins. Co.*, 134 S. C. 183, 132 S. E. 171, that "good and sufficient cause" must be shown to entitle the moving party to the order for examination. *United States Tire Co. v. Keystone Tire Sales Co.*, 153 S. C. 56, 150 S. E. 347, 350, 66 A. L. R. 1264.

Which may be done by verified complaint.—In complaint seeking order for examination before trial, under this section, sufficient cause for examination may be shown in complaint without necessity of additional affidavits, but complaints should be verified and at least prima facie proof made of material allegations of legal cause of action. *United States Tire Co. v. Keystone Tire Sales Co.*, 153 S. C. 56, 150 S. E. 347, 66 A. L. R. 1264.

In *People's Bank v. Helms*, 140 S. C. 107, 138 S. E. 622, a verified complaint was relied upon as showing a "good and sufficient cause." The facts set forth therein were held sufficient.

And the requirement of four days' notice is mandatory.—Under the old law, notice of motion for an order of examination was not required. *Fox v. Clifton Mfg. Co.*, 122 S. C. 86, 114 S. E. 700. But the amendment of 1923 (33 Stat.

170) required four days' notice of the application for an order of examination. *White v. Bankers' Nat. Life Ins. Co.*, 134 S. C. 183, 132 S. E. 171; *United States Tire Co. v. Keystone Tire Sales Co.*, 153 S. C. 56, 150 S. E. 347, 350, 66 A. L. R. 1264; *People's Bank v. Helms*, 140 S. C. 107, 138 S. E. 622.

In *People's Bank v. Helms*, 140 S. C. 107, 138 S. E. 622, it was said that the last clause of this section, which was added by the 1923 amendment, was evidently occasioned by the decision in the case of *Fox v. Clifton Mfg. Co.*, 122 S. C. 86, 114 S. E. 700.

And where corporation is a party notice is given to its officers.—On application for order for examination before trial of corporation through its officers, under this section, it is necessary to give corporation and officers and agents sought to be examined notice of application, since officers and agents, not being direct parties, are entitled for proper cause to resist application. *United States Tire Co. v. Keystone Tire Sales Co.*, 153 S. C. 56, 150 S. E. 347, 66 A. L. R. 1264.

Where it did not appear from record that notice of application for order of examination of corporation before trial was given to president and other officers of corporation under this section, president and other officers of corporation not named in order could not be required to appear for examination. *United States Tire Co. v. Keystone Tire Sales Co.*, 153 S. C. 56, 150 S. E. 347, 66 A. L. R. 1264.

An application for order of examination of corporation before trial, under this section should set forth that examination of corporation through certain

named officers is asked for, that persons so named may resist application for any proper reason. *United States Tire Co. v. Keystone Tire Sales Co.*, 153 S. C. 56, 150 S. E. 347, 66 A. L. R. 1264.

Physical examination of party is not authorized.—The circuit court has no authority to order a plaintiff suing for personal injuries to submit to a physical examination by defendant's physician, to enable the latter to testify as to the extent of plaintiff's injuries. *Easler v. Southern Ry. Co.*, 60 S. C. 117, 38 S. E. 258, 23 L. R. A. (N. S.) 463.

Because the remedy afforded by this section is exclusive.—The remedy provided by the Code for taking testimony before a trial of the parties to the action, in behalf of the adverse party, is exclusive, and supersedes all remedies existing at the time of its adoption, as hereinbefore stated. There is no statutory provision in this state empowering the court to order the physical examination of such a party. *Easler v. Southern Ry. Co.*, 60 S. C. 117, 38 S. E. 258, 260, 23 L. R. A. (N. S.) 463. See § 674 and the note thereto.

Under this section a master has no authority whatsoever in examining a party before trial. *United States Tire Co. v. Keystone Tire Sales Co.*, 153 S. C. 56, 150 S. E. 347, 66 A. L. R. 1264.

Examine railroad agents.—Plaintiff suing for injuries sustained when train in which he was riding crashed into unlighted freight cars entitled to examine railroad's agents before trial to determine who placed such freight cars upon main line, and to determine railroad's rules in force at time of collision, dealing with storage in night time of box cars on main line. *Mahaffey v. Southern Ry. Co.*, 175 S. C. 198, 178 S. E. 838.

Motion for examination denied on the merits in *Augusta Power Co. v. Savannah River Electric Co.*, 163 S. C. 541, 163 S. E. 822.

In action to recover balance due for fertilizer furnished agent under agency contract, trial court's order that agent submit to examination before trial could not be disturbed in absence of abuse of discretion. *Planters fertilizer & Phosphate Co. v. McCreight*, 187 S. C. 483, 198 S. E. 405.

§ 677. Adverse party—how compelled to attend.—The party to be examined, as in section 676 provided, may be compelled to attend in the same manner as a witness who is to be examined conditionally; and the examination shall be taken and filed by the judge in like manner, and may be read by either party on the trial. *Provided*, that the judge before whom such matter may be brought up, may, if he deems it necessary or advisable, refer such matter to the master, if there be one in the county where such matter arises, or if not, then to a special referee; and in event of such order of reference being passed, the party whose testimony is desired to be taken shall appear and be examined before such master or referee on a date to be fixed in the first instance in the order of reference, and on such other dates as such master or referee shall determine and notify such party of; and the examination shall be had with the same force and effect as would apply if before the judge himself, and upon completion thereof the testimony shall be reported and filed with the clerk of court for use in the cause in accordance with law. The said master and special referee shall have the same power and authority in the conduct of such proceedings, and in preserving and enforcing order and compelling attendance of the witness, as they would have in the conduct of any other matters in litigation referred to them; this proviso to operate as an amendment likewise to section 676.

1932 Code, § 677; Civ. P. '22, § 693; Civ. P. '12, § 431; Civ. P. '02, § 393; 1870 (14) § 409; 1938 (40) 1603.

See the three foregoing sections and their respective notes.

§ 678. Testimony of party may be rebutted.—The examination of the party, thus taken, may be rebutted by adverse testimony.

1932 Code, § 678; Civ. P. '22, § 694; Civ. P. '12, § 432; Civ. P. '02, § 394; 1870 (14) § 410.

§ 679. Effect of refusal to testify.—If a party refuses to attend and testify, as in sections, 675 thru 678 provided, he may be punished as for a contempt, and his complaint, answer, or reply may be stricken out.

1932 Code, § 679; Civ. P. '22 § 695; Civ. P. '12, § 433; Civ. P. '02, § 395; 1870 (14) § 411.

Service of a rule to show cause seems to be prerequisite to punishment for contempt hereunder. *Shelton v. Southern Ry. Co.*, 80 S. C. 74, 61 S. E. 220.

Progress of cause as affected by failure to appear.—In *Shelton v. Southern Ry. Co.*, 80 S. C. 74, 61 S. E. 220, the plaintiff had been ordered to appear and testify before a referee, but failed to appear for the purpose of examination, and the referee filed his report, together with

the original order, showing the facts. Subsequently plaintiff obtained an order for discontinuance. It was held that, as it was not shown that plaintiff had been guilty of contempt of court or that the cause had so far progressed as to entitle defendant to a judgment against plaintiff, the order of discontinuance did not affect any substantial right of defendant, and was properly granted.

§ 680. Rebuttal of testimony not responsive to the inquiries.—A party examined by an adverse party, as in this chapter provided, may be examined on his own behalf, subject to the same rules of examination as other witnesses. But if he testify to any new matter, not responsive to the inquiries put to him by the adverse party, or necessary to explain or qualify his answers thereto, or discharge when his answers would charge himself, such adverse party may offer himself as a witness on his own behalf in respect to such new matter, subject to the same rules of examination as other witnesses, and shall be so received.

1932 Code, § 680; Civ. P. '22, § 696; Civ. P. '12, § 434; Civ. P. '02, § 396; 1870 (14) § 412.

§ 681. Persons for whom action is brought or defended may be examined.—A person for whose immediate benefit the action is prosecuted or defended, though not a party to the action, may be examined as a witness, in the same manner and subject to the same rules of examination as if he were named as a party.

1932 Code, § 681; Civ. P. '22, § 697; Civ. P. '12, § 435; Civ. P. '02, § 397; 1870 (14) § 413.

§ 682. Examination of co-plaintiff or co-defendant.—A party may be examined on behalf of his co-plaintiff, or of a co-defendant, as to any matter in which he is not jointly interested or liable with such co-plaintiff or co-defendant, and as to which a separate and not joint verdict or judgment can be rendered. And he may be compelled to attend in the same manner as at the instance of an adverse party; but the examination thus taken shall not be used in the behalf of the party examined. And whenever, in the case mentioned in sections 675 and 676, one of the several plaintiffs or defendants who are joint contractors, or are united in interest, is examined by the adverse party, the other of such plaintiffs or defendants may offer himself as a witness to the same cause or action or defense, and shall be so received.

1932 Code, § 682; Civ. P. '22, § 698; Civ. P. '12, § 436; Civ. P. '02, § 398; 1870 (14) § 414.

CHAPTER 40

Attendance of Witnesses

683. Allowance in bill of costs.

684. Clerks to subpoena witnesses.

685. Witness living in another county.

688. Liability for failure to attend.

689. Refusal to testify.

690. Prisoners as witnesses.

§ 683. Allowance of charge for witness in bill of costs.—In any bill of costs there shall not be allowed the charge of more than three witnesses to the proof of any one particular matter of fact.

1932 Code, § 683; Civ. P. '22, § 699; Civ. C. '12, § 3964; Civ. C. '02, § 2860; G. S. 2192; R. S. 2324; 1755 (7) 219.

Correction of improper taxation of costs.—Where costs have been taxed for more than three witnesses to each issue (thirteen in the case below), it is proper to order the clerk to reform the taxation. *Young v. Merchants' Ins. Co.*, 29 F. 273, 275.

Judicial notice is taken of general custom. *Fleischman, Morris & Co. v. Southern Ry. Co.*, 76 S. C. 237, 56 S. E. 974, 9 L. R. A. (N. S.) 519, 31 L. R. A. (N. S.) 106, 1 A. L. R. 908.

See generally, *Ragsdale v. Southern Ry. Co.*, 121 F. 924.

§ 684. Clerks of courts to subpoena witnesses—what to be expressed in subpoena.—The clerk of every circuit court shall, upon the request of either party, issue one or more subpoena or subpoenas for any person or persons to attend as witnesses in any cause or matter depending in the same, expressing in every subpoena the time and place where the witnesses are to appear, the names of the parties to the suit or cause wherein they are to give evidence, and at whose request they are summoned.

1932 Code, § 684; Civ. P. '22, § 700; Civ. C. '12, § 3965; Civ. C. '02, § 2861; G. S. 2193; R. S. 2325, 1755 (7) 219.

A witness under subpoena duces tecum is not required to testify. *Treasurer v. Moore*, 3 Brev. 550, 128 Am. St. Rep. 773; *Sherman v. Barrett*, 1 Mcm. 147, 14 Am. St. Rep. 742, 128 Am. St. Rep. 773.

Subpoena is essential to taxation of

fees. *Atherton v. Atlantic Coast Line R. Co.*, 82 S. C. 474, 64 S. E. 411.

Defendant is entitled to subpoena a witness to testify on sentence day to extenuating circumstances. *State v. Smith*, 2 Bay 62.

§ 685. How subpoenaed when living in another county.—If any witness shall be an inhabitant of another county, the clerk shall issue a subpoena directed to the sheriff of such county where such witness usually resides, which shall be by such officer executed and returned to the office whence the same issued.

1932 Code, § 685; Civ. P. '22, § 701; Civ. C. '12, § 3966; Civ. C. '02, § 2862; G. S. 2194; R. S. 2326; 1755 (7) 219.

§ 688. Liability for fines for contempt and damages sustained by failure to attend.—If any person summoned as aforesaid, or summoned to attend before commissioners appointed to take his or her examination and deposition, shall fail to attend accordingly, he or she so failing shall be fined by the court for a contempt, and shall be liable to the action of such party at the common law for all damages sustained for want of such witness' testimony; but if the person so failing to attend shall, at the court to which the summons is returnable, or at the next succeeding court show cause satisfactory to the court of his or her disability to attend at

the time he or she ought to have appeared, then no fine or forfeiture shall be incurred by such failure.

1932 Code, § 688; Civ. P. '22, § 704; Civ. C. '12, § 3969; Civ. C. '02, § 2865; G. S. 2198; R. S. 2329; 1785 (7) 219; 1794, V, 249.

§ 689. Penalty for refusal to give evidence or answer interrogatories.—

If any person summoned as a witness, upon his or her appearance before the court, or before commissioners appointed to take his or her examination and deposition, or other officer authorized by law, shall refuse to give evidence, or answer to the interrogatories and cross-interrogatories, or any of them, annexed to the commission, on oath, affirmation, or otherwise (as the case may be), to the best of his or her knowledge, every person so refusing shall be committed to the common jail, there to remain until he or she shall give such evidence.

1932 Code, § 689; Civ. P. '22, § 705; Civ. C. '12, § 3970; Civ. C. '02, § 2866; G. S. 2190; R. S. 2330; 1785 (7) 219; 1794 (5) 249.

§ 690. Prisoners—how to be brought into court as witnesses.—

Whenever it shall be necessary to bring any prisoner into court as a witness in any case, it shall be lawful for the presiding judge to order such prisoner to be brought into court, without the necessity of a writ of habeas corpus; and when the said prisoner shall have given his evidence, to cause him to be remanded to the custody of the officer to whose keeping he shall have been originally committed.

1932 Code, § 690; Civ. P. '22, § 706; Civ. C. '12, § 3971; Civ. C. '02, § 2867; G. S. 2201; R. S. 2331; 1808 (5) 571.

CHAPTER 41

Examination of Witnesses

ARTICLE 1. General Provisions, § 691.

ARTICLE 2. Examination by Commission, § 693.

ARTICLE 3. Examination before Clerk and Depositions de Bene Esse, § 703.

ARTICLE 1

General Provisions

691. Interest of witness no disqualification.

692. Parties competent except in stated cases.

§ 691. Interest not to exclude witness.—No person offered as a witness shall be excluded by reason of his interest in the event of the action.

1932 Code, § 691; Civ. P. '22, § 707; Civ. P. '12, § 437; Civ. P. '02 § 399; 1870 (14) § 414.

Section Establishes the General Rule.
—This section lays down the general rule, which is limited by the provisions

of the following sections. *Rapley v. Klugh*, 40 S. C. 134, 18 S. E. 680, 127 Am. St. Rep. 764, 13 L. R. A. (N. S.)

53, 80.

And if interest is to exclude a witness who is otherwise competent, it must be under the next section following. *Cain v. Atlantic Coast Line R. Co.*, 74 S. C. 89, 54 S. E. 244, 37 L. R. A. (N. S.) 237, 250, L. R. A. 1915A, 1049.

Officers of mortgagee bank may testify as to execution of mortgage.—Under this section stockholders and officers of a bank which has taken a mortgage are competent witnesses as to its execution. *Farmers' Bank, etc., Co. v. Fudge*, 113 S. C. 25, 100 S. E. 628, 27 A. L. R. 85.

§ 692. Parties to actions and special proceedings competent witnesses except in certain cases.—A party to an action or special proceeding in any and all courts, and before any and all officers and persons acting judicially, may be examined as a witness on his own behalf, or in behalf of any other party, conditionally, on commission, and upon the trial or hearing in the case, in the same manner and subject to the same rules of examination as any other witness: *provided, however*, that no party to the action or proceeding, nor any person who has a legal or equitable interest which may be effected by the event of the action or proceeding, nor any person who, previous to such examination, has had such an interest, however the same may have been transferred to, or come to the party to the action or proceeding, nor any assignor of anything in controversy in the action, shall be examined in regard to any transaction or communication between such witness and a person at the time of such examination, deceased, insane, or lunatic, as a witness against a party then prosecuting or defending the action as executor, administrator, heir at law, next of kin, assignee, legatee, devisee, or survivor of such deceased person, or as assignee or committee of such insane person or lunatic, when such examination, or any judgment or determination in such action or proceeding, can in any manner affect the interest of such witness or the interest previously owned or represented by him. But when such executor, administrator, heir at law, next of kin, assignee, legatee, devisee, survivor, or committee, shall be examined on his own behalf in regard to such transaction or communication or the testimony of such deceased or insane person or lunatic, in regard to such transaction or communication (however the same may have been perpetuated or made competent), shall be given in evidence on the trial or hearing in behalf of such executor, administrator, heir at law, next of kin, assignee, legatee, devisee, survivor, or committee, then all other persons not otherwise rendered incompetent shall be made competent witnesses in relation to such transaction or communication on said trial or hearing. Nothing contained in section 700 shall be held or construed to effect or restrain the operation of this section.

- (1) In any trial or inquiry in any suit, action, or proceeding in any court, or before any person having, by law, or consent of parties, authority to examine witnesses or hear evidence, the husband or wife of any party thereto, or of any person in whose behalf any such suit, action, or proceeding is brought, prosecuted, opposed, or defended, shall, except as hereinafter stated, be competent and compellable to give evidence, the same as any other witness, on behalf of any party to such suit, action, or proceeding.
- (2) No husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage.

1932 Code, § 692; Civ. P. '22, § 708; Civ. P. '12, § 438; Civ. P. '02, § 400; 1870 (14) § 415.

- I. General Considerations.
- II. The Section Disqualifies Whom.
 - A. Parties to the Action.
 - B. Person Whose Interest Is Affected.
- III. When the Disqualification Exists.
 - A. Transaction with Persons Deceased, Insane or Lunatic.
 - 1. General Principles.
 - 2. "Transaction" Illustrated.
 - B. Testimony Must Be against One of Designated Classes of Persons.
- IV. Exceptions.
- V. Pleading and Practice.

I. GENERAL CONSIDERATIONS.

Editor's note.—Few sections in the entire code have given rise to so many conflicting and inharmonious rulings, as has this section. The provisions herein contained are subject to several possible constructions, most of which are supported by at least a dictum in the decided cases. This fact alone makes difficult the problem of inclusion and exclusion in collecting the principles and authorities to compose the note to the section. It may seem strange that after having been in the statute books of this state for over sixty years, and having been construed and elucidated by the supreme court in innumerable appeals, this section of the code should still appear to be hard to understand, and difficult to apply as a rule of evidence. And yet, to use the language of Mr. Justice Benet in *Norris v. Clinkscales*, 47 S. C. 488, 25 S. E. 797, Ann. Cas. 13E, 796, "it is not strange when one regards the abnormal length of its periods, and the intricate involutions of its phraseology."

However, there are certain general principles upon which the authorities are in general accord. These, together with authorities in support of the component parts thereof, are set out below. In submitting the following note to the practitioners of this state, it is the hope of the Editor that the annotations composing the note will serve as a guide-post to assist the practitioner in his effort to apply properly the provisions of this section.

Mr. Justice Benet in *Norris v. Clinkscales*, 47 S. C. 488, 25 S. E. 797, Ann. Cas. 13E, 796, gives the following analytical treatment to this section, which has been cited and approved in many of the cases wherein the section has been considered. It is submitted that if the practitioner, in passing upon the exclusion or non-exclusion of the evidence in the case bearing upon this section, will carefully compare the point at issue with the clauses of the following outline, then much time will be saved, in addition to his having the assurance that he more than likely will be correct in his conclusion, since, as has been said, the substantive part of this resume has been accepted by the great

majority of the courts.

This section disqualifies:

Whom.—1. A party to the action or proceeding.

2. A person having an interest which may be affected by the event of the trial.

3. A person who has had such an interest, but which has been in any manner transferred to, or has in any manner come to, a party to the action or proceeding.

4. An assignor of a thing in controversy in the action.

A witness, although belonging to one of these four classes, is incompetent only when the testimony possesses all three of the following characteristics:

When—(a) In regard to any transaction or communication between the witness and a person deceased, insane, or lunatic.

(b) Against a party prosecuting or defending the action as executor, administrator, heir at law, next of kin, assignee, legatee, devisee, or survivor of such deceased person, or as assignee or committee of such insane person or lunatic.

(c) When the present or previous interest of the witness may in any manner be affected by the testimony or by the event of the trial.

It will thus be seen that, to justify the exclusion of testimony under this section, it should be shown to the satisfaction of the trial judge—First, that the witness belongs to one or more, or to all, of the four classes of persons whose testimony may under certain circumstances be excluded; and, secondly, that his testimony partakes of, not merely one or two of the disqualifying characteristics classified under a, b, and c, but that it possesses all three of those characteristics. *Norris v. Clinkscales*, 47 S. C. 488, 25 S. E. 797, 799, Ann. Cas. 13E, 796.

This section applies to criminal as well as to civil actions. *State v. Reynolds*, 48 S. C. 384, 26 S. E. 679, 106 Am. St. Rep. 765, 2 L. R. A. (N. S.) 862. It was held also that this view was not in conflict with the cases of *State v. Belcher*, 13 S. C. 459, 43 Am. Dec. 83, 86 Am. St. Rep. 641, 664, 103 Am. St. Rep. 160, 17 L. R. A. 484, 56 L. R. A. 360, 396, 24 L. R. A. (N. S.) 779, and *State v. Dodson*, 16 S. C. 453, 460, 59 Am. Dec. 579, 132 Am. St. Rep. 570, 35 L. R. A. (N. S.) 988, 47 L. R. A. (N. S.) 206, 17 A. L. R. 1123.

The concluding sentence of the first paragraph of this section shows an intention to guard against the construction that the section applies only to civil actions. *State v. Kennedy*, 85 S. C. 146, 67 S. E. 152, 155, 18 A. L. R. 919.

Thus, it is held that a wife may testify against her husband in criminal prosecutions, except as to confidential communications made during marriage. *State v. Reynolds*, 48 S. C. 384, 26 S. E. 679, 106 Am. St. Rep. 765, 2 L. R. A. (N. S.) 862.

And, in a prosecution of an accessory to a homicide, principals jointly indicted, but not on trial, were competent witnesses for the state, without their being finally discharged from the record either by a nolle prosequi, order of discharge, acquittal, plea of guilty, or sentence, under this section. *State v. Kennedy*, 85 S. C. 146, 67 S. E. 152, 18 A. L. R. 919.

And serves to restrict the general right contained in preceding section.—This section is in restriction of the general right conferred by the preceding section and cannot be extended by construction beyond its clearly expressed design. *Guery v. Kinsler*, 3 S. C. 423, 2 A. L. R. 1486; *Jones v. Plunkett*, 9 S. C. 392.

And excludes testimony which if untrue cannot be contradicted.—The rule embodied in this section aims to prevent testimony "as to communications and transactions with persons deceased" in the cases therein enumerated, on the ground that it is against public policy to allow witnesses to testify as to matters, when, if such testimony is untrue, it cannot be contradicted. *Trimmier v. Thomson*, 41 S. C. 125, 19 S. E. 291, 293, 23 L. R. A. (N. S.) 704, Ann. Cas. 17B, 525, 6 A. L. R. 760.

But only persons expressly named are included in this section.—Only persons included in the particular relations herein referred to can be considered as embraced in the proviso or exceptions; others not named, though within the mischief intended to be prevented, cannot be included. *Colvin v. Phillips*, 25 S. C. 228, 29 L. R. A. (N. S.) 1180, Ann. Cas. 13E, 796, 1 A. L. R. 803, 825.

In every case wherein this section has been construed, it has been held to be in restriction of the general right to testify, and at the same time this court has recognized its inability to extend it beyond the classes expressly denied the right to testify. *Rapley v. Klugh*, 40 S. C. 134, 18 S. E. 680, 683, 127 Am. St. Rep. 764, 13 L. R. A. (N. S.) 53, 80. As was said in *Guery v. Kinsler*, 3 S. C. 423, 2 A. L. R. 1486: "When, however, an exception is made by words of description, including only persons referred to as occupying particular relations, it would be transcending our authority, and usurping the functions of another department, to include others who, though they may be within the mischief, have not been so recognized and protected by the enactment."

Thus, a remote alienee of one deceased is within the mischief intended to be remedied by the exception, but she is not within its express terms, and can testify as to communications and transactions between herself and the deceased as to the land she seeks to recover in the action. *Cantey v. Whitaker*, 17 S. C. 527.

And one of specified grounds must exist before testimony should be excluded.—It is error to exclude testimony concerning statements made by a person since deceased, unless the testimony is objectionable on some of the grounds and for reasons stated in this section. *Van Ness v. Schachte*, 143 S. C. 429, 141 S. E. 721.

Applicability of section is determined by the pleadings.—This section must be construed by the intent appearing on its face, and whether the proviso should be applied must be determined by the issue raised through the pleadings and not by the form of the action. *Boykin v. Watts*, 6 S. C. 76, 29 L. R. A. (N. S.) 1182, Ann. Cas. 13E, 796.

Applied in *Stuckey v. Truett*, 124 S. C. 122, 117 S. E. 192; *Merck v. Merck*, 95 S. C. 328, 78 S. E. 1027; *McAuley v. Orr*, 97 S. C. 214, 81 S. E. 489; *Harris v. Bratton*, 34 S. C. 259, 13 S. E. 447, 51 L. R. A. (N. S.) 1210, 23 A. L. R. 1513, 1547; *McCutchen v. McCutchen*, 77 S. C. 129, 57 S. E. 678, 12 L. R. A. (N. S.) 1140, Ann. Cas. 17D, 549; *Thomson v. Ehrlich*, 148 S. C. 330, 146 S. E. 149; *Maxwell v. Epton*, 177 S. C. 184; 181 S. E. 16. *Johnson v. Broome*, 175 S. C. 385; 179 S. E. 315.

II. THE SECTION DISQUALIFIES WHOM.

A. Parties to the Action.

Editor's note.—The following cases under this analysis line will demonstrate when persons are considered, or are not considered, parties within the meaning of this section.

A surviving executor. in an action against the administrator of his late co-executor, cannot, under this section, testify as to what assets he did or did not receive from the deceased, or what passed between them relative to preparing the inventory of the estate. *Williams v. Mower*, 29 S. C. 332, 7 S. E. 505.

The testimony by an heir, party to the proceeding, as to a communication had between his ancestor and the ancestor, since deceased, of a co-defendant adverse in interest, is competent, under this section. *Moore v. Trimmier*, 32 S. C. 511, 11 S. E. 548, 30 L. R. A. 128, 29 L. R. A. (N. S.) 1180, Ann. Cas. 13E, 796, Ann. Cas. 16D, 1121.

A legatee under lost will, in attempting to set up same, cannot testify to communications or transactions with testator. *Bauskett v. Keitt*, 22 S. C. 187, 28 Am. St. Rep. 348, 107 Am. St. Rep. 468, 110 Am. St. Rep. 453, 38 L. R. A. 436.

Legatee claiming lands involved in controversy.—In an action by a tenant against the executors of his former landlord for the unlawful seizure of crops for rent alleged to be due, it is competent for a legatee, who also claims to own the land by gift from the deceased, and to whom the tenant has attorned, to

testify as a witness to the arrangement between himself and the deceased landlord, whereby he became entitled to the rents, he not being a "party" to the action, and having no interest therein, within the meaning of this section. *Huff v. Latimer*, 33 S. C. 255, 11 S. E. 758.

A factor in his action against executor of owners of cotton for reclamation cannot testify to conversation had with them. *Blakely v. Frazier*, 11 S. C. 122, 72 Am. Dec. 545, 21 A. L. R. 932.

A ward, in action for account brought by him after majority against the executor of his deceased guardian, cannot testify to communications made to him by the deceased upon the matter of compromise formerly made between them, as to the value of the estate, although the returns of the guardian have been introduced in evidence by the executor. *Owens v. Watts*, 24 S. C. 76, 47 L. R. A. (N. S.) 456.

The survivor of a firm, in an action against devisee of deceased partner to recover his share of certain lands held in deceased partner's name, but being really partnership property, is incompetent to prove any communications or transactions between the deceased and himself. *Jones v. Smith*, 31 S. C. 527, 10 S. E. 340, 43 Am. St. Rep. 373, 27 L. R. A. 454, 464, 28 L. R. A. 99.

In an action to which a married woman is a party, her husband is not a "party" within the meaning of this section, and has no "interest" therein that will prohibit him from testifying as to a transaction between his wife and a person since deceased. *Scott v. Wiggins*, 113 S. C. 88, 101 S. E. 113.

Plaintiff's agent is not a "party."—In action for dower, testimony of plaintiff's son as to his acts as agent for plaintiff was not objectionable as being testimony of party in interest, within this section. *Hazelwood v. Mayes*, 111 S. C. 23, 96 S. E. 672, 673, 21 A. L. R. 932.

Person claiming property of deceased under oral contract. — Where plaintiff sued to recover an undivided one-half of deceased's property, alleging oral contract on his part to will her such property, her testimony was incompetent to prove the contract under this section. *Brown v. Golightly*, 106 S. C. 519, 91 S. E. 869, Ann. Cas. 18A, 1185.

Under this section, in an action, by one of the parties to an alleged agreement to execute mutual, irrevocable wills, against the executor, legatees, and devisees of the other party to enforce such agreement, plaintiff's testimony as to transactions and communications with the deceased should have been excluded. *Dicks v. Cassels*, 100 S. C. 341, 84 S. E. 878, L. R. A. 1916B, 635.

Persons seeking partition of property of deceased.—In an action for partition of real estate of an intestate, plaintiff's

testimony as to statements of the deceased regarding sale of lands to him is incompetent under this section. *Walker v. Henderson*, 109 S. C. 160, 95 S. E. 337.

In an action by an administrator who is surviving partner of deceased, he is incompetent to testify that the deceased partner was responsible for goods sold by the firm to his tenants, so that his estate should be charged therewith, under this section. *Gee v. Humphries*, 49 S. C. 253, 27 S. E. 101, 54 L. R. A. 621.

A party examined on his own behalf may, like other witnesses, refresh his memory by book entries and other memoranda. *Bull v. Lambson*, 5 S. C. 284.

B. Person Whose Interest Is Affected.

The interest must be held in individual capacity.—The "interest" must be held by the witness in his individual capacity, and does not apply to interest held solely in a representative capacity. *Devereux v. McCrady*, 46 S. C. 133, 24 S. E. 77, 81, 39 L. R. A. (N. S.) 53.

This section does not render one of two executors, who is a defendant, but who has no interest except in his representative capacity, incompetent as a witness for the plaintiff. *Devereux v. McCrady*, 46 S. C. 133, 24 S. E. 77, 81, 39 L. R. A. (N. S.) 53.

And must be "affected" by event of action.—It is the possibility that "any person who has a legal or equitable interest which may be affected by the event of the action" that will exclude him as a witness. *Roe v. Harrison*, 9 S. C. 279, 29 L. R. A. (N. S.) 1180, Ann. Cas. 13E, 796.

These provisions do not apply where the witness is not a party to the action, has no interest in the event of it, and cannot be affected by it. *Bollman v. Bollman*, 6 S. C. 29, 13 Am. Dec. 547, 132 Am. St. Rep. 159, Ann. Cas. 18C, 974; *Twitty v. Houser*, 7 S. C. 153, 87 Am. Dec. 326, 12 Am. St. Rep. 316, 98 Am. St. Rep. 372, 20 L. R. A. 711, 7 L. R. A. (N. S.) 618, 26 L. R. A. (N. S.) 417, 45 L. R. A. (N. S.) 2, Ann. Cas. 15C, 50, 8 A. L. R. 92; *Blakeley v. Frazier*, 11 S. C. 122, 72 Am. Dec. 545, 21 A. L. R. 932; *Shaw v. Cunningham*, 16 S. C. 631, 29 L. R. A. (N. S.) 1180, Ann. Cas. 13E, 796.

Thus, in an action of ejectment, where both parties claim title under a common grantor, the widow of the grantor, who purchased at a sale under an execution against her husband, may, under this section, competently testify whether, when she purchased at the execution, it was understood between her and her husband that she was to take subject to a mortgage by her husband, she having no interest in the result of the action. *Blohme v. Lynch*, 26 S. C. 300, 2 S. E. 136 137.

A party as witness is incompetent to testify as to communication with deceased person against his administrator

where the judgment would affect his interest. *Earle v. Harrison*, 18 S. C. 329.

Which means an increase or diminution thereof.—A person is not excluded as a witness whose liability on a note will in no way be increased or diminished by the event of the suit. *Sanders v. Bagwell*, 37 S. C. 145, 15 S. E. 714, 16 S. E. 770, 57 L. R. A. 880, Ann. Cas. 17D, 342, 2 A. L. R. 1572; *Twitty v. Houser*, 7 S. C. 153, 87 Am. Dec. 326, 12 Am. St. Rep. 316, 98 Am. St. Rep. 372, 20 L. R. A. 711, 7 L. R. A. (N. S.) 618, 26 L. R. A. (N. S.) 417, 45 L. R. A. (N. S.) 2, Ann. Cas. 15C, 50, 8 A. L. R. 92.

The interest affected means the interest promoted; parties are competent to testify against their interest. *Moffatt v. Hardin*, 22 S. C. 9, 25 L. R. A. 1918A, 874, Ann. Cas. 13A, 14, Ann. Cas. 18C, 479.

But the testimony must be favorable to interest of witness.—Even where the interest is held as an individual right, yet the testimony of the witness is competent if it is against such interest. *Devereux v. McCrady*, 46 S. C. 133, 24 S. E. 77, 81, 39 L. R. A. (N. S.) 53; *Shell v. Boyd*, 32 S. C. 359, 11 S. E. 205, 108 Am. St. Rep. 430, 23 L. R. A. (N. S.) 93.

This section was never intended to take from one named as a party the locus penitentiae, and to compel him to remain silent, when he is willing to tell the truth against his own interest, even if his testimony should affect the rights of others. *Shell v. Boyd*, 32 S. C. 359, 11 S. E. 205, 206, 108 Am. St. Rep. 359, 23 L. R. A. (N. S.) 93.

In a contest between two claimants under the obligee, in a bond for title, the obligor can testify to communications between himself and the deceased obligee, as such a witness, though a party to the cause, has no interest in the action. *Wood v. Wood*, 25 S. C. 600.

Parent of contingent legatees.—In an action by legatees to recover a legacy from executors, the father of contingent legatees does not have such an interest as will preclude him from testifying concerning a communication by the deceased executor. *Gilbert v. Glenn*, 159 S. C. 135, 156 S. E. 325, 335.

Agent of party plaintiff.—This section does not prohibit testimony as to conversations between plaintiff's agent and defendant's testator. *Kean v. Landrum*, 72 S. C. 556, 52 S. E. 421, 16 L. R. A. (N. S.) 769, 25 L. R. A. (N. S.) 1302, Ann. Cas. 17C, 970, 21 A. L. R. 932.

This is based upon the fact that the agent is not legally interested in the suit of his principal within the meaning of this section. *Id.*

Agent of defendant insurance company.—In an action against the company on an insurance policy, where the agent had authority to accept a note

for premiums, the agent was asked on examination what agreement there was between him and deceased at the time he took deceased's note for the premiums; the agreement sought to be shown being that, if a note was not paid at maturity, deceased should return the policy. The trial court excluded the policy on the ground that it contravened this section excluding the transactions of a deceased person with a witness who was a party in interest. Held, that the testimony was properly excluded. *Clark v. Home Fund Life Ins. Co.*, 79 S. C. 494, 61 S. E. 80.

Employee of defendant company may testify.—This section does not prohibit the admission of testimony of an employee of defendant insurance company in an action on a policy of insurance. *Caldwell v. Volunteer State Ins. Co.*, 170 S. C. 294; 170 S. E. 349.

Statements by agent since deceased are admissible. *Berry v. Virginia State Ins. Co.*, 83 S. C. 13, 64 S. E. 859.

Grantee of deceased debtor.—This section does not prevent the son and grantee of a deceased debtor from testifying for complainant in a suit by a judgment creditor of his father to set the deed aside as fraudulent. *Shell v. Boyd*, 32 S. C. 359, 11 S. E. 205, 108 Am. St. Rep. 359, 23 L. R. A. (N. S.) 93.

A witness in interest is not incompetent to testify to communications and transactions had between a person deceased and some third person. *Roe v. Harrison*, 9 S. C. 279, 29 L. R. A. (N. S.) 1180, Ann. Cas. 13E, 796; *Hughey v. Eichelberger*, 11 S. C. 36, 29 L. R. A. (N. S.) 1180, Ann. Cas. 13E, 796, 26 A. L. R. 1110, 1195; *Shaw v. Cunningham*, 16 S. C. 631, 29 L. R. A. (N. S.) 1180, Ann. Cas. 13E, 796; *McLaurin v. Wilson*, 16 S. C. 402, 29 L. R. A. (N. S.) 1180, 45 L. R. A. (N. S.) 1123, Ann. Cas. 13E, 796, Ann. Cas. 18E, 649; *Robinson v. Robinson*, 20 S. C. 567, 22 L. R. A. 373, 1 A. L. R. 792.

Applied, as to lack of interest rendering testimony admissible, in *Mims v. Hair*, 80 S. C. 460, 61 S. E. 968.

III. WHEN THE DISQUALIFICATION EXISTS.

A. Transaction with Person Deceased. Insane or Lunatic. General Principles.

Editor's note.—Continuing the treatment as based upon Mr. Justice Benet's resume of the section, it is proper at this place to consider the circumstances which render incompetent the testimony of the witness who comes within one or more of the four classes of persons who are disqualified by the provisions of the section.

Term "transaction" is comprehensive in nature.—The term "transaction" is a very comprehensive term, meaning the carrying on or through of any matter or affair. *Merck v. Merck*, 89 S. C. 347, 71

S. E. 969, 970, Ann. Cas. 13A, 937, 42 L. R. A. (N. S.) 321, Ann. Cas. 13E, 797.

And, as here used, it implies mutuality.—"Transaction" implies mutuality—something done by both the witness and the decedent, in concert, in which both take some part. *Sullivan v. Latimer*, 38 S. C. 158, 17 S. E. 701, 704, 29 L. R. A. (N. S.) 1180, L. R. A. 1915B, 1173, Ann. Cas. 13E, 796, Ann. Cas. 17E, 381, and the numerous authorities therein cited.

In *Hutton v. Smith*, 175 N. Y. 375, 67 N. E. 633, approved in *Merck v. Merck*, 89 S. C. 347, 71 S. E. 969, 970, Ann. Cas. 13A, 937, 42 L. R. A. (N. S.) 321, Ann. Cas. 13E, 797, it is said: "It has now been limited to this extent at least: That all conversations or transactions between persons since deceased and a third party, in the presence or hearing of the witness, may not be testified to by such witness if he by word or sign participated in the transaction or conversation, or is referred to in the course of it, or was in any way a party to it."

Thus a witness may testify as to a conversation between his wife and decedent, in which he took no part, such conversation not being a transaction or communication between the witness and decedent. *Sullivan v. Latimer*, 38 S. C. 158, 17 S. E. 701, 29 L. R. A. (N. S.) 1180, L. R. A. 1915B, 1173, Ann. Cas. 13E, 796, Ann. Cas. 17E, 381.

And, under this section, the testimony of a party, setting up a counterclaim for goods sold and delivered to a person since deceased, that items in his books of original entry were made by him, is not incompetent, since it relates only to his own acts. *Jeffords v. Muldrow*, 104 S. C. 388, 89 S. E. 357, 6 A. L. R. 755.

In an action to recover a share of crop made by plaintiff on defendant's farm, revived after defendant's death against his executors, the plaintiff could testify as to his own acts in connection with the subject matter, which he in no way attempted to connect with the deceased. *Rookheart v. Dean*, 21 S. C. 597.

In a suit to partition the estate of an intestate, the plaintiff may testify that he paid the purchase money; that he paid half of the taxes; that he took and held possession of half the land, and the date and extent of his occupancy, the improvements made by him, the insurance of his house, and the collection and retention of the amount of the policy, with the knowledge and acquiescence of his deceased mother; that he paid no rent; that a line between the part occupied by him and that occupied by her was run by a surveyor a short while before she died—for these were independent substantive acts and facts which involved no transaction or communication with the deceased. *Walker v. Henderson*, 109 S. C. 160, 95 S. E. 337, 338.

And does not apply to conversations between deceased and third person.—

Ivester v. Fowler, 109 S. C. 424, 96 S. E. 154. To the same effect is *Kennemore v. Kennemore*, 26 S. C. 251, 1 S. E. 881, 3 L. R. A. (N. S.) 806, 8 L. R. A. (N. S.) 873, 29 L. R. A. (N. S.) 1180, Ann. Cas. 13E, 796; *Sloan v. Hunter*, 56 S. C. 385, 34 S. E. 658, 29 L. R. A. (N. S.) 1180, Ann. Cas. 13E, 796; *Singleton v. Singleton*, 60 S. C. 216, 38 S. E. 462, 99 Am. St. Rep. 171.

The crucial test in determining the competency of testimony under this section is, was the transaction or communication between a person now deceased and the witness? If it was, he is not competent to testify as to such transaction or communication. If it was not, he is competent. *Brock v. O'Dell*, 44 S. C. 22, 21 S. E. 976, 977, 65 Am. St. Rep. 487, 117 Am. St. Rep. 241, 28 L. R. A. (N. S.) 798, 820, 916, 29 L. R. A. (N. S.) 1180, Ann. Cas. 13E, 796.

Thus, the examination of plaintiff as to whether he knew how defendant came into possession of certain property, received from a deceased relative, was not improper, under this section, as the transaction referred to was not between the witness and a deceased person, but between the defendant and a deceased person. *Brice v. Miller*, 35 S. C. 537, 15 S. E. 272, 81 Am. St. Rep. 364, 20 L. R. A. 112, 25 L. R. A. (N. S.) 1211, 29 L. R. A. (N. S.) 1180, Ann. Cas. 13E, 796.

Where, in an action to recover an interest in land, a party defendant offers to testify as to declarations and transactions between the deceased owner of the land and the father of the plaintiffs, also deceased, under whom plaintiffs claim the land, the evidence is admissible. *Kennemore v. Kennemore*, 26 S. C. 251, 1 S. E. 881, 3 L. R. A. (N. S.) 806, 8 L. R. A. (N. S.) 873, 29 L. R. A. (N. S.) 1180, Ann. Cas. 13E, 796.

This section does not prevent a husband from testifying as to a transaction between his wife and a person since deceased. *Scott v. Wiggins*, 113 S. C. 88, 101 S. E. 113.

In action by executor, an attorney can testify to communications between himself as attorney for the testator and the administrator, now deceased, of an estate under which defendants claim. *Reynolds v. Rees*, 23 S. C. 438, Ann. Cas. 16D, 254.

In action by administratrix for possession of an automobile in defendant's possession, the admission of a check and bank book as documentary evidence that defendant had delivered the check to deceased held not subject to objection under this section, since it could not be considered a transaction or communication between witness and deceased. *Bense v. O'Neill*, 154 S. C. 126, 151 S. E. 228.

Plaintiff in action against a town can testify as to the transactions between himself and former intendant of the town, acting for the corporation, but at the time of trial deceased. *Coleman v. Chester*, 14 S. C. 286, 75 Am. Dec. 728, 102 Am. St. Rep. 247.

In proceeding for amount allegedly advanced by plaintiff for deceased stockholder of bank upon stockholder's alleged agreement to accept bank examiner's scheme for continued operation of the bank which required payment by the stockholder which plaintiff agreed to advance, evidence of what plaintiff heard the deceased stockholder tell another stockholder which constituted an acquiescence in the plan of the bank examiner was admissible. *Oswald v. Lawton*, 187 S. C. 42; 196 S. E. 535.

In suit to cancel purported deed, testimony of transaction between witnesses and deceased person, against party prosecuting the action, held admissible where such party was not prosecuting action as executor, administrator, heir at law, next of kin, assignee, legatee, devisee, or survivor of deceased person. *Godfrey v. Godfrey*, 182 S. C. 117; 188 S. E. 653.

Though a party may be disqualified another witness may be competent to testify as to the event.—In *Brickle v. Leach*, 55 S. C. 510, 33 S. E. 720, 29 L. R. A. (N. S.) 1180, L. R. A. 1916B, 107, 231, 403, Ann. Cas. 13E, 796, it is held that this section, providing that, in action by or against the representative of a decedent, the opposing party may not testify as to conversations between himself and the decedent, does not prohibit other witnesses from testifying to such conversations.

Testimony of scrivener of codicil competent in construction of will where codicil in so far as any possible interest of scrivener was concerned had been declared of no force except that order making such declaration preserved all rights of minor claimant, and hence, by law of the case as established by such order, scrivener had no interest in event of the action and was competent to testify. *Ex Parte Newton*, 183 S. C. 379; 191 S. E. 59.

2. "Transaction" Illustrated.

The witnessing of a deed executed by a decedent, thus giving validity to the instrument, is a "transaction," between the witness and the deceased person which prohibits such person from testifying to the execution of the deed. *Merck v. Merck*, 89 S. C. 347, 71 S. E. 969, Ann. Cas. 13A, 937, 42 L. R. A. (N. S.) 321, Ann. Cas. 13E, 797. In other words, such witness is a participant in the transaction, so that his testimony concerning the execution of the deed is obnoxious to this section. *Id.*

And the witnessing of the Execution of a mortgage is a transaction.—Under this section, a plaintiff was held incom-

petent to testify, on an issue of the execution of a mortgage, that he saw the deceased mortgagor execute the mortgage. *Stelts v. Martin*, 90 S. C. 14, 72 S. E. 550, 1 A. L. R. 822.

But the observations of a physician do not amount to a transaction within this section, so as to prohibit such physician from testifying as to decedent's physical condition, and the amount of time required to look after his health. *Sullivan v. Latimer*, 38 S. C. 158, 17 S. E. 701, 704, 29 L. R. A. (N. S.) 1180, L. R. A. 1915B, 1173, Ann. Cas. 13E, 796, Ann. Cas. 17E, 381.

Statements as to disposition of land by deceased.—A witness could not, in view of this section, testify regarding disposition a deceased ancestor made of his land and as to what arrangements, with respect to whether the ancestor had agreed to sign a deed to witness, had been made. *Floyd v. Montgomery Lumber Co.*, 111 S. C. 382, 98 S. E. 139.

The inhibitions of this section limited to testimony against executor. It was enacted to protect an estate under certain circumstances after death has closed mouth of decedent. It was never intended to prevent an adverse claimant from telling the truth in favor of decedent's representatives. *Shell v. Boyd*, 32 S. C. 359; 11 S. E., 205. *Devereux v. McCrady*, 46 S. C., 133; 24 S. E., 77, 81. *Ex parte Cleveland et al. Patterson v. Cleveland et al.* 177 S. C., 514; 181 S. E., 890.

Mere consent to occupancy of land by another is not a "transaction," within the meaning of this section. *Brown v. Moore*, 26 S. C. 160, 2 S. E. 9, 89 Am. St. Rep. 497.

Payment of money to decedent for a definite interest in land.—In partition against a husband of lands claimed by him through his deceased wife, he is incompetent to testify as to payment to the wife of certain sum for her interest, under this section, because it relates to a transaction with a decedent. *Corbett v. Fogle*, 72 S. C. 312, 51 S. E. 884.

If the witness had simply testified that he placed a certain sum in the hands of his wife, the testimony would have been admissible; but, when he further testified that the sum of money was in payment of a certain interest, then this involved the act of the wife in so receiving it, and rendered the testimony incompetent. *Corbett v. Fogle*, 72 S. C. 312, 51 S. E. 884, 886.

Statement of purchase of land from decedent.—A son, after introduction in evidence of a deed to him by his father, since deceased, may testify that he bought the land of the father and paid for it, such testimony being not inadmissible under this section. *Langston v. Cothran*, 78 S. C. 23, 58 S. E. 956, 15 L. R. A. (N. S.) 1191, 1209, 1258.

Statement of decedent's possession of

land sold to witness.—That decedent was in possession of certain land when he conveyed the same to the witness is not a transaction between the witness and the decedent as to which the witness was incompetent to testify. *Langston v. Cothran*, 78 S. C. 23, 58 S. E. 956, 15 L. R. A. (N. S.) 1191, 1209, 1258.

Agreement of decedent to cancel mortgage relates to a transaction.—Under this section the testimony of defendant that the deceased, in asking him to execute a mortgage, assured him that the mortgage was only intended to evidence the purchase price of a lot, and that he would soon have a settlement with the defendant, and would then deliver up the mortgage for a cancellation and satisfaction, was excluded as relating to a transaction with deceased. *Woodrow v. Frederick*, 133 S. C. 431, 131 S. E. 598, 600.

Gift of property by decedent to witness.—In an action by the administrator of a deceased wife against her husband for money of her estate in his hands, the husband is, under this section, incompetent to testify that the wife gave him the property as his own. *McElveen v. King*, 88 S. C. 346, 70 S. E. 801, L. R. A. 1916E, 292.

Work done by decedent and his knowledge thereof.—In an action for services rendered on a building for deceased, plaintiff's testimony as to work done by him on deceased's premises when the latter was at home, and could not have been ignorant of such work, is not a "transaction" within the meaning of this section. *Foggette v. Gaffney*, 33 S. C. 303, 12 S. E. 260.

The testimony of the plaintiff, in a suit for services rendered to a person since deceased, that she rendered services for a specified time, and on cross-examination as to what she received from the deceased, was not incompetent, under this section. *Marshall v. Mitchell*, 59 S. C. 523, 38 S. E. 158, Ann. Cas. 18D, 202.

Declarations of conductor in action for injuries to passenger.—In an action for injuries to a passenger, declarations of the conductor (made while taking up the tickets immediately before the wreck) who was killed in the wreck, are a part of the *res gestae*, and are not excluded by this section. *Cain v. Atlantic Coast Line R. Co.*, 74 S. C. 89, 54 S. E. 244, 37 L. R. A. (N. S.) 237, 250 L. R. A. 1915A, 1049.

Arrangements by deceased as to method of payment of debt of witness.—Where suit is brought upon the notes of a married woman, alleged to have been given with reference to certain property received from a deceased relative upon condition that she pay a certain debt of the husband, it is not incompetent under this section as a transaction with a de-

cedent, for plaintiff, speaking of a change in the possession of the property, to say that the decedent "had fixed the property so they could pay the debt." *Brice v. Miller*, 35 S. C. 537, 15 S. E. 272, 81 Am. St. Rep. 364, 20 L. R. A. 112, 25 L. R. A. (N. S.) 1211, 29 L. R. A. (N. S.) 1180, Ann. Cas. 13E, 796.

Mere statement of having had conversation with deceased not inadmissible if details thereof not given.—This section does not render incompetent testimony by the son's administrator that he had had frequent conversations with the father in relation to the settlement of the son's estate, and that the father, though knowing that he was administrator, never made any demand upon him for the note, where he does not undertake to testify to what the conversations were. *Richards v. Munro*, 30 S. C. 284, 9 S. E. 108.

A decree in an action by an executor against the estate of his co-executor in relation to their testator's estate will not be set aside, under this section, because of testimony that plaintiff had had repeated conversations with deceased, where the details of the conversations were not given. *Williams v. Mower*, 35 S. C. 206, 14 S. E. 483.

Thus where assignee of sealed notes sues, the defendant may prove the loss of the receipt given him by assignor, since deceased, but he cannot testify to contents of it. *Standridge v. Powell*, 11 S. C. 549, 45 L. R. A. (N. S.) 591.

But if the testimony of the plaintiff is to the effect that she gave a check to deceased for the purpose of buying a car for her, it would be clearly inadmissible. *Bense v. O'Neill*, 154 S. C. 126, 151 S. E. 228, 229.

And the date of the conversation may be testified to.—A plaintiff may state the fact and date of a conversation with defendant's testator. *Trimmier v. Thomson*, 41 S. C. 125, 19 S. E. 291, 23 L. R. A. (N. S.) 704, Ann. Cas. 17B, 525, 6 A. L. R. 760.

Showing note sued upon to be mere accommodation paper.—In administrator's action on note given by defendant to intestate, defendant could not testify that note was merely an accommodation note for which no consideration had been given, such testimony relating to a "transaction" with deceased. *Witsell v. Nettles*, 131 S. C. 140, 126 S. E. 429.

Use of land by decedent as tenant of witness.—Under this section, the testimony of a widow and administratrix, defending a suit by heirs for an accounting, that the decedent had used XX XX XVV V land, as to the rental value thereof, as to mortgages and debts collected for her, and as to money which he had borrowed from her, in view of other evidence showing that he had handled her mortgages and collected

upon them, and that she had never received the amount, was competent. *Smith v. Smith*, 105 S. C. 393, 89 S. E. 1032, 16 A. L. R. 758.

Payments on note by indorser relate to a transaction.—Under this section the plaintiff, in an action on a note, was incompetent to testify that an indorser, since deceased, made payments and promises to him, and in what the last payment consisted. *Patrick v. English*, 106 S. C. 267, 91 S. E. 295.

But the existence of decedent's name on note at time of acquisition by witness does not relate to a transaction.—In an action upon a note indorsed by defendant's intestate, it was competent for plaintiff to testify that, when he got possession of the note, it had the intestate's name on the back of it, and that intestate did not put his name on the back after plaintiff got it. *Patrick v. English*, 106 S. C. 267, 91 S. E. 295.

Contingent liability.—Husband not permitted to testify in action by administratrix against his wife on note executed by husband and wife to administratrix's intestate that note resulted from wagering transaction, although husband had been adjudicated a bankrupt and listed the said note as one of his liabilities, because he didn't list his contingent liability to his wife, his comaker. *Huntley v. Sullivan*, 170 S. C. 391; 170 S. E. 664.

Statement of what was included in sale of interest in business relates to a transaction.—In an action by the owner of a store building against a former tenant and a purchaser from such tenant of a half interest in the business carried on in such store, for damages for the removal of alleged fixtures, evidence as to whether, when the purchasing defendant bought the interest in the business, the tenant's manager, since deceased, represented the fixtures as being a part of the business, was not admissible under this section. *Hurst v. Craig Furniture Co.*, 95 S. C. 221, 78 S. E. 960.

Fact of correctness of account sued upon.—In an action against an administrator for services to defendant's decedent it is inadmissible for plaintiff to testify that the account sued on was correct. *Boyd v. Cauthen*, 28 S. C. 72, 5 S. E. 170.

In action by wife for reasonable value of services rendered to decedent, even if husband had contract similar to wife's with decedent, husband would not be disqualified from testifying as to transactions and communications of decedent relating to matters in issue. *Riddle v. George*, 181 S. C. 360; 187 S. E. 524.

Natural personal interest that husband may have had in wife's welfare held not to clothe husband with legal or equitable interest in alleged agreement between wife and person dead at time of prof-

ferred testimony so as to preclude husband from testifying as to transaction between wife and decedent. *Riddle v. George*, 181 S. C. 360; 187 S. E. 524.

This statute does not prohibit evidence concerning transactions or communications with decedent but renders certain witnesses incompetent to give such evidence. *Riddle v. George*, 181 S. C. 360; 187 S. E. 524.

Applied in *Glenn v. Gerald*, 64 S. C. 236, 42 S. E. 155, 133 Am. St. Rep. 254, 11 L. R. A. (N. S.) 907, Ann. Cas. 13C, 309, Ann. Cas. 16C, 402, Ann. Cas. 17C, 562; *McAulay v. McAulay*, 96 S. C. 86, 79 S. E. 785, 48 L. R. A. (N. S.) 514; *Butler v. Butler*, 62 S. C. 165, 40 S. E. 138; *Jones v. Quattlebaum*, 31 S. C. 606, 9 S. E. 982, 983, 50 Am. St. Rep. 280, 6 L. R. A. (N. S.) 945, 957, 11 L. R. A. (N. S.) 68, Ann. Cas. 15B, 20; *Harrell v. Parrott*, 50 S. C. 16, 27 S. E. 521; *Archer v. Long*, 38 S. C. 272, 16 S. E. 998, 58 Am. St. Rep. 100, 37 L. R. A. 358, 53 L. R. A. 534; *Harrell v. Parrott*, 45 S. C. 611, 23 S. E. 946.

B. Testimony Must Be against One of Designated Classes of Persons.

General rules stated.—Under this section, to disqualify a witness, the examination must not only be in regard to a transaction with deceased, and his testimony or the event of the trial affect the interest of the witness, but the action or proceeding must be one against or by one of the designated classes of persons. *Lewie v. Hollman*, 53 S. C. 18, 30 S. E. 601, L. R. A. 1916B, 352, 492.

So, in order for the section to apply, the action must be prosecuted or defended by a person, in the capacity of one of the relations mentioned in the section. The mere existence of the relation does not make the section applicable unless the action is prosecuted in that capacity. *Brown v. Moore*, 26 S. C. 160, 2 S. E. 9, 10, 89 Am. St. Rep. 497.

If the defendant, though not named as executor, defends for the benefit of the estate of his testator, whose declarations the plaintiff has offered to prove, he is protected against such testimony. *Boyd v. Watts*, 6 S. C. 76, 29 L. R. A. (N. S.) 1182, Ann. Cas. 13E, 796.

Thus, the plaintiff may be the heir at law of the deceased person with whom the communication was had and about which testimony is being offered, yet if the plaintiff is not prosecuting the action in the capacity of heir at law, this section does not apply. *Brown v. Moore*, 26 S. C. 160, 2 S. E. 9, 10, 89 Am. St. Rep. 497.

Illustrative cases.—The following cases will illustrate the above stated principle.—Ed. note.

In an action by creditors of a partnership to subject the lands of a deceased partner to the firm debts, where the defendant claims an equitable mortgage upon said lands, said defendant is not

prohibited by this section from testifying as to communications and transactions between himself and the deceased as to the land in question; the testimony not being against any one belonging to the classes mentioned in said section, but against creditors. *Hutzler v. Phillips*, 26 S. C. 136, 1 S. E. 502, 4 Am. St. Rep. 687, 31 Am. St. Rep. 265, 43 Am. St. Rep. 368, 46 Am. St. Rep. 298, 55 Am. St. Rep. 102, 6 L. R. A. (N. S.) 587, 19 L. R. A. (N. S.) 207, Ann. Cas. 15C, 1176, 4 A. L. R. 313.

In an action against a bank to recover a policy of insurance upon the life of A., deceased, payable to plaintiffs and one J., deceased, which policy, as defendant alleged, had been assigned by A. to it as collateral, held, that plaintiffs did not sue in any of the representative capacities referred to in this section, and that the testimony of defendant's president and cashier, as to transactions and communications with A. concerning the policy, was admissible. *Macauley v. Central Nat. Bank*, 27 S. C. 215, 3 S. E. 193, 87 Am. St. Rep. 490, 30 L. R. A. 596.

Under this section the testimony of a defendant in partition as to an agreement between himself and his deceased father is competent, where the plaintiffs claim as heirs of defendant's deceased brother, because it is not against a party prosecuting or defending in any character mentioned in this section. *Harmon v. Harmon*, 96 S. C. 393, 71 S. E. 815.

Under this section one who is sued as an heir may testify to the contents of a letter received by her ancestor from plaintiff, and to conversations between her and the ancestor, because such testimony was not against a party prosecuting or defending the action as executor, administrator, etc., of such deceased person. *Martin v. Jennings*, 52 S. C. 371, 29 S. E. 807, 102 Am. St. Rep. 757, 112 Am. St. Rep. 1018, Ann. Cas. 13E, 796.

In an action on a life insurance policy, where the defense was suicide, plaintiff can testify to conversations with insured before his death, since defendant is not defending as representative of the deceased, so that this section is not applicable. *Lanter v. Southern, etc., Ins. Co.*, 114 S. C. 536, 104 S. E. 193.

In a boundary suit, testimony of a former owner as to a conversation of a third person with his father, then the owner of the land, is not obnoxious, to this section as it was not a transaction between the witness and the deceased, and it was not against a defendant who sustained any of the relations to the deceased mentioned in the statute. *Holden v. Cantrell*, 100 S. C. 265, 84 S. E. 826, L. R. A. 1918D, 19, 67, 81, and the numerous authorities therein cited.

One who petitioned for letters of administration could testify that he paid a doctor's bill for the deceased, notwithstanding this section, since the testimony

was not given in an action against any of the parties named in the section. *Burkhim v. Pinkhussohn*, 58 S. C. 469, 36 S. E. 908, 1 L. R. A. (N. S.) 342, 48 L. R. A. (N. S.) 860, Ann. Cas. 15A, 47.

The son of a grantor in a deed may testify as to remarks made by the grantor at the time of executing the deed, which was to another son of the grantor, and as to directions by the grantor to the person drawing the deed, without infringing this section. *Brock v. O'Dell*, 44 S. C. 22, 21 S. E. 976, 65 Am. St. Rep. 487, 117 Am. St. Rep. 241, 28 L. R. A. (N. S.) 798, 820, 916, 29 L. R. A. (N. S.) 1180, Ann. Cas. 13E, 796.

In proceeding to revive execution by administrator of the assignee the defendant cannot testify that he had placed two notes in the hands of the deceased assignee to collect. *Monts v. Koon*, 21 S. C. 110.

A trustee is not the representative of his deceased predecessor, and the obligor of bond, given to the latter, can prove payment to him in the action thereon by the former. *Guery v. Kinsler*, 3 S. C. 423, 2 A. L. R. 1486.

In an action to recover land, brought against one who claimed as purchaser under A, who had purchased from C, deceased, A was a competent witness to prove C's declarations as to the title to the land. *Jones v. Plunkett*, 9 S. C. 392.

A defendant to an action for partition is not incompetent to testify to communications between himself and a former trustee of the property, now deceased, under whom plaintiff claimed, the plaintiff not holding any of the relations to the deceased specified in this section. *Minton v. Pickens*, 24 S. C. 592, Ann. Cas. 17C, 662.

The fact that the defendant was the alienee of the deceased person would not necessarily make the defendant an "assignee" so as to render it incompetent for the plaintiff to testify to a transaction with the deceased. *Brice v. Miller*, 35 S. C. 537, 15 S. E. 272, 277, 81 Am. St. Rep. 364, 20 L. R. A. 112, 25 L. R. A. (N. S.) 1211, 29 L. R. A. (N. S.) 1180, Ann. Cas. 13E, 796.

The fact that the plaintiff is an alienee of the rights of the other heirs at law, as well as an heir at law, cannot prevent her from invoking the provision of this section. *Vann v. Howle*, 44 S. C. 546, 22 S. E. 735, 738.

An alienee, by executor's sale of land of a deceased person, is not deceased's "assignee" within the protection of this section. *Rapley v. Klugh*, 40 S. C. 134, 18 S. E. 680, 127 Am. St. Rep. 764, 13 L. R. A. (N. S.) 53, 80, citing, among other authorities, the case of *Jones v. Plunkett*, 9 S. C. 392; *Cantey v. Whitaker*, 17 S. C. 527.

A "grantee" of decedent is an "assignee" within the meaning of that term

as used in this section. In short, anyone who is excluded from testifying to communications or transactions with an "assignee" of the deceased is likewise debarred from testifying to communications or transactions with the "grantee" of one deceased. *Palachucola Club v. Withington*, 159 S. C. 446, 157 S. E. 621.

Applied as to testimony not being given against one claiming by virtue of or belonging to one of classes mentioned in section in *Blohme v. Lynch*, 26 S. C. 300, 2 S. E. 136; *Orr v. Orr*, 34 S. C. 275, 13 S. E. 467; *Martin v. Adams*, 29 S. C. 597, 6 S. E. 860; *Jackson v. Lewis*, 32 S. C. 593, 10 S. E. 1074.

IV. EXCEPTIONS.

Rule stated.—It has always been the proper construction of the section to allow a plaintiff to testify fully as to communications and transactions with a person deceased, if and whenever the personal representative of such deceased persons opens the door by giving testimony himself to such a communication or transaction. *Trimmier v. Thomson*, 41 S. C. 125, 19 S. E. 291, 293, 23 L. R. A. (N. S.) 704, *Ann. Cas.* 17B, 525, 6 A. L. R. 760.

Testimony in insurance case held not to "open the door," in *Barber v. Industrial Life & Health Ins. Co.*, 189 S. C. 108, 200 S. E. 102.

The introduction of testimony other than that of the representative of the deceased, as to certain transactions or communications of the deceased, does not render a party in interest competent to testify as to the same matter. *Brice v. Hamilton*, 12 S. C. 32, 96 Am. St. Rep. 73, *Ann. Cas.* 13E, 897.

Illustrations.—In action in claim and delivery for possession of automobile in defendant's possession, plaintiff's testimony on cross-examination that deceased had come to her house in car and had stated that car was his did not open the door for admission of defendant's testimony purporting to give details of transaction between herself and deceased under this section. *Bense v. O'Neill*, 154 S. C. 126, 151 S. E. 228.

But under this section, testimony of plaintiff as to transactions with a deceased person is admissible where the testimony of such person taken *de bene esse* was used by the defendant in reference to the same transaction. *Ellis v. Cribb*, 55 S. C. 328, 33 S. E. 484.

And in an action to recover land, evidence on the part of the plaintiff that she left the deed to the land with the grantor, who had a life interest, for safe-keeping, and he was dead, was not inadmissible under this section, where the defendant had already testified that he did not claim the land as heir at law, devisee or assignee of the deceased. *Brucke v. Hubbard*, 74 S. C. 144, 54 S. E. 249.

Applied, as to prohibited testimony being admissible after executor first testified concerning the transaction with deceased, in *Lenhardt v. Ponder*, 64 S. C. 354, 42 S. E. 169, 170, 25 L. R. A. (N. S.) 1199.

V. PLEADING AND PRACTICE.

Testimony incompetent under this section is admissible if not objected to. *Tompkins v. Tompkins*, 18 S. C. 1, 77 Am. Dec. 115, 11 L. R. A. (N. S.) 299, 315; *Burris v. Whitner*, 3 S. C. 510; *Bollmann v. Bollmann*, 6 S. C. 29, 30, 13 Am. Dec. 547, 132 Am. St. Rep. 159, *Ann. Cas.* 18C 974; *McGougan v. Hall*, 21 S. C. 600, 601.

Testimony offered without objection is competent. *Martin v. Jennings*, 52 S. C. 371, 29 S. E. 807, 102 Am. St. Rep. 757, 112 Am. St. Rep. 1018, *Ann. Cas.* 13E, 796.

So, it was error for probate judge to strike out on motion testimony as incompetent under this section, where such testimony had been previously given without objection. *Stark v. Hopson*, 22 S. C. 42.

And grounds of objection must be stated. — When testimony is offered which is deemed objectionable under this section, it is the duty of the objector to state to the trial court the grounds of objection. *Terry v. Husbands*, 53 S. C. 69, 30 S. E. 826. See, also, *Gaston v. Gaston*, 80 S. C. 157, 61 S. E. 393, 396.

In *Sherwood v. McLaurin*, 103 S. C. 370, 88 S. E. 363, 364, it was agreed among counsel that all the testimony should be taken down and that any objections that either party desired to make could be made at the argument of the case. At the argument no special objections were made, and each side merely said that they objected to any testimony that was objectionable under this section if it had not been waived. The court held the objection to be too general, and further that since both sides had introduced testimony conflicting with the rule of this section, the protection of the statute had been waived.

In *Trimmier v. Liles*, 58 S. C. 284, 36 S. E. 652, it appeared that the circuit judge, on the return of a master's report, ordered one of the issues submitted to a jury. On appeal from the order refusing to confirm the master's report, exception was made that evidence had been received which violated this section. The Supreme Court held that the testimony, if improper, related to the issue which was to be tried by the jury. The court said: "We cannot say now whether (this section) will exclude such testimony or not. It depends upon circumstances."

Otherwise the Supreme Court will not consider the objections on appeal. *Terry v. Husbands*, 53 S. C. 69, 30 S. E. 826;

Wingo v. Caldwell, 35 S. C. 609, 14 S. E. 827, 12 L. R. A. (N. S.) 1140.

Nor will the Supreme Court consider grounds of objection to testimony not properly within the exceptions assigned. Terry v. Husbands, 53 S. C. 69, 30 S. E. 826.

But an objection cannot be taken to testimony which has already been admitted without objection in another part of the examination. Brice v. Miller, 35 S. C. 537, 15 S. E. 272, 81 Am. St. Rep. 364, 20 L. R. A. 112, 25 L. R. A. (N. S.) 1211, 29 L. R. A. (N. S.) 1180, Ann. Cas. 13E, 796.

Such testimony taken on one reference is not rendered competent on a second reference against persons not parties to the first by a provision in the order of reference that the testimony taken on the first reference might be used. Gee v. Humphries, 49 S. C. 253, 27 S. E. 101, 54 L. R. A. 621.

And after excluding the incompetent testimony the case must stand or fall by the evidence that is left. Dash v. Inabniet, 53 S. C. 382, 31 S. E. 297, 133 Am. St. Rep. 252, 11 L. R. A. (N. S.) 904.

If the testimony of some of the witnesses appears to be obnoxious to this section, the court on appeal will exclude it and then proceed to consider whether the remaining evidence is strong enough to support the plaintiff's case. Gaston v. Gaston, 80 S. C. 157, 61 S. E. 393, 396;

Marshall v. Marshall, 42 S. C. 436, 20 S. E. 298, 110 Am. St. Rep. 472, 25 L. R. A. (N. S.) 1143; Scoggins v. Smith, 31 S. C. 605, 9 S. E. 971, 972, 44 L. R. A. (N. S.) 45; Bennett v. Cook, 28 S. C. 353, 6 S. E. 28, L. R. A. 1916E, 292, 1 A. L. R. 1242.

Where the only testimony of the transaction relied on by defendant was her own, which was objected to as incompetent under this section, and which was at least unsatisfactory, leave first asked on hearing of the master's report to amend the answer to conform thereto, was properly refused. Mims v. Jones, 107 S. C. 81, 91 S. E. 987.

In Young v. Young, 27 S. C. 201, 3 S. E. 202, 208, after striking out the evidence which was incompetent under this section, there was no evidence left that supported the contention of the plaintiff.

Trial Court's ruling on admissibility of evidence will not usually be disturbed.

—The ruling of the trial court as to the relevancy of evidence will not be reversed unless the party complaining has been injured by an abuse of discretion. Martin v. Jennings, 52 S. C. 371, 29 S. E. 807, 102 Am. St. Rep. 757, 112 Am. St. Rep. 1018, Ann. Cas. 13E, 796.

Applied as to failure to object to inadmissibility of evidence, in Hobbs v. Beard, 43 S. C. 370, 21 S. E. 305, 310; Pressley v. Pressley, 102 S. C. 174, 86 S. E. 377.

ARTICLE 2

Examination by Commission

693. Judge or clerk may grant commission.

694. Service of notice of application.

695. Compulsory attendance of witness.

696. Testimony of officers of state hospital.

697 and 698. Subpoena.

698. Fee of witness.

699. Failure of witness to attend.

700 and 701. Commission from other States.

702. Persons aged, infirm or sick.

§ 693. Granting commissions to examine witnesses on application of any party to suit.—Any judge or clerk of the circuit court shall have power and authority, on the application of any party to a suit pending in the court of common pleas for his county, which application may be made to him by the party, either in person or by agent or attorney, to grant commissions, under the seal of the court, directed to three or more commissioners, authorizing and empowering them or any two of them, to take the depositions in writing, of the witness or witnesses therein mentioned, resident without the limits of the State or county, where the trial is to be had, or that reside at a greater distance than one hundred miles from the court where said action is instituted, or may be about to remove without the limits of the State before the sitting of the next court, or before the suit will stand ready for trial, or whose presence cannot be procured by reason of indis-

pensable attendance on some public official duty, or professional duty as an attorney at such time, or of such sickness or infirmity as incapacitates such witness or witnesses from traveling in order to appear and testify, touching such matters as they may have in charge by such commission.

1932 Code, § 693; Civ. P. '22, § 708; Civ. C. '12, § 3972; Civ. C. '02, § 2868; G. S. 2202; R. S. 2332; 1787 (5) 45; 1794 (5) 249; 1816 (6) 44; 1839 (11) 107.

Cross reference.—As to when testimony may be taken by deposition *de bene esse*, see § 706.

The attorney of the party can apply for commission. Brooks v. Brooks, 16 S. C. 621, 34 L. R. A. 342, 1 A. L. R. 727.

Which may be issue by the deputy clerk. Brooks v. Brooks, 16 S. C. 621, 34 L. R. A. 342, 1 A. L. R. 727.

But it will not be granted for sickness or infirmity unless shown. Carloss v. Colclough, 1 Brev. 462.

And a defendant about to leave the state cannot have commission to examine himself. Stone v. Jones, 4 McC. 254, 19 L. R. A. 344, L. R. A. 1918E, 527, Ann. Cas. 16A, 1067.

The depositions may betaken in a foreign language. Kuhlman v. Brown, 4

Rich. 479, 17 L. R. A. 814.

But they cannot include statement of witness made by refreshing his memory from paper not sent with commission nor referred to in interrogatories. Floyd v. Mintsey, 7 Rich. 181, 89 Am. St. Rep. 87, 12 L. R. A. (N. S.) 1140.

Interrogatories may be first objected to at the trial. McBride v. Ellis, 9 Rich. 269; Bridger v. Asheville, etc., R. Co., 25 S. C. 24, 14 L. R. A. 783, 4 L. R. A. (N. S.) 81, 51 L. R. A. (N. S.) 581, L. R. A. 1917F, 67, 111, L. R. A. 1918A, 747, Ann. Cas. 13C, 1093.

See generally. Miller v. George, 30 S. C. 526, 9 S. E. 659; Nobles v. Hogg, 36 S. C. 322, 15 S. E. 359, 132 Am. St. Rep. 389, 44 L. R. A. (N. S.) 927, 964, 1 A. L. R. 787, 805.

§ 694. Service of notice of application.—Ten days' notice of such application, with a copy of the interrogatories propounded, shall be served upon the opposite party or attorney, who shall have leave to resist such application, on cause shown: *provided*, also, that such application be accompanied by an affidavit of the party applying declaring his or her belief of the materiality of any witness proposed to be so examined, together with the fact which may entitle the party to such commission.

1932 Code, § 694; Civ. P. '22, § 710; Civ. C. '12, § 3973; Civ. C. '02, § 2869; G. S. 2202; R. S. 2333.

The clerk should not issue commission unless the service of the notice has been personally made or knowledge thereof

ten days before has been shown. Gooday v. Corlies, 1 Strob. 199.

§ 695. How attendance of witness may be compelled.—Either party to a cause in which a commission has been issued may, in the discretion of the court, on motion, and upon showing that two days' notice thereof has been given to the adverse party or attorney, be entitled to a rule to compel the personal attendance of any witness so to be examined, who may reside within the county, or not more than thirty miles from the court house where the trial is to be held.

1932 Code, § 695; Civ. P. '22, § 711; Civ. C. '12, § 3974; Civ. C. '02, § 2870; G. S. 2202; R. S. 2334.

§ 696. Testimony of officers of state hospital by commission in civil causes.—Whenever the testimony of any officer at the state hospital shall be required in a court of justice, in a civil cause, the same may be taken by commission; nor shall his or her personal appearance be required, unless it shall be made to appear to the court, by affidavit, that justice cannot be done without such personal presence in court.

1932 Code, § 696; Civ. P. '22, § 712; Civ. C. '12, § 3975; Civ. C. '02, § 2871; G. S. 2203; R. S. 2335; 1829 (6) 382.

§ 697. Where commission issues, subpoena for witnesses to be issued.—Where a commission shall issue, by consent of parties or otherwise, out of any court of judicature in this State, to examine any witness or witnesses residing within this State, touching any matter or thing depending in such court, the said court shall have power, and is hereby required, to issue a subpoena, in due and legal form, commanding such witness or witnesses to attend before the commissioners named in the commission, at a certain time and at some place not more than fifteen miles from the residence of such witness or witnesses, respectively, and answer on oath, according to their knowledge, to the interrogatories and cross-interrogatories annexed to the said commission.

1932 Code, § 697; Civ. P. '22, § 713; Civ. C. '12, § 3976; Civ. C. '02, § 2872; G. S. 2204; R. S. 2336; 1794 (5) 249.

§ 698. Serve subpoena two days before attendance of witnesses—fees of witness.—Such subpoena shall be served on the witness or witnesses personally, at least two days before the time at which attendance is required by it; and such witnesses so attending and giving evidence, shall be entitled to the same fees as witnesses in civil cases summoned before a circuit court for every day of necessary absence from home, and his or her necessary ferriages in going to and from attending the said commissioners, to be paid by the party obtaining the commission, or his or her agent, before it is delivered out of the hands of the commissioners, who are hereby authorized and required to estimate the number of days for which payment is allowed as aforesaid, and to retain the commission till such payment be made.

1932 Code, § 698; Civ. P. '22, § 714; Civ. C. '12, § 3977; Civ. C. '02, § 2873; G. S. 2205; R. S. 2337; 1794 (5) 249; 1870 (14) 399.

See generally, *Kirkley v. Nolly*, 1 Hill 398.

§ 699. How witnesses to be punished for contempt in not attending before commissioners.—Nothing contained in this chapter shall authorize commissioners to attach or commit persons summoned as witnesses, but any of the circuit courts of this State, on such subpoena as is herein mentioned being produced, and satisfactory information made on oath that it was personally and in due time served on any witness therein named, who refused or neglected to attend, according to the command of the said subpoena, or attending, refused to answer as aforesaid, shall have power, and is hereby required, to order an attachment against such witness, to appear and answer for such neglect or refusal, as for a contempt of the court; which attachment shall be served and executed by the sheriff of that court where it was awarded, or his deputy, and shall run into any part of the state; and such other proceedings shall be had thereon, as are usual and allowed in other cases of attachment for contempt.

1932 Code, § 699; Civ. P. '22, § 715; Civ. C. '12, § 3978; Civ. C. '02, § 2874; G. S. 2206; R. S. 2338; 1794 (5) 249.

§ 700. Witnesses to attend and give evidence on commission from other States.—Where a commission shall issue out of any court of judicature of the United States, or of another state, to examine any witness or witnesses

residing in this State, touching any cause, matter, or thing depending in such court, the person having obtained such commission, or his or her agent, shall produce it to a judge of the Supreme or circuit courts of this State, who, on being satisfied of its authenticity and regularity, shall direct a subpoena to issue in due form from the clerk's office of the nearest circuit court, in like manner as is provided by section 697 in cases where commissions are issued out of the courts of this State.

1932 Code, § 700; Civ. P. '22, § 716; Civ. C. '12, § 3979; Civ. C. '02, § 2875; G. S. 2207; R. S. 2339; 1794 (5) 249.

§ 701. Service of subpoena in case of commission from other States—compensation—liabilities.—Such subpoena shall be served within the same time, and such witness or witnesses, so attending and giving evidence, shall be entitled to the same compensation, to be assessed and secured in the same manner, and in case of neglect or refusal to attend or refusal to give evidence, shall be liable to the same actions, pains and penalties, and to be proceeded against in the same manner, as is provided by sections 699 and 702 for the case of witnesses to be examined in causes pending in this State.

1932 Code, § 701; Civ. P. '22, § 717; Civ. C. '12, § 3980; Civ. C. '02, § 2876; G. S. 2208; R. S. 2340; 1794 (5) 249.

§ 702. Examination of persons aged, infirm, sick, etc.—liabilities.—Nothing contained in this chapter shall be held to extend to persons unable to leave home by reason of age, infirmity, sickness, or bodily hurt, all of which persons, whenever it may be necessary to examine them by commission in causes depending either in this State or other states, shall be attended by the commissioners; and in case of their refusal to give evidence, or to answer to the interrogatories and cross-interrogatories under any such commission, they shall be liable to the action of the party who may be injured by the want of their testimony, and shall make reparation in damages for such injury.

1932 Code, § 702; Civ. P. '22, § 718; Civ. C. '12, § 3981; Civ. C. '02, § 2877; G. S. 2209; R. S. 2341; 1794 (5) 249.

See generally, *Owen v. Foreman*, Bail. Eq. 165.

ARTICLE 3

Examination before Clerk and Depositions de Bene Esse

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| 703. Depositions taken by clerk of court. | 706. Deposition de bene esse. |
| 704. Compelling attendance of witnesses. | 707. Testimony reduced to writing. |
| 705. Fees of clerk. | 708. Custody of deposition. |

§ 703. Depositions taken by clerks of court—right of examination—deposition to be certified.—The clerks of the courts of commons pleas in this State, in all civil causes or proceedings at issue in the courts of common pleas for their respective counties, shall, upon the application of either party to such cause or proceeding, after ten days' notice to the adverse party, take, in writing, the depositions of said party, or of any witness or witnesses in said cause or proceedings, whose examination shall be re-

quired by the party making such application; upon taking which depositions, the several parties shall be entitled to the same rights of examination, cross-examination, and examination in reply, and the same exceptions to the admissibility of evidence, as are allowed by law upon examination before the court. And the deposition so taken shall be certified by the clerk before whom such examination was had, and may be read in evidence at the trial of the said cause or proceeding; subject, nevertheless, to the right of either party to require the personal attendance and viva voce examination of the witness or witnesses at the trial of said cause, or proceeding; the exercise of which right, however, not to cause a continuance or delay in the trial of the said cause or proceeding.

1932 Code, § 703; Civ. P. '22, § 719; Civ. C. '12, § 3982; Civ. C. '02, § 2878; G. S. 2210; R. S. 2342; 1872 (15) 41.

This section does not limit power of circuit judge to order reference to take testimony. *McSween v. McCown*, 21 S. C. 371.

And testimony taken before the action is commenced is not admissible at the trial. *Ivy v. Clawson*, 14, S. C. 267, Ann. Cas. 13D, 854.

But it may be required to be read at the trial, although the witness is present.

McLaurin v. Wilson, 16 S. C. 402, 29 L. R. A. (N. S.) 1180, 45 L. R. A. (N. S.) 1123, Ann. Cas. 13E, 796, Ann. Cas. 18E, 649.

Testimony taken *de bene esse* and used at first trial may be used by adverse party at subsequent trial. *Providence Mach. Co. v. Browning*, 70 S. C. 148, 49 S. E. 325, 52 L. R. A. (N. S.) 334, Ann. Cas. 13B, 1169, 2 A. L. R. 72.

§ 704. Power to compel attendance of witnesses—failure to attend—penalty.—Every clerk of the court of common pleas shall have power to compel the attendance before him of the witness or witnesses to be examined, as aforesaid, upon the application of a party to any civil cause or proceeding at issue in the said court; for which purpose he may issue a subpoena to any such witness, which shall be served personally; and if any witness, upon whom such subpoena has been duly served, shall fail to attend conformably thereto, the clerk by whom the same was issued shall have power to issue a rule, requiring such witness to show cause why he should not be attached for contempt; and, upon the failure or neglect of such witness to show cause, the said clerk shall have power to issue an attachment against such witness for contempt, which attachment shall not be dissolved, except by the order of a judge, or of the said clerk.

1932 Code, § 704; Civ. P. '22, § 720; Civ. C. '12, § 3983; Civ. C. '02, § 2879; G. S. 2211; R. S. 2343; 1872 (15) 41.

§ 705. Fees of clerk for examination of witnesses.—Every clerk of the court of common pleas, for taking the depositions hereinabove mentioned, shall be entitled to demand and receive the sum of one dollar for each witness examined, to be paid by the party against whom judgment shall be rendered in said cause or proceeding.

1932 Code, § 705; Civ. P. '22, 721; Civ. C. '12, § 3984; Civ. C. '02, § 2880; G. S. 2212; R. S. 2344; 1872 (15) 41.

§ 706. When testimony may be taken by deposition *de bene esse* and by whom—proceedings.—In addition to the methods for taking testimony now provided by law the testimony of any witness may be taken in any civil action depending in the court of common pleas for any county within this State by deposition *de bene esse*, where the witness lives without the county in which such cause is to be tried, or at a greater distance from the place

of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of this State or out of the county in which the cause is to be tried, or to a greater distance than one hundred miles from the place of trial before the time of trial, or when he is aged or infirm. The deposition may be taken before any circuit judge of this State, or the clerk of any of the circuit courts of this state, or any magistrate or notary public of this State, or any chancellor, justice or judge of a Supreme or superior court, mayor or chief magistrate of a city, magistrate, judge of a county court or court of common pleas, of any of the United States or the Dominion of Canada or Kingdom of Great Britain, or any notary public not being of counsel or attorney to either of the parties interested in the event of the cause. Reasonable notice, not less than ten days, must first be given in writing by the party or his attorney proposing to take such deposition, to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition; and whenever, by reason of absence from the State and want of an attorney of record or other reason, the giving of the notice herein required shall be impracticable, it shall be lawful to take such depositions as there shall be urgent necessity for taking, upon such notice as any of the circuit judges of this state shall think reasonable and direct. Any person may be compelled to appear and depose as provided by this section in the same manner as witnesses may be compelled to appear and testify in court.

1932 Code, § 706; Civ. P. '22, § 722; Civ. C. '12, § 3985; Civ. C. '02, § 2881; R. S. 2345; 1883 (18) 373.

This section is limited to depositions in civil actions.—The intent of the law-makers was to limit the taking of the depositions *de bene esse* to civil actions in differentiation from criminal actions. The expressive word in this section is "civil" and not "action." In *re Percival's Estate*, 108 S. C. 39, 93 S. E. 243, Ann. Cas. 17E, 463.

And the depositions may be typewritten.—When the body of the deposition is typewritten, and it is signed officially by the notary public before whom it was taken, and by the witness, it cannot be objected that the deposition does not conform to the statute requiring it to be taken down in writing. *Stoddard v. Hill*, 38 S. C. 385, 17 S. E. 138, 63 L. R. A. 967, Ann. Cas. 18E, 282; *Edgefield Mfg. Co. v. Maryland Cas. Co.*, 78 S. C. 73, 58 S. E. 969, 33 L. R. A. (N. S.) 514, 38 L. R. A. (N. S.) 64, Ann. Cas. 12D, 910, 12 A. L. R. 384.

And it need not state it was written by witness or read over to him. *Edgefield Mfg. Co. v. Maryland Cas. Co.*, 78 S. C. 73, 58 S. E. 969, 33 L. R. A. (N. S.) 514, 38 L. R. A. (N. S.) 64, Ann. Cas. 12D, 910, 12 A. L. R. 384.

But this section does not provide for interrogatories.—Under this section the admission of depositions in evidence cannot be objected to on the ground that they were taken without interrogatories having been first served, the statute not

providing for interrogatories. *Moore v. Willard*, 30 S. C. 615, 9 S. E. 273.

And a party who chooses to use them can make no charge therefor.—Where a witness is examined under the provisions of this section cross interrogatories are not necessary; and, since the statute makes no provision for the taxing of costs for cross interrogatories, a party who chooses to use them can make no charge for them. *Cunningham v. Cauthen*, 47 S. C. 150, 25 S. E. 87.

Nor does it require that the signature of the witness be identified, other than by the certificate of the notary that he had sworn and examined the witness. *Sonneborn & Co. v. Southern R. Co.*, 65 S. C. 502, 44 S. E. 77, 99 Am. St. Rep. 346, L. R. A. 1917D, 506.

A notice is sufficient if it shows that the testimony is to be taken under this section.—Where the notice is given to the opposite party stating the names of the witnesses and the time and place of taking the deposition, a notice, reciting such facts, sufficiently informed the opposite party that the depositions were to be taken under the statute *de bene esse*, without explicitly stating that they were to be so taken. *Henderson v. Williams*, 57 S. C. 1, 35 S. E. 261.

And a notice not giving name of notary is sufficient. *Battle v. Cape Fear Lumber Co.*, 80 S. C. 273, 61 S. E. 441, Ann. Cas. 12D, 593.

Appearance waives defect in notice. Sloan v. Hunter, 56 S. C. 385, 34 S. E., 658, 76 Am. St. Rep. 551, 29 L. R. A. (N. S.) 1180, Ann. Cas. 13E, 796.

And a notice to take a deposition on the 23d, served on the 13th, is sufficient. Williams v. Halford, 64 S. C. 396, 42 S. E. 187.

As is likewise a notice served on the tenth, to take testimony on the twentieth. Williams v. Halford, 67 S. C. 296, 45 S. E. 207. For requirements as to contents of notice, see Wallingford v. Western U. Tel. Co., 60 S. C. 201, 38 S. E. 443, 446, 117 Am. St. Rep. 297, 41 L. R. A. (N. S.) 1190, Ann. Cas. 14A, 1297.

The taking of testimony de bene esse by a party to an action does not ipso facto make such testimony a part of the record, but it may or may not be offered by the party at whose instance it has been procured. Baker v. Metropolitan Life Ins. Co., 184 S. C. 341; 192 S. E. 571.

A witness being shown to be a non-resident when deposition was taken, is presumed to be such at time of trial in absence of testimony to the contrary. Kaufman v. Caughman, 49 S. C. 159, 27 S. E. 16, 61 Am. St. Rep. 808, 77 Am. St. Rep. 478, 107 Am. St. Rep. 465, 6 L. R. A. (N. S.) 203, 26 L. R. A. (N. S.)

1126, 27 L. R. A. (N. S.) 91, L. R. A. 1916 C, 1244.

In view of this section, delay in serving amended complaint insufficient to justify dismissal.—White v. Harby, 175 S. C. 36, 179 S. E. 671.

A declaration against interest is voluntary and admissible.—A declaration against interest, made by one of the parties, whose testimony was taken by a special referee, under this section, is voluntary, and admissible against deponent, where such referee was not an officer authorized by statute to take such testimony, but it was taken by consent of all parties. McGahan v. Crawford, 47 S. C. 566, 25 S. E. 123, Ann. Cas. 14A, 1008.

A declaration against interest, made by one whose testimony was taken de bene esse, under this section, is admissible against him, since the rule that a witness cannot be compelled to give testimony against himself does not apply to civil cases. McGahan v. Crawford, 47 S. C. 566, 25 S. E. 123, Ann. Cas. 14A, 1008.

A party has right at any stage of the case to call for such testimony of witness on behalf of other party. Petrie v. Columbia, etc., R. Co., 27 S. C. 63, 64, 2 S. E. 837, 95 Am. Dec. 74, 42 L. R. A. (N. S.) 943, Ann. Cas. 13B, 1169.

§ 707. Testimony to be reduced to writing.—Every person deposing as provided in the preceding sections shall be cautioned and sworn to testify the whole truth and carefully examined. His testimony shall be reduced to writing by the officer taking the deposition, or by himself in the officer's presence, and by no other person, and shall, after it has been reduced to writing, be subscribed by the deponent: *provided*, that this shall not be construed to prevent the use of stenographers for the purpose of taking such testimony, but the testimony so taken by such stenographers shall be reduced to writing or typewritten and read over to such witnesses.

1932 Code, § 707; Civ. P. '22, § 723; Civ. C. '12, § 3986; Civ. C. '02, § 2882; R. S. 2346; 1883 (18) 373; 1902 (23) 1072.

When a deposition was typewritten and the officer testified that he took it at his office, it will be presumed on appeal that the officer himself reduced the testimony to typewriting; the statute

only requiring testimony de bene esse to be read over to the deponent when taken down by a stenographer and afterwards transcribed. Slaughter Co. v. King Lumber Co., 79 S. C. 338, 60 S. E. 705.

§ 708. Deposition retained by the officer taking it until delivered to court—when not used.—Every deposition taken under the provisions of the sections 706 and 707 shall be retained by the officer taking it until he delivers it with his own hand into the court for which it is taken, or shall, together with a certificate of the reasons as aforesaid of taking it and of the notice, if any, given to the adverse party, be by such officer sealed up and directed to such court, and forwarded to such court either by mail or express, and remain under his seal until opened in court. But unless it appears to the satisfaction of the court that the witness is then dead or gone out of the county or State, or to a greater distance than one hundred miles from the place where the court is sitting, or that, by reason of age,

sickness, bodily infirmity or imprisonment, he is unable to travel and appear at court, such deposition shall not be used in the cause.

1932 Code, § 708; Civ. P. '22, § 724; Civ. C. '12, § 3987; Civ. C. '02, § 2883; R. S. 2347; 1883 (18) 373.

This section does not state what an officer shall do with respect to retention of depositions. Crosby v. Seaboard, etc., Ry., 81 S. C. 24, 61 S. E. 1064, Ann. Cas. 18B, 943.

Nor does it require a formal seal.—This section was sufficiently complied with where the officer, on one side of the envelope containing the deposition, signed a statement that it contained the deposition and, on the other side across the flap, wrote the word "seal" in brackets; it not being fatal that the seal was not placed by the signature or that a wafer or other formal seal was not used. McClamrock Marble, etc., Co. v. Bristow, 94 S. C. 252, 77 S. E. 923.

Nor does it require the certificate to be under the seal of the officer taking it. Wallingford v. Western U. Tel. Co., 60 S. C. 201, 38 S. E. 443, 446, 117 Am. St. Rep. 297, 41 L. R. A. (N. S.) 1190, Ann. Cas. 14A, 1297.

Nor to state where the examination took place. Wallingford v. Western U. Tel. Co., 60 S. C. 201, 38 S. E. 443, 446, 117 Am. St. Rep. 297, 41 L. R. A. (N. S.) 1190, Ann. Cas. 14A, 1297.

But the officer must show that the deposition sent to the court is his work.—A deposition transmitted to the court by mail in a sealed envelope is not admissible in evidence, unless the notary, by some act, such as the use of sealing wax with his notarial seal stamped thereon, or his name written across it, or the writing of his name across the flap of the envelope after sealing it, evinces that the package sent to the court is his work. Travelers v. Jennings, 39 S. C. 410, 17 S. E. 849.

Where depositions in due form are signed with the name and title of the officer, and sealed, and are received by the clerk of the court, in sealed package, by mail, there is substantial compliance

with the requirements of this and the preceding section. Bulwinkle v. Cramer, 30 S. C. 153, 8 S. E. 689.

Certificate and seal of the notary is sufficient evidence that he is a notary and that the witness was sworn. Moore v. Willard, 30 S. C. 610, 10 S. E. 390.

And that the reasons for taking the Testimony is shown in the certificate.—Testimony taken by deposition is properly rejected when the certificate accompanying the deposition contains no reasons for taking the testimony under this section, and no reason is shown why the witness cannot be produced at the trial. Featherstone v. Dagnall, 29 S. C. 45, 6 S. E. 897, 22 Am. St. Rep. 80, 20 L. R. A. 110.

A certificate attached to the notice for taking depositions, stating that they were taken "in pursuance of the above order," meaning the above "notice," was sufficient, where the notice stated the reason for taking them. Henderson v. Williams, 57 S. C. 1, 35 S. E. 261.

However the certificate does not have to be prepared before placing the depositions in the envelope.—Where the certificate of the notary states that the depositions were retained by him until they were placed in the post office properly addressed, and that he personally placed them in the post office, it makes no difference whether he prepared the certificate before or after placing the depositions in the envelope. Riser v. Southern Ry., 67 S. C. 419, 46 S. E. 47, 25 L. R. A. (N. S.) 347, L. R. A. 1915A, 1061.

And exhibits introduced need not accompany the deposition. Stoddard v. Hill, 38 S. C. 385, 17 S. E. 138, 63 L. R. A. 967, Ann. Cas. 18E, 282.

See generally, Haigns v. Aetna Life Ins. Co., 72 S. C. 216, 51 S. E. 683, 25 L. R. A. (N. S.) 23, 8 A. L. R. 397.

CHAPTER 42

Provisions Respecting Methods of Proof

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| <p>709. Proof of signatures to note or bond.</p> <p>710. Signature in action against executors or administrators.</p> <p>711. Protest of notary.</p> <p>712. Testimony of survivors to fraudulent transaction.</p> <p>713. Admission of public records.</p> <p>714. Admission of affidavit of director of motor vehicle division.</p> <p>715. Proof of ordinances.</p> | <p>716. Statutes of other States.</p> <p>721. Copies of grants and plats by North Carolina.</p> <p>723. Production of original where instrument recorded.</p> <p>724. Proof of recorded instruments when fraud alleged.</p> <p>725 and 726. Foreign instruments.</p> <p>727. Farmers' and planters' books</p> <p>728. Medical or scientific books.</p> |
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729. Substitution of new record where original lost.
730 thru 732. Proceedings to perpetuate testimony.

733. Proof of lost papers.
734. Preservation of testimony.
735. Mortuary table.
736. Papers issued by common carriers.

§ 709. Proof of signatures in absence of witnesses—postponement.—The absence of a witness to any bond or note shall not be deemed a good cause, by any court of justice, for postponing a trial respecting the same; but the signature to such bond or note may be proved by other testimony; unless the defendant in his answer, shall swear, or affirm, according to the form of his religious profession, that the signature to the bond or note in suit is not his or hers.

1932 Code, § 709; Civ. P. '22, § 725; Civ. C. '12, § 3988; Civ. C. '02, § 2884; G. S. 2213; R. S. 2348; 1802 (5) 485.

Cross reference.—As to power to compel attendance of witnesses, see § 704 and note. As to postponement where witnesses to signature are absent in action against executor, see § 710 and note thereto. As to taking of depositions by clerks of court, see § 703 and note thereto. As to when testimony may be taken by deposition *de bene esse* and by whom, see § 706 and note thereto.

Section must be strictly construed.—This section is in derogation of the common law rule, and therefore must be confined to the particular causes herein enumerated. *Townsend v. Covington*, 3 McC. 219, 220.

Thus, the section applies only to bonds and notes.—*Townsend v. Covington*, 3 McC. 219. See, also, *Harper v. Solomon*, 1 Brev. 3, 35 L. R. A. 334.

But mortgages securing notes are included.—It is not necessary that the delegation of power to seize chattels under a mortgage should be in writing, under seal or otherwise, and although such power may be in writing, and attested, it is not necessary to prove its execution by the subscribing witnesses unless the same is denied under oath, as provided for by this section. *McGowan v. Reid*, 27 S. C. 262, 3 S. E. 337, 95 Am. St. Rep. 669, 137 Am. St. Rep. 489, 35 L. R. A. 341.

And this is true as to endorsements on notes.—This section applies to an endorsement on a promissory note and such endorsement may be proved by evidence of handwriting of the endorser although it appears that there was a witness to it who had not been subpoenaed. *Madden v. Burris*, 1 Brev. 387, 35 L. R. A. 332.

The object of this section was to dispense with the strict common law mode of proof and to substitute a greater facility in its place. *Brown v. Edgar*, 4 McC. 91, 35 L. R. A. 331.

But it does not dispense with the rule that the next best evidence must be produced. *Myers v. Taylor*, 1 Brev. 245, 35 L. R. A. 331.

If the subscribing witness to a bond is dead or out of the state the next best evidence to prove the execution of the

bond is the proof of the handwriting of the obligor with the additional evidence of the handwriting of such subscribing witness. *Plunket v. Bowman*, 2 McC. 138, 35 L. R. A. 332, Ann. Cas. 13B, 1318. See also, *Myers v. Taylor*, 1 Brev. 245, 35 L. R. A. 331.

Any competent witness may prove handwriting of obligor in place of subscribing witness on plea of non est factum.—This section permits any competent witness who can, to prove the handwriting of the obligor in the place of the subscribing witness on a plea of non est factum, unless such plea of the defendant be verified. *Marigault v. Deas*, 1 McC. 391.

And the "Mark" of the defendant may be proved in the same manner.—When the maker of a note signs his name with his mark, and the subscribing witness is not produced to prove the making of the said note, it is sufficient to prove by any witness the defendant's signature under the authority of this section. *Gervais v. Baird*, 2 Brev. 37, 22 L. R. A. 373, 35 L. R. A. 332, 351; *Whitaker v. Bussey*, 2 N. & McC. 374, 22 L. R. A. 373, 35 L. R. A. 332, 350.

Proof of handwriting of subscribing witnesses is not necessary on proof of execution of bond. *Brown v. Edgar*, 4 McC. 91, 35 L. R. A. 331.

But it was said in the case of *Myers v. Taylor*, 1 Brev. 245, 35 L. R. A. 331, that where the subscribing witnesses do not attend, their handwriting must be proved as well as the signature of the obligor, the court basing such conclusion on the fact that this section does not dispense with the rule that the next best evidence must be produced.

Where the law requires more than one attesting witness to make the paper valid, and there is a real contest over the proper execution, all should be produced, if alive and within the reach of the court; but if any be dead, or absent, proof of handwriting will be sufficient. *McGowan v. Reid*, 27 S. C. 262, 3 S. E. 337, 95 Am. St. Rep. 669, 137 Am. St. Rep. 489, 35 L. R. A. 341.

§ 710. Postponement where witnesses to signature are absent in action against executors, etc.—In case the defendant or defendants should be executors or administrators, the cause shall not be postponed for want of the subscribing witness to the bond or note in suit, but the signature may be proven by other testimony; unless one of the executors or administrators, who are defendants, shall swear, or affirm, as aforesaid, in his answer, that they have cause to believe the signature to such bond or note is not the testator's or intestate's, as the case may be.

1932 Code, § 710; Civ. P. '22, § 726; Civ. C. '12, § 3989; Civ. C. '02, § 2885; G. S. 2214; R. S. 2349; 1802 (5) 485.

§ 711. Notary's protest sufficient evidence if notary be dead, or lives in another county.—Whenever a notary public, who may have made protest for non-payment of any inland bill or promissory note, shall be dead, or shall reside out of the county in which said bill or note is sued, his protest of said bill or note shall be received as sufficient evidence of notice in any action by any person whatsoever, against any of the parties to such bill or note.

1932 Code, § 711; Civ. P. '22, § 727; Civ. C. '12, § 3990; Civ. C. '02, § 2886; G. S. 2215; R. S. 2350; 1802 (5) 485.

Editor's note.—This section was enacted by the legislature as a consequence of the decision in *Williamson v. Patterson*, 2 McC. 132, which held that the protest of a notary who is dead (the handwriting being proved), is not admissible to prove a demand on the maker of a note, and notice to the endorser. For other cases dealing with the law on this subject before the enactment of this section, see *Sharpe v. Bingley*, 1 Mill 373, 12 Am. Dec. 643, 51 Am. Dec. 302, 59 Am. Dec. 104, 98 Am. Dec. 623; *Haig v. Newton*, 1 Mill 423, 98 Am. Dec. 621.

This section is intended to make the protest evidence of what is stated therein. *Dobson v. Laval*, 4 McC. 57.

And the protest should state both the demand and notice of payment and is evidence of both. *Dobson v. Laval*, 4 McC. 57. Cited with approval in *Bank v. Green*, 2 Bail, 230.

It is clear that this section did not intend to dispense with the necessity of a demand on the drawer and if the protest does not state that such demand has been made, of course it cannot be evidence of that fact. *Dobson v. Laval*, 4 McC. 57, 58.

But protest must show the usual evidence of genuineness.—Such a paper, to be evidence per se, must carry with it all the usual evidence of genuineness. If it be altered after made, such alteration de-

stroys its character of authenticity and would go far to exclude it altogether from being offered as evidence. *Aiken v. Cathcart*, 2 Speers 642, 645, 28 A. L. R. 544.

And the mere correction by the notary of his protest is no more than his declaration that it was wrong, and such is clearly inadmissible in evidence. *Aiken v. Cathcart*, 2 Speers 642, 645, 28 A. L. R. 544.

In a case where after suit was brought on a note, the protest of the notary, altered by him after commencement of the suit so as to correct a mistake in stating that he presented the note "at the said bank" where the note was discounted instead of "at said office," meaning the place where the note was payable, is not admissible in evidence to prove a demand of, and notice of, nonpayment. *Aiken v. Cathcart*, 2 Speers 642, 28 A. L. R. 544.

Protest placed upon same footing as a protest of a foreign bill made abroad.—This section places the protest of an inland bill or promissory note, in the case of the death of the notary, or his residence being out of the district where the case was tried, upon the same footing as a protest of a foreign bill made abroad. *Aiken v. Cathcart*, 2 Speers 642, 645, 28 A. L. R. 544.

§ 712. Survivors to transaction impeached for fraud, competent and compellable to testify.—In any proceeding in any of the courts of this State in which any transaction shall be impeached for fraud by a creditor, or creditors, of either part to such transaction, or by any other person interested in establishing such fraud, the survivor, or survivors, of the parties to such alleged fraud, when one or more of the said parties shall be dead, shall be

competent and compellable to testify in behalf of such creditor or creditors, or other person interested in establishing such fraud, any law, rule, or usage to the contrary notwithstanding: *provided*, that nothing herein shall render such survivor, or survivors, competent to testify in relation to such transaction in their own behalf in any proceeding instituted by him or them: *provided, further*, that nothing herein shall render any person incompetent as a witness who is now competent under the laws and usage of this State.

1932 Code, § 712; Civ. P. '22, § 728; Civ. C. '12, § 3991; Civ. C. '02, § 2887; G. S. 2216; R. S. 2351; 1876 (16) 38.

§ 713. Admit in evidence certified copies, or certified photostatic copies, of public records and papers eligible record.—In any case where the original of any instrument, document or other paper is required or authorized by law to be recorded, or is kept on file, in any public office of the United States, or any agency thereof, or the State of South Carolina or any agency thereof, or any political subdivision of said State, and the original of any such paper is required to be kept on file in any such office, or is in the possession of any adverse party, or has been lost or destroyed, a certified copy of the record of such paper, if same has been recorded, or copy of such paper certified by the lawful custodian thereof if same is kept on file in any such office, must be received in evidence in any court of competent jurisdiction in lieu of the original of such paper. *Provided*, that a certified photostatic copy of any of such papers may be used in lieu of a certified copy thereof; and such certified photostatic copy shall in all respects be treated as a certified copy under the provisions of this section. *Provided*, that in case of possession of such paper by any adverse party, or his agent or his attorney, then two days' notice shall be given to such adverse party or his attorney that a certified copy thereof will be offered in evidence, unless the original be produced as required in such notice. *Provided, further*, that the time of giving notice herein to any such adverse party, or his agent or attorney, may be lessened by officer presiding at trial in which such certified copy may be offered.

1942 (42) 1451.

§ 714. Introduce in evidence in cases involving ownership of motor vehicle affidavits of director of motor vehicle division of state highway department showing registration records of such department.—In any case tried in any court of competent jurisdiction in this State in which the ownership of any motor vehicle is in issue, an affidavit by the director of the motor vehicle division of the state highway department, of the state of South Carolina showing what the registration records of the state highway department show, or fail to show, relative to the ownership of the motor vehicle in question, shall be admissible in evidence on the sole issue of ownership of the said motor vehicle.

1938 (40) 1817.

§ 715. Proof of ordinances of municipalities.—In all the courts held in this State the printed ordinances of the municipalities in said State, whether they be in pamphlet or book form, shall be admitted into evidence in said courts and shall constitute prima facie evidence of the genuineness

of the same: *provided*, the clerk of such municipality certify to the correctness of same.

1932 Code, § 715; 1930 (36) 1107.

§ 716. Laws of other States—how proved.—Printed copies, in volumes, of statutes, codes, decided cases or other written law enacted by any other Sovereignty, State, Territory, or Foreign Government, purporting or proved to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law in the courts and judicial tribunals of such Sovereignty, State, Territory, or Government, or purporting to be an authentic publication by a reputable publisher, shall be admitted by the courts and officers of this State, on all occasions, as presumptive evidence of such laws without further proof. The unwritten or common law of any other Sovereignty, State, Territory, or foreign government, may be proved as facts by parol evidence; and the books of reports of cases adjudged in their courts may also be admitted as presumptive evidence of such law.

1932 Code, § 716; Civ. P. '22, § 731; Civ. P. '12, § 460; Civ. C. '12, § 3994; Civ. P. '02, § 422; Civ. C. '02, § 2890; G. S. 2218; R. S. 2353; 1870 (14) § 441; 1911 (27) 146.

Presumption that common law prevails in absence of proof of contrary.—In the absence of allegations and proof of the laws of another state, the courts will presume that the common law prevails in that state. *Rosemand v. Southern Ry.*, 66 S. C. 91, 98, 44 S. E. 574, 113 Am. St. Rep. 876, 67 L. R. A. 52, cited with approval in *Crosby v. Seaboard, etc., Ry.*, 81 S. C. 24, 61 S. E. 1064, 1066, Ann. Cas. 18B, 943.

Thus, in absence of any evidence as to the law in Florida, an action brought in South Carolina for an injury occurring in Florida must be controlled by the common law of the forum. *Crosby v. Seaboard, etc., Ry.*, 81 S. C. 24, 61 S. E. 1064, 1066, Ann. Cas. 18B, 943.

Trial court's assumption that common-law rule in effect in South Carolina was also in effect in Florida held proper where law of Florida was not proved as provided by statute. *Alexander v. Martin*, 182 S. C. 399; 189 S. E. 468.

Statute law cannot be proved by introduction of state reports.—The statute law of a state cannot be proved by the introduction of the reports of the Supreme Court of that state. Nothing less than the printed copies of the volume containing the statute purporting to have been published by the state's authority will be taken as evidence. *Free v. Southern Ry.*, 78 S. C. 57, 58 S. E. 952, 953, L. R. A. 1917 E, 33, 156, Ann. Cas. 16D, 856.

But decision of courts of N. Y., as reported in the N. Y. Supplement of the national reporter system, offered by plaintiff, should have been admitted and

considered by trial judge under this section. But court could only have considered the decisions offered or introduced in evidence, *Columbia Weighing Machine Co. v. Rhem*, 164 S. C. 376; 162 S. E. 427.

The law of another state is a question of fact to be pleaded and proven. *Copeland et al. v. Craig et al.* 193 S. C. 484, 8 S. E. (2d) 858.

Mexican law.—In action in South Carolina based upon tort allegedly committed in Mexico, proof of Mexican law on question of liability by submission of Mexican Civil Code and translation of pertinent sections thereof by a skilled linguist who was present at trial met requirements of statute providing method of proving foreign laws. *Rauton v. Pullman Co.*, 193 S. C. 495; 191 S. E. 416.

In action in South Carolina based upon tort allegedly committed in Mexico, deposition of a Mexican lawyer, who had practiced law for 50 successive years in Mexico, construing sections of Mexican Civil Code in evidence which trial judge deemed applicable on question of liability, was competent to prove Mexican law. *Routon v. Pullman Co.* 183 S. C. 495; 191 S. E. 416.

See generally. *Bridger v. Asheville, etc., R. Co.*, 25 S. C. 24, 14 L. R. A. 783, 4 L. R. A. (N. S.) 81, 51 L. R. A. (N. S.) 581, L. R. A. 1917F, 67, 111, L. R. A. 1918A, 747, Ann. Cas. 13C, 1093; *Eastern Bldg., etc., Assn. v. Ebaugh*, 185 U. S. 114, 22 S. Ct. 566, 46 L. Ed. 830; as to construction of Florida law, *Howard v. Atlantic Coast Line R. Co.*, 83 S. C. 240, 65 S. E. 245.

§ 721. Copies of grants and plats issued by State of North Carolina.—It shall be lawful, in every court of this State, for any party, plaintiff or defendant, to produce in evidence certified copies of grants under the authority of the State of North Carolina: *provided*, that the person or persons so applying to produce an office copy of a grant in evidence swear that the original grant is lost, destroyed, or out of his, her, or their power to produce, and that he, she, or they have not destroyed, mislaid, or in any way willingly, previous to that time, put it out of his, her, or their power to produce the same, with an intention to produce an office copy of the same in evidence: *and provided, also*, that nothing herein contained shall be construed to deprive any party in possession of the original grant of any advantage he would have had or derived from possessing the same, in case this section had never been passed.

1932 Code, § 721; Civ. P. '22, § 736; Civ. C. '12, § 3999; Civ. C. '02, § 2895; G. S. 2224; R. S. 2360; 1731 (3) 303; 1906 (5) 459; 1942 (42) 1451.

Cross reference.—As to copies of deeds where the originals are lost, see § 722 and note thereto. As to what instruments are to be recorded, see § 8875 and note thereto. As to proof of recorded instruments other than wills by production of original, see § 723 and note thereto. As to provision as to proof of recorded instrument not applicable when fraud is alleged, see § 724 and note thereto.

A copy of a grant is not admissible in evidence without first accounting for the non-production of the original. *Malcolmson v. McKee*, 1 Brev. 168; *Dingle v. Bowman*, 1 McC. 177.

But such non-production may be proved by slight evidence.—Very slight evidence of the loss of the original grant is sufficient to authorize the admission in evidence of an office copy where the land has been conveyed by the original grantee, and has passed to different purchasers, and there is no proof that the party claiming under it ever had possession of the original. *Turner v. Moore*, 1 Brev. 236, 35 L. R. A. 332, 351.

Thus, a copy of the grant, without a copy of the plat, is sufficient. *Rosamond v. M'Ilwain*, 2 Brev. 132, 133.

The object of the oath is to protect the parties from fraud.—The object of requiring the oath under this section was to protect the opposite party from fraud in suppressing the original, and giving in evidence imperfect copies of the grant. *Linning v. Crawford*, 2 Bail. 296, 297.

Section does not prescribe the time or manner of swearing.—This section nowhere prescribes the manner or time of swearing. But the practice has been uniform to receive as evidence an affida-

vit of the loss of the grant. And if an affidavit be received at all, there appears to be no reason for requiring its execution at one period rather than at another, provided it be satisfactory as to the loss of the grant. *Turnipseed v. Freeman*, 2 McC. 269, 270.

Hence an affidavit sworn to subsequent to docketing of case may be received.—Where the affidavit is sworn to subsequent to the docketing of the case, for the purpose of being used in that case, and no circumstance independent of the lapse of time appears to invalidate it, it ought to be received. *Turnipseed v. Freeman*, 2 McC. 269, 271.

And it is not necessary that the affidavit be made at the time of trial.—The affidavit provided for by this section need not be made at the time of the trial, provided it is made after the commencement of the suit. *Linning v. Crawford*, 2 Bail. 591.

The affidavit must be that of the party applying to produce the copy.—The affidavit provided for by this section must be made by the person or persons applying to produce an office copy of the grant; and an affidavit made by a third party is insufficient. *Marane v. Carroll*, 2 Bay 525, 526.

And this means all such parties.—To entitle the plaintiffs, where there are more than one, to give in evidence a certified copy of the original grant, all must make the affidavit as required by this section. *Linning v. Crawford*, 2 Bail. 296.

See generally, *Chisolm v. Caines*, 67 F. 285, 289.

§ 723. Production of instruments other than wills required to be recorded prima facie evidence of execution and recording.—The production (without further or other proof) of the original of any and every instrument in writing (other than wills) required by law to be recorded shall always and everywhere be prima facie evidence of the execution and recording of such instrument: *provided*, that such instrument shall have been recorded in the manner and place and within the time prescribed by law for recording the same, and the recording thereof shall have been certified by the clerk of court or register of mesne conveyance: *and provided, further*, that any party or his attorney so producing any such recorded instrument shall have given at least ten (10) days' previous notice in writing to the opposite party or his attorney of the intention so to produce any such recorded instrument with a description of the same.

1932 Code, § 723; Civ. P. '22, § 738; Civ. C. '12, § 4001; Civ. C. '02, § 2897; 1898 (22) 745; 1900 (23) 347.

Cross reference.—As to copies of deeds where the original are lost, see § 722 and note thereto. As to copies of grants and plats issued by this state and North Carolina, see § 721 and note thereto. As to application for leave to substitute new records in place of those lost or destroyed, see § 729.

Offer of original mortgage without proof of execution thereof.—In an action for personalty claimed under a chattel mortgage, where the plaintiff gave notice he would offer the original mortgage without formal proof of execution, due

to the inaccessibility of the subscribing witness, and the defendant gave no notice of his intention to attack the mortgage on the grounds of fraud in the execution as provided for by § 724, the defendant having testified at prior trials that he executed it, the plaintiff was properly allowed to put the instrument in evidence without formal proof by the subscribing witness. *Fairey v. Haines*, 111 S. C. 132, 96 S. E. 694, 696.

The record itself admissible, where proof shows deed lost. 195 S. C. 59, 10 S. E. 2d 350.

§ 724. Provision of § 723 not applicable when fraud is alleged.—The provisions of section 723 shall not apply when any such recorded instrument is assailed or attacked on the ground of fraud in its execution: *provided*, that at least ten (10) days previous notice in writing of such ground by a pleading or otherwise and duly sworn to shall have been given by the party or his attorney so assailing or attacking such instrument to the opposite party or his attorneys.

1932 Code, § 724; Civ. P. '22, § 739; Civ. C. '12, § 4002; Civ. C. '02, § 2898; 1898 (22) 745.

§ 725. Foreign instruments.—All exemplifications of records, and all deeds and bonds, or other specialties, all letters of attorney, procuration, or other powers in writing, and all testimonials, which shall at any time be produced in any of the courts of this State, and shall be attested to have been proved, upon oath, under the corporation seal of any mayor or chief officer of any city, borough, or town corporate in any foreign State, or under the hand of the Governor and public seal of any State in America, or under the notarial seal of any notary public, shall be deemed and adjudged good and sufficient in law, in any of the courts of judicature in this State, as if the witnesses to such deeds were produced and proved the same viva voce, except as hereinafter provided.

1932 Code, § 725; Civ. P. '22, § 740; Civ. C. '12, § 4003; Civ. C. '02, § 2899; G. S. 2226; R. S. 2362; 1721 (7) 176; 1731 (8) 285.

Cross reference.—See U. S. Const., art. 4. § 1, declaring that full faith and credit

shall be given in each state to the records and judicial proceedings of every other

state. As to restriction upon the use of copies of foreign instruments, see § 726.

A judgment in a sister state is a record.—It was said in the case of *Napier v. Gidiere*, Speers Eq. 215, 227, 40 Am. Dec. 613, 44 Am. Dec. 693, 48 Am. Dec. 589, 53 Am. Dec. 300, 71 Am. Dec. 355, 17 L. R. A. 611, in speaking of the act of Congress dealing with the "full faith and credit laws," that a judgment in a sister state is a record in another state; and that it is conclusive evidence—record evidence.

What records are authentic.—In the early case of *McKenny v. Gordon*, 13 Rich. 40, 5 L. R. A. (N. S.) 962, it was held that judicial proceedings including the judgment in "the court of Pleas and Quarter Sessions" of North Carolina, certified by the clerk and authenticated by the chairman pro tem of the court, are sufficiently authenticated to be received in evidence. See also, *Campbell v. Home Ins. Co.*, 1 S. C. 158, 103 Am. St. Rep. 319, 19 L. R. A. 577, 59 L. R. A. 367, 5 L. R. A. (N. S.) 953; *Napier v. Gidiere*,

Speer Eq. 215, 40 Am. Dec. 613, 44 Am. Dec. 693, 48 Am. Dec. 589, 53 Am. Dec. 300, 71 Am. Dec. 355, 17 L. R. A. 611.

Transcript of proceedings as evidence of judgment.—In a case where the plaintiff offered in evidence properly attested transcripts of proceedings in the county and superior courts of North Carolina, containing a writ, several interlocutory orders, continuances, memorandum of a verdict and "judgment affirmed," and executions at length, but no contract or cause of action was set forth, it was held that these transcripts should have been received as evidence of a judgment. *Gregory v. Williams*, Harp. 417. The plaintiff also offered a copy of a bond attested by the clerk of the county court as the cause of action on which the proceedings were founded; but as no connection appeared between them on the transcript, such copy was held inadmissible. *Id.*

Marriage licenses.—Certified and exemplified copy of marriage license may be admitted. *Armitage v. Seaboard A. L. R. Co.*, 166 S. C. 21, 164 S. E. 169.

§ 726. Restriction upon use of copies of foreign instruments.—No testimonial, probate, certificate, or other instrument under the seal of any foreign court of law, notary public, or other magistrate or person qualified and empowered to give the same, shall be received in the courts of the State as evidence of any debt or demand owing by any person or persons resident within the limits of this State: *provided, nevertheless*, that if it shall appear to the court that the testimonials, probates, certificates, or other instruments of writing for the purposes aforesaid, which have been, or shall be hereafter, issued from any of the courts of this State, or by any of the officers thereof authorized and empowered to give the same, are received and allowed as evidence in the courts of such foreign country, then such instruments of writing shall be received in evidence in the courts of this State.

1932 Code, § 726; Civ. P. '22, § 741; Civ. C. '12, § 4004; Civ. C. '02, § 2899; G. S. 2227; R. S. 2363; 1787 (5) 45.

§ 727. Farmers' and planters' books receivable in evidence.—Books of original entry kept by farmers and planters relating to the transactions of their farms or plantations shall be receivable in evidence in all trials in which the business or transactions of their farms or plantations shall be called in question, as between the farmer or planter and his employees, in the same manner as books of merchants and shopkeepers are.

1932 Code, § 727; Civ. P. '22, § 742; Civ. C. '12, § 4005; Civ. C. '02, § 2900; G. S. 2228; R. S. 2364; 1721 (7) 168; 1865 (13) 307.

§ 728. Medical or scientific books—in what cases may be read.—In all actions or proceedings, civil or criminal, in which the question of sanity or insanity, or the administration of poison or other article destructive to life, is involved, and in which expert testimony may now be introduced, the medical or scientific works, or such parts thereof as may be relevant to

the issues involved, shall be competent and admissible to be read before the court, or jury, in addition to such expert testimony.

1932 Code, § 728; Civ. P. '22, § 744; Civ. C. '12, § 4007; Civ. C. '02, § 2902; R. S. 2366; 1891 (20) 1042.

Section limits reading to court or jury.

—Except as provided in this section it is not permissible to read to the court, or the jury, or to witnesses on examinations, from medical books. *Baker v.*

Southern Cotton Oil Co. et al., 161 S. C. 479, 159 S. E. 822; *Edwards v. Union Buffalo Mills Co. et al.*, 162 S. C. 17, 159 S. E. 818.

§ 729. Substitute new records in place of lost or destroyed records in decrees and judgments.—The plaintiff or plaintiffs or any of them, in any judgment or decree, the record whereof has been destroyed or abstracted or lost, or his or their personal representatives, or other person or persons claiming under or through them, or any or either of them, or any person whatever, having an interest in the preservation of the evidence of such judgment or decree, may upon notice of not less than twenty-one days, served as a summons in actions is now served pursuant to law, upon the defendant or defendants therein, or upon those upon whom his, her or their liability has devolved, or others interested to oppose the application, apply to the court in which such judgment or decree was rendered for leave to substitute a new record; and if, upon hearing the evidence on each side the court is satisfied of the existence and loss of such record, an order for leave to substitute shall be made, conforming as nearly as possible in all respects to the lost, abstracted or destroyed record; and if it be for the payment of money, the balance due thereon and date of lien, if any, shall be made to appear thereon, and such substituted record shall be good and valid in law to all intents and purposes.

1932 Code, § 729; Civ. P. '22, § 745; Civ. C. '12, § 4008; Civ. C. '02, § 2903; G. S. 2230; R. S. 2367; 1882 (17) 1081.

As to other proof of lost papers not excluded, see § 733 and note thereto.

Court of Common Pleas has power to substitute new records outside of any statutory authority.—It was said in the case of *Dubois v. Thomas*, 14 S. C. 30, that the court of common pleas, outside

of any special statutory authority, in virtue of its general authority possesses the power of substituting new records including judgments in the place of originals lost or destroyed, and such authority may be derived from common law.

§ 730. Preserve evidence relating to contents of instruments lost, or destroyed, or defective in the record thereof.—Any person interested in the preservation of the contents of any deed, release, private writing usually put on record, or document alleged to have been lost or destroyed or defective in the record thereof, and desiring to preserve the evidence thereof for any purpose, may, by summons and complaint as now provided by the Code of Procedure, institute an action in the court of common pleas to perpetuate testimony as to the existence and true contents of the same, in which complaint the defects, if any, complained of in the records shall be substantially set forth, and to said action all persons interested, or known or supposed to claim an interest in the property to which such testimony may relate, shall be made parties defendants, and served with summons as now provided by law in civil actions.

1932 Code, § 730; Civ. P. '22, § 746; Civ. C. '12, § 4009; Civ. C. '02, § 2904; G. S. 2230, 2232; R. S. 2368; 1882 (17) 1081.

As to application for leave to substitute new records in place of those which have been lost or destroyed, see § 729.

Failure to serve summons on subsequent claimant not fatal to admissibility of testimony.—It was said in the case of *Atlantic Coast Line R. Co. v. Baker*, 143 S. C. 445, 141 S. E. 688, 696, in con-

struing this section and sections 731 and 732, that it was necessary to serve a summons only on claimants or persons interested, who were known or supposed to have an interest, and a failure to so serve is not fatal to the admissibility of such testimony as is taken in the proceedings here provided for.

§ 731. Court or judge at chambers hear and grant orders preserve such testimony.—The court, or judge at chambers, having jurisdiction of the subject matter may hear, determine and grant all orders, as will best subserve the purposes of the complaint, and the preservation of the testimony sought, without delay.

1932 Code, § 731; Civ. P. '22, § 747; Civ. C. '12, § 4010; Civ. C. '02, § 2905; G. S. 2230, 2233; R. S. 2369; 1882 (17) 1082.

As to powers of circuit and special judges at chambers, see § 37 and notes thereunder.

Failure to serve summons on subse-

quent claimant not fatal to admissibility of testimony.—See this catchline under § 730.

§ 732. Record such evidence—force and effect.—The evidence so taken shall be preserved, and the parties may have the same recorded in the office to which the same may relate; and such evidence so taken, preserved and recorded, shall be received in all courts, subject to the same rules as to competency and credibility as any other evidence.

1932 Code, § 732; Civ. P. '22, § 748; Civ. C. '12, § 4011; Civ. C. '02, § 2906; G. S. 2230, 2234, 2235; R. S. 2370; 1882 (17) 1082.

Failure to serve summons on subsequent claimant not fatal to admissibility

of testimony.—See this catchline under § 730.

§ 733. Other proof of lost papers not excluded—cost.—Nothing herein contained shall prevent any one from establishing, on the trial of any cause, any lost papers, according to the rules of evidence existing at common law. The costs of such proceedings as shall be had under the provisions of §§ 729-733 shall be in the discretion of the presiding judge.

1932 Code, §§ 733, 734; Civ. P. '22, §§ 749, 750; Civ. C. '12 §§ 4012, 4013; Civ. C. '02, §§ 2907, 2908; G. S. 2230, 2235; R. S. 2236, 2371; 1882 (17) 1082.

Cross references.—As to copies of deeds where the originals are lost, see § 722 and note thereto. As to copies of grants and plats issued by this state and North Carolina, see § 721 and note thereto.

A lost deed could be proved at common law by record thereof, hence such record is admissible under this section. *State v. Crocker*, 49 S. C. 242, 27 S. E. 49, 50.

§ 734. Preserve evidence material to cause of action.—Any person or corporation interested in the preservation of any evidence material to a cause of action, accrued or to accrue, may, by summons and complaint, institute an action in the court of common pleas to perpetuate such evidence, in which complaint the said cause of action and the materiality of such evidence shall be substantially set forth; and to said action all persons interested, or known or supposed to claim an interest in the property to which such evidence may relate, shall be made parties defendants and served with summons as now provided by law in civil actions.

1939 (41) 309.

§ 735. **Mortuary table established.**—In all civil actions or other modes of litigation, whenever it shall be necessary to establish the expectancy of continued life of any person from any period of such person's life, whether he be living at the time or not, the table hereto appended shall be received in all courts, and by all persons having power to determine litigation, as evidence, with other evidence as to the health, constitution and habits of such person, of such expectancy represented by the figures in the columns headed by the words "completed age" and "expectation," respectively:

Completed Age	Expectation	Completed Age	Expectation
10	48.7	53	18.79
11	48.1	54	18.09
12	47.4	55	17.40
13	46.8	56	16.72
14	46.2	57	16.05
15	45.5	58	15.39
16	44.9	59	14.74
17	44.2	60	14.09
18	43.5	61	13.47
19	42.9	62	12.86
20	42.2	63	12.26
21	42.53	64	11.67
22	40.85	65	11.10
23	40.17	66	10.54
24	39.49	67	10.00
25	38.81	68	9.47
26	38.11	69	8.97
27	37.43	70	8.48
28	36.73	71	8.00
29	36.03	72	7.55
30	35.33	73	7.11
31	34.62	74	6.68
32	33.92	75	6.27
33	33.21	76	5.88
34	32.50	77	5.49
35	31.78	78	5.11
36	31.07	79	4.74
37	30.35	80	4.39
38	29.62	81	4.05
39	28.90	82	3.71
40	28.18	83	3.39
41	27.45	84	3.08
42	26.72	85	2.77
43	25.99	86	2.47
44	25.27	87	2.18
45	24.54	88	1.91
46	23.80	89	1.66
47	23.08	90	1.42
48	22.36	91	1.19
49	21.63	92	.98
50	20.91	93	.80
51	20.20	94	.64
52	19.49	95	.50

Damages may be ascertained by table.—The value of this table to a jury is that, in ascertaining damages, one may find what a person is capable of earning in a year and then take his or her expectancy and find what their earning capacity would be for a lifetime. *Clifford v. Southern Ry. Co.*, 87 S. C. 324, 69 S. E. 513, 515, L. R. A. 1915E, 507, 534.

Court may charge jury as to expect-

ancy of life as shown by table.—In an action for wrongful death the court may charge the jury as to the deceased's expectancy of life as shown by the mortuary table provided for by this section. *Hambright v. Atlanta, etc., R. Co.*, 102 S. C. 166, 86 S. E. 375, citing *Clifford v. Southern Ry. Co.*, 87 S. C. 324, 69 S. E. 513, L. R. A. 1915E, 507, 534.

§ 736. Copies of certain papers issued by common carriers prima facie evidence.—It shall be competent to introduce in evidence any instrument purporting to be the original or copy of any waybill, receipt, bill of lading, or similar instrument issued by any common carrier, as prima facie evidence that the same is genuine or is a true and correct copy: *provided*, the adverse party shall fail, upon due notice given to produce the original instrument.

1932 Code, § 736; Civ. P. '22, § 752; Civ. C. '12, § 4015; 1910 (26) 695.

TITLE 12

Executions and Proceedings Supplementary to Executions

CHAPTER 43. Executions, § 737.

CHAPTER 44. Proceedings Supplementary to Executions, § 746.

CHAPTER 43

Executions

737. Execution within ten years.

738. Enforcement of judgment.

739. Kinds of executions.

740. Execution against married women.

741. Execution against the person.

742. Forms of execution.

743. Effect of final judgment.

744. When executions may issue—magistrate's judgment.

745. Action on judgments after twenty years.

§ 737. Execution within ten years of course.—Writs of execution for the enforcement of judgments shall conform to this title; and the party in whose favor judgment has been heretofore or shall hereafter be given, and, in case of his death, his personal representatives duly appointed, may, at any time within ten years after the entry of judgment, proceed to enforce the same, as prescribed by this title.

1932 Code, § 737; Civ. P. '22, § 604; Civ. P. '12, § 342; Civ. P. '02, § 303; 1870 (14) § 306; 1873 (15) 498, § 15; 1885 (19) 229.

Editor's note.—As this section formerly stood, an execution had to be issued within three years, instead of the present ten, after the entry of a judgment. Prior to the Act of 1783, which provided for the three year limitation, the time limit was five years. See *Garvin v. Garvin*, 34 S. C. 388, 13 S. E. 625, 117 Am. St. Rep.

789.

This section is expressly retrospective.—The provisions of this section are expressly retrospective, and execution may be levied on property under a judgment rendered prior to the enactment of this section as well as subsequent to its enactment. *Garvin v. Garvin*, 34 S. C.

388, 13 S. E. 625; *Kennedy v. Kennedy*, 86 S. C. 483, 68 S. E. 664.

Court may act directly on property within its jurisdiction.—The court of common pleas has power (see Const. Art. 5, § 15, and also, §§ 584, 585, 657) to act directly upon property within its jurisdiction, and by its judgment to divest one party of legal title and vest it in another. *Bush v. Aldrich*, 110 S. C. 491, 96 S. E. 922.

Compelling non-resident to convey lands within the state.—Under the provision of art. 5, § 15 of the State Constitution and this section and § 740, the court of common pleas has power to compel specific performance of a contract of a non-resident to convey lands within the state and within the jurisdiction of the court. *Bush v. Aldrich*, 110 S. C. 491, 96 S. E. 922.

Leave required after, but not before, ten year period is up.—An execution may be issued without leave of the court at any time within ten years after entry of judgment, and with leave of the court

upon motion at any time while the judgment remains unsatisfied. *Lawrence v. Grambling*, 13 S. C. 120.

Execution without leave after ten years renders it voidable.—If an execution is issued without leave of the court after the ten year period has expired, it is not void, but only voidable for irregularities, and a purchaser at the sale of property sold under such execution is not prejudiced by the irregularities. *Lawrence v. Grambling*, 13 S. C. 120.

It seems that formerly there was a section of the Code following this section providing that, "after the lapse of five years from the entry of judgment, an execution can only be issued by leave of court. * * * But the leave shall not be necessary when execution has been issued on the judgment within the five years, and returned unsatisfied, in whole or in part." See *Garvin v. Garvin*, 34 S. C. 388, 13 S. E. 625, 117 Am. St. Rep. 789.

These foregoing rules are apparently based on this section.—Ed. Note.

§ 738. Judgments—how enforced.—Where a judgment requires the payment of money, or the delivery of real or personal property, the same may be enforced, in those respects, by execution, as provided in this title. Where it requires the performance of any other act, a certified copy of the judgment may be served upon the party against whom it is given, or the person or officer who is required thereby or by law to obey the same, and his obedience thereto enforced. If he refuse, he may be punished by the court as for contempt.

1932 Code, § 738; Civ. P. '22, § 605; Civ. P. '12, § 343; Civ. P. '02, § 304; 1870 (14) § 308.

Language of section permissive.—It seems that the language of this section, providing that a judgment for the delivery of real or personal property "may" be enforced by execution, intimates that it is permissive and not imperative. See *Gerald v. Gerald*, 31 S. C. 171, 9 S. E. 792, 137 Am. St. Rep. 267.

Judgment to foreclose mortgage not a judgment for delivery of land.—A judgment foreclosing a mortgage on land is not a judgment for its delivery, so as to come under this section, but is a judgment for the sale of such property unless the debt is paid within the prescribed

time, and therefore such judgment may be enforced by attachment. *Gerald v. Gerald*, 31 S. C. 171, 9 S. E. 792, 137 Am. St. Rep. 267. See also, *Le Conte v. Irwin*, 23 S. C. 106; *Trenholm v. Wilson*, 13 S. C. 174, 21 Am. St. Rep. 248.

An order of the circuit court granting leave to issue execution against the body of defendant, as provided in this section, on failure to pay a judgment for fraudulently procuring the assignment of a lease and demise of certain property for the purpose of depriving plaintiff of the use thereof, is not void. *Ex parte Hutto*, 78 S. C. 560, 60 S. E. 34.

§ 739. The different kinds of execution.—There shall be three kinds of executions: One against the property of the judgment debtor; another against his person; and the third for the delivery of the possession of real or personal property, or such delivery with damages for withholding the same. They shall be deemed the process of the court.

1932 Code, § 739; Civ. P. '22, § 606; Civ. P. '12, § 344; Civ. P. '02, § 305; 1870 (14) § 309.

§ 740. To what counties execution issued—sales—by whom made—execution against married women.—When the execution is against the property of the judgment debtor, it may be issued to the sheriff of any county where judgment is docketed by the clerk of court in which the judgment was originally entered up or by the clerk of court of any county where the judgment is docketed or transcribed. When it requires the delivery of real or personal property it must be issued to the sheriff of the county where the property, or some part thereof is situated. Executions may be issued at the same time to different counties. Property adjudged to be sold must be sold in the county where it lies except as hereinafter otherwise provided, and in the following manner. All sales of real estate under the orders of the probate court shall be made by the judge of probate; all sales under the order of the court where the title is to be made by the clerk of the circuit court shall be made by the clerk. In those counties where the office of master exists, the master shall make all sales ordered by the court in granting equitable relief, conformable to the practice of the circuit court, or to the practice of the courts of equity of this State before said courts were abolished. And whenever real estate is adjudged to be sold by a master, such sale may take place by consent of the parties to the cause, or their attorneys, or, when infants are parties, by consent of their guardians ad litem, or their attorneys, in any county which the court may direct. Whenever the court of common pleas in any county shall have acquired jurisdiction over real estate lying in another county, it shall be lawful for the master for the county in which the action is brought to sell such real estate in the county in which the land is situated: *provided, however*, that where such land is contained in one tract or adjoining tracts lying in more than one county, the land may be sold in whatever county the court may fix, and the advertisement shall appear in the county or counties in which the land is situate and in which the land is to be sold. All other judicial sales shall be made by the sheriffs, as now provided by law. Upon such sale being made, and the terms complied with, the officer making the same must execute a conveyance to the purchaser, which conveyance shall be effectual to pass the rights and interests of the parties adjudged to be sold. An execution may issue against a married woman, and it shall direct the levy and collection of the amount of the judgment against her from her separate property, and not otherwise.

1932 Code, § 740; Civ. P. '22, § 607; Civ. P. '12, § 345; Civ. P. '02, § 306; 1870 (14) § 310; 1872 (15) 194; 1878 (16) 336, 558; 1884 (18) 708; 1885 (19) 7; 1927 (35) 289; 1929 (36) 1052.

...Consent cures want of leave.—The want of leave to issue an execution may be supplied by proof of consent, and such consent may be presumed from the failure of defendant to move to have the execution set aside; and a payment upon an execution irregularly issued is proof of actual consent. *Lawrence v. Grambling*, 13 S. C. 120.

The provisions as to property sold in county in which it lies are mandatory.—The provisions requiring property adjudged to be sold, to be sold in the county where it lies, and by the sheriff of the county are mandatory. *Rose v. Thornley*, 33 S. C. 313, 12 S. E. 11. See

also, *Ostendorff v. Brown*, 15 S. C. 616; *Armstrong v. Humphreys*, 5 S. C. 128, 84 Am. Dec. 572.

But even if directory, courts are bound to pursue such directions.—Even if the provision of this section requiring property adjudged to be sold, to be sold in the county where it lies, and by the sheriff of the county, was directory merely, it would still follow that the courts were bound to pursue such direction, and a decree or order disregarding it would have to be considered as erroneous. *Rose v. Thornley*, 33 S. C. 313, 12 S. E. 11, 14. See also, *Ostendorff v. Brown*, 15 S. C. 616; *Armstrong v.*

Humphreys, 5 S. C. 128, 84 Am. Dec. 572.

Provisions as to execution against married woman are directory merely.—The provisions of this section as to an execution against a married woman are merely directory and not necessary to the validity of an execution, which, upon motion to set it aside, may be amended. *Clinkscales v. Hall*, 15 S. C. 602, 100 Am. Dec. 502.

A court may order a receiver, instead of a master, to dispose of the assets of a bankrupt.—This and § 584 when construed together mean that while, as a general rule, sales ordered by the court in granting equitable relief must be made by the master, in a case of the sale of the property of an insolvent bank, the Circuit Court is not obliged to follow the general rule, and may order the assets disposed of through a receiver by sale or otherwise. *Buist v. Merchants', etc., Bank*, 65 S. C. 487, 43 S. E. 958, 959.

Without contravening this section.—An order authorizing a receiver appointed by the court under the authority of § 584 to sell the property of an insolvent bank is not in contravention to this section requiring the property be sold by a master. *Buist v. Merchants', etc., Bank*, 65 S. C. 487, 43 S. E. 958.

Court may order clerk to sell mortgaged land in foreclosure proceedings.—Under the provisions of this section a circuit court judge is authorized to order the clerk to sell certain premises under a decree of mortgage foreclosure and to pay the proceeds to the mortgagee, and the sureties on the clerk's official bond are liable for any misappropriation by him. *Fort v. Assmann*, 38 S. C. 253, 16 S. E. 887, 91 Am. St. Rep. 567.

Or sheriff, in counties where office of master does not exist.—In counties where the office of master does not exist, the court may order a sale for foreclosure of mortgaged land to be made by the sheriff. *Childs v. Alexander*, 22 S. C. 169, 56 L. R. A. 696, L. R. A. 1916B, 747, Ann. Cas. 16C, 947.

But not a referee, though a purchaser at this sale is protected.—A decree in foreclosure directing the sale of property to be made by a referee is erroneous, and will be set aside, on appeal; but, until notice of appeal is given, it binds the defendant, and purchaser at the sale will not be affected by an appeal afterwards taken, *Armstrong v. Humphrey's* 5 S. C. 128, 84 Am. Dec. 572.

An official deprived of this right may

demand judicial inquiry.—It seems that a judge cannot disqualify an official to sell property under this section without a right of judicial inquiry in that official as to the basis of the judgment. See *New England Mfg. Security Co. v. Kinard*, 43 S. C. 311, 21 S. E. 113.

Sale under renewed execution passes good title if defendant fails to object to renewal.—A sheriff's sale of land made in another county than where the land lies gives indisputable title to the purchaser as against the defendant and his vendee, where the defendant failed, on being summoned, to show cause against renewal of the execution. *Freer v. Tupper*, 21 S. C. 75.

Even of an execution twenty years old.—A sheriff's sale of land made under a renewal of an execution twenty years old passes indisputable title to a purchaser as against a defendant, where he failed to object when summoned to show cause against the renewal. See *Jackson v. Patrick*, 10 S. C. 197, 30 L. R. A. 142, 31 L. R. A. 61, 32 L. R. A. 328, Ann. Cas. 18C, 152; *McNair v. Ingraham*, 21 S. C. 70, 1 A. L. R. 785, 798, 825.

Execution may issue on transcript of judgment on lands in new county.—When a judgment, entered in one county and becoming a lien on land in that county, is transcribed to the records of a new county, formed from the old county and embracing the lands under the lien, execution may issue upon the transcript and the land be sold. *Garvin v. Garvin*, 34 S. C. 388, 13 S. E. 625, 117 Am. St. Rep. 789.

Even when judgment is rendered after land disposed of by defendant.—An unsatisfied execution of an older judgment lodged in the sheriff's office before defendant sells land, will permit a sheriff's sale of the land under an execution on a judgment obtained after the sale by defendant, and the purchaser will, in such a case, prevail over defendant's vendee. *Garvin v. Garvin*, 34 S. C. 388, 13 S. E. 625, 117 Am. St. Rep. 789.

A recital in record of sale of land in foreign county by consent is not open to collateral attack.—A recital in the record of partition proceedings that the sale of land in another county was by consent, as provided for in this section and § 3694, is not open to collateral attack. *Connor v. McCoy*, 83 S. C. 165, 65 S. E. 257, 136 Am. St. Rep. 817, Ann. Cas. 14D, 5, 1 A. L. R. 1446.

See generally, *Martin v. Hutto*, 82 S. C. 432, 440, 64 S. E. 421.

§ 741. Execution against the person—in what cases.—If the action be one in which the defendant might have been arrested, as provided in section 500 and section 502, an execution against the person of the judgment debtor may be issued to any county within the jurisdiction of the court, after

the return of an execution against his property unsatisfied in whole or in part. But no execution shall issue against the person of a judgment debtor, unless an order of arrest has been served, as in this code of procedure provided, or unless the complaint contains a statement of facts showing one or more of the causes of arrest required by section 500.

1932 Code, § 741; Civ. P. '22, § 608; Civ. P. '12, § 346; Civ. P. '02, § 307; 1870 (14) § 311.

Constitutionality.—This statute held constitutional in *Blackmon v. Kirven*, 175 S. E. 814, 173 S. C. 322.

Execution against the person on a tort judgment is valid.—An execution against the person, as set out in this section, on a judgment for a tort, resulting in that person's imprisonment, was valid, and his constitutional right not to be imprisoned for debt except for fraud, was not invaded, as a tort judgment was not a debt. *Ex parte Berry*, 85 S. C. 243, 67 S. E. 225, L. R. A. 1915B, 646; *Blackmon v. Kirven*, 173 S. C. 322, 175 S. E. 814.

Such as for wrongfully causing plaintiff's discharge from his employment.—An execution may be issued against the defendant's person as set out here, if the execution against his property has been returned unsatisfied in a judgment obtained against him for damages for wrongfully causing plaintiff's discharge from his employment. *Castles v. South Carolina, etc., Agency*, 104 S. C. 81, 88 S. E. 273.

But execution against the property must first be returned unsatisfied.—Under the provisions of this section, an execution cannot issue against the person until an execution against defend-

ants property has been returned unsatisfied. *Martin v. Hutto*, 82 S. C. 432, 64 S. E. 421. See also, *Martin v. Hodge*, 87 S. C. 214, 69 S. E. 225.

However, execution against the person of defendant may be ordered while proceedings in execution against his property are pending. *Blackmon v. Kirven*, 175 S. C. 814, 173 S. E. 322.

Execution against the person may be issued without rule to show cause.—An execution against a person, as set out here, may be issued without a rule to show cause, when defendant has notice to the cause of action and the relief asked by service of the complaint on him, and he has had an opportunity in the trial to show why the allegations of fraudulent misappropriation or embezzlement are not well founded, and why the relief asked should not be granted. *Martin v. Hutto*, 82 S. C. 432, 64 S. E. 421.

Debtor arrested on execution may apply for discharge.—A debtor arrested on execution, as provided for in this section, is entitled to apply for discharge as an insolvent debtor under §§ 851-869. *Hurst v. Samuels*, 29 S. C. 476, 7 S. E. 822.

§ 742. Forms of execution.—The execution must be directed to the sheriff, or coroner when the sheriff is a party or interested, attested by the clerk, subscribed by the party issuing it, or his attorney, and must intelligibly refer to the judgment, stating the court, the county where the judgment roll or transcript is filed, the names of the parties, the amount of the judgment if it be for money, the amount actually due thereon, and the time of docketing in the county to which the execution is issued, and shall require the officer, substantially, as follows:

(1) If it be against the property of the judgment debtor, it shall require the officer to satisfy the judgment out of the personal property of such debtor; and if sufficient personal property cannot be found, out of the real property belonging to him.

(2) If it be against real or personal property in the hands of personal representatives, heirs, devisees, legatees, tenants of real property, or trustees, it shall require the officer to satisfy the judgment out of such property.

(3) If it be against the person of the judgment debtor, it shall require the officer to arrest such debtor and commit him to the jail of the county until he shall pay the judgment or be discharged according to law.

(4) If it be for the delivery of the possession of real or personal prop-

erty, it shall require the officer to deliver the possession of the same, particularly describing it, to the party entitled thereto, and may, at the same time, require the officer to satisfy any costs, damages, or rents or profits recovered by the same judgment, out of the personal property of the party against whom it was rendered, and the value of the property for which the judgment was recovered, to be specified therein; if a delivery thereof cannot be had, and if sufficient personal property cannot be found, then out of the real property belonging to him, and shall, in that respect, be deemed an execution against property.

1932 Code, § 742; Civ. P. '22, § 609; Civ. P. '12, § 347; Civ. P. '02, § 308; 1870 (14) § 312.

Judgment must be entered before execution.—This section and the other provisions of the code relative to executions show that the law contemplates an entry of the judgment in the book entitled "Abstract of Judgments," before the execution can properly be issued. *Mason, etc., Co. v. Killough Music Co.*, 45 S. C. 11, 22 S. E. 755.

Or execution is of no effect.—The failure of a judgment creditor to enter his judgment in the book of "Abstract of Judgments" before issuing execution to enforce the same is such an irregularity as to render the execution of no effect. *Mason, etc., Co. v. Killough Music Co.*, 45 S. C. 11, 22 S. E. 755.

A judgment not enforceable by execution may be proved against judgment debtor's estate.—If a judgment cannot be enforced by execution, it still may be proved against the judgment debtor's estate within twenty years after the rendition of the judgment. See *Ex parte Goldsmith*, 68 S. C. 528, 47 S. E. 984.

For a revival, an execution must be taken within ten years after judgment.—The procedure prescribed by this and the immediately following sections for the revival of an execution, must be taken within ten years after rendition of judgment. *First Nat. Bank v. Carolina, etc., Warehouse Co.*, 98 S. C. 168, 82 S. E. 405.

An execution on a judgment for crops or their value may be issued against the person.—Under subdivision 3 of this section a judgment finding plaintiff en-

titled to one third of a crop and stating its value, is not an ordinary money judgment, but is one that will authorize an execution against the person, as a judgment debtor, as set out in this section, after the return of an execution against the property unsatisfied. *Maxwell v. Horton*, 107 S. C. 380, 93 S. E. 4.

This section specifies terms on which executions against persons shall issue. *Martin v. Hutto*, 82 S. C. 432, 64 S. E. 421.

Sureties on delivery bond released by delivery of property under execution.—Judgment for a truck or its value having been rendered in a claim and delivery action, the delivery of the truck to the sheriff, in an execution issued under subdivision 4 of this section, released the sureties on defendant's bond given to prevent delivery at the beginning of the action. *Morris Motor Co. v. Alford*, 137 S. C. 446, 135 S. E. 557.

Appeal from order and not habeas corpus is remedy for imprisonment.—Anyone committed to imprisonment as a result of disobeying an order, as herein set out, must seek relief by appeal and not by habeas corpus. In *re Stokes*, 5 S. C. 71, 12 Am. Dec. 186, 22 Am. St. Rep. 422.

Judgment is not lien on personality until execution is issued and levied, and hence must have been entered up in accordance with law to constitute lien. *Powers v. Fidelity & Deposit Co. of Maryland*, 180 S. C. 501; 186 S. E. 523.

See generally, *Deer Island Lumber Co. v. Virginia-Carolina Chemical Co.*, 111 S. C. 299, 97 S. E. 833.

§ 743. Final judgments.

(1) **Lien on real estate for ten years—transcripts—where lien filed.**—Final judgments and decrees entered in any court of record in this State, subsequent to the twenty-fifth day of November, A. D., 1873, or of any circuit or district court of the United States within this State, or of any other federal court which, by act of Congress, shall be declared to create a lien, shall constitute a lien upon the real estate of the judgment debtor situate in any county in this State, where the said judgment or transcript thereof is entered upon the book of abstracts of judgments and duly indexed, the lien to begin from the time of such entry on

the book of abstracts and indices, and to continue for a period of ten years from the date of such final judgment or decree: *provided*, that a transcript of any judgment rendered by any court of this State may be filed in the office of the clerk of court of common pleas of any county, and when so filed, shall be entered upon the book of abstracts and duly indexed, and shall thereupon constitute a lien upon the real estate of the judgment debtor in that county from the date of its entry upon the books of abstracts and indices, for a period of ten years from the date of the original judgment.

(2) **Revival of judgment—limitations—manner — transcripts.**—A final judgment may be revived at any time within the period of ten years from the date of the original entry thereof by the service of a summons upon the judgment debtor, as provided by law, or, if the judgment debtor be dead, upon his heirs, executors or administrators, or, if he be removed out of the State, by publication of such summons in the manner provided in section 436 for publication of summons on complaint to be filed, to show cause, if any he or they may have, why such judgment should not be revived; and if no good cause be shown to the contrary, it shall be decreed that such judgment is revived. And such judgment shall thereupon constitute a lien upon the real estate of the judgment debtor, then owned or thereafter to be acquired by such judgment debtor, in the county where the judgment is entered, for a period of ten years from the entry of such decree; but such lien shall not revert back to the date of the original entry of such judgment. And a transcript of said summons and decree may be filed in the office of the clerk of the court of any other county, and when so filed the judgment shall have like liens in that county from the date of filing of such transcript and for a like period as in the county in which the judgment is revived as aforesaid: *provided*, that a judgment shall not in any case constitute a lien on any property of the judgment debtor in any county after the lapse of twenty years from the date of the original entry of the judgment.

(3) **Judgments not a lien on property exempt.**—This section shall not be construed so as to make final judgments in any case a lien on the real property of the judgment debtor exempt from attachment, levy and sale by the Constitution.

(4) **Not to apply to judgments prior to 1870.**—Nothing herein contained shall be construed to affect the lien of judgments or executions entered prior to the first day of March, A. D., 1870.

(5) **Renewals of judgments to be indexed.**—All registers of mesne conveyance of the various counties of this State, and all the clerks of court where, by law, they are required to perform the duties of such register of mesne conveyances, are required to reindex all renewals of judgments. Any officer failing to comply with the provisions of this act shall be liable for such failure on his official bond.

(6) **Entry of renewal or revived judgments—lien.**—Whenever a judgment is renewed or revived, or whenever a judgment is recovered upon an original judgment, in the manner provided by law, then such renewal or revival, or such newly recovered judgment, shall be re-entered and re-indexed and entered upon the abstract of judgments as if an original judgment and of the same date as such renewal or revival or recovery of judgment.

ment upon a judgment; else such renewal or revival or such newly recovered judgment upon an original judgment shall not constitute a lien upon any property of the judgment debtor nor afford notice thereof to any third person except from the date it is legally indexed.

(7) Judgment rolls for judgments renewed, revived, etc.—Whenever a judgment is renewed or revived or whenever a judgment is recovered upon an original judgment, in the manner provided by law, a new judgment roll shall be made up, filed and entered as if an original judgment; and such judgment roll shall consist of the record of such renewal, revival or recovery of a new judgment upon an original judgment only.

1932 Code, § 743; Civ. P. '22, § 610; Civ. P. '12, § 348; Civ. P. '02, § 309; 1870 (14) § 313; 1873 (15) 498; 1884 (18) 749; 1885 (19) 229; 1909 (26) 39; 1910 (26) 621; 1924 (33) 940; 1928 (35) 1223.

Cross references.—As to liens on real estate after 20 years, see § 8864 and note thereto. As to actions on judgments after 20 years, see § 745 and note thereto. Reference "this Act" in subsection (5) refers to subsection (5)—see 1910 Acts at page 621.

Editor's note.—An act of 1873 provided for a renewal and revival of a judgment within three years after its active energy had expired. This provision was omitted in a subsequent act (1885) and does not seem to appear in any of the subsequent codes. See *Cheraw, etc., R. Co. v. Marshall*, 40 S. C. 59, 18 S. C. 247. Quite a number of the early cases revolved around this particular proviso. See *Cheraw, etc., R. Co. v. Marshall, supra*; *Woodward v. Woodward*, 39 S. C. 259, 17 S. E. 638, 39 Am. St. Rep. 716, 38 L. R. A. 248; *Henry v. Henry*, 31 S. C. 1, 9 S. E. 726; *King v. Belcher*, 30 S. C. 381, 9 S. E. 359; *State v. Johnson*, 77 S. C. 252, 57 S. E. 846; *Kaminsky v. Trantham*, 45 S. C. 393, 23 S. E. 132; *Lauderdale v. Mahon*, 41 S. C. 97, 19 S. E. 294; *Witte v. Moore*, 32 S. C. 226, 10 S. E. 950; *Verner v. Bookman*, 53 S. C. 398, 31 S. E. 283, 69 Am. St. Rep. 870; *Lawton v. Perry*, 40 S. C. 255, 18 S. E. 861, 92 Am. St. Rep. 778, 53 L. R. A. 703, Ann. Cas. 14A, 368.

Clerk's duty to publish all judgments.—It is the duty of the clerk to publish the judgments which constitute a lien on land as set out in this section so as to protect innocent third parties. *Ex parte Graham*, 54 S. C. 163, 32 S. E. 67.

The word "debtor" includes the personal representative of a deceased.—The word "debtor," appearing in subdivision 2 of this section, is here used as a generic term, to embrace all proceedings necessary to carry into effect the interest on that side, on the familiar principle that upon the death of a party his rights and obligations devolve on his personal representative. *Cheraw, etc., R. Co. v. Marshall*, 40 S. C. 59, 18 S. E. 247.

"As provided by law" is construed to include revival of a judgment against an execution.—The phrase "as provided by law" should be construed to provide for

the revival of a judgment against the executor of a deceased judgment debtor, as the right to revive an execution necessarily involves the right to revive the judgment. *Cheraw, etc., R. Co. v. Marshall*, 40 S. C. 59, 18 S. E. 247.

Apparently, the clause in subdivision 2 providing "if the judgment debtor be dead" for service "upon his heirs, executors or administrators" was not a part of the code as it stood when this case was decided, as the discussion in the case seems to be based on an omission of it.—Ed. note.

These provisions are prospective only.—The provisions in this section with respect to judgments liens are, in express terms, prospective only. *Garvin v. Garvin*, 34 S. C. 388, 13 S. E. 625, 117 Am. St. Rep. 789.

Proceedings to revive are by summons to show cause.—Proceedings to revive a judgment are by summons to show cause why the judgment should not be revived and not by an action at law. *Carrol v. Tompkins*, 14 S. C. 223, 10 A. L. R. 538.

And defendant's failure to make an available defense estops him to ever set it up.—When a party served with summons to show cause why a judgment should not be revived, and execution renewed, fails to make a defense which he has the opportunity of making, he must be held to have formally made such defense, and to have been unsuccessful, and he is forever afterwards estopped from setting up that defense. *Babb v. Sullivan*, 43 S. C. 436, 21 S. E. 277, 278. See also, *Sullivan v. Shell*, 36 S. C. 578, 15 S. E. 722, 31 Am. St. Rep. 894, 53 Am. St. Rep. 449, 31 L. R. A. 35, 771, 32 L. R. A. 323; *Chenshaw v. Julian*, 26 S. C. 283, 2 S. E. 133, 5 Am. St. Rep. 626, 10 Am. St. Rep. 22, 57 Am. St. Rep. 169, 134 Am. St. Rep. 941, 21 L. R. A. 41; *McNair v. Ingraham*, 21 S. C. 70, 1 A. L. R. 785, 798, 825; *Jackson v. Patrick*, 10 S. C. 197, 30 L. R. A. 142, 31 L. R. A. 61, 32 L. R. A. 328, Ann. Cas. 18C, 152; *Davis v. Murphy*, 2 Rich. 560, 45 Am. Dec. 749, 13 A. L. R. 1152.

And this failure to answer results in judgment by default against him.—If defendant fails to answer summons, to show cause why a judgment should not be revived, the court may in its discretion enter a judgment, by default, to revive. *Carrol v. Tompkins*, 14 S. C. 223, 10 A. L. R. 538.

And administrator's acquiescence of debt after twenty years will not support revival.—Under the provisions of this section a judgment cannot be revived against the administrator of a judgment debtor by his acquiescence of the debt as provided in § 8864 after the expiration of 20 years from the death of the judgment debtor. *Brantley v. Bittle*, 72 S. C. 179, 51 S. E. 561, Ann. Cas. 17A, 860, 16 A. L. R. 24, 34, 47. See also § 8864 and note thereto.

Consent to revival of judgment estops denial of its validity.—By consenting to an order renewing an execution on a judgment, defendant is estopped to later deny the validity of the judgment or that it is still unpaid. *McLaurin v. Kelly*, 40 S. C. 486, 19 S. E. 143.

Act of 1873 extended to ten years all all unexpired liens of that date.—Executions, having an unexpired lien in 1873, then acquired, by virtue of the act of that year amending this section, an extended lien for 10 years from the day the lien attached. *Adickes v. Lowry*, 12 S. C. 97, 20 L. R. A. 625, 38 L. R. A. 248; *Arnold v. McKellar*, 9 S. C. 335, 37 L. R. A. 395, Ann. Cas. 17B, 710.

And sheriff may sell under such a lien.—A levy being made under an execution having active energy, the sheriff may sell at any time thereafter while the lien of the judgment remains. *Adickes v. Lowry*, 12 S. C. 97, 20 L. R. A. 625, 38 L. R. A. 248.

Section not unconstitutional as an attempt to extend homestead law.—This section, subdivision 4, is not unconstitutional as an attempt to extend the provisions of this homestead law beyond the limits fixed by the constitution. *Ketchin v. McCarley*, 26 S. C. 1, 11 S. E. 1099, 34 Am. St. Rep. 499, 30 L. R. A. 102, Ann. Cas. 18C, 152.

Execution cannot be had against homestead.—Under subdivision 3 of this section an execution on a judgment against a debtor cannot be enforced against a right of homestead in the debtor, and lands sold by the debtor can be subjected under execution only to the excess over the homestead, even though the homestead has not been set apart. *Martin v. Bowie*, 37 S. C. 102, 15 S. E. 736. See also, *Ketchin v. McCarley*, 26 S. C. 1, 11 S. E. 1099, 34 Am. St. Rep. 499, 30 L. R. A. 102, Ann. Cas. 18C, 152.

Whether it be set apart or not, or even in the hands of another.—A judgment does not constitute a lien on the land of the debtor exempt as a homestead

either in his or another's hands and whether it has been set off as homestead or not. *Cantrell v. Fowler*, 24 S. C. 424, 34 Am. St. Rep. 499; *Bailey v. Wood*, 71 S. C. 36, 50 S. E. 631.

Though, if set apart, there be errors of law in the assignment.—Where a homestead in land was once set apart and duly recorded, and no exceptions were filed to the return of the commissioner it could never be sold to satisfy the judgment in which it was set apart, though there may have been errors of law in the assignment. *Sloan v. Hunter*, 65 S. C. 235, 43 S. E. 788.

And debtor may demand it to be set apart, even where execution is in the hands of sheriff.—A levy is not a condition precedent to the right to make application for homestead, and the judgment debtor may, where there is an unlevied execution in the hands of the sheriff, notify the sheriff that he demands that his homestead be set off. *Nance v. Hill*, 26 S. C. 227, 1 S. E. 897, Ann. Cas. 14B, 856.

This section dealing with time for revival is one of limitation and must be pleaded.—This section dealing with the time allowed for the revival of a judgment is one of limitation and must be pleaded. *Smith v. Ellison*, 78 S. C. 120, 58 S. E. 966.

Court cannot fix time for issuance of summons to revive.—These sections having prescribed no time for the issuance of summons to renew a judgment, the court cannot fix any. *Alsobrook v. Watts*, 19 S. C. 539.

But if served after ten years it is too late.—Under the provision of this section, a summons to show cause why a judgment should not be revived which is served after 10 years from the date of original entry of the judgment is too late. *Smith v. Ellison*, 78 S. C. 120, 58 S. E. 966.

A decree in chancery is a judgment just as is a judgment at law.—The final adjudication of the rights of parties litigant is the judgment of the court, whether it be in a case at law or one involving an equity cause, and the rules enacted and established for the enforcement of liens of judgments apply to all, so that now a decree in chancery is a judgment to all intents and purposes, and is governed by the requirements of the code and acts on the subject of judgments as fully as a judgment at law. *Reid v. McGowan*, 28 S. C. 74, 5 S. E. 215.

And must be entered in order to become a lien.—Under this section a judgment does not create a lien until entered and such lien must be postponed to a mortgage executed before its entry, to one who had no notice of the judgment. *Reid v. McGowan*, 28 S. C. 74, 5 S. E. 215.

And so with a transcript of a judg-

ment from another county.—Under subdivision 1 of this section as construed with §§ 662-664, a judgment does not become a lien on the real estate of a judgment debtor in a county other than that where judgment was rendered by mere filing of transcript of judgment with clerk of court of that county, but only on being entered on abstract of judgments. *Farmers, etc., Bank v. Holliday*, 108 S. C. 116, 93 S. E. 333.

But does not have priority over home judgment entered on same day.—A transcript of a judgment from another county entered on the same day as a judgment from the county in which the land is situated has no priority over the home county judgment though it may have been rendered in the other county, on a prior date. *Farmers', etc., Bank v. Holliday*, 108 S. C. 116, 93 S. E. 333.

This case was decided on the former standing of this section which provided that there should be no priorities of verdicts and decrees rendered during same term of court, and held that such provision did not affect the priorities of transcripts of judgment filed in another county.—Ed. note.

Transcript of magistrates' judgment filed in circuit court will support an execution.—A party who obtains a judgment in a trial justice court may have a transcript thereof lodged in the office of the clerk of the court of common pleas of the county, and the clerk shall then issue execution to the sheriff of county, and there is no time limit in which this transfer must be made. *Rhoad v. Patrick*, 37 S. C. 517, 520, 16 S. E. 536.

Federal court judgment becomes lien in state court when transcript thereof is filed and entered on abstract of judgments in proper office of same county in state. *Powers v. Fidelity & Deposit Co. of Maryland*, 180 S. C. 501, 186 S. E. 523.

The lien allowed to decrees and judgments is no part of the remedy of enforcement and an act which prevented such lien in absence of levy does not impair the obligation of the contract and is valid. *Moore v. Holland*, 16 S. C. 15, 79 Am. Dec. 495, 96 Am. St. Rep. 71.

Judgment is a lien from rendition until entry five days later.—Under the provisions of subdivision 1 of this section and circuit court rule No. 3, a county court judgment entered 5 days after rendition, is a lien from the day of rendition notwithstanding an order giving plaintiff "four days from this date to enter up judgment." *Gilfillin v. Rector*, 131 S. C. 84, 126 S. E. 761.

Failure of judgment creditor to enter

judgment until more than six years after rendition thereof did not extend lien thereof so as to entitle judgment debtor to have judgment set aside. *Harvey v. Gibson*, 190 S. C. 98, 2 S. E. (2d) 385.

And no court order can divest this lien.—An order of a judge giving a plaintiff 4 days in which to enter judgment could not divest the lien given by this section for five days after rendition of judgment. *Gilfillin v. Rector*, 131 S. C. 84, 126 S. E. 761.

Sale under junior lien is referred to senior lien.—A sale of land under a junior lien will be referred to a senior lien where there are two judgments against the same party, the eldest of which is a lien on the land and the sheriff has endorsed a levy thereof on both executions. *Arnold v. McKellar*, 9 S. C. 335, 37 L. R. A. 395, Ann. Cas. 17B, 710.

Doctrine of laches not applicable to time of enforcing judgment.—The time within which a judgment creditor may enforce his judgment being fixed by statute, there is no room for the application of the doctrine of laches as a ground for injunction. *Ex parte Anderson*, 82 S. C. 131, 62 S. E. 513, 63 S. E. 354.

Lien of judgment not affected by bankruptcy proceedings.—An order of a bankrupt court directing a sale of the bankrupt's property without mentioning liens, only authorizes a sale subject to the existing liens, including a valid judgment lien. *Ex parte Anderson*, 82 S. C. 131, 62 S. E. 513, 63 S. E. 354.

Limitation on revival of judgment runs from date of order.—The time limit to revive a judgment is ten years and begins to run from the date of the order for judgment. *Blohme v. Schmancke*, 81 S. C. 81, 84, 61 S. E. 1060.

And a judgment revived within time allowed by law is a continuous lien from date of its entry.—A judgment revived within the time allowed by law, according to the force, form, and effect of the former recovery, is a continuous lien, under this section, from the date of its entry; and its priority, is preserved as against all liens which existed against the debtor during the period of its original active energy. *Verner v. Bookman*, 53 S. C. 398, 31 S. E. 283, 69 Am. St. Rep. 870.

See generally, as to revival of judgment before the code. *Leitner v. Metz*, 32 S. C. 383, 10 S. E. 1082, 1 A. L. R. 824; *Wood v. Milling*, 32 S. C. 378, 10 S. E. 1081, 1 A. L. R. 824; *Adams v. Richardson*, 32 S. C. 139, 10 S. E. 931, 1 A. L. R. 785, 824.

§ 744. Issuance of executions—returns.

(1) **When issue—limitations—effect on personal property—magistrate's judgment.**—Executions may issue upon final judgments or decrees at any

time within ten years from the date of the original entry thereof, or within ten years from the date of any revival of the same, and shall have active energy during said periods, respectively, without any renewal or renewals thereof, and thus whether any return or returns may or may not have been made during such periods, respectively, in said executions: *provided*, the execution shall not issue or be renewed in any case after the lapse of twenty years from the date of original entry of the judgment. Executions shall not bind the personal property of the debtor, but personal property shall only be bound by actual attachment or levy thereon for the period of four months from the date of such levy. When judgment shall have been rendered in a court of a magistrate, or other inferior court, and docketed in the office of the clerk of the circuit court, the application for leave to issue execution must be to the circuit court of the county where the judgment was rendered.

(2) Returns.—The sheriff, coroner, or other officer, with whom final process as aforesaid shall be lodged, shall, at each regular term of the court from which the said execution or process was sued out, during the continuance of its active energy, until full execution thereof be returned, make a return to the office of the clerk of the court of common pleas of his actings and doings thereunder. If he shall have fully executed, he shall return the process, with the manner of its execution; if he shall have partially executed, he shall return on oath to the clerk, a statement in writing, under his hand, of such partial execution, with the reason of his failure as to the remainder; if he shall have wholly failed to make execution, he shall return on oath, a statement in writing under his hand, of his failure, with the reasons; and in any event, on the first day of the term at which the active energy of the process shall cease as herein provided, he shall return the process, if the same has not been before returned, as fully executed; and the return of the officer made as aforesaid shall, for all purposes, have the same legal effect as if the said process had been made returnable to the term succeeding its first lodgment, and renewed after each subsequent regular term. For failure or neglect to make any of the returns above mentioned, or for any false return, the sheriff, or other officer as aforesaid, shall be subject to rule, attachment, action, penalty, and all other consequences provided by law for neglect of duty by executive or judicial officers.

1932 Code, § 744; Civ. P. '22, § 611; Civ. P. '12, § 349; Civ. P. '02, § 310; 1875 (15) 499; 1885 (19) 229.

Cross reference.—As to issuance of execution on judgments rendered in magistrates courts, see § 274, subd. 12, ante.

Term of court held after conclusion of general session not a "regular term."—A term of the court of common pleas held at the conclusion of a court of general sessions for determining matters not involving a jury trial, is not a "regular term" within the meaning of this section. *McLaurin v. Kelly*, 40 S. C. 486, 19 S. E. 143.

Revival of execution must be taken within ten years.—The procedure prescribed by these sections for the revival of an execution must be taken within 10

years after rendition of judgment. *First Nat. Bank v. Carolina, etc., Warehouse Co.*, 98 S. C. 168, 82 S. E. 405.

Performance of duty immaterial to sheriff's competency to prove his indorsements or sales.—Whether or not the sheriff does his duty in respect to subd. 2 of this section, dealing with returns, furnishes no reason why he should be held incompetent to prove that the indorsements appearing on the executions were made by him, or that he sold the property levied on, as they are independent facts. *Nat. Bank v. Kinard*, 28 S. C. 101, 5 S. E. 464.

Which may be proved by his parol

testimony.—In regard to subd. 2 of this section, it may be shown by parol testimony of the sheriff that he made certain entries appearing on plaintiff's execution, and that the property levied upon has not been sold, and such a return may be sufficient to enable plaintiff to commence an action to set aside a deed on the grounds of fraud upon creditors. *Nat. Bank v. Kinard*, 28 S. C. 101, 5 S. E. 464.

As the code applies only to executions issued after its adoption.—Having no retroactive effect, these sections of the code relating to executions apply only to executions issued after its adoption. *Warren, etc., Co. v. Jones*, 9 S. C. 288. See also, *Lauderdale v. Mahon*, 41 S. C. 97, 104, 19 S. E. 294; *Lawton v. Perry*, 40 S. C. 255, 18 S. E. 861, 92 Am. St. Rep. 778, 53 L. R. A. 703, Ann. Cas. 14A, 368; *Cheraw, etc., R. Co., v. Marshall*, 40 S. C. 59, 63, 18 S. E. 247.

It does not abrogate lien of execution on personalty issued and lodged prior to code.—An execution issued and lodged with the sheriff prior to the adoption of the code does not lose its lien upon personalty because of provisions of this section in reference to executions. *Warren, etc., Co. v. Jones*, 9 S. C. 288; *Carrier v. Thompson*, 11 S. C. 79.

And such liens attach to personalty acquired after the adoption of code.—A lien under an execution issued prior to the adoption of the code attaches also to the personal property of execution debtor acquired after the adoption of the code. *Carrier v. Thompson*, 11 S. C. 79.

An execution having lost its active energy may be renewed by consent.—An execution which has lost its active energy may be renewed by the written consent of the judgment debtor, endorsed on the execution and signed by him, without service of summons, there being no fraudulent collusion between the plaintiff and defendant in such execution. *Carrier v. Thompson*, 11 S. C. 79.

The lien upon real estate being created by the judgment.—The lien upon real estate is created by the judgment, the execution being simply the means provided for enforcing the judgment. *Charleston Heights Co. v. City Council*, 138 S. C. 187, 136 S. E. 393, 399.

Is sufficient for all purposes.—The lien of a judgment is sufficient for all purposes and it is superfluous to hold that a lien is created by a levy under an execution. *Charleston Heights Co. v. City Council*, 138 S. C. 187, 136 S. E. 393, 399.

But lien on personal property must be created by execution and levy.—The provisions of this section as to executions on personal property show that the procedure prevailing prior to the adoption of the code has been changed, and that it is now necessary to issue and levy the execution in order to create

a lien. *State v. McCary*, 120 S. C. 361, 113 S. E. 275; *McManus v. Bank*, 171 S. C. 84, 171 S. E. 473.

And personalty must be reduced to possession or brought within immediate control of sheriff to constitute levy. *Ibid.*

And it applies to magistrate's judgments also.—A magistrate's judgment for the purchase money of personal property without execution and levy thereunder, as required by § 274, subd. 12, and this section, does not create a lien sustaining a conviction for disposing of property subject to a lien. *State v. McCary*, 120 S. C. 361, 113 S. E. 275.

But only levy can give lodgment of execution a lien on real or personal property.—It seems that no lien upon the execution of debtor's property either real or personal is given to a lodgment of an execution except by levy. *Charleston Heights Co. v. City Council*, 138 S. C. 187, 136 S. E. 393, 399.

And the execution becomes a lien on personal property when levy is made.—*Charleston Heights Co. v. City Council*, 138 S. C. 187, 136 S. E. 393, 399; *State v. McCary*, 120 S. C. 361, 113 S. E. 275. See also, *Kohn v. Meyer*, 19 S. C. 190, 200, 99 Am. Dec. 276.

Deposits in banks.—General deposit in bank cannot be levied on, as there exists between the bank and judgment debtor depositor the relation of creditor and debtor. The judgment creditor's remedy is by supplementary proceedings, by which he can reach a judgment debtor's bank account. *McManus v. Bank*, 171 S. C. 84, 171 S. E. 473.

Stock of building and loan association is not subject to levy and sale under execution. *Dixon v. Cleveland*, 31 F. S. 1011.

Judgment against legatee does not constitute lien against interest of legatee in decedent's estate, where, under equitable doctrine of conversion, the interest of legatee in decedent's estate constituted personalty. *Dixon v. Davis*, 31 F. S. 912.

Property discovered through supplementary proceedings.—Where three executions are levied at the same time, on same property, the fact that one of judgment creditors had his execution returned nulla bona, brought supplementary proceedings and discovered the property which was levied upon, gives this creditor a preference where the proceeds of sale of the property are insufficient to satisfy even one of the executions, when other judgment creditors issued no executions thereon until property of judgment debtor was discovered through supplementary proceedings. *Ex parte Roddey*, *Seabury v. Hall*, 171 S. C. 489; 172 S. E. 866.

An assessment of taxes, which represents a judgment.—In the matter of a tax execution, the assessment of taxes

represents the judgment; if there be no lien provided for the taxes, there can be neither a judgment lien, nor an execution lien; certainly not before the levy of the tax execution. *Charleston Heights Co. v. City Council*, 138 S. C. 187, 136 S. E. 393, 399.

Does not give a general lien a lodgment of execution in the absence of any levy.—In view of this section a simple lodgment of execution for taxes due with the city sheriff in due time for collection and sale, if necessary, does not give a general lien on the property taxed in the absence of any levy. *Charleston Heights Co. v. City Council*, 138 S. C. 187, 146 S. E. 393.

An execution quashed for failure to obtain leave will not bar action to revive.—An order quashing and vacating an execution issued on the judgment of a magistrate and docketed in the office of the clerk of the circuit court on the ground that under this section, subd. 1, leave should have been obtained, is not a bar to a subsequent action to revive the judgment and issue execution therein. *Rhoad v. Patrick*, 37 S. C. 517, 16 S. E. 536.

Revival unnecessary on dissolution of injunction restraining sale under execution.—An order that a levy should continue in force pending an injunction restraining a sale thereunder renders a revival of the judgment unnecessary on the dissolution of the injunction, where the levy was made within the period of limitation, though the period had expired when the dissolution was ordered. *Ex parte Graham*, 54 S. C. 163, 32 S. E. 67.

Order to issue execution revives judgment.—*Ex parte Graham*, 54 S. C. 163, 32 S. E. 67. See also, *McLaurin v. Kelly*, 40 S. C. 486, 19 S. E. 143.

Claim to renew execution involves right to revive judgment.—Execution is the only process to enforce a judgment, and it cannot have active energy unless the underlying judgment has a lien. The claim to renew the execution necessarily involves the right to revive the judgment. *Cheraw, etc., R. Co. v. Marshall*, 40 S. C. 59, 18 S. E. 247.

Application to circuit court for leave to renew is not always necessary.—As the latter clause of subd. 1 of this section declares that only where an application for leave to issue an execution is necessary, such application is to be made to the circuit court, execution on a justice's judgment filed in the circuit court may issue without the court's leave to enforce it within 10 years from the entry. *Amick v. Amick*, 59 S. C. 70, 37 S. E. 39, 86 Am. St. Rep. 182, L. R. A. 1915E, 882. But see the dissenting opinion in this case.

Judgments may be proved against deceased debtor's estate.—Though a

judgment cannot be enforced by execution, if 20 years have not elapsed since its rendition, it may be proved against the estate of the judgment debtor. *Ex parte Goldsmith*, 68 S. C. 528, 47 S. E. 984.

And may be set off against each other on motion and rule to show cause. *Ex parte Hiers*, 67 S. C. 108, 109, 45 S. E. 146, 100 Am. St. Rep. 713, L. R. A. 1916E, 76, Ann. Cas. 16D, 894.

But funeral and last illness expenses rank before payment on judgment.—In proceeding supplementary to execution brought to subject a fund belonging to the estate of a deceased to the payment of a judgment under which execution was returned unsatisfied during his life, the court may allow out of the fund before payment on the judgment all funeral and last illness expenses. *De Loach v. Sarratt*, 58 S. C. 117, 36 S. E. 532.

A fixed sum may be allowed as costs though not designated in the order as costs.—Under the provisions of this section a person examined as having property of the debtor in his possession is properly allowed witness fees and disbursements, and a fixed sum as costs, though that be not designed in the order as costs. *Cheatham v. Seawright*, 30 S. C. 101, 8 S. E. 526, L. R. A. 1916C, 1077.

But can be fixed by the judge only.—The "fixed sum as costs" herein provided for must be fixed by the judge and not by the clerk of the court. *Dilling, etc., Co. v. Foster*, 21 S. C. 334, 100 Am. Dec. 507, 72 Am. St. Rep. 36, 94, 33 L. R. A. 551.

Provisions for costs in a judge's order are set aside on reversal of order.—The matter of costs, being statutory, a judge's provision for cost will necessarily be set aside on a reversal of his order. *Burdett v. McAllister*, 42 S. C. 352, 20 S. E. 86.

A judgment and execution for such costs, fees, etc., are unauthorized.—In view of section 755, infra, a judgment and execution for costs, fees, etc., as set out here, are unauthorized. *Cheatham v. Seawright*, 30 S. C. 101, 8 S. E. 526, L. R. A. 1916C, 1077.

And especially so where in pursuance of an order granted by a judge at chambers.—A judge sitting at chambers has no power, unless expressly conferred to render a judgment enforceable by execution; so he cannot render a judgment for the costs, fees, etc., as set out in this section, and grant leave to issue execution thereon. *Cheatham v. Seawright*, 30 S. E. 101, 9 S. E. 526, L. R. A. 1916C, 1077.

Technical sense of the words "costs" and "disbursements" subordinate to sense in which they are used.—In the use of the words "costs" and "disbursements" regard must be had to the sense in which they are used more than to their

strict technical meaning. *Dauntless Mfg. Co. v. Davis*, 24 S. C. 536.

Costs may be allowed for any specific services in an action.—In supplementary proceedings, a party may be allowed not only the sum provided for in this section but also such other costs as

may be provided for the several officers of the court, including attorneys, for any specific services in an action. *Dauntless Mfg. Co. v. Davis*, 24 S. C. 536.

See generally, *Deer Island Lumber Co. v. Virginia-Columbia Chemical Co.*, 111 S. C. 299, 97 S. E. 833.

§ 745. Actions on judgments after lapse of twenty years.—Nothing in sections 743 and 744 contained shall be construed to prevent an action upon a judgment after the lapse of twenty years from the date of the original entry thereof, and a recovery thereon, in case it shall be established by competent and sufficient evidence that said judgment, or some part thereof, remains unsatisfied and due; nor shall be construed as prejudicing any action pending on the twenty-fourth of December, 1885.

1932 Code, § 745; Civ. P. '22, § 612; Civ. P. '12, § 350; Civ. P. '02, § 311; 1885 (19) 229.

Section applicable to judgments obtained before 1873.—This section applies to judgments obtained before, as well as after, Nov. 25, 1873. *Lawton v. Perry*, 40 S. C. 255, 18 S. E. 861, 92 Am. St. Rep. 778, 53 L. R. A. 703, Ann. Cas. 14A, 368.

Language of section applies to all judgments.—The language of this section applies generally to all judgments, no matter when recovered, and not to a particular class of judgments. *Lawton v. Perry*, 40 S. C. 255, 18 S. E. 863, 92 Am. St. Rep. 778, 53 L. R. A. 703, Ann. Cas. 14A, 368.

Object of this section is to repel inferences that might be drawn from the preceding sections.—The object of this section of the code is to repel any inference that might possibly be drawn from the provisions of the two preceding sections that, after the lapse of 20 years from the date of the entry of a judgment, no proceeding of any kind can be instituted to enforce the payment of any amount that might still remain "unsatisfied and due," by expressly authorizing an action on such judgment, and a recovery thereon, if "it shall be established by competent and sufficient evidence that said judgment, or some part thereof, remains unsatisfied and due." *Latimer v. Trowbridge*, 52 S. C. 193, 29 S. E. 634, 635, 1 A. L. R. 818.

Testimony admitted without objection, being competent should be left to jury as to sufficiency.—It is error to grant a non-suit in an action brought on a judgment 20 years after its rendition, where there is testimony admitted without objection, and therefore competent, that no part of the amount due has been paid, etc., as the question of its sufficiency should be left to the jury. *Latimer v. Trowbridge*, 52 S. C. 193, 29 S. E. 634, 1 A. L. R. 818.

Presumption of payment of judgment is rebuttable.—Even after a judgment is

presumptively paid, an action may be maintained upon it and the presumption of payment be rebutted by proof, and a recovery had thereon. *Lawton v. Perry*, 40 S. C. 255, 18 S. E. 863, 92 Am. St. Rep. 778, 53 L. R. A. 703, Ann. Cas. 14A, 368.

Revival of judgment is highest evidence that original judgment is unsatisfied and due.—An order of revival is a judgment in the sense of a final adjudication of the rights of the parties, and as such, it is not only "competent and sufficient evidence," but the highest evidence, that at its date the original judgment was "unsatisfied and due," and it continues to evidence lack of satisfaction until payment is proved or presumed. *Gregory v. Perry*, 71 S. C. 246, 50 S. E. 787, 788, 122 Am. St. Rep. 108.

The revival of a judgment is in the nature of an action.—The revival of a judgment on a scire facias, though not a new judgment to be formally entered independent of the original judgment, yet is in the nature of an action; and the decree based thereon is a new judgment. *Gregory v. Perry*, 71 S. C. 246, 50 S. E. 787, 122 Am. St. Rep. 108.

And constitutes a new starting point for statute of limitations.—*Anderson v. Baughman*, 69 S. C. 38, 48 S. E. 38, 1 A. L. R. 823, cited with approval in *Gregory v. Perry*, 71 S. C. 246, 50 S. E. 787, 122 Am. St. Rep. 108.

Action on judgment may be maintained without revival.—An action on a judgment obtained in 1871 may be maintained without first reviving it, where plaintiff does not seek to maintain a lien growing out of it. *Lawton v. Perry*, 40 S. C. 255, 18 S. E. 861, 92 Am. St. Rep. 778, 53 L. R. A. 703, Ann. Cas. 14A, 368.

The recovery on a revived judgment is the amount of the original judgment with interest. *Gregory v. Perry*, 71 S. C. 246, 50 S. E. 787, 122 Am. St. Rep. 108.

Competent and sufficient evidence

should revive within 20 years.—In the dissenting opinion of *Smith v. Ellison*, 78 S. C. 120, 58 S. E. 966, 957, Mr. Justice Gary cites this section to show that

a judgment should be allowed to be revived at any time within 20 years by "competent and sufficient evidence."

CHAPTER 44

Proceedings Supplementary to Executions

- 746. Order for discovery of property.
- 747. Examination of judgment debtor and others.
- 748. Witnesses.
- 749. Compulsory attendance.
- 750. Property subject to execution.
- 751. Receivership and prohibiting trans-

- fer of property.
- 752. Claims of others and denial of indebtedness.
- 753. Reference.
- 754. Costs.
- 755. Punishment for contempt.

§ 746. Order for discovery of property—examination of judgment debtor, etc.—When an execution against property of the judgment debtor, or any of the several debtors in the same judgment, issued to the sheriff of the county where he resides or has a place of business, or, if he do not reside in the State, to the sheriff of the county where a judgment roll is filed, is returned unsatisfied, in whole or in part, the judgment creditor, at any time after such return is made, is entitled to an order from a judge of the circuit court, requiring such judgment debtor to appear and answer concerning his property before such judge, at a time and place specified in the order within the county to which the execution was issued.

After the issuing of an execution against property, and upon proof by affidavit of a party, or otherwise, to the satisfaction of the court, or a judge thereof, that any judgment debtor has property which he unjustly refuses to apply towards the satisfaction of the judgment, such court or judge may, by an order, require the judgment debtor to appear at a specified time and place to answer concerning the same; and such proceedings may thereupon be had for the application of the property of the judgment debtor towards the satisfaction of the judgment as are provided upon the return of an execution.

On an examination under this section, either party may examine witnesses in his behalf, and the judgment debtor may be examined in the same manner as a witness.

Instead of the order requiring the attendance of the judgment debtor, the Judge may, upon proof by affidavit, or otherwise, to his satisfaction, that there is danger of the debtor's leaving the State or concealing himself, and that there is reason to believe he has property which he unjustly refuses to apply to such judgment, issue a warrant requiring the sheriff of any county where such debtor may be, to arrest him and bring him before such judge. Upon being brought before the judge, he may be examined on oath, and, if it then appears that there is danger of the debtor's leaving the State, and that he has property which he has unjustly refused to apply to such judgment, ordered to enter into an undertaking, with one or more sureties, that he will, from time to time, attend before the judge, as he shall direct, and that he will not, during the pendency of the proceedings,

dispose of any portion of his property not exempt from execution. In default of entering into such undertaking, he may be committed to prison by warrant of the judge, as for a contempt.

No person shall, on examination, pursuant to this chapter, be excused from answering any question on the ground that his examination will tend to convict him of the commission of a fraud; but his answer shall not be used as evidence against him in any criminal proceeding or prosecution. Nor shall he be excused from answering any question, on the ground that he has, before the examination, executed any conveyance, assignment, or transfer of his property for any purpose; but his answer shall not be used as evidence against him in any criminal proceeding or prosecution.

ANY DEBTOR TO EXECUTION DEBTOR MAY PAY HIS DEBT TO SHERIFF.—After the issuing of execution against property, any person indebted to the judgment debtor may pay to the sheriff the amount of his debt, or so much thereof as shall be necessary to satisfy the execution; and the sheriff's receipt shall be a sufficient discharge for the amount so paid.

1932 Code, § 746; Civ. P. '22, § 613; Civ. P. '12, § 351; Civ. P. '02, § 312; 1870 (14) §§ 318, 319; 1919 (31) 236.

Intent.—Proceedings under this chapter are not a substitute for an execution, but are intended to assist in reaching assets that cannot be reached merely by levy. *McManus v. Bank*, 171 S. C. 84; 171 S. E. 473.

It is important to know amount remaining unpaid on execution.—In the light of this section and its related sections, it is important to know the amount remaining unpaid on an execution, to carry into effect the provisions of this section without detriment to the rights of at least some of the parties to the action. *Archer v. Long*, 47 S. C. 556, 25 S. E. 84, Ann. Cas. 12B, 308.

So a person is permitted to show value of property not returned.—In a judgment for defendant, in a claim and delivery action for return of property or its value, when plaintiff returns only part of property, he may be permitted to show value of property not returned. *Archer v. Long*, 47 S. C. 556, 25 S. E. 84, Ann. Cas. 12B, 308.

Judgment debtor may arrest funds in hand of third party.—In supplementary proceedings in search of assets to pay a judgment, the judgment creditor may in view of this section arrest funds in hands of third parties, alleged to belong to judgment debtor and proved *prima facie* to so belong, and hold fund until issue of ownership shall be decided. *Deer Island Lumber Co. v. Virginia-Carolina Chemical Co.*, 111 S. C. 299, 97 S. E. 833. See also, *Palmetto Bank, etc., Co. v. McCown-Clark Co.*, 143 S. C. 98, 141 S. E. 155.

And it is immaterial that third party is a corporation.—*Deer Island Lumber Co. v. Virginia-Carolina Chemical Co.*, 111 S. C. 299, 97 S. E. 833.

These sections govern in proceedings

in search of assets to pay judgment.—A judge is governed, in his procedure in supplementary proceedings in search of assets to pay judgment, by these sections and not by § 584. *Deer Island Lumber Co. v. Virginia-Carolina Chemical Co.*, 111 S. C. 299, 97 S. C. 833.

Creditor allowed examination after nulla bona return as matter of right.—Under this section a judgment creditor may have the examination after a return of nulla bona as a matter of right and without affidavit showing that the debtor has property which he unjustly refuses to apply to the satisfaction of the debt though such affidavit is prerequisite to examination before such return. *Robinson v. McMaster*, 109 S. C. 20, 95 S. E. 110.

Order to pay debt from funds in hand invalid on lack of evidence of such funds.—A judgment debtor cannot be ordered to pay a judgment debt from money in his hands in the absence of evidence that he has such money, he having refused to testify on that point. *Burdett v. McAllister*, 42 S. C. 352, 20 S. E. 86. See also note to § 751.

As the fact of unsatisfied execution may be shown from judgment roll or return of execution.—If the return of an execution unsatisfied by a prerequisite to an order of the judge granting an application for an examination, the fact could be made to appear from the judgment roll and from an inspection of the execution with the sheriff's return thereon endorsed. *Phillips v. Bruton*, 128 S. C. 369, 122 S. E. 514.

The affidavit in supplementary proceedings need not show unsatisfied execution.—This section does not require the affidavit accompanying an application for examination in supplementary

proceedings to show an unsatisfied execution against debtor's property. *Phillips v. Bruton*, 128 S. C. 369, 122 S. E. 514.

And may be on information and belief.—Under this section an application for an examination may be granted on an affidavit alleging on information and belief that the judgment debtor has property which he unjustly refuses to apply towards satisfaction of a judgment. *Phillips v. Bruton*, 128 S. C. 369, 122 S. E. 514.

The sufficiency of the proof being in the discretion of the judge.—The sufficiency of the showing "that, judgment debtor has property which he unjustly refuses to apply to the satisfaction of the judgment" is within the discretion of the judge. *Phillips v. Bruton*, 128 S. C. 369, 122 S. E. 514.

Appeal will not stay execution where bond in double amount is filed.—No stay of execution having been granted in a money judgment, an appeal from such judgment will not stay supplementary proceeding in view of this section when the plaintiff files his bond in double amount as required by § 782. *Phillips v. Bruton*, 128 S. C. 369, 122 S. E. 514. See also § 782 and note thereto.

Absence of court's seal on clerk's certificate is not ground to dismiss proceedings.—The absence of the court's seal on the clerk's certificate in a copy-order to appear before a referee in supplementary proceedings is no ground for dismissing the proceedings, nor after appearance and examination, could the defendant object to the service of such copy-order on him. *Dilling, etc., Co. v. Foster*, 21 S. C. 334, 100 Am. Dec. 507, 72 Am. St. Rep. 36, 94, 33 L. R. A. 551.

Mortgagee of judgment debtor is not a necessary party.—A mortgagee of a judgment debtor is not a necessary party to supplementary proceedings when an order for such proceedings interferes in no way with the mortgaged property. *Dilling, etc., Co. v. Foster*, 21 S. C. 334, 100 Am. Dec. 507, 72 Am. St. Rep. 36, 94, 33 L. R. A. 551.

Every judgment creditor, meeting requirements, can institute supplementary proceedings.—The right to institute supplementary proceedings is given to every judgment creditor who can make the required showing, without any limitation or qualifications whatsoever. *Sparks v. Davis*, 25 S. C. 381, 72 Am. St. Rep. 94.

Even though his judgment be obtained after a receiver is appointed.—A creditor, who obtains his judgment after a receiver is appointed in a former proceeding, is entitled to an examination of the judgment debtor. *Sparks v. Davis*, 25 S. C. 381, 72 Am. St. Rep. 94.

As the remedy of examination is not

to be enforced by one creditor only.—"The statute does not seem to provide that this remedy (examination of judgment debtor) is to be enforced by one judgment creditor only, or that the remedy is exhausted by being enforced in on action, and that subsequent judgment creditors have no right of discovery under it." See *Sparks v. Davis*, 25 S. C. 381, 72 Am. St. Rep. 94.

This section is a special statutory remedy.—The object of this section is to give a summary remedy based directly on the judgment and supplementary to the proceedings terminating in the judgment. This is a special statutory remedy and must be taken in the form given. *Wylie v. Lyle*, 7 S. C. 202.

And creditors must follow directions of section.—A judgment creditor desiring to avail himself of the provision of this section must proceed according to the directions of this section. *Wylie v. Lyle*, 7 S. C. 202.

And he cannot avail himself of the remedy by way of defense to an action. *Wylie v. Lyle*, 7 S. C. 202.

Debtor has right to be examined in his own county.—A judgment debtor has the right in supplementary proceedings under this section to have his examination conducted in his own county. *Union Bank v. Northrop*, 19 S. C. 473.

But this right extends no further than the examination.—The right of a debtor to be examined in his own county extends no further than the examination and was given, probably, to relieve him from the inconvenience of being dragged to another county, possibly in a distant part of the state. *Union Bank v. Northrop*, 19 S. C. 473.

And may be waived by him.—A debtor may waive his right to be examined in his own county, and does waive it by submitting, without protest, a written statement which is accepted by the plaintiff as a sufficient compliance with the order. *Union Bank v. Northrop*, 19 S. C. 473. See also, *Green v. Bookhart*, 19 S. C. 466.

Court may apply money in its hands to debt after return of execution unsatisfied.—After the return of an execution unsatisfied, the court may, under proper proceedings, require money in its hands, belonging to the defendant to be applied to the payment of the debt. *McDaniel v. Stokes*, 19 S. C. 60.

Last subdivision applies only to claims not reduced to judgment.—The last subdivision of this section providing that a debtor of judgment debtor may pay his debt to the sheriff applies only to claims not reduced to judgment. *Gray v. Putnam*, 51 S. C. 97, 28 S. E. 149, L. R. A. 1915A, 424.

As it was designed to give those indebted on such claims the right to pay

voluntarily.—This section providing for payment by debtor of judgment debtor of his debt to the sheriff was only designed to give those indebted to the execution debtor on claims not reduced to judgment the right to pay voluntarily the amount due the execution debtor to the sheriff, and to give the sheriff the right to receive and receipt for the same as if payment had been made to the debtor. *Gray v. Putnam*, 51 S. C. 97, 28

S. E. 149, L. R. A. 1915A, 424.

A payment to apply on junior execution, with active energy lost, is valid.—Defendant's payment to a sheriff of an indebtedness to plaintiff to be applied to a junior execution against plaintiff which had lost its active energy was valid and discharged the defendants from further payment. *Isabell v. Dunlap*, 17 S. C. 581, 58 Am. St. Rep. 306, 19 L. R. A. (N. S.) 1039, Ann. Cas. 13B, 140.

§ 747. Examination of debtors of judgment debtor, or of persons having property belonging to him.—After the issuing or return of an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, and upon an affidavit that any person or corporation has property of such judgment debtor, or is indebted to him in any amount exceeding ten dollars, the judge may, by an order, require such person or corporation, or any officer or member thereof, to appear at a specified time and place, and answer concerning the same. The judge may also, in his discretion, require notice of such proceeding to be given to any party to the action, in such manner as may seem to him proper.

The proceedings mentioned in this section, and in section 746, may be taken upon the return of an execution unsatisfied issued upon a judgment recovered in an action against joint debtors, in which some of the defendants have not been served with the summons by which said action was commenced, so far as relates to the joint property of such debtors; and all actions by creditors to obtain satisfaction of judgments out of the property of joint debtors are maintainable in the like manner and to the like effect. These provisions shall apply to all proceedings and actions now pending, and not actually terminated by any final judgment or decree.

1932 Code, § 747; Civ. P. '22, § 614; Civ. P. '12, § 352; Civ. P. '02, § 314; 1870 (14) § 320.

The granting or refusal of a petition for discovery of assets owing to a judgment debtor is within discretion of trial judge, whose decision will not be disturbed unless there is shown to be an abuse of his discretion. *Bilrite Bldg. Co. v. Adams*, 193 S. C. 142, 7 S. E. (2d) 857.

No "fishing expeditions."—The courts do not look with favor upon a proceeding in the nature of a discovery which is shown to be merely a fishing expedition. *Ibid.*

However, while the Supreme Court does not favor needless orders for discovery which may go too far afield, nevertheless it does not find it necessary in all such cases to reverse the granting of discovery but Supreme Court will prune such orders of their excesses and affirm them for their virtues. *Ibid.*

Proof of facts entitling judge to exercise discretion.—If petition by judgment creditor for examination of president and general manager of corporation to determine if it was indebted to judgment debtor by way of moneys, capital stock, bonds, or other assets, satisfied

trial judge that there was merit in the prayer, judge had right to permit petitioners to show by competent proof that it was a case in which he could properly exercise his discretion and allow examination prayed for to be made. *Ibid.*

An order requiring president and general manager of corporation to be examined before a special master concerning any moneys, capital stock, bonds, or other assets which corporation owed to judgment debtor, was not an abuse of discretion, where petition for examination showed that execution had been returned nulla bona, and examination of judgment debtor was barred by judgment debtor's illness, and petition alleged on information and belief that judgment debtor was a stockholder, and that corporation was indebted to judgment debtor, and trial judge permitted petitioners to supplement petition by introducing evidence in support of petition. *Ibid.*

Verified petition takes place of affidavit.—In proceeding by judgment creditor for examination of officer of corporation to determine whether it was

indebted to judgment debtor, the verified petition will take the place of the affidavit named in statute; and "affida-

vit" being a written declaration under oath made without notice to the adverse party. *Ibid.*

§ 748. Witnesses required to testify.—Witnesses may be required to appear and testify on any proceedings under this chapter, in the same manner as upon the trial of an issue.

1932 Code, § 748; Civ. P. '22, § 615; Civ. P. '12, § 353; Civ. P. '02, § 315; 1870 (14) § 321.

See generally, *Deer Island Lumber Co. v. Virginia-Carolina Chemical Co.*, 111 S. C. 299, 97 S. E. 833.

§ 749. Compelling party or witnesses to attend.—The party or witness may be required to attend before the judge, or before a referee appointed by the court or judge. If before a referee, the examination shall be taken by the referee, and certified to the judge. All examinations and answers before a judge or referee, under this chapter, shall be on oath, except that when a corporation answers, the answer shall be on the oath of an officer thereof.

1932 Code, § 749; Civ. P. '22, § 616; Civ. P. '12, § 354; Civ. P. '02, § 316; 1870 (14) § 322.

Referee may hear two cases together when taken by two creditors against same defendant.—In supplementary proceedings separately taken by two creditors against the same defendant, the same referee being appointed in each case to take the examination might hear the two cases together. *Kennesaw Mills Co. v. Walker*, 19 S. C. 104, 100 Am. Dec. 501, 514, 117 Am. St. Rep. 952, 10 L. R. A. (N. S.) 1101, Ann. Cas. 16A, 728.

And he must sometimes decide questions of law.—A referee, no matter how limited his powers, must sometimes necessarily decide questions of law arising in the progress of the inquiry he is ordered to take. *Kennesaw Mills Co. v. Walker*, 19 S. C. 104, 100 Am. Dec. 501,

514, 117 Am. St. Rep. 952, 10 L. R. A. (N. S.), 1101, Ann. Cas. 16A, 728.

Circuit judge may pass final order at his chambers in county other than debtors.—A circuit judge at his chambers in a county other than that in which the judgment debtor resides, may pass the final order in such proceedings, the examination of the defendant having been had in his own county before a referee appointed for that purpose. *Kennesaw Mills Co. v. Walker*, 19 S. C. 104, 100 Am. Dec. 501, 514, 117 Am. St. Rep. 952, 11 L. R. A. (N. S.) 1101, Ann. Cas. 16A, 728.

See generally, *Deer Island Lumber Co. v. Virginia-Carolina Chemical Co.*, 111 S. C. 299, 97 S. E. 833.

§ 750. What property may be ordered to be applied to execution.—The judge may order any property of the judgment debtor, not exempt from execution, in the hands either of himself or any other person, or due to the judgment debtor, to be applied towards the satisfaction of the judgment; except that the earnings of the debtor for his personal services, at any time within sixty days next preceding the order, cannot be so applied, when it is made to appear by the debtor's affidavit or otherwise, that such earnings are necessary for the use of a family supported wholly or partly by his labor.

1932 Code, § 750; Civ. P. '22, § 617; Civ. P. '12, § 355; Civ. P. '02, § 317; 1870 (14) 323.

See also, section 751 and notes thereto.

One claiming property rights not passed on in original action has right of trial.—A third person claiming property rights which have not been passed upon in the original action under which the execution is issued should not be

deprived either of his day in court or of the right of trial in the form prescribed by law for a regular judicial procedure. *Palmetto Bank, etc., Co. v. McCown-Clark Co.*, 143 S. C. 98, 141 S. E. 155.

And the court cannot summarily dispose of issues of ownership.—The court

cannot in supplementary proceedings summarily dispose of issues of ownership or order the property claimed by third persons applied towards satisfaction of judgment. *Palmetto Bank, etc., Co. v. McCown-Clark Co.*, 143 S. C. 98, 141 S. E. 155.

But may merely keep property until determination of ownership.—On a prima facie showing of ownership in judgment debtor, a court may in supplementary proceedings merely keep the property in its possession till determination of right thereto in proper action therefor by either of the interested parties. *Palmetto Bank, etc., Co. v. McCown-Clark Co.*, 143 S. C. 98, 141 S. E. 155.

Nor can real estate conveyed to third party by judgment debtor be reached in supplementary proceedings. *Wannamaker v. Bryant*, 165 S. C. 107, 162 S. E. 779.

Money in court's hands may be applied to judgment.—After return of execution unsatisfied, the court may require money in its hands, belonging to defendant, to be applied to the payment of the judgment. *McDaniel v. Stokes*, 19 S. C. 60. See also, *Union Bank v. Northrop*, 19 S. C. 473.

Attorneys fees, had more than 60 days before, not exempt.—An attorney's fee from a litigation had more than 60 days next preceding an order of a judge, as set out in this section, is not an earning of a debtor so as to be exempt from the execution under this section. *Union Bank v. Northrop*, 19 S. C. 473.

A court of record has the right to enforce its orders for such application by attachment as for contempt. *Kennesaw Mills Co. v. Walker*, 19 S. C. 104, 100 Am. Dec. 501, 514, 117 Am. St. Rep. 952, 10 L. R. A. (N. S.) 1101, Ann. Cas. 16A, 728.

Judgment of an administrator charged to him on final settlement is his property.—Where an administrator is charged, on final settlement, with a judgment recovered by him as administrator, such judgment becomes his own property and may be reached by his creditors in supplementary proceedings. *Rhodes v. Casey*, 20 S. C. 491, 100 Am. Dec. 502.

And upon such judgment supplemen-

tary proceedings may be held.—A judgment recovered against an administrator on final settlement of the estate of his intestate, is a judgment against him individually and upon such judgment supplementary proceedings may be had. *Rhodes v. Casey*, 20 S. C. 491, 100 Am. Dec. 502.

But property reached should go to moving creditors alone.—Where a judgment is rendered against an administrator, in favor of several distributees, two of whom institute supplementary proceedings against him, it would seem that the property thus reached should go to the moving creditors alone; but this is a matter of no interest to the debtor. See *Rhodes v. Casey*, 20 S. C. 491, 100 Am. Dec. 502.

Debtor's sureties not required to surrender property given them as indemnity.—The sureties on a bond for the delivery of property levied on cannot be required to surrender to the judgment creditor the proceeds of the property placed in their hands to indemnify them, until it is shown that they have been relieved from liability. *Cheatham v. Seawright*, 30 S. C. 101, 8 S. E. 526.

Innocent assignee of judgment debtor protected.—An innocent assignee of a judgment from a judgment debtor bought after an order in supplementary proceedings will not be required to turn over the assignment under the order. *Robertson, etc., Co. v. Segler*, 24 S. C. 387, 78 Am. St. Rep. 52.

Not necessary to serve rule to show cause so as to render party amenable for its violation.—It is not necessary for actual service of a rule, and injunction, issued by a court to a judgment debtor to show cause why a judgment in his hands should not be applied to the payment of his judgment, to be made upon a party in order to make him amenable for its violation. *Robertson, etc., Co. v. Segler*, 24 S. C. 387, 78 Am. St. Rep. 52.

See generally. *Deer Island Lumber Co. v. Virginia-Carolina Chemical Co.*, 111 S. C. 299, 97 S. E. 833.

§ 751. Judge may appoint receiver and prohibit transfer of property.—

The judge may also, by order, appoint a receiver of the property of the judgment debtor, in the same manner, and with the like authority, as if appointment was made by the court, according to section 584. But before the appointment of such receiver, the judge shall ascertain, if practicable, by the oath of the party or otherwise, whether any other supplementary proceedings are pending against the judgment debtor, and if such proceedings are so pending, the plaintiff therein shall have notice to appear before him, and shall likewise have notice of all subsequent proceedings in relation to said receivership. No more than one receiver of the property of a judgment debtor shall be appointed. The judge may also, by order, forbid

a transfer or other disposition of the property of the judgment debtor not exempt from execution, and any interference therewith.

Whenever the judge shall grant an order for the appointment of a receiver of the property of the judgment debtor, the same shall be filed in the office of the clerk of the court of common pleas of the county where the judgment roll in the action, or transcript from magistrate's judgment, upon which the proceedings are taken, is filed; and the said clerk shall record the order in a book, to be kept for that purpose in his office, to be called "Book of Orders Appointing Receivers of Judgment Debtors," and shall note the time of the filing of said order therein. A certified copy of said order shall be delivered to the receiver named therein, and he shall be vested with the property and effects of the judgment debtor from the time of the filing and recording of the order as aforesaid. The receiver of the judgment debtor shall be subject to the direction and control of the court in which the judgment was obtained, or docketed, upon which the proceedings are founded.

A certified copy of said order shall also be filed and recorded in the office of the register of mesne conveyances of the county in which any real estate of such judgment debtor sought to be affected by such order is situated, and, also in the office of the register of mesne conveyances of the county in which such judgment debtor resides.

1932 Code, § 751; Civ. P. '22, § 618; Civ. P. '12, § 356; Civ. P. '02, § 318; 1870 (14) § 324.

For powers of receiver in proceedings supplementary to execution, see sections 584 and 750 and notes thereto.

What property applied.—See section 750 and notes thereto.

This section is the warrant of a judge to appoint a receiver to secure the fruits of a judgment. *Deer Island Lumber Co. v. Virginia-Carolina Chemical Co.*, 111 S. C. 299, 97 S. E. 833.

But only one appointment can be made.—Though a creditor, who obtains his judgment after the appointment of a receiver for the judgment debtor in a former proceeding, is entitled to have an examination of the judgment debtor (see § 746 and note, *supra*), there cannot be more than one appointment of a receiver. *Sparks v. Davis*, 25 S. C. 381, 72 Am. St. Rep. 94.

All of property of judgment debtor should go to his receiver.—In supplementary proceedings in search of assets to pay a judgment, if fund arrested is in truth the property of judgment debtor, all of it ought to go to his receiver. *Deer Island Lumber Co. v. Virginia-Carolina Chemical Co.*, 111 S. C. 299, 97 S. E. 833.

And the residue be returned after payment of debts.—After paying the debts the receiver should return to the debtor all property remaining in his hands, but it is not error of law to omit such a direction from the order appointing the receiver. *Dilling, etc., Co. v. Foster*, 21 S. C. 334, 100 Am. Dec. 507, 72 Am. St.

Rep. 36, 94, 33 L. R. A. 551.

Though a debt to judgment debtor be extinguished a receiver may be appointed.—A receiver may be appointed for an indebtedness due the judgment debtor, though the debt may be extinguished, when the order of appointment does not determine the amount due upon the claim or prevent the cancellation of the debt from being shown as a defense to an action to recover thereon. *Globe Phosphate Co. v. Pinson*, 52 S. C. 185, 29 S. E. 549, 119 Am. St. Rep. 748.

Or when a part of a sum of indebtedness, but not the whole, is claimed as exempt.—When a sum of indebtedness due judgment debtor is claimed as exempt, but only a part is properly so claimed, a receiver may be appointed if the order of appointment directs that the proceeds of the debt be held subject to the order of the court. *Globe Phosphate Co. v. Pinson*, 52 S. C. 185, 29 S. E. 549, 119 Am. St. Rep. 748.

A receiver may be appointed without notice of application for appointment.—A judge may, on hearing a referee's report, appoint a receiver, without specific notice having been given that such appointment would then be applied for. *Dilling, etc., Co. v. Foster*, 21 S. C. 334, 100 Am. Dec. 507, 72 Am. St. Rep. 36, 94, 33 L. R. A. 551.

And it will be assumed that no other such proceedings were pending against defendant.—A receiver having been appointed in supplementary proceedings

it will be assumed that circuit judge did his duty and ascertained that no other supplementary proceeding was then pending against this defendant. Dilling, etc., Co. v. Foster, 21 S. C. 334, 100 Am. Dec. 507, 72 Am. St. Rep. 36, 94, 33 L. R. A. 551.

An appointment may be made though judgment debtor has sufficient property.—Though, on examination, property is found in debtor's hands sufficient to pay the judgment, a receiver may nevertheless be appointed, and when appointed he should be the receiver of all the defendant's property. Dilling, etc., Co. v. Foster, 21 S. C. 334, 100 Am. Dec. 507, 72 Am. St. Rep. 36, 94, 33 L. R. A. 551.

Or small amount of property when he refuses to apply it to debt.—Judgment creditors may, after a return of an execution unsatisfied, apply for the appointment of a receiver of the property of the judgment debtor when it appears that he has property, even in a small amount, which he refuses to apply to the debt. Burdett v. McAllister, 42 S. C. 352, 20 S. E. 86.

It is not essential to require a bond of

receiver.—It is the usual and better practice to require bond from receivers, but it is not essential. Dilling, etc., Co. v. Foster, 21 S. C. 334, 100 Am. Dec. 507, 72 Am. St. Rep. 36, 94, 33 L. R. A. 551.

Judge is governed by sections 746-755 in appointment of receiver, not by section 584. Deer Island Lumber Co. v. Virginia-Carolina Chemical Co., 111 S. C. 299, 97 S. E. 833.

A receiver may be appointed for a non-resident judgment debtor.—Where judgment debtor, residing in another county, appeared without objection, and was examined in the county where the judgment was entered and a receiver was appointed, he cannot afterwards object to such appointment. Green v. Bookhart, 19 S. C. 466.

Receiver can set aside fraudulent conveyances.—Receiver appointed in supplementary proceedings need not be mere agent or representative of judgment debtor, but often is trustee for creditors, and may sue in his own name to set aside debtor's fraudulent conveyances. Gardner v. Kirven, 173 S. C. 302, 175 S. E. 637.

§ 752. Proceedings on claims of others to property or on denial of indebtedness.—If it appear that a person or corporation alleged to have property of the judgment debtor, or, indebted to him, claims an interest in the property adverse to him, or denies the debt, such interest or debt shall be recoverable only in an action against such person or corporation by the receiver; but the judge may, by order, forbid a transfer or other disposition of such property or interest, till a sufficient opportunity be given to the receiver to commence the action, and prosecute the same to judgment and execution; but such order may be modified or dissolved by the Judge granting the same, at any time, on such security as he shall direct.

1932 Code, § 752; Civ. P. '22, § 619; Civ. P. '12, § 357; Civ. P. '02, § 319; 1870 (14) § 325.

Debtor of judgment debtor may pay his debt only to receiver.—The provisions of this section authorize an order in supplementary proceedings forbidding one not a party to the proceedings, but indebted to a judgment debtor, from paying the amount of indebtedness to anyone but the receiver. Globe Phosphate Co. v. Pinson, 52 S. C. 185, 29 S. E. 549, 119 Am. St. Rep. 748.

And judgment debtor may not appeal from an order requiring this.—An injunction forbidding a debtor of judgment debtor from paying his debt to anyone but the receiver cannot be appealed from by the judgment debtor because it was directed against one not a party to the proceedings, since he is not aggrieved. Globe Phosphate Co. v.

Pinson, 52 S. C. 185, 29 S. E. 549, 119 Am. St. Rep. 748.

Administrator not entitled to interplead in supplementary proceedings by creditors of his intestate.—An administrator, not denying the possession of or claiming any interest in a fund belonging to the estate of his deceased, is not entitled to an action making all claimants parties to settle the right to the fund, when judgment creditors of the deceased have instituted supplementary proceedings to subject this fund. See De Loach v. Sarratt, 58 S. C. 117, 36 S. E. 532.

See generally, Deer Island Lumber Co. v. Virginia-Carolina Chemical Co., 111 S. C. 299, 97 S. E. 833.

§ 753. Reference by judge.—The judge may, in his discretion, order a reference to a referee agreed upon by the parties, or appointed by him, to report the evidence or the facts, and may, in his discretion, appoint such referee in the first order, at any time.

1932 Code, § 753; Civ. P. '22, § 620; Civ. P. '12, § 358; Civ. P. '02, § 320; 1870 (14) § 326.

See generally, *Deer Island Lumber Co. v. Virginia-Carolina Chemical Co.* 111 S. C. 299, 97 S. E. 833.

§ 754. Cost of proceeding.—The judge may allow to the judgment creditor, or to any party so examined, whether a party to the action, or not, witness fees and disbursements, and a fixed sum in addition, not exceeding thirty dollars, as costs.

1932 Code, § 754; Civ. P. '22, § 621; Civ. P. '12, § 359; Civ. P. '02, § 321; 1870 (14) § 327.

This section does not authorize a fee to plaintiff's attorney. *Dilling, etc., Co. v. Foster*, 21 S. C. 334, 100 Am. Dec. 507, 72 Am. St. Rep. 36, 94, 33 L. R. A. 551.

"The judge" here means the judge before whom such supplementary proceedings are brought for conformation or reversal of the referee's report. *Anderson v. Pilgram*, 41 S. C. 423, 19 S. E. 1002, 1009, 20 S. E. 64, 31 L. R. A. 610.

Allowances are made only when proceedings go beyond referee's report.—No such allowance as here set out will be made when the proceedings go no further than the report of the referee. *Anderson v. Pilgram*, 41 S. C. 423, 19 S. E. 1002, 1009, 20 S. E. 64, 31 L. R. A. 610.

Creditor may recover cost for such proceeding from administrator.—Where

administrators voluntarily place a fund belonging to their decedent's estate out of their hands and beyond their control, they will be held liable for cost of proceeding supplementary to execution instituted by a judgment creditor of the decedent to subject such fund to the payment of his judgment. *De Loach v. Sarratt*, 58 S. C. 117, 36 S. E. 532.

Or failing there, from the fund before it is applied to his judgment.—In case the cost for proceedings supplementary to execution against administrators for funds voluntarily placed beyond their control cannot be collected from them, the creditor may recover his cost from the fund before it is applied to his judgment. *De Loach v. Sarratt*, 58 S. C. 117, 36 S. E. 532.

§ 755. Punishment for contempt.—If any person, party or witness, disobey an order of the judge or referee, duly served, such person, party or witness may be punished by the judge as for a contempt. And, in all cases of commitment under this chapter, the person committed may, in case of inability to perform the act required, or to endure the imprisonment, be discharged from imprisonment by the court or judge committing him, or the court in which the judgment was rendered, on such terms as may be just.

1932 Code, § 755; Civ. P. '22, § 622; Civ. P. '12, § 360; Civ. P. '02, § 322; 1870 (14) § 328.

All orders in these proceedings are to be enforced by attachment for contempt.—This section seems to imply that all orders made in supplementary proceedings are to be enforced, not by judgment and execution, but by attachment for contempt. *Cheatham v. Seawright*, 30 S. C. 101, 8 S. E. 526, L. R. A. 1916 C, 1077.

And this applies to irregular and improperly granted orders.—An irregular and improperly granted order, which should be attached by motion to set aside for irregularity, cannot be disregarded and one who does so is subject

to attachment for contempt. *Earle v. Stokes*, 5 S. C. 336, 100 Am. Dec. 514.

Order for imprisonment does not violate the Constitution.—An order for imprisonment of defendant in case he refuses to surrender a sum of money adjudged to be due in supplementary proceedings does not violate the Constitution. *Kennesaw Mills Co. v. Walker*, 19 S. C. 104, 100 Am. Dec. 501, 514, 117 Am. St. Rep. 952, 10 L. R. A. (N. S.) 1101, Ann. Cas. 16A, 728.

But it should not be incorporated in order for delivery of money by debtor.

—In an order in supplementary proceedings for the delivery of money by the judgment debtor to the receiver, it is error to incorporate a direction for imprisonment in case of refusal. *Kennesaw Mills Co. v. Walker*, 19 S. C. 104, 100 Am. Dec. 501, 514, 17 Am. St. Rep. 952, 10 L. R. A. (N. S.) 1101, Ann. Cas. 16A, 728.

As the application for attachment is made after time fixed for execution of order.—The application for attachment on defendant's refusal to surrender money in his hands as ordered by the

court should be made after the time fixed for the execution of the order, and on rule to show cause. *Kennesaw Mills Co. v. Walker*, 19 S. C. 104, 100 Am. Dec. 501, 514, 17 Am. St. Rep. 952, 10 L. R. A. (N. S.) 1101, Ann. Cas. 16A, 728.

Senior lien not divested by sale under junior lien.—A sale in 1878 under a junior execution issued by a trial justice, did not divest the lien of a senior execution issued in 1868 from the court of common pleas. *Carrier v. Thompson*, 11 S. C. 79.

TITLE 13

Costs in Civil Actions

- 756. Costs follow event of action.
- 757. Partition and foreclosure suits.
- 758. Costs on appeal to Supreme Court.
- 760. Execution for costs.
- 761. Interest on verdict or report.
- 762. Taxation of costs.
- 763. Postponement of trial.
- 764. Costs on motion.

- 765. Infant plaintiff.
- 766. Costs in actions by or against representative.
- 767. Review of decision in special proceeding.
- 768 and 769. Action by State.
- 770. Assignment after commencement of action.

§ 756. Costs follow event of action, except in chancery cases when otherwise ordered.—In every civil action commenced or prosecuted in the courts of record in this State (except cases in chancery) the attorneys of plaintiff or defendant shall be entitled to recover costs and disbursements of the adverse party, as prescribed in sections 757, 758, and chapter 117, such costs to be allowed as of course to the attorneys of plaintiff or defendant, and all officers of the court thereto entitled, accordingly as the action may terminate, and to be inserted in the judgment against the losing party. In cases in chancery, the same rule as to costs shall prevail, unless otherwise ordered by the court: *provided*, that wherever, in action for assault, battery, false imprisonment, libel, slander, malicious prosecution, criminal conversation or seduction, or in any other action for damages for torts, the amount recovered shall be less than one hundred dollars, the total amount of costs and disbursements shall not exceed the amount so recovered in the action.

1932 Code, § 756; Civ. C. '22, § 5721; Civ. C. '12, § 4204; Civ. C. '02, § 3096; G. S. 2425; R. S. 2547; Code Proc., § 361; 1883 (18) 449; 1892 (21) 30; Civ. P. '22, § 623; Civ. P. '12, § 361; Civ. P. '02, § 323; 1870 (14) § 335.

- I. General Consideration.
- II. Allowance of Costs and Who Liable Therefor.
 - A. Cases at Law.
 - B. Cases in Equity.
- III. Pleading and Practice.

Cross References.

For provisions as to costs in actions brought in the original jurisdiction of the Supreme Court see § 25. As to costs of appeal to the circuit court from an inferior court see §§ 808-809. For provisions

as to fees and costs officers of the state are entitled to receive by law see §§ 4920-4964 (5). See §§ 4920 et seq. for reference "chapter 117." See also section 762 and notes thereto.

I. GENERAL CONSIDERATION.

History of section.—For cases discussing the effect on this section, of the Act of 1892, which repealed acts in relation to attorney's costs except to causes then pending or to existing liquidated contracts, the practitioner is referred to

McElwee v. Dickson, 55 S. C. 307, 33 S. E. 365; Powell v. Pearlstine, 43 S. C. 403, 21 S. E. 328, 32 L. R. A. (N. S.) 290. See also, Salley v. Seaboard, etc., Ry., 79 S. C. 454, 60 S. E. 1123; Addison v. Sujette, 50 S. C. 192, 27 S. E. 631; 51 S. C. 305, 28 S. E. 948, Ann. Cas. 17D, 120, Ann. Cas. 18B, 281, 11 A. L. R. 378; Durham Fertilizer Co. v. Glenn, 48 S. C. 494, 26 S. E. 796; State v. Town Council, 47 S. C. 225, 25 S. E. 38; and to Lewis v. Brown, 16 S. C. 58, for still earlier changes.

Common law doctrine as to costs.—At common law judgments did not carry costs. The provisions of this and the following sections are thus entirely statutory, and being so, claims for costs not coming within their provisions cannot be allowed. See Matheson v. Rogers, 84 S. C. 458, 65 S. E. 1054, 67 S. E. 476, L. R. A. 1915B, 939; Kershaw County v. Richland County, 61 S. C. 75, 39 S. E. 263, 265, Ann. Cas. 13B, 187; Whittle v. Saluda County, 56 S. C. 505, 35 S. E. 203; Green v. Anderson County, 56 S. C. 411, 34 S. E. 691, Ann. Cas. 18D, 934; Hightower v. Bamberg County, 54 S. C. 536, 32 S. E. 576; Sease v. Dobson, 36 S. C. 554, 15 S. E. 703; Scott v. Alexander, 27 S. C. 15, 2 S. E. 706; People's Bank v. Aetna Ins. Co., 76 F. 548; State v. County Treasurer, 10 S. C. 40, Ann. Cas. 15D, 563; Church v. Washington, 3 Rich. 380; Trenholm v. Bumpfield, 3 Rich. 376. But as a matter of statutory regulation costs are of great antiquity. For a time, beginning with 6 Edward 1, costs were allowed to the plaintiffs succeeding, or "demandant's," as the parties were styled in the statutes. Afterwards, by the statute of Marlbridge, in the time of Henry III, they were allowed to the party prevailing—and so they have continued to do the present day. See also, Carolina Nat. Bank v. Senn, 25 S. C. 572, 70 Am. St. Rep. 115, 56 L. R. A. 42, 4 L. R. A. (N. S.) 395.

Nature of costs.—It is said that costs are in the nature of penalties. Kershaw County v. Richland County, 61 S. C. 75, 39 S. E. 263, Ann. Cas. 13B, 187; State v. County Treasurer, 10 S. C. 40, 43, Ann. Cas. 15D, 563; Lancaster v. Barnwell County, 40 S. C. 445, 19 S. E. 74; Thompson v. Farr, 1 Rich. 4. They have also been referred to as damages. People's Bank v. Aetna Ins. Co., 76 F. 548; Kapp v. Loyns, 13 S. C. 288.

Costs are governed by the fee bill in force at the time of the verdict or order of judgment. Benbow v. Richardson, 21 S. C. 601, 602; Kapp v. Loyns, 13 S. C. 288; Stegall v. Bolt, 11 S. C. 522.

See § 754, providing for the payment to a judgment creditor of costs incurred in the examination of a defaulting judgment debtor, and the note thereto.

This section contains the only provisions in the code regulating the right to costs in all civil action, either legal

or equitable. Cooke v. Poole, 26 S. C. 321, 2 S. E. 609.

Costs not allowed in lieu of damages.—Under this section costs are not allowed in place of damages by expense in carrying on the litigation. Loeb v. Mann, 39 S. C. 465, 469, 18 S. E. 1.

Payment of costs in dower is exception to this section.—The special provisions of § 8607 as to payment of costs in admeasurement of dower by the claimant or the person in possession of the disputed land must be reconciled with the general provisions of this section as an exception thereto. Fooshe v. Merriwether, 20 S. C. 337. See § 8607 and the note thereto.

Costs are not creatures of contract.—Under this section the taxable costs are not the creatures of the contract of the parties, but of statute. Matheson v. Rogers, 84 S. C. 458, 65 S. E. 1054, 67 S. E. 476, L. R. A. 1915B, 939.

Costs not allowable in special proceedings.—Under the provisions of this section costs are not allowable in special proceedings, but only in actions. Columbia Water Power Co. v. Columbia, 4 S. C. 388, 402, Ann. Cas. 13B, 566, Ann. Cas. 13D, 384.

Arbitrators may tax costs under this section.—Where a submission to arbitration of a pending cause refers all issues of law and fact to the arbitrators, they have power to award as to who shall pay the costs under this section. Bollmann v. Bollmann, 6 S. C. 29, 48, 13 Am. Dec. 547, 132 Am. St. Rep. 159, Ann. Cas. 18C, 974.

"The court" means the trial court.—The words "the court" as used in this section in the sentence beginning "In cases in chancery," are to be construed as meaning the court trying the case. Cooke v. Poole, 26 S. C. 321, 2 S. E. 609.

Words "or in any other action for damages for torts," apply to personal torts only.—An action of trespass quare clausum fregit is not within the purview of the proviso of this section as there is nothing in the general expression "any other action for damages for torts" which compels an extension of meaning to cover classes of torts unlike those personal torts enumerated. Vassey v. Spake, 83 S. C. 566, 65 S. E. 825, Ann. Cas. 16E, 55.

Costs and disbursements are distinguishable.—The act of December 22, 1892, repealing all acts relating to attorney's costs, does not apply to attorney's costs, does not apply to attorney's "disbursements," as provided for in this section which are expenditures of money which an attorney is authorized by law to make in the conduct of a cause, while his costs were fixed amounts, authorized by prior statutes to be taxed for specified services rendered in a cause. Durham Fertilizer Co. v. Glenn, 48 S. C. 494, 26 S. E. 796.

Regard must be had to the sense in which the terms "costs" and "disbursements," as contained in this section, are intended to be used, more than to their strict technical signification. Dauntless Mfg. Co. v. Davis, 24 S. E. 536.

It was said in this case "we suppose that a good deal of the confusion in the use of the terms 'costs' and 'disbursements' has arisen from this conflict between the theory and the practice—the theory being that the fees of the several officers of court and the witnesses are paid by the plaintiff or defendant, as the case may be, at the time the services are rendered, in which case they would very properly be termed disbursements and taxed as such, in order to reimburse the party for the outlay he has been required to make; while the practice, in many cases, is that such fees are not paid at the time, but remaining due to the several officers at the termination of the action, are taxed as costs due to such officers."—Ed. note.

Where fees are paid by party they are considered "disbursements." — Where fees of officers of the court and witnesses are paid by the party himself, they are to be taxed as "disbursements" in favor of the prevailing party. Mitchell v. Barrs, 64 S. C. 197, 41 S. E. 962, Ann. Cas. 14C, 739; Dauntless Mfg. Co. v. Davis, 24 S. C. 536; Cureton v. Westfield, 24 S. C. 457; Lewis v. Brown, 16 S. C. 58.

Where not so paid fees may be taxed to officers and witnesses as "costs." — Under this section the prevailing party is entitled to have the amount of officers' and witnesses' fees taxed to him, but if, as set down in the bill of disbursements, they appear to be due to them, rather than to such prevailing party, it is not prejudicial error. Dauntless Mfg. Co. v. Davis, 24 S. C. 536; Cureton v. Westfield, 24 S. C. 457; Lewis v. Brown, 16 S. C. 58.

As to such "necessary disbursements" to be entered into the judgments as costs, see § 762 and note thereto.

Costs must be taxed independently in each action.—In taxing costs under this section in a partition suit, it is improper for the clerk to hold in abeyance taxation of costs incurred solely in a contest between plaintiff and attorneys, until the determination of another independent suit between plaintiff and the attorneys; it being proper to tax such costs against either plaintiff or the attorneys. Cauthen v. Cauthen, 81 S. C. 313, 62 S. E. 319.

II. ALLOWANCE OF COSTS AND WHO LIABLE THEREFOR.

A. Cases at Law.

Prevailing party to recover costs under judgment from losing party.—Under this section a judgment covers the costs of the case and entitles the prevailing party to recover them from the losing

party. Shuford v. Shingler, 30 S. C. 612, 8 S. E. 799; People's Bank v. Aetna Ins. Co., 76 F. 548.

This section gives costs "accordingly as the action may terminate," and where, in an action of claim and delivery of personal property, each party has a verdict for the part of the property in controversy as both parties have verdicts, both should recover costs. Stoney v. Bailey, 28 S. C. 156, 5 S. E. 347.

Costs taxable where action discontinued.—An action which is commenced but thereafter discontinued is within the purview of this section, and in such cases a party may, under this section, have his costs taxed and an execution issued therefor. Duncan v. Duncan, 93 S. C. 487, 76 S. E. 1099, 1101. But where the action is discontinued because of lack of jurisdiction over the defendant's person or of the subject matter of the suit, then the court itself may not, in such cases, provide for the payment of costs. Id.

Where a complaint is dismissed, the plaintiff is liable for the costs, under this section, of all the references in the action. Huffman v. Stork, 25 S. C. 267.

Defendant not liable until and because case lost.—Under this section the defendant is in no sense liable for these costs until and because he has lost his case. People's Bank v. Aetna Ins. Co., 76 F. 548.

Costs taxed as matter of course, only against parties to record.—The provisions of this section that costs shall be allowed "accordingly as the action may terminate, and shall be inserted in the judgment against the losing party," indicate that costs are to be taxed, as a matter of course, only against those who are parties on the record, and therefore may be reached by a judgment entered thereon. State v. Marshall, 28 S. C. 559, 6 S. E. 564.

In Thompson v. Thompson, 6 S. C. 279, 287, the court declined to consider whether, since the code, costs under former laws could be taxed. For exception where costs may be taxed against one not a party to the record, see § 770 and note thereto.

Costs accruing before party brought in not taxable.—This section does not allow a person brought in as a party after the commencement of an action to be charged with costs which had previously accrued. Williams v. Washington, 43 S. C. 355, 21 S. E. 259.

Nor are costs arising after party dismissed from case taxable to him.—Under this section where an action is commenced against a board of aldermen, in which there is involved but one issue, which is finally determined in the plaintiff's favor, and afterwards this board is succeeded in office by a new board, when, by amendment, other parties are brought in and other issues are

raised and litigated, the original defendants are properly chargeable with the costs incurred in the determination of the first issue only. *Scott v. Alexander*, 23 S. C. 120.

And a plaintiff is not required to pay costs between rival defendants.—A plaintiff should not be required to pay the costs, under this section, of an action attributable entirely to litigation between rival defendants. *McCrady v. Jones*, 36 S. C. 136, 15 S. E. 430, 451, 52 L. R. A. 582, Ann. Cas. 12B, 1137.

Neither should one defendant pay "all" costs where a portion has been assessed against another defendant.—Where a decree, which was not appealed from, adjudges that defendant B. recover his costs, under this section, against defendant W. alone, and leaves open for future adjustment the costs between the other parties, it is error to subsequently charge another defendant with "all" the costs in the case. *Williams v. Washington*, 43 S. C. 355, 21 S. E. 259.

But where one of co-defendants "prevails" against the other on appeal he is entitled to Supreme Court costs.—Where a bank and a surety company were both defendants in the original action to settle the affairs of an insolvent corporation wherein it was held that the surety company was not liable to the bank upon an indemnity bond, and on appeal by the bank from this holding the surety company was held liable to the bank less a certain sum for set-off, the bank was within the meaning of the phrase "prevailing party" as used in this section and entitled to costs. *Murray v. Aiken Mining, etc., Co.*, 39 S. C. 457, 18 S. E. 5.

Public functionaries and private trustees may be required personally to pay costs.—Where public functionaries, who are exercising special public trusts of functions, or trustees of private individuals, by their malfeasance or other misconduct render a suit against them necessary, they may be required personally to pay costs. *Scott v. Alexander*, 23 S. C. 120, 126.

Liability of state highway department.—State highway department is liable for costs in action against it, notwithstanding statute authorizing action provided for recovery of actual damages. *Sawyer v. State Highway Department*, 164 S. C. 53, 161 S. E. 883.

State board of bank control is liable for costs though agency of state. 192 S. C. 164, 5 S. E. (2d) 865.

Interest does not run on costs under this section.—This section is not affected by § 6736, providing that, "by all money decrees and judgments of courts enrolled or entered * * * the legal interest shall be at seven per centum per annum so as to allow interest to run on costs in civil actions." *People's Bank v. Aetna Ins. Co.*, 76 F. 548.

B. Cases in Equity.

In absence of order to the contrary same rule exists in chancery as at law.—*Lockwood v. Lockwood*, 73 S. C. 18, 52 S. E. 735; *Cooke v. Poole*, 26 S. C. 321, 2 S. E. 609.

So in absence of such order costs must be taxed in favor of prevailing party.—Attorneys having lost in a contest with plaintiff in partition respecting their fees, costs incurred solely in that contest should have been taxed against them, under this section, in the absence of a contrary direction by the circuit court, based on equitable grounds. *Cauthen v. Cauthen*, 81 S. C. 313, 62 S. E. 319.

The payment of costs in chancery is within the discretion of the court.—*Brown v. Brown*, 44 S. C. 378, 22 S. E. 412, 2 A. L. R. 447, and the cases there cited; *Younger v. Massey*, 41 S. C. 50, 19 S. E. 125; *Geddes v. Jones*, 40 S. C. 402, 19 S. E. 9; *Dial v. Tappan*, 20 S. C. 167, Ann. Cas. 16E, 133; *Cooke v. Pennington*, 15 S. C. 185, 4 Am. St. Rep. 189; *Nimmons v. Stewart*, 13 S. C. 445. See also, *Alexander v. Meroney*, 30 S. C. 335, 9 S. E. 266; *Bean v. Bean*, 28 S. C. 607, 5 S. E. 827; *McAfee v. McAfee*, 28 S. C. 218, 5 S. E. 593; *Gary v. Barnwell*, 24 S. C. 595; *Johnson v. Pelot*, 24 S. C. 255, 264, 58 Am. Rep. 253, 52 Am. St. Rep. 947, 29 L. R. A. 449, L. R. A. 1915B, 963, 1 A. L. R. 1195, 1208, 27 A. L. R. 187, 250; *Covar v. Sallat*, 22 S. C. 265; *Hand v. Savannah, etc., R. R. Co.*, 21 S. C. 162, 54 L. R. A. 824, 11 A. L. R. 715; *Lake v. Shumate*, 20 S. C. 23, 88 Am. Dec. 181; *Pearson v. Carlton*, 18 S. C. 47, 78 Am. Dec. 666, 12 Am. St. Rep. 99, 101 Am. St. Rep. 869, 119 Am. St. Rep. 592, 594, 28 L. R. A. 838, 8 L. R. A. (N. S.) 51, 69, 27 A. L. R. 212; *Jacobs v. Bush*, 17 S. C. 594, 595, L. R. A. 1915B, 963, 974, 1 A. L. R. 1204, 1212; *Childs v. Frazee*, 15 S. C. 612; *Winsmith v. Winsmith*, 15 S. C. 611, 48 L. R. A. (N. S.) 763; *Mars v. Connor*, 9 S. C. 70, 35 L. R. A. (N. S.) 12.

Some doubt was intimated in the early case of *Scott v. Alexander*, 23 S. C. 120, as to the discretionary power of a judge in chancery to enter an order for costs where the cause had not proceeded to a final judgment on the merits; but all doubt on this question has been removed as to a cause in which such final judgment has been reached. *Cooke v. Poole*, 26 S. C. 321, 2 S. E. 609.

It would seem that all doubt as to a chancellor's discretion to tax costs at any time in a case is removed by the insertion of the word "commenced" in the present code.—Ed. note.

Under this section one commencing a suit in equity, which he is not entitled to maintain, and which is afterwards dismissed, may properly be required to pay the costs. *McCrady v. Jones*, 36 S.

C. 136, 15 S. E. 430, 52 L. R. A. 582, Ann. Cas. 12D, 1137.

Under this section a pretended purchaser who resists action for foreclosure is liable for costs on his title being adjudged bad. *Dendy v. Waite*, 36 S. C. 569, 15 S. E. 712.

Under this section, in action for specific performance of an agreement to purchase a city lot, the circuit judge may in his discretion, decree that each party pay his own costs. *Webb v. Chisolm*, 24 S. C. 487, 19 Am. St. Rep. 282.

Where, in an action in equity by persons unable to contract, or by one of a class for the benefit of all, the decision is unfavorable, the costs and disbursements may be apportioned and paid out of the fund in court. *Cauthen v. Cauthen*, 81 S. C. 313, 62 S. E. 319; *Roberts v. Johns*, 24 S. C. 580, 14 L. R. A. 416, 1 A. L. R. 787; *Nimmons v. Stewart*, 13 S. C. 445. See, also, *Baxter v. Baxter*, 23 S. C. 114, 29 L. R. A. 244, 1 L. R. A. (N. S.) 255.

And judge's tacit allowance of clerk to tax costs against losing party not reviewable by subsequent circuit judge.—Upon the rendition of a decree in chancery, in favor of one or the other party, it is within the discretion of the judge rendering the decree, under this section, either to direct, by an order, who shall pay the costs, or tacitly allow them to be taxed by the clerk in favor of the prevailing party; and his action in that respect is not reviewable by any subsequent circuit judge. *Cooke v. Poole*, 26 S. C. 321, 2 S. E. 609.

And Supreme Court will not interfere with equity's discretion as to costs.—Under the provisions of this section the Supreme Court will not interfere with a decree fixing costs in an equity decree except in a clear case of abuse of discretion, or the violation of some rule of law. *Matheson v. Rogers*, 84 S. C. 458, 65 S. E. 1054, 67 S. E. 476, L. R. A. 1915B, 939; *Cauthen v. Cauthen*, 81 S. C. 313, 62 S. E. 319; *Dendy v. Waite*, 36 S. C. 569, 15 S. E. 712; *Scott v. Scott*, 29 S. C. 414, 7 S. E. 811, 18 Am. St. Rep. 674, 704. See also, *Young v. Edwards*, 33 S. C. 404, 11 S. E. 1066, 26 Am. St. Rep. 689, 10 L. R. A. 55, 100 Am. St. Rep. 650, 47 L. R. A. (N. S.) 579, 1 A. L. R. 1195; *Bredenburg v. Landrum*, 32 S. C. 215, 216, 10 S. E. 956, 99 Am. St. Rep. 168; *Anderson v. Butler*, 31 S. C. 183, 184, 9 S. E. 797, 5 L. R. A. 166, 136 Am. St. Rep. 808, L. R. A. 1918B, 12, Ann. Cas. 12B, 1020; *Miller v. Stark*, 29 S. C. 325, 7 S. E. 501; *Booker v. Wingo*, 29 S. C. 116, 7 S. E. 49, 7 Am. St. Rep. 587, 48 L. R. A. 848, L. R. A. 1918D, 942, Ann. Cas. 13A, 522; *Hunter v. Mills*, 29 S. C. 72, 6 S. E. 907, 29 Am. St. Rep. 48, 40 L. R. A. (N. S.) 545; *Finch v. Finch*, 28 S. C. 164, 165, 5 S. E. 348, 44 L.

R. A. (N. S.) 890; *Graveley v. Graveley*, 25 S. C. 1, 2, 60 Am. Rep. 478, 27 L. R. A. 113, 29 L. R. A. 644, L. R. A. 1915A, 431, 433.

Where the circuit judge in an equity case exercises his discretion as to costs by omitting to make any order therefor, the Supreme Court will not direct the judge to make such an order. *Harbon v. Parker*, 19 S. C. 598; *Walker v. Walker*, 17 S. C. 329, 339, 4 Am. St. Rep. 707, Ann. Case. 13C, 561; *Johnson v. Pelot*, 24 S. C. 255, 58 Am. Rep. 253, 52 Am. St. Rep. 937, 29 L. R. A. 449, L. R. A. 1915B, 963, 1 A. L. R. 1195, 1208, 27 A. L. R. 187, 250.

In a suit for partition, and to establish a claim against the common estate, on judgment for plaintiff, the chancellor did not abuse his discretion in taxing the costs against the estate, under this section, rather than against defendants' interest therein. *Cauthen v. Cauthen*, 81 S. C. 313, 62 S. E. 319.

Costs, under this section, of readvertising a sale in partition were improperly taxed against plaintiff because he failed to pay in his whole bid in cash, he being justified in claiming a credit for the amount of his distributive share in the proceeds of the sale, and the balance due him on his judgment. *Cauthen v. Cauthen*, 81 S. C. 313, 62 S. E. 319.

But may question judgment where it is alleged costs taxed against party not legally liable therefor.—No interpretation of equity's discretionary powers to tax costs under this section will preclude the Supreme Court from hearing an appeal from the decision of a judge who only heard the question of costs, where it is alleged that he awarded costs against parties not in law liable therefor. *Scott v. Alexander*, 23 S. C. 120.

And such discretion does not include taxing of costs where principal matter in controversy is still unsettled.—Under the provision of this section that costs in equity are within the discretion of the court as a part of the relief granted, in a suit by an indorser of a note to restrain the holder from selling his property under attachment process on the ground that the holder had attached property of the maker sufficient to pay the debt, and had negligently discharged part of it, where an order is granted restraining the sale, and the cause is referred to a referee to ascertain the value of the property so released, the complainant is not entitled to costs. The principal matter in controversy having been referred back, the question of costs is premature. *Twiggs v. Augusta Sav. Bank*, 26 S. C. 612, 2 S. E. 398.

Cost in Supreme Court taxed against losing party both at law and in equity.—Even in equity cases, under this section, costs and disbursements in the Supreme Court are taxed against the losing

party on appeal, irrespective of the result below, and the circuit judge or chancellor has no power or discretion to make a contrary direction. *Cauthen v. Cauthen*, 81 S. C. 313, 62 S. E. 319, and the cases there cited; *Sullivan v. Latimer*, 43 S. C. 262, 21 S. E. 3; *Cleveland v. Cohrs*, 13 S. C. 397, 51 Am. St. Rep. 434; *Heath v. Town of Darlington*, 176 S. C. 252, 180 S. C. 52; *Ex parte Miller*, 192 S. C. 164, 5 S. E. (2d) 865.

See § 758 and the note thereto.

III. PLEADING AND PRACTICE

Costs illegally inserted or omitted from judgment reviewable by Supreme Court.—Costs form a part of the judgment under this section, as much so as the interest which may accrue "from the time of the verdict or report, until judgment be finally entered," as provided in §§ 761, 762, and, like such interest, must be inserted in the judgment. And there is dictum in the case cited below to the effect that if costs are illegally inserted in, or omitted from, the judgment, to that extent the judgment is erroneous and illegal, and may be corrected by the Supreme Court. *Stegall v. Bolt*, 11 S. C. 522, 525. But this dictum appears to be against the weight of authority. See *Harbin v. Parker*, 19 S. C. 598; *Walker v. Walker*, 17 S. C. 329, 339, 4 Am. St. Rep. 707, Ann. Cas. 13C, 561.

Under this section the usual method of taxing costs and disbursements is by motion before the clerk of the court, and if any one is not satisfied with the action of the clerk, appeal therefrom or motion to correct, before the circuit court, from which an appeal may be taken to the Supreme Court. *Lockwood v. Lockwood*, 73 S. C. 18, 52 S. E. 735. See also the authorities therein cited.

But taxation by clerk must be first reviewed in lower court on motion to correct.—Under this section alleged errors in the taxation of costs by the clerk are not reviewable by an appellate court until passed upon and decided in the court below, by a motion to correct such errors. *Cooke v. Poole*, 26 S. C. 321, 2 S. E. 609; *Dauntless Mfg. Co. v. Davis*, 24 S. C. 536. See, also, *Armstrong v. Freisleben*, 28 S. C. 605, 5 S. E. 479, 7 A. L. R. 5; *Hecht v. Freisleben*, 28 S. C. 181, 5 S. E. 475, 7 A. L. R. 5, 26, 79; *Dilling, etc., Co. v. Foster*, 21 S. C. 334, 100 Am. Dec. 507, 72 Am. St. Rep. 36, 94, 33 L. R. A. 551; *Bradley v. Rodelsperger*, 6 S. C. 290, 291.

However, there may be direct appeal from erroneous order of court below.—Where it is desired to review a taxation of costs by the clerk under this section, the proper practice is by motion, in the court below, to correct such taxation, and the appeal should be from the decision on such motion; but where the clerk has undertaken to carry out an erroneous

order of a circuit judge in reference to the taxation of costs, such erroneous order may be appealed from, and the taxation thereby corrected. *Dilling, etc., Co. v. Foster*, 21 S. C. 334, 340, 100 Am. Dec. 507, 72 Am. St. Rep. 36, 94, 33 L. R. A. 551.

Supreme Court may only affirm or reverse decision as to costs at law.—The general rule in cases at law, where the Supreme Court is reviewing the decision of the circuit court, is that such court can only affirm or reverse, as to costs, and has no power to modify the decision. *Salley v. Seaboard, etc., Ry.*, 79 S. C. 388, 60 S. E. 938; *Hosford v. Wynn*, 22 S. C. 309, 313.

As the right to tax costs is not within the original jurisdiction of the Supreme Court.—The right to tax costs under this section or the manner of adjusting them is a matter not within the original jurisdiction of the Supreme Court, and cannot be there adjudged except on appeal from rulings in the court below. *Huff v. Watkins*, 20 S. C. 477, 53 Am. Rep. 539, 5 L. R. A. (N. S.) 1096.

Supreme Court would not disturb circuit judge's ruling as to circuit court costs in a solvent building and loan association's receivership proceeding where some of such costs would probably have accrued in receivership proceeding without interference of State Board of Bank Control, which had been unsuccessful in litigation, and it was not shown that circuit judge abused his discretion respecting circuit court costs. *Ex parte Miller*, 192 S. C. 164, 5 S. E. (2d) 865.

So abatement of \$5 on appeal leaves respondent prevailing party.—Where, on appeal in a law action from a judgment of \$42, the amount was reduced \$5, the judgment was affirmed, entitling the respondent, as the "prevailing" party, under this section, to recover Supreme Court costs. *Salley v. Seaboard, etc., Ry.*, 79 S. C. 388, 60 S. E. 938.

Where, on appeal, it was held that contested land belonged to the plaintiff, and that one of the two mortgages held by the defendant should be delivered up for cancellation, but that defendant should have a lien on the land for the amount of the other mortgage, payment of which he had refused, it was not error under this section to tax all the costs of the appeal against the defendant. *Williams v. Washington*, 43 S. C. 355, 21 S. E. 259.

But if appellant succeeds in modifying decree in equity Supreme Court may allow him costs as prevailing party, under this section.—*Sullivan v. Latimer*, 43 S. C. 262, 21 S. E. 3. See *Salley v. Seaboard, etc., Ry.*, 79 S. C. 388, 60 S. E. 938.

If on appeal to Supreme Court judgment is modified, appellant is prevailing party and entitled to taxation of his costs. If however the Supreme Court

orders a new trial on condition, that is unless respondent remit a portion of the judgment, and affirming the judgment, if the remittance is made, then if such remittance is made, it would be an affirmation and the respondent entitled to tax his costs. Appellant held entitled to tax his cost where judgment as to actual damages affirmed but reversed as to punitive damages. *Gatling v. Great A. & P. Tea Co.*, 170 S. C. 219; 170 S. E. 153.

And where judgment reversed on merits costs also reversed.—In equity where an appeal is had upon the merits, as well as upon the question of costs, and the appeal below is reversed upon some point affecting the merits, the order for costs will likewise be reversed. *Scott v. Alexander*, 23 S. C. 120, and the cases there cited.

Where, on appeal from a circuit decree

overruling a demurrer, with costs allowed under this section, to be paid out of certain proceeds of sale, the decree is reversed and the complaint dismissed, the direction for the payment of costs falls with the decree, although not mentioned in the exceptions or in the opinion of the court. *Bratton v. Massey*, 18 S. C. 555.

Security for costs.—Resident beneficiaries of action to collect stockholders' liability not required to give security for cost. *Griffin et al. v. Allendale Bank, et al.*, 170 S. C. 212; 170 S. E. 149. See circuit court rule 10 which requires non-residents to give cost.

See generally.—*Setzler v. Odom*, 174 S. C. 56, 176 S. E. 869; *Heath v. Town of Darlington*, 176 S. C. 252, 180 S. E. 52; *Ex parte Miller*, 192 S. C. 164, 5 S. E. (2d) 865.

§ 757. Cases in partition of property and foreclosure of property of certain value.—All allowances for costs prescribed by sections 756, 758, and chapter 117 to which the provisions of this section are applicable shall be subject thereto.

(1) **COSTS IN PARTITION CASES.**—The costs allowed by law in all cases of partition where the property sought to be partitioned does not exceed one thousand dollars in value, and in actions for foreclosure of mortgage where the amount claimed does not exceed five hundred dollars, shall be one-half of the cost allowed in cases where the value exceeds those sums, and this provision shall apply to all costs in the cause.

(2) **COSTS AND EXPENSES IN SETTLEMENT OF ESTATES—CERTAIN VALUES.**—All the items of cost and expenses allowed by law in the administration and settlement of estates, where the amount of such estate is less than one hundred dollars, shall be one-half the amount as now provided by law.

(3) **COSTS FOR REFERENCES.**—Costs for references shall only be taxed for the number of days which the master shall certify to have been unavoidably necessary, and no costs shall be taxed for references where no testimony has been taken, or argument had.

(4) **COSTS ONLY TO SUCCESSFUL PARTY—COSTS ON PROVING CLAIMS.**—No costs shall be allowed to any party unless he succeed, in whole or in part, in his claim or defense, unless otherwise directed by the judge hearing the cause. No costs shall be allowed for proving uncontested claims; and in proving other claims by attorneys not of record, no costs shall be allowed except for the days in which the master or referee is occupied in taking proof for or against such claim.

(5) **COSTS TO MASTER, ETC., FOR REFERENCE.**—The master, special master, or referee shall be entitled to three dollars for each reference, and the work of one day shall constitute a reference, without regard to the number of claims presented and passed upon.

(6) **COSTS FOR MILEAGE.**—No constructive mileage shall be allowed, but in all cases costs for mileage shall only be taxed for the number of miles actually traveled.

1932 Code, § 757; Civ. C. '22, § 5723; Civ. C. '12, § 4206; Civ. C. '02, § 3097; R. S. 2548; 1897 (22) 429.

Editor's Note.—Under the standing of this section prior to 1897 there was contained herein the words "except Clerk's and Sheriff's costs," at the end of subdivision one. The quoted phrase was stricken out at the above mentioned date. See *Addison v. Sujette*, 50 S. C. 192, 27 S. E. 631; 51 S. C. 305, 28 S. E. 948, Ann. Cas. 17D, 120, Ann. Cas. 18 B, 281, 11 A. L. R. 378. See §§ 4920 et seq. for reference "chapter 117."

"All costs" includes commission to master for making sale.—The term "all costs," used in this section, providing that in certain cases the costs shall be one-half of the usual costs and declaring that this provision shall apply to "all costs" in the cause, includes fees allowed to officers, including the commission allowed to the master, by §§ 4941, for making the sale. *Bryan v. Reams*, 59 S. C. 340, 37 S. E. 921.

Where no necessity for partition or foreclosure costs are not taxable under

this section.—Costs are not taxable under this provision of this section as to half costs, where the pleadings show there was no necessity for an action for partition or an action for the foreclosure of a mortgage, it appearing that there was no objection to a division of the land and no obstacle in the way of making a partition by the act of the parties. *Williams v. Washington*, 43 S. C. 355, 21 S. E. 259.

Where foreclosure is sought under a void mortgage the action is not one that is contemplated by this section.—Where a mortgagor sues to determine his title to the mortgaged land after a void sale under the mortgage, offering to pay the mortgage, and a defendant claims under a mortgage made by the purchasers at such void sale, and asks foreclosure thereof, the action is not one to foreclose a mortgage, in which, under this section, only half costs can be allowed. *Williams v. Washington*, 43 S. C. 355, 21 S. E. 259.

§ 758. Attorneys' cost on appeal to Supreme Court, etc.—When an appeal is taken to the Supreme Court of this State, the following costs shall be allowed in all classes of cases legal or equitable: for the plaintiff's or defendant's attorneys, for making and serving a case or a case containing exceptions, ten dollars; for procuring an order of injunction, five dollars; on argument in the Supreme Court, twenty-five dollars.

1932 Code, § 758; Civ. C. '22, § 5724; Civ. C. '12, § 4207; Civ. C. '02, § 3098; 1901 (23) 620.

Editor's note.—Under the prior standing of this section the words "When an appeal is taken to the Supreme Court of this State," were not included therein. Under this wording, it was held in the case of *Finley v. Cudd*, 45 S. C. 87, 22 S. E. 753, that the section did not apply to proceedings in the Supreme Court, but only to those in the circuit court. It is obvious that under the present wording the provisions of the section can have no application to proceedings in the circuit court.

Under a prior standing of this section the provisions were different, in that fifteen dollars were allowed on appeal to the Supreme Court, and for argument therein, twenty dollars. Under the present standing, the express provision "on appeal" has been omitted, a fee of ten dollars being substituted for "making or serving a case, or a case containing exceptions," and the fee for argument has been raised to twenty-five dollars. For a case decided under the early law, see *Sease v. Dobson*, 36 S. C. 554, 15 S. E. 703, 704. In this case it was held that the prevailing party on appeal, whether appellant or respondent, was entitled to the fee for appeal as mentioned in the section.

Under the provisions of this section as enacted in 1901, "From and after the passage of this act when an appeal is taken to * * *" appeared at the beginning of the section. See *Saverance v. Lockhart*, 66 S. C. 539, 45 S. E. 83. In this case it was held that where notice of appeal was filed before passage of this act, and return or agreed case filed after such passage, the prevailing party was not entitled to recover costs under the act.

"Cases" includes any appeal allowed by law.—The word "cases," in the phrase "in all classes of cases," in this section is used in a sense sufficiently broad to include any instance where an appeal is allowed by law, and contemplates within its meaning "special proceedings" as contradistinguished from "actions." *Sease v. Dobson*, 36 S. C. 554, 15 S. E. 703.

This section, providing that on appeal to the Supreme Court costs on argument, of \$25, shall be allowed, authorizes such allowance of costs, where a proceeding has been brought before a justice of the court for a restraining order, and an appeal is taken therefrom. *Western Union Tel. Co. v. Winnsboro*, 72 S. C. 42, 51 S. E. 528.

See Editor's note of this section as to changes in amount of attorney's costs allowable.

Costs on appeal in proceedings for prohibition are allowable under this section, which expressly provides that cost "shall be allowed in all classes of cases, legal or equitable, * * * on appeal to the Supreme Court." *State v. Town Council*, 47 S. C. 225, 25 S. E. 38.

Costs in Supreme Court taxed against losing party both at law and in equity.—See this catchline under § 756, wherein are treated the cases of *Sullivan v. Latimer*, 43 S. C. 262, 21 S. E. 3, and *Cleveland v. Cohrs*, 13 S. C. 397, 51 Am. St. Rep. 434.

This section allows the costs provided for an appeal to the prevailing party, without regard to the necessary termination of the action. *Huff v. Watkins*, 25 S. C. 243.

Where on two appeals to the Supreme Court the plaintiff was successful in reversing judgments of the circuit court,

and after this the defendant died and the action was abated, the plaintiff was entitled to the costs of the two appeals in which he had prevailed, notwithstanding there had been no final determination of the action. *Huff v. Watkins*, 25 S. C. 243.

Where three cases tried together each prevailing party entitled to costs.—Where, for the sake of convenience, three cases are tried together in the Supreme Court, but they are not, and are of such a nature that they can not be, consolidated, the prevailing party in each case is entitled to his costs under this section. *Baker v. Irvine*, 64 S. C. 430, 42 S. E. 194.

See generally. *Ketchin v. Rion*, 72 S. C. 153, 51 S. E. 557. As to attorneys' fees. *Cauthen v. Cauthen*, 76 S. C. 226, 56 S. E. 978, 11 A. L. R. 715; *Butler v. Butler*, 73 S. C. 402, 53 S. E. 646; *Park v. Laurens*, 68 S. C. 212, 46 S. E. 1012, 27 L. R. A. (N. S.) 1129, L. R. A. 1916D, 94; *Boyd v. Lee*, 35 S. C. 19, 15 S. E. 332, 333.

§ 760. Officers may take out execution for costs.—Whenever a case may be settled or determined at the mutual costs of parties, or discontinued or settled by plaintiff, or the judgment shall be for defendant, or the execution against the defendant shall be returned nulla bona, any of the officers aforesaid shall have power to issue an execution for his costs, or the clerk may issue for the whole, directed to the sheriff who is authorized and required to execute such process as in other cases of execution delivered to him.

1932 Code, § 760; Civ. P. '22, § 625; Civ. P. '12, § 363; Civ. P. '02, § 324; 1878 (16) 631.

As to necessary payment of costs in the first action for recovery of real property as precedent to right to bring second ac-

tion, see § 374 and the note thereto.

Costs taxable where action discontinued.—See this catchline under § 756.

§ 761. Interest on verdict or report—when allowed.—When the judgment is for the recovery of money, interest from the time of the verdict or report, until judgment be finally entered, shall be computed by the clerk, and added to the costs of the party entitled thereto.

1932 Code, § 761; Civ. P. '22, § 626; Civ. P. '12, § 364; Civ. P. '02, § 325; 1870 (14) § 336.

§ 762. Costs—how insert in judgment—adjustment of interlocutory costs.—The clerk shall insert in the entry of judgment, on the application of the prevailing party, upon five days' notice to the other, except when the attorneys reside in the same city, village or town, and then, upon two days' notice, the sum of the allowances for costs and disbursements, as provided by law, the necessary disbursements, including the fees of officers allowed by law, the fees of witnesses, the reasonable compensation of commissioners in taking depositions, the fees of referees, and the expense of printing the papers for any hearing, when required by a rule of the court. The disbursements shall be stated in detail and verified by affidavit. A copy of the

items of the costs and disbursements shall be served, with a notice of adjustment.

Whenever it shall be necessary to adjust costs in any interlocutory proceeding in an action, or in any special proceedings, the same shall be adjusted by the judge before whom the same may be heard, or the court before which the same may be decided or pending, or in such other manner as the judge or court may direct.

1932 Code, § 762; Civ. P. '22, § 627; Civ. P. '12, § 365; Civ. P. '02, § 326; 1870 (14) § 337.

See § 756 as to when costs are allowable in civil actions and the note thereto.

The trial judge, being unable to separate the costs as provided for in this section, incurred under the original issues, from those incurred under issues of the amended complaint, was held not to err in allowing them as if under the original issue. *Scott v. Alexander*, 27 S. C. 15, 2 S. E. 706.

Costs and disbursements are distinguishable.—See this catchline under § 756.

Disbursements must be verified by affidavit.—*Mitchell v. Barrs*, 64 S. C. 197, 41 S. E. 962, Ann. Cas. 14C, 739; *Cureton v. Westfield*, 24 S. C. 457.

Where fees are paid by party they are considered disbursements.—See this catchline under § 756.

Costs of clerk and sheriff not paid by attorney taxable without verification.—Costs of clerk and sheriff when not paid by the attorneys are not strictly speaking disbursements, and if charged as due to the several officers, they need not be verified by affidavit nor certified to by the officers claiming. *Cureton v. Westfield*, 24 S. C. 457.

As are costs of witnesses.—When disbursements are not verified by affidavit, in accordance with the provision of this section, the costs will be regarded as taxed in favor of the witnesses, in which case the witnesses have the right to execute a valid receipt for their costs. *Mitchell v. Barrs*, 64 S. C. 197, 41 S. E. 962, Ann. Cas. 14C, 739.

Costs for witnesses may be paid directly to witnesses.—See this catchline treating the case of *Mitchell v. Barrs*, 64 S. C. 192, 41 S. E. 962, Ann. Cas. 14C, 739, under § 374, analysis line III, B, 2, b.

Defendant proving his contention entitled to have clerk tax his costs under this section.—In equity and under this section, a defendant, in a proceeding to foreclose an agricultural lien, who claims one-half of the crops free from the lien and makes out his case and shows that he was without fault in bringing about the litigation, is entitled to his costs. *Baird v. Weatherford*, 100 S. C. 490, 85 S. E. 59.

Proper for judge to direct in decree that clerk enter costs as matter of course.—Though the costs are to be inserted in

the judgment as a matter of course, it is not error to direct in the decree that the clerk shall so enter them. *Johnson v. Masters*, 49 S. C. 525, 27 S. E. 474.

Clerk may give required notice.—The notice of taxation required by this section may be given by the clerk as well as by the attorneys. *Cureton v. Westfield*, 24 S. C. 457.

Reimbursement for substituted type-written copies.—See this catchline under § 779.

"Rule" does not include order pro hac vice for printing of papers so as to allow same as disbursement.—This section allows "the expense of printing the papers for any hearing, when required by a rule of the court," to be taxed as disbursements, but an order of the court that the report of a certain referee be printed is merely an order pro hac vice and not a "rule within the meaning of the section," and therefore does not bring the expense within the provision. *Scott v. Alexander*, 27 S. C. 15, 2 S. E. 706.

The same reasons apply to the expense of printing the briefs, and of employing a stenographer, and therefore such expense will be disallowed. *Id.*

Expenses of printing papers in the circuit court can not be taxed by the clerk under this section. And neither will expenses of notices to creditors under new issues framed after amendment of complaint be allowed. *Id.*

Under this section a 46 page statement of points and authorities was properly allowed, where there was no specification of any surplus statements. *McElwee v. Kennedy*, 59 S. C. 335, 37 S. E. 920. This case was decided under the provisions of Supreme Court Rules 8 and 9 (the subject matter of each being now incorporated in Rule 8) which have seen radical changes in their structural composition. —*Ed. Note.*

Clerk's adjustment is not a reference and is not so to be taxed.—The adjustment of costs by the clerk in accordance with the terms of this section is not a reference, and it may not be taxed as such in the costs. *Cureton v. Westfield*, 24 S. C. 457.

To order master to estimate costs does not conflict with clerk's duties under section.—There is nothing inconsistent

with the duty of the clerk under this section to insert costs and disbursements, that the Circuit Judge in an equity case should, preparatory to an insertion into the judgment of the costs in such a case, order the master of the court to estimate the costs and disbursements. *Dial v. Tappan*, 20 S. C. 167, Ann. Cas. 16E, 133.

Expenses under illegal attachment should not be taxed as costs.—Where, on appeal from a taxation of costs for the keep of horses under an illegal warrant of attachment by the plaintiff, the only exception is as to the amount of such costs, the court will not pass on the question whether such costs should have been taxed. *Addison v. Sujette*, 60 S. C. 58, 38 S. E. 229. The court was of the opinion in this case that the costs of the keep would have been more properly assessed against the plaintiff as one of the items of the damages secured by the undertaking entered into by him before the attachment. See also, *Southern Ry. Co. v. Shepard*, 42 S. C. 543, 20 S. E. 481.

Costs illegally inserted or omitted from judgment reviewable by Supreme Court.—See this catchline under § 756.

But taxation by clerk must be first received in lower court on motion to correct.—See this catchline in note to § 756.

Taxation of costs must await final judgment when circuit decree has been reversed.—*Addison v. Duncan*, 35 S. C. 165, 14 S. E. 305, 61 L. R. A. 517, 555.

But see *Heath v. Town of Darlington*, 176 S. C. 252, 180 S. E. 52, where the court held that plaintiff who twice prevailed on appeal was entitled to have judgment entered taxing costs of appeals, though action had not been finally determined but was awaiting trial. However, judgment for costs could not be

enforced until entry of final judgment in the action. The court here said that *Black v. Kirkland Seed Co.*, 163 S. C. 222, 161 S. E. 489, did not hold otherwise.

An order of circuit court confirming taxation is not a final judgment that allows previous orders to be heard. *Huffman v. Stork*, 25 S. C. 267.

Points and authorities in Supreme Court are taxable as disbursements. *Elder & Co. v. C. C., etc., R. Co.*, 15 S. C. 610.

Court officers and witnesses, until paid have an interest in the judgment as to the respective amount due them. *Black v. Kirkland Seed Co.*, 163 S. C., 222, 161 S. E., 489.

Set off of cost against judgment.—Cost incurred by defendant in obtaining a reversal may be set off against judgment recovered against it in second trial. *Ibid.*

Assignment of part interest in judgment recovered by plaintiff to his attorney as attorney's compensation held not to prevent defendant from setting off cost incurred in former appeal against judgment. *Ibid.*

Costs on appeal to United States Supreme Court.—Respondent sustaining judgment on appeal to United States Supreme Court is entitled to costs for printing brief and for transcript of record. Taxation of costs by clerk of that court is not final so as to preclude any additional taxation by state court or officer thereof. Nor is this section, as thus applied, unconstitutional as attempting to control or direct practice of United States Supreme Court. *Ford v. Atlantic Coast Line Ry. Co.*, 170 S. C. 92, 169 S. E. 834.

§ 763. Costs on postponement of trial.—When an application shall be made to a court or referee to postpone a trial, the payment to the adverse party of a sum not exceeding ten dollars, besides the fees of witnesses, may be imposed, as the condition of granting the postponement.

1932 Code, § 763; Civ. P. '22, § 628; Civ. P. '12, § 366; Civ. P. '02, § 327; 1870 (14) § 340.

§ 764. Costs on motion.—Costs may be allowed on a motion, in the discretion of the court or judge, not exceeding ten dollars, and may be absolute or directed to abide the event of the action.

1932 Code, § 764; Civ. P. '22, § 629; Civ. P. '12 § 367; Civ. P. '02, § 328; 1870 (14) § 341.

Costs for "Motion" cannot be taxed without court order.—The costs provided for in this section are discretionary with the court and cannot be taxed by the clerk without an order allowing them. *Dauntless Mfg. Co. v. Davis*, 24 S. C. 536.

Section does not apply to appeal to circuit judge from decision of clerk.—

This section, which provides that "costs" may be allowed on a motion, in the discretion of the court or judge, not exceeding ten dollars," applies only to motions, and not to an appeal to the circuit judge from the decision of the clerk, in which latter case no such allowance should be made. *State v. Marshall*, 28 S. C. 559, 6 S. E. 564.

§ 765. Costs against infant plaintiff.—When costs and disbursements are adjudged against an infant plaintiff, the guardian by whom he appeared in the action shall be responsible therefor, and payment thereof may be enforced by attachment.

1932 Code, § 765; Civ. P. '22, § 630; Civ. P. '12, § 368; Civ. P. '02, § 329; 1870 (14) § 342.

§ 766. Costs in action by or against executors, administrators, trustees, or persons authorized by statute.—In an action prosecuted or defended by an executor, administrator, trustee of an express trust, or a person expressly authorized by statute, costs shall be recovered, as in an action by and against a person prosecuting or defending in his own right; but such costs shall be chargeable only upon or collected of the estate, fund, or party represented, unless the court shall direct the same to be paid by the plaintiff or defendant personally, for mismanagement or bad faith in such action or defense.

1932 Code, § 766; Civ. P. '22; § 631; Civ. P. '12, § 369; Civ. P. '02, § 330; 1870 (14) § 343.

Cross reference.—See section 756 and notes thereto.

Editor's note.—The provision of this section that an administrator shall not be liable for costs except for bad faith was in conflict with and prevailed over the provision of § 413, making an administrator personally liable for costs in actions for wrongful death, until 1903, when such provision was omitted from § 413 by amendment.

Administrator not personally liable unless guilty of bad faith in action before the court.—This section provides that, in an action prosecuted or defended by an administrator, costs may be recovered, chargeable upon the estate, unless the court shall direct the same to be paid by the administrator for mismanagement or bad faith in such action; but when there is no evidence of mismanagement or bad faith in such mentioned action, it is error for the court to make such a direction. *Clark v. Wright*, 26 S. C. 196, 1 S. E. 814, 14 L. R. A. 699.

This section does not cover a case in which an administrator, under cover of his representative character, prosecutes or defends an action really for his own benefit, and not for the benefit of the estate of his intestate, if such case does not really involve mismanagement or bad faith in such action, the section does not apply. *Id.*

The court should charge the assigned estate with costs where the assignee has

not made himself liable "for mismanagement or bad faith in the conduct of the business." *Akers v. Rowan*, 36 S. C. 87, 15 S. E. 350.

A committee is liable for the cost of a suit maliciously prosecuted by him without cause. *Ashley v. Holman*, 44 S. C. 145, 21 S. E. 624.

Where fund is in keeping of equity it is proper to order it to remain there until disputed costs be adjusted.—In the absence of an order making an executrix personally liable for costs, such costs, and disbursements in the case, under this section, are chargeable upon the funds of the estate, and where the fund is still in the court of equity, it is proper for an order to issue that it remain there until such costs, disputed, are adjusted. *Lockwood v. Lockwood*, 73 S. C. 18, 52 S. E. 735.

Costs against administrator of insolvent estate deductible from judgment subsequently obtained.—Under this section, where an administrator brings action for death by wrongful act, decedent leaving no estate, judgment for defendant for the costs of an appeal, may be deducted by him from a judgment procured by plaintiff at a subsequent trial. *Rookard v. Atlanta, etc., Ry.*, 89 S. C. 371, 71 S. E. 992, 42 L. R. A. (N. S.) 576.

Security for costs not be required under this section of residents of this state. *Griffin et al. v. Allendale Bank, et al.*, 170 S. C. 212; 170 S. E. 149. Cost non-resident. See circuit court rule 10.

§ 767. Costs on review of decision of inferior court in special proceeding.—When the decision of a court of inferior jurisdiction in a special proceeding, including appeals from probate courts, shall be brought before the circuit court for review, such proceeding shall, for all purposes of costs, be deemed an action, at issue, on a question of law from the time the same

shall be brought into court, and costs thereon shall be awarded and collected as provided by law.

1932 Code, § 767; Civ. P. '22, § 632; Civ. P. '12, § 370; Civ. P. '02, § 331; 1870 (14) § 344.

Commission for refunding of taxes not "Court of inferior jurisdiction."—The commissioner provided by an act providing for the distribution of direct taxes collected by the United States during the war and returned to the state in trust, before whom direct tax claims are to be

proved, is not a "court of inferior jurisdiction," within the meaning of this section, providing for costs when the jurisdiction of such court in a special proceeding shall be brought before the court for review. *Campbell v. Sanders*, 42 S. C. 522, 20 S. E. 415, 416.

§ 768. Costs in action prosecuted by the State.—In all civil actions, prosecuted in the name of the State, by an officer duly authorized for that purpose, the State shall be liable for costs in the same cases, and to the same extent, as private parties. If a private person be joined with the State as plaintiff, he shall be liable in the first instance for the defendant's costs, which shall not be recovered of the State till after execution issued therefor against such private party and return unsatisfied.

1932 Code, § 768; Civ. P. '22, § 633; Civ. P. '12, § 371; Civ. P. '02, § 332; 1870 (14) § 345.

State highway department liable for costs in action brought against it under

section 5887. *Sawyer v. State Highway Department*, 164 S. C. 53, 161 S. E. 883.

§ 769. Costs in action prosecuted in name of the State for others.—In an action prosecuted in the name of the State, for the recovery of money or property, or to establish a right of claim for the benefit of any county, city, town, village, corporation, or person, costs awarded against the plaintiff shall be a charge against the party for whose benefit the action was prosecuted, and not against the State.

1932 Code, § 769; Civ. P. '22, § 634; Civ. P. '12, § 372; Civ. P. '02, § 333; 1870 (14) § 346.

§ 770. Costs against assignee, after action brought.—In actions in which the cause of action shall, by assignment after the commencement of the action or in any other manner, become the property of a person not a party to the action, such person shall be liable for the costs and disbursements in the same manner as if he were a party, and payment thereof may be enforced by attachment.

1932 Code, § 770; Civ. P. '22, § 635; Civ. P. '12, § 373; Civ. P. '02, 334; 1870 (14) § 347.

Court alone may tax costs against person not party to action after rule to show cause.—Under this section, providing that in certain cases a person not a party to an action shall be liable for the costs thereof, and that payment may be enforced by attachment, the clerk of the court has no right to tax the costs against such person, but it can only be done by the court after rule to show cause, and opportunity given the party, sought to be so made liable, to be heard thereon. *State v. Marshall*, 28 S. C. 559, 6 S. E. 564.

Assignee not liable for costs where he has no notice of action to set aside judg-

ment pending at time of sale.—Where a claim due a firm under agreement becomes the property of one of the partners, who sues it to judgment, and then on settlement of the partnership affairs, it is sold as a partnership asset and bought by another member of the firm, the purchaser is not liable to the judgment creditor, under this section, for costs accruing in an action to set aside the judgment, pending at the time of the sale, but of which he had no notice and to which action he was not made a party. *Walker v. Doty*, 76 S. C. 464, 57 S. E. 181.

Where Supreme Court did not tax

costs, circuit court cannot after handing down remittitur.—Where solvent building and loan association and its receivers were not parties to proceeding brought in original jurisdiction of Supreme Court by State Board of Bank Control respecting liquidation of association, and Supreme Court did not order any costs or disbursements to be paid to board which

was unsuccessful in litigation, a circuit judge, after filing of opinion by Supreme Court and handing down of remittitur, did not have discretionary power to order that costs and disbursements, including costs of proceeding brought in Supreme Court, be paid out of association's assets. *Ex parte Miller*, 192 S. C. 164, 5 S. E. (2d) 865.

TITLE 14

Appeals in Civil Actions

CHAPTER 45. Appeals in General, § 771.

CHAPTER 46. Appeals to the Supreme Court, § 780.

CHAPTER 47. Appeals to the Circuit Court from an Inferior Court, § 794.

CHAPTER 45

Appeals in General

771. Mode of review.

772. Vacating or modifying orders made without notice.

773. Who may appeal.

774. Designation of parties.

775. Notice of appeal.

775-1. Appeal from verdicts.

776. Clerk to transmit papers.

777. Review of intermediate order.

778. Judgment on appeal.

779. When printing unnecessary.

§ 771. Mode of reviewing judgment or order.—The only mode of reviewing judgment or order in a civil or criminal action, shall be prescribed by this title.

1932 Code, § 771; Civ. P. '22, § 636; Civ. P. '12, § 374; Civ. P. '02, § 335; 1870 (14) § 349.

The Supreme Court will not interfere where no exception is taken to the charge of the judge, but only to the verdict of the jury. *Winsmith v. Walker*, 5 S. C. 473; *First Nat. Bank v. Gary*, 14 S. C. 571, 572.

Appeal will not lie from an order made out of court, without notice to the adverse party. *Hill v. Watson*, 10 S. C. 268.

Nor from a judgment by default. *Washington v. Hesse*, 56 S. C. 28, 33 S. E. 787.

But rulings of law on appeal are final and must be adhered to until the case is finally disposed of. *Forrest v. McBee*, 78

S. C. 105, 108, 58 S. E. 955; *Carpenter v. Lewis*, 65 S. C. 400, 43 S. E. 881, 43 L. R. A. (N. S.) 892.

A circuit judge cannot review an order granting temporary restraining order made on a complaint stating a cause of action for injunction and irreparable injury on notice, after hearing both sides, except in some extraordinary emergency subsequently arising. *Jordan v. Wilson*, 69 S. C. 52, 55, 48 S. E. 37.

Applied in *Tallevast v. Kaminski*, 146 S. C. 225, 143 S. E. 796; *Montgomery v. Robinson*, 93 S. C. 247, 76 S. E. 188.

§ 772. Orders made out of court—how vacated or modified.—An order, made out of court, without notice to the adverse party, may be vacated or modified, without notice, by the judge who made it, or may be vacated or modified, on notice, in the manner in which other motions are made.

1932 Code, § 772; Civ. P. '22, § 637; Civ. P. '12, § 375; Civ. P. '02, § 336; 1870 (14) § 350.

This section applies only when an order is made out of court. *Dean v. Standard Warehouse Co.*, 123 S. C. 353, 116 S. E. 440.

Applied in *Montgomery v. Robinson*, 93 S. C. 247, 76 S. E. 188; *Jordan v. Wilson*, 69 S. C. 52, 48 S. E. 37.

§ 773. Who may appeal.—Any party aggrieved may appeal in the cases prescribed in this title.

1932 Code, § 773; Civ. P. '22, § 638; Civ. P. '12, § 376; Civ. P. '02, § 337; 1870 (14) § 351.

Special proceedings are included in the word "cases." *Sease v. Dobson*, 36 S. C. 554, 15 S. E. 703.

Under this section a party ordinarily cannot appeal from a judgment, order, or decree in his own favor. *Wilson v. Southern R. Co.*, 123 S. C. 399, 115 S. E. 764.

Executor is only a party in a representative capacity, and is not entitled to ap-

peal from judgment ordering land divided in kind because he will receive no commissions on such, while if sold he would. *Byrd v. Shell*, 169 S. C. 226; 168 S. E. 692.

As to situation where only some of several parties appeal, see *Brantley v. Bittle*, 72 S. C. 179, 51 S. E. 561, Ann. Cas. 17A, 860, 16 A. L. R. 24, 34, 47.

§ 774. Parties—how designated on appeal.—The party appealing shall be known as the appellant, and the adverse party as the respondent. But the title of the action shall not be changed in consequence of the appeal.

1932 Code, § 774; Civ. P. '22, § 639; Civ. P. '12, § 377; Civ. P. '02, § 338; 1870 (14) § 352.

§ 775. Appeal—how made—notice.—An appeal must be made by the service of a notice in writing, on the adverse party, or his attorney, and in the cases provided by law, on the judge or magistrate, or other officer who heard the cause, with whom the judgment or order appealed from is entered, stating the appeal from the same, or some specific part thereof. The service of the notice of appeal of a cause heard by a magistrate may be made by mailing said notice, properly addressed, and with sufficient postage, to the magistrate who heard the cause. (2) When a party shall give, in good faith, notice of appeal from a judgment or order and shall omit, through mistake, to do any other act necessary to perfect the appeal or to stay proceedings, the court may permit an amendment on such terms as may be just.

1932 Code, § 775; Civ. P. '22, § 640; Civ. P. '12, § 378; Civ. P. '02, § 339; 1870 (14) 353; 1878 (16) 698; 1880 (17) 368; 1912 (27) 625.

As to how appeal perfected, see § 785, and notes thereto.

A notice of appeal must be in writing. *Barnwell v. Marion*, 56 S. C. 54, 33 S. E. 719; *Abney v. Cole*, 30 S. C. 607, 10 S. E. 390; *Molair v. Port Royal, etc., Ry. Co.*, 31 S. C. 510, 10 S. E. 243, 15 L. R. A. 39.

And this rule applies in a criminal case. *State v. Avant*, 85 S. C. 570, 67 S. E. 908.

And should be from the judgment, instead of the mere order for judgment. *Boylston v. Crews*, 2 S. C. 422; *Grayson v. Harris*, 37 S. C. 606, 16 S. E. 154.

It may be served by Mail.—Defendant appealing from magistrate's court to circuit court may serve notice of appeal by mail, in view of Const. art. 5, § 23, and this section. *State v. Funderburk*, 130 S. C. 352, 126 S. E. 140. See § 794 et seq. and the notes there placed.

The expressions, "notice of intention to

appeal" and "notice of appeal," are used interchangeably and mean the same thing. *Saverance v. Lockhart*, 66 S. C. 539, 45 S. E. 83, 84.

Failure to serve exceptions is relievable under this section.—Failure to serve exceptions in time is an omission within this section and § 785, but the court, within its discretion, may permit the party to perfect the appeal. *Croswell v. Connecticut Indemnity Ass'n*, 49 S. C. 374, 27 S. E. 388.

But party seeking relief must act within reasonable time.—A party appealing from a judgment of the probate court must file a certified copy in the appellate court within a reasonable time; and where he permits five terms of court to convene without doing so, and fails, after motion to dismiss the appeal, to take any steps under this section and

§ 785, to relieve himself from his neglect, the appeal is properly dismissed. In re Dicks' Will, 90 S. C. 439, 73 S. E. 866.

Failure to perfect appeal, trial judge retains jurisdiction to dismiss appeal.—Where defendants failed to perfect appeal, trial judge retained jurisdiction to dismiss the appeal; for until return is filed with Supreme Court, that court does not acquire jurisdiction. *State v. Atkins*, 169 S. C. 170, 168 S. E. 540.

And attempt to file transcript of record after expiration of time therefor is not

effective to give Supreme Court jurisdiction. *Ibid*.

Delay in perfecting appeal pending negotiations for settlement of proposed amendment.—Appeal would not be dismissed for failure to perfect appeal where plaintiff did not intend to abandon appeal but merely intended to delay perfection of appeal pending negotiations for settlement of defendant's proposed amendment to plaintiff's proposed case for appeal. *Salley v. Western Mutual Fire Ins. Co.*, 177 S. C. 281, 181 S. E. 72.

§ 775-1. May appeal from verdicts.—In case an appeal shall be taken from any verdict in any court on which a final judgment might be entered, the appellant shall not be prejudiced by reason of the fact that his appeal was taken without the entry of such judgment or before said judgment shall have been entered.

1934 (38) 1214.

§ 776. Clerk to transmit papers to appellate court.—If the appellant shall not, within twenty days after his appeal is perfected, cause a certified copy of the notice of appeal and of the judgment roll, or, if the appeal be from an order or any part thereof, a certified copy of such order, and the papers upon which the order was granted, to be transmitted to the appellate court by the clerk with whom the notice of appeal is filed, the respondent may cause such certified copy to be transmitted by such clerk to the appellate court, and recover the expenses thereof, as a disbursement on such appeal, in case the judgment or order appealed from shall be in whole or in part affirmed; and this provision shall apply to all appeals heretofore taken, where the appeal has not been dismissed in the manner provided by the rules of the appellate court.

1932 Code, § 776; Civ. P. '22, § 641; Civ. P. '12 § 379; Civ. P. '02, § 340; 1870 (14) § 354.

§ 777. Review of intermediate orders affecting judgment.—Upon an appeal from a judgment, the court may review any intermediate order involving the merits and necessarily affecting the judgment.

1932 Code, § 777; Civ. P. '22, § 642; Civ. P. '12, § 380; Civ. P. '02, § 341; 1870 (14) § 355.

Intermediate decree is reviewable although appeal therefrom has been dismissed.—Where a circuit judge enters a decree subject to a master's finding on a matter committed to him, and another judge renders a decree on the master's report, on appeal from the latter decree the court may review the intermediate decree, though an appeal from such intermediate decree has been dismissed, as such dismissal cannot affect the court's right to review such intermediate decree on appeal from the final judgment. *Morgan v. Smith*, 59 S. C. 49, 37 S. E. 43.

And on appeal from final judgment, court may review order overruling demurrer though no notice of intention to

appeal therefrom was given within ten days, since such order was intermediate, and involved the merits of the case, affecting the final judgment appealed from. *McCoy v. State Highway Department*, 169 S. C. 436, 169 S. E. 174.

So on appeal from decree in receivership proceeding, intermediate orders which affected the final decree could be reviewed although no notice of intention to appeal was given within ten days. *Montgomery & Crawford, Inc. v. Arcadia Mills*, 173 S. C. 464, 176 S. E. 589.

But order granting new trial cannot be reviewed on appeal from that judgment after second trial, especially where timely notice of intention to appeal there-

from was not given. *DePass v. Broad River Power Co.*, 173 S. C. 387, 176 S. E. 325.

Failure to move for new trial does not preclude Supreme Court from passing upon errors of law committed in the course of the trial. *Hubbard v. Rowe*,

192 S. C. 12, 5 S. E. (2d) 187.

The judgment of a circuit court on appeal from judgment of magistrate's court is res adjudicata of the issue involved when not appealed from. *Forrest v. McBee*, 78 S. C. 105, 58 S. E. 955.

§ 778. Judgment on appeal.—Upon an appeal from a judgment or order, the appellate court may reverse, affirm, or modify the judgment or order appealed from in the respect mentioned in the notice of appeal, and as to any or all of the parties, and may, if necessary or proper, order a new trial. When the judgment is reversed or modified, the appellate court may make complete restitution of all property and rights lost by the erroneous judgment.

1932 Code, § 778; Civ. P. '22, § 643; Civ. P. '12, § 381; Civ. P. '02, § 342; 1870 (14) § 356.

In an action at law the Supreme Court cannot modify a judgment of the court below; it must either reverse or affirm. *Hosford v. Wynn*, 22 S. C. 309, 313.

But it may direct the respondent to en-

ter a remittitur on the judgment below, and grant a new trial upon his failure so to do. *Cave v. Home Ins. Co.*, 57 S. C. 347, 35 S. E. 577, 580. 10 L. R. A. (N. S.) 1074.

§ 779. Parties unable pay for printing may use mimeographed or typewritten carbon copies of records in appeals to Supreme Court.—No rule or order of any court or judge shall require the printing of any brief, report, or other paper connected with the appeals by any party to an action or proceeding, who makes an affidavit, to be filed with the clerk of the Supreme Court, that he or she is unable to pay for such printing. In such cases the party who is unable to pay for the printing of the records, briefs, and other papers, required to be printed on appeal, may use mimeographed or typewritten carbon copies. Such copies must be made on high grade, plain white bond paper 8½ by 13 inches in size, with the lines of writing double spaced on only one side of the paper, and all copies must be clean, neat and clearly legible.

1932 Code, § 779; Civ. P. '22, § 644; Civ. P. '12, § 382; Civ. P. '02, § 343; 1873 (15) 501; 1941 (42) 223.

Reimbursement for substituted typewritten copies.—A party who, on account of his poverty, is allowed, under this section, to substitute manuscript or typewritten, instead of printed, copies

of the case and points and authorities, is entitled to his expenses incurred in having such substitutes prepared. *Finley v. Cudd*, 45 S. C. 87, 22 S. E. 753.

CHAPTER 46

Appeals to the Supreme Court

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| 780. Cases appealable. | delivery of personalty. |
| 781. Necessary steps in appealing cases. | 787. Judgment directing execution of instrument. |
| 782, 788, 789, 792. Stay of execution. | 788. When appeals will stay execution. |
| 783. New undertaking when sureties become insolvent. | 789. Stay of proceedings. |
| 784. Extension of time for perfecting appeal. | 790, 793. Undertakings. |
| 785. Perfecting appeals. | 791. Justification and approval of sureties. |
| 786. Staying execution of judgment for | |

§ 780. Appeal in what cases.—An appeal may be taken to the Supreme Court in the cases mentioned in section 26. When the circuit court shall render judgment upon a verdict taken, subject to the opinion of the court, the questions or conclusions of law, together with a concise statement of the facts upon which they arose, shall be prepared by and under the direction of the court, and shall be filed with the judgment roll, and be deemed a part thereof, for the purposes of a review in the Supreme Court.

The provisions of this section shall apply to any judgment therein mentioned that has been heretofore rendered, and upon which an appeal has been brought and is now pending, or upon which an appeal shall hereafter be brought. When the return has already been filed with the clerk of the Supreme Court, such statement shall be filed with him, and be deemed a part of such return.

1932 Code, § 780; Civ. P. '22, § 645; Civ. P. '12, § 383; Civ. P. '02, § 344; 1870 (14) § 358.

Findings of fact by circuit court on appeal from magistrate's court are not reviewable.—*Stacy v. Cherokee Foundry, etc., Works*, 70 S. C. 178, 183, 49 S. E. 223.

Supreme Court cannot review findings of fact by circuit court on appeal in law case from magistrate's court. *Jones v. Atlantic Coast Line R. R.*, 70 S. C. 214, 216, 49 S. E. 568, Ann. Cas. 18D,

1205.

Nor is an order refusing to quash the array of jurors.—An order refusing to quash the array of jurors on grounds held to be mere irregularities is not appealable under this section. *Rhodes v. Southern Ry. Co.*, 68 S. C. 494, 47 S. E. 689, Ann. Cas. 13C, 436.

Applied in *Verner v. Perry*, 45 S. C. 262, 22 S. E. 888.

§ 781. Notice — case — exceptions — objections — alterations — docketing—failure perfect—agreements upon statement of case.

(1) **Notice—serving case with exceptions—objections and alterations.**—In every appeal to the Supreme Court from an order, decree or judgment granted or rendered at chambers from which an appeal may be taken to the Supreme Court the appellant or his attorney shall, within ten days after written notice that the said order has been granted or decree or judgment rendered, give notice to the opposite party or his attorney of his intention to appeal, and in all other appeals to the Supreme Court the appellant or his attorney shall, within ten days after the rising of the circuit court, give like notice of his intention to appeal to the opposite party or his attorney, and within thirty days after said notice the appellant or his attorney shall prepare a case with exceptions and serve them on the opposite party or his attorney. The respondent within ten days after service of such case may propose any objections thereto or alterations thereof, and the case shall be settled in such mode as may be provided in the rules of the Supreme Court: *provided*, that whenever a motion for a new trial

upon the judge's minutes shall have been made and the decision thereon not be both heard and filed at the term at which the trial is had, then notice of intention to appeal either from the judgment or the order granting or refusing a new trial shall be given to the opposite party or his attorney within ten days after written notice that such order has been granted or rendered.

(2) **Docketing of cause.**—The case shall be placed on the docket of the Supreme Court at such time as may be fixed by the rules of the Supreme Court.

(3) **Waiver by failure to perfect appeal.**—Whenever the appellant shall fail to perfect his appeal, his failure to do so shall amount to a waiver thereof, unless the court permit the appeal to be perfected as provided in sections 775 and 785.

(4) **Agreements upon statement of case.**—Upon appeals to the Supreme Court, in case the attorney for the appellant and respondent shall agree upon a statement of the case as prepared by them for the hearing by the Supreme Court, such statement of the case shall be a sufficient brief of the same, and no return or other paper from the circuit court shall be required.

Upon the transmission of a certified copy of such agreement to the clerk of the appellate court, within the time now required by law, he shall place said cause on the docket for a hearing by said court.

1932 Code, § 781; Civ. P. '22, § 646; Civ. P. '12, § 384; Civ. P. '02, § 345; 1875 (15) 862; 1878 (16) 698; 1889 (20) 356; 1902 (23) 1905.

Appeal from verdict see § 775-1.

I. In General.

A. Notice of Intention to Appeal.

1. In General.
2. From Orders Rendered at Chambers.
3. In All Other Cases.

B. Service of Case with Exceptions.

1. In General.
2. Time of Service.
3. Contents.

C. Objections and Alterations.

D. After Motion for New Trial.

II. Docketing of Case.

III. Waiver by Failure to Perfect Appeal.

IV. Agreement upon Statement of Case.

I. IN GENERAL.

A. Notice of Intention to Appeal.

1. In General.

Appeal from verdict.—Previously, appeal was required to be from judgment and not from verdict. *Hamer v. Hillcrest Land Co., Inc.*, 165 S. C. 297, 163 S. E. 727. But see section 775-1, expressly permitting appeal from verdict.

Notice required by section is imperative.—The Supreme Court has no power to remedy the omission to give notice of appeal within the ten days, which is imperative. *Renneker v. Warren*, 20 S. C. 581.

With burden of proving service on appellant.—Appeal dismissed because notice was not served in time. Service being denied, appellant was bound to prove it. *Allen v. Stokes*, 19 S. C. 602.

So that appeal must be dismissed for want of jurisdiction for failure to give notice within prescribed time.—*Haughton v. Order of U. C. T. of A.*, 108 S. C. 73, 93 S. E. 393; *Rogers v. Nash*, 12 S. C. 559.

An appeal will be dismissed unless notice thereof is given, as provided for by this section, within ten days after notice of the filing of the decree has been served on an attorney retained, after the suit was commenced, "as assistant counsel in the management of the cause, and in such arguments as the exigencies of the case might require." *Brayton v. Bacon*, 33 S. C. 605, 12 S. E. 365.

Which time courts cannot extend.—*Saverance v. Lockhart*, 66 S. C. 539, 45 S. E. 83, 84.

And which does not begin to run until order is filed.—*Archer v. Long*, 46 S. C. 292, 24 S. E. 83.

The delivery of the original order, with date of filing marked thereon, to defendant's attorney, was not such notice of the filing of the order as was required to set the limitation of time to appeal in motion. *Greenwood Loan, etc., Ass'n v. Childs*, 67 S. C. 251, 45 S. E. 167, 26 A. L. R. 46, 72.

Provided such order is appealable.—The jurisdiction of the Supreme Court is dependent on the fact that the order is appealable. *McDaniel v. Atlantic Coast*

Line R. Co., 76 S. C. 189, 193, 56 S. E. 956.

Circuit judge may dismiss appeal to Supreme Court for want of prosecution. Equitable Fire Ins. Co. v. Fishburne, 72 S. C. 24, 25, 51 S. E. 528.

Where appellant fails to appear on regular call of case on the docket, the appeal will be dismissed, on motion, for want of prosecution. Varn v. Williams, 30 S. C. 608, 10 S. E. 390.

New trial nisi; notice of filing of order.

—Where an order for a new trial unless plaintiff should remit in 20 days part of his verdict was filed out of term time, after trial judge had announced that he would take motion for new trial under advisement, and an assistant in office of county clerk of court inadvertently failed to give notice to attorneys for the parties of the filing of the order as directed by trial judge, and plaintiff's attorneys did not learn of filing of order until more than 20 days had elapsed, actual notice to attorneys of the parties of the filing of the order was a "condition precedent" to its effectiveness, and hence filing of remittitur within 20 days after actual notice of the filing was sufficient to prevent order from becoming an absolute order for a new trial. Thornton v. Atlantic Coast Line Ry. Co., 196 S. C. 316, 13 S. E. (2d) 442.

See generally, Mott Iron Works v. Clark, 84 S. C. 493, 494, 66 S. E. 680; Pickens v. Quillian, 31 S. C. 602, 9 S. E. 743; Pelzer Mfg. Co. v. Cely, 40 S. C. 430, 18 S. E. 790.

Contents of and service of notice of intention to appeal.—Sherbert v. School Dist. No. 83, Spartanburg Co., 169 S. C. 191; 168 S. E. 391.

Applied in Verner v. Perry, 45 S. C. 262, 22 S. E. 888; State v. Avant, 85 S. C. 570, 67 S. E. 908.

2. From Order Rendered at Chambers.

The time for appeal runs from written notice of the judgment at chambers notwithstanding actual notice previously had. Lake v. Moore, 12 S. C. 563, 564.

Where an order overruling a motion for a new trial is made six days after the final adjournment of the trial court, and judgment is entered accordingly on the verdict on the next day, the judgment and order are to be deemed "rendered at chambers," within this section. Appleby v. South Carolina, etc., R. Co., 58 S. C. 33, 36 S. E. 109.

So that an appeal more than ten days after order may be in time.—A habeas corpus order made in chambers, but not served upon adverse party, may be appealed more than ten days after date of order. Ex parte Murray, 112 S. C. 342, 99 S. E. 798, 5 A. L. R. 1152, 10 A. L. R. 396.

Where a judgment was filed after adjournment for the term, and no notice thereof was given to the unsuccessful party, a notice of appeal served by his

attorney eleven days after the filing of the judgment was in time under this section. Strickland v. Strickland, 95 S. C. 492, 79 S. E. 520.

3. In All Other Cases.

A notice more than ten days after rising of court is sufficient.—Notice of appeal within ten days after entry of judgment on a verdict, but more than ten days after rising of the court is sufficient. First Nat. Bank v. Gary, 14 S. C. 571.

Where notice was deposited in the post office, directed to the attorney of respondents at one o'clock on the tenth day after the rising of the circuit court, but did not reach such attorney until the eleventh day, it constituted a sufficient service. Walters v. Laurens Cotton Mills, 53 S. C. 155, 31 S. E. 1, L. R. A. 1918A, 39.

Provided it is within ten days after judgment.

—In an action tried at regular term, verdict was given during term-time, but judgment was not entered during term-time, or at chambers. It was held that a notice of appeal within ten days after judgment was entered was sufficient, though it was more than ten days after the rising of the court. Molair v. Port Royal, etc., Ry. Co., 31 S. C. 510, 10 S. E. 243, 15 L. R. A. 39.

Under this section notice of intention to appeal from a judgment in a law case should be served in ten days after rising of trial court, and the time is not extended because appellant had no notice of proposed taxation of costs and the clerk had not adjudicated the taxation. Foster v. Western Union Tel. Co., 77 S. C. 155, 57 S. E. 760.

Serve notice of appeal within 10 days from the rising of court. — To appeal from a judgment entered upon a verdict rendered one shall within 10 days from the rising of the court serve written notice of his intention to appeal upon the adverse party or his attorney. Parks v. Blue Ridge Lumber Co. et al., 170 S. C. 217; 170 S. E. 156.

B. Service of Case with Exceptions.

1. In General.

Or a copy of the case may be filed. Archer v. Long, 35 S. C. 585, 14 S. E. 24.

2. Time of Service.

The exceptions must be served within the required time. Bell v. Wheeler, 3 S. C. 104; Weatherly v. Jackson, 3 S. C. 228; Spratt v. Pierson, 4 S. C. 301, 308; Kibler v. McIlwain, 12 S. C. 555; Rogers v. Nash, 12 S. C. 559; Sullivan v. Speights, 12 S. C. 561; Gibbs v. Greenville, etc., R. Co., 14 S. C. 385; Blakeley v. Frazier, 15 S. C. 615.

The proposed case may be served in parts, so they be within time. Archer v. Long, 35 S. C. 585, 14 S. E. 24.

Where notice of intention to appeal was duly given, appellant had thirty days thereafter to serve exceptions, and forty days more (now twenty) to file

the return. *Dial Hardware Co. v. Levy*, 38 S. C. 552, 16 S. E. 838.

Notice of appeal within ten days from notice of filing a decree at chambers, and service of case within thirty days thereafter, is a compliance with the law. *Godbold v. Vance*, 14 S. C. 458, L. R. A. 1915B, 1037, Ann. Cas. 12A, 13.

Otherwise the appeal will be dismissed.—*Rogers v. Nash*, 12 S. C. 559; *McElwee v. McElwee*, 14 S. C. 623, Ann. Cas. 13B, 439.

When party fails to file return within forty days (now twenty), as required by rule 1 of Supreme Court, his appeal will be dismissed on motion. *Agnew v. Adams*, 24 S. C. 86, 90; *Nabors v. Latimer*, 30 S. C. 607, 10 S. E. 390; *Abney v. Cole*, 30 S. C. 607, 10 S. E. 390; *Calvo v. Railroad Co.*, 30 S. C. 608, 10 S. E. 389.

In the absence of satisfactory excuse.—Where the case and exceptions are not served within the statutory time, and there is no satisfactory excuse, the appeal should be dismissed. *Bledsoe v. Columbia Mills Co.*, 75 S. C. 545, 55 S. E. 886.

But time does not commence to run until after judgment has been entered.—*American Publishing, etc., Co. v. Gibbes*, 59 S. C. 215, 37 S. E. 753.

A failure to serve the proposed case and exceptions within thirty days after notice of appeal, as required by this section, will be excused where no judgment has been entered. *Warren v. Wilson*, 89 S. C. 108, 71 S. E. 513.

And of course the time limit may be waived.—*Messervy v. Messervy*, 80 S. C. 277, 281, 61 S. E. 442, Ann. Cas. 13A, 667, 6 A. L. R. 73, 193.

Or extended by the trial judge.—Though this section requires appellant to serve his case with exceptions on the opposite party or his attorney within thirty days after service of the notice of appeal, the trial judge may extend his time; and when he has done so, and the clerk, without knowledge of the extension, has dismissed the appeal, under Supreme Court rule No. 1, the appeal will be reinstated. *Cunningham v. Cauthen*, 34 S. C. 575, 13 S. E. 322.

Within his discretion.—If the trial judge had jurisdiction to extend the time for serving the case and exceptions on appeal, it was a matter within his discretion, from which there was no appeal. *Deal v. Deal*, 85 S. C. 262, 67 S. E. 241.

But the Supreme Court has no power to extend the time within which to serve the case. *Scurry v. Coleman*, 14 S. C. 166.

3. Contents.

A "case" is a clear and intelligible statement of all the proceedings on the trial, important to a review of a cause, upon the points raised by the appeal. *Sullivan v. Thomas*, 3 S. C. 531.

The case is defective if it does not

contain a proper statement of the nature of the issue to which the judgment appealed relates. *Trotter v. Robinson*, 6 S. C. 410.

And also exceptions specifying errors complained of. *Cureton v. Dargan*, 16 S. C. 619.

As to exception being too general, see *State v. Simmons*, 73 S. C. 234, 235, 53 S. E. 286.

If brief presented is not the case as settled, the appeal will be dismissed. *Collins v. Roumillat*, 22 S. C. 589.

Service on opposing counsel by counsel of the appealing party of exceptions to an order of the trial judge settling a proposed case for appeal was not equivalent to service of a case with exceptions as required by the statute, and an appeal so presented was not valid. *Southern Pine Lumber Co. v. Martin*, 118 S. C. 319, 110 S. E. 804.

Where the fact that an appeal was taken before the judgment was entered of record in the circuit court does not appear in the "brief" prepared for argument, under this section, a motion to dismiss will be denied. *Huff v. Latimer*, 33 S. C. 598, 11 S. E. 553.

And facts upon which exceptions are founded.—Where an exception is founded on facts, they must appear in the case, and not in the exception alone, or the Supreme Court will not consider it. *Thompson v. Thompson*, 6 S. C. 279; *State v. Satterwhite*, 20 S. C. 536, 538; *McPherson v. McPherson*, 21 S. C. 261, 267, 31 L. R. A. 634, 36 L. R. A. 345; *State v. Jenkins*, 21 S. C. 595, 596.

And when it does not contain an intelligible statement of the case and grounds of appeal, it will be stricken from the docket. *Shumate v. Powell*, 5 S. C. 286.

As the appellant is confined to case embraced in his exceptions.—The appellant is confined to matters in the judge's view of the case and embraced in his exceptions; but respondent may rely upon other and any grounds to sustain the judgment. *Southern Porcelain Mfg. Co. v. Thew*, 5 S. C. 5, 30 L. R. A. 240; *Sheriff v. Welborn*, 14 S. C. 480, 487.

But the use of court stenographer's notes is unnecessary.—Under this section and rule 5 of Supreme Court, providing for the preparation of a case on appeal, the use of the court stenographer's notes in the preparation of the appeal is not necessary, so that a new trial is not authorized because stenographer died without transcribing his notes and no other person could read his notes. *Southern Pine Lumber Co. v. Martin*, 118 S. C. 319, 110 S. E. 804.

As the trial judge can make a report of the whole case himself.—Under this section and rule 5 of the Supreme Court, where there is a disagreement in set-

ting the case or allowing proposed amendments because of the death of the stenographer who acted at the trial, the trial judge who tried the case may allow so much of the proposed case or amendments as he sees fit, or he can make a report of the whole case himself, and the Supreme Court is bound by whatever case the trial judge makes. *Southern Pine Lumber Co. v. Martin*, 118 S. C. 319, 110 S. E. 804.

C. Objections and Alterations.

The case may be settled upon affidavits and other proofs, as well as upon the minutes and personal recollections of the judge. *Chalk v. Patterson*, 4 S. C. 98.

And the power of a judge to settle a case is not personal, but may be exercised by his successor in office. *Chalk v. Patterson*, 4 S. C. 98.

He settles the case at the time and place for settlement, and must not regard the respondent's amendment proposed as abandoned because his attorney does not appear. *Chalk v. Patterson*, 4 S. C. 98.

And an incorrect case must be taken advantage of before submission or hearing.—If case for appeal is incorrect or improper, it can be taken advantage of only on proper motion before the submission or hearing: it is too late after hearing begins. *Sullivan v. Thomas*, 3 S. C. 531, 548; *Redding v. Railroad Co.*, 5 S. C. 67; *Green v. Railroad Co.*, 6 S. C. 342.

And under the rules, no ex parte statements can be considered by Supreme Court.—*Hornesby v. Burdell*, 9 S. C. 303; *Ransom v. Anderson*, 9 S. C. 438, 72 Am. Dec. 522, Ann. Cas. 17D, 1178.

D. After Motion for New Trial.

Notice may be given after remittitur though more than ten days after order for new trial.—Notice of intention to appeal, served four days after remittitur, in accordance with order granting a new trial nisi, is served within time, under this section, though more than ten days after order granting new trial. *Linder v. Cowpens Cotton Oil Co.*, 146 S. C. 355, 144 S. E. 73.

Or within ten days after notice of order granting new trial.—If an order for a new trial, unless plaintiff should remit part of the recovery, was made after the court rose, and there was an appeal therefrom, appellant could have given his notice of appeal within 10 days after written notice that such order had been granted, as provided by this section. *Barnett v. Gottlieb*, 105 S. C. 67, 89 S. E. 641.

II. DOCKETING OF CASE.

One docketing is sufficient where both parties appeal.—*Coleman v. Keels*, 31 S. C. 601, 9 S. E. 735.

III. WAIVER BY FAILURE TO PERFECT APPEAL.

Until appeal is perfected circuit court may declare it abandoned. — *State v.*

Johnson, 52 S. C. 505, 30 S. E. 592, 593.

Where no steps are taken to perfect an appeal after service of a notice of intention to appeal, and the court recites, in an order to resentence defendant, that the appeal is abandoned, and no exception is taken to such finding no fact will be assumed on an appeal from a resentence that is inconsistent with the facts found in the order. *State v. Johnson*, 52 S. C. 505, 30 S. E. 592.

As jurisdiction of Supreme Court attaches only after appeal is perfected.—Where no return has been filed, the circuit judge is empowered to hear motion to dismiss an appeal, since under Supreme Court rule 23 the jurisdiction of that court does not attach, to the exclusion of the circuit court until an appeal is perfected, as required by this section. *Rylee v. Marett*, 121 S. C. 366, 113 S. E. 483.

Attempt to file the record after the time expired not effective to bring the case within the jurisdiction of Supreme Court. *State v. Atkins*, 169 S. C. 170; 168 S. E. 540.

Failure of appellant to comply with requirements of appeal amounts to waiver of appeal, and upon such failure appearing by certificate of clerk of Supreme Court and affidavit of respondent's attorney, the court below may dismiss appeal and proceed as if no notice of intention to appeal had been given. *Id.*

Notice of intention to appeal served within ten days after receipt of written acceptance of terms of order on new trial held sufficient. Additional notice given after entry of judgment unnecessary and out of order. *Breeden v. S. & H. X-Ray Co.*, 173 S. C., 112; 174 S. E., 913.

But appeal would not be dismissed for failure to perfect appeal where plaintiff did not intend to abandon appeal but merely intended to delay perfection of appeal pending negotiation for settlement of defendant's proposed amendment to plaintiff's proposed case for appeal. *Salley v. Western Mut. Fire Ins. Co.*, 177 S. C., 281; 181 S. E., 72.

And where defendant, under the misapprehension that trial judge's failure to pass on motion for new trial before judge's death was tantamount to refusal of the motion, served notice of intention to appeal therefrom but within ten days served notice that it would apply to another judge to hear the motion for new trial, the notice of intention to appeal was a nullity, and defendant did not "waive" or "abandon" the motion. *Bridgers v. South Carolina State Highway Department*, 197 S. C. 125, 14 S. E. (2d) 632.

Failure to perfect waives the right to appeal on any question.—Where defendant, given a suspended sentence, failed to give notice of intention to appeal

within ten days after the rising of the court which imposed the sentence, as required by this section, he waived the right to raise the question whether the sentence was violative of Const. art. 1, sec. 14, as an attempt of the judicial department to exercise executive and legislative power. *State v. Stauss*, 114 S. C. 445, 103 S. E. 769.

And the appeal may be dismissed on motion.—Where appellant's case and exceptions on appeal had not been served within the time required by circuit court rule 50 and this section, no extension of time had been granted by the judge who heard the cause or by a Supreme Court justice, no application had been made to the Supreme Court for permission to perfect the appeal, and no return had been filed in the Supreme Court, the circuit judge on motion should have dismissed the appeal. *Rylee v. Maretz*, 121 S. C. 366, 113 S. E. 483.

But notice is necessary of motion to have appeal declared waived or abandoned.—The motion to have the proposed appeal judicially declared waived or abandoned for failure to perfect the appeal is a motion of which notice is necessary. Whether the appeal has in fact been perfected, or whether there has been in fact an extension of time by competent authority or by agreement of counsel or otherwise, are issues of fact upon which the party who has served due notice of intention to appeal is entitled to be heard. *Horger v. Sims*, 131 S. C. 117, 126 S. E. 430.

IV. AGREEMENT UPON STATEMENT OF CASE.

There cannot be an agreed case, except in writing; and unless it is, it cannot be filed as required by this section. *Beattie v. Latimer*, 41 S. C. 552, 19 S. E. 748, 749.

An agreement of counsel annexed to the case filed in the office of the clerk of the Supreme Court, to the effect that "the foregoing shall constitute the case for a hearing on the appeal before the Supreme Court," renders the case an "agreed statement," within the meaning of this section. *McNair v. Craig*, 34 S. C. 9, 12 S. E. 367, 664.

Which must be filed and served with-

in required time.—The agreed statement, under this subdivision, to constitute the appeal, should be filed, and the case, or brief for argument, served, in the time required; otherwise the respondent is entitled to have the appeal dismissed. In other words, that act does not dispense with the other requirements as to the return so made up, and the case, or brief, for the purpose of the argument. *Gardner v. Mays*, 26 S. C. 613, 7 S. E. 71.

Cir. ct. rule No. 49, which requires the case and exceptions settled for hearing in the Supreme Court to be filed in the clerk's office of the circuit court within ten days after settlement, must be complied with, though the case has been settled by agreement between the parties, pursuant to this section. *Chisolm v. Providence, etc., Ins. Co.*, 35 S. C. 599, 14 S. E. 349.

Although it need not specifically purport to be a return.—The fact that the statement of the case for the Supreme Court agreed on by counsel for the respective parties does not specifically purport to be the return, will not deprive it of that character. *Davis v. Pollock*, 35 S. C. 584, 13 S. E. 897.

This is for the reason that this section provides that, where counsel for the respective parties agree on a statement of the case for the Supreme Court, "no return or other paper from the circuit court shall be required," and rule 2 of the Supreme Court provides that such agreed statement, with the notice of appeal and exceptions, shall constitute the return. *Nabors v. Latimer*, 30 S. C. 607, 10 S. E. 390; *McNair v. Craig*, 34 S. C. 9, 12 S. E. 367, 664.

And papers not in the agreed case cannot be considered, though the case refers to them as filed with the clerk "for reference by either party." *Moore v. Perry*, 42 S. C. 369, 20 S. E. 200.

A "statement of the case," agreed on by attorneys, referring to papers containing the evidence, which are filed with the clerk of the Supreme Court, is insufficient, and the trial court's finding of facts cannot be reviewed. In *re Perry's Estate*, 42 S. C. 183, 20 S. E. 84.

§ 782. When notice of appeal may stay execution—undertaking on appeal.

—A notice of appeal from a judgment directing the payment of money shall not stay the execution of the judgment, unless the presiding judge before whom the judgment was obtained shall grant a stay of execution; but, after notice of appeal, the plaintiff shall not enforce a sale of property without giving an undertaking or bond to the defendant, with two good sureties, in double the appraised value of the property, or double the amount of the judgment, conditioned to pay all damages which the defendant may sustain by reason of such sale, in case the judgment is reversed. Nor shall the plaintiff in such case be allowed to proceed with a

sale of defendant's property if the defendant do enter into an undertaking, with good sureties, in double the appraised value of the said property, or the amount of the judgment, to pay the judgment with legal interest, and all costs and damages which the plaintiff may sustain by reason of the appeal, or produce the property levied on, and submit to the sale in case the judgment be confirmed.

1932 Code, § 782; Civ. P. '22, § 647; Civ. P. '12, § 385; Civ. P. '02, § 346; 1870 (14) § 360; 1873 (15) 501.

The stay of execution is discretionary with the judge; it is not mandatory. *Brown v. Buttz*, 15 S. C. 488.

And a review of such order is by appeal.—*Jordan v. Wilson*, 69 S. C. 52, 55, 48 S. E. 37.

And an appeal will not be dismissed for failure to give bond.—An appeal by defendant from a judgment of foreclosure will not be dismissed on the ground that no bond was given, under this section. *McLemore v. Powell*, 32 S. C. 582,

10 S. E. 550.

But sheriff may refuse to sell property in absence of required bond.—*State v. Gilreath*, 16 S. C. 100.

A judgment obtained on a money demand is one "directing the payment of money," within this section. *Pelzer Mfg. Co. v. Cely*, 40 S. C. 430, 18 S. E. 790.

This section applicable to appeal in workmen's compensation case.—*McDonald et al. v. Palmetto Theaters et al.*, 196 S. C. 38; 11 S. E. (2d) 444.

§ 783. New undertaking in case sureties insolvent.—Whenever it shall be made satisfactorily to appear to the court that since the execution of the undertaking the sureties have become insolvent, the court may, by rule or order, require the appellant to execute, file and serve a new undertaking as above; and, in case of neglect to execute such undertaking within twenty days after the service of a copy of the rule or order requiring such new undertaking, the appeal may, on motion to the court, be dismissed with costs. Whenever it shall be necessary for a party to any action or proceeding to give a bond or an undertaking with surety or sureties, he may in lieu thereof, deposit with the officer or into court, as the case may require, money to the amount for which such bond or undertaking is to be given. The court in which such action or proceeding is pending may direct what disposition shall be made of such money, pending the action or proceeding. In any case where, by this section, the money is to be deposited with an officer, a judge of the court, in term or at chambers, upon the application of either party, may, before such deposit is made, order it to be deposited in court instead of with such officer; and a deposit, made pursuant to such order, shall be of the same effect as if made with such officer.

1932 Code, § 783; Civ. P. '22, § 648; Civ. P. '12, § 386; Civ. P. '02, § 347; 1870 (14) § 360.

§ 784. Extending time for certain steps in appeals.—The time for taking any step or proceeding in the preparation and perfection of appeals from the circuit courts to the Supreme Court, as now prescribed by law, may be extended by the judge who heard the cause, or by any one of the justices of the Supreme Court, upon four days' notice of such motion being first given to the opposite party, except the time of giving notice of appeal to the opposite party.

1932 Code, § 784; Civ. P. '22, § 649; Civ. P. '12, § 387; Civ. P. '02, § 348; 1880 (17) 368.

In general.—The Supreme Court has no power to remedy the omission to give notice of appeal within the required

time of ten days. *Renneker v. Warren*, 20 S. C. 581.

For a case distinguishing the time for

exceptions to master's report and for appeal to Supreme Court, see *Brown v. Rogers*, 71 S. C. 512, 517, 51 S. E. 257.

This section relates only to proceedings on appeal. *Brown v. Easterling*, 59 S. C. 472, 38 S. E. 118, 121.

This section and the section following do not apply to an application to a judge of the circuit court to extend the time for serving an amended complaint after the time limited for that purpose in an order made by another judge has expired, since such sections relate only to proceedings on appeals. *Brown v. Easterling*, 59 S. C. 472, 38 S. E. 118.

And should be complied with to obtain extension of time.—Where opposing counsel do not consent to an extension of time to perfect appeal, appellant's counsel should proceed on motion as provided for in this section to secure from judge who heard cause, or from one of justices of Supreme Court, an order allowing time to be extended. *Wade v. Gore*, 154 S. C. 262, 151 S. E. 470.

Such extension may be granted where record cannot be prepared in the time limited. *Lysaght v. Berkeley County Land, etc. Co.*, 41 S. C. 554, 19 S. E. 747.

But motion for extension must be made before expiration of time limited.—*Stribling v. Johns*, 16 S. C. 112; *Tribble v. Poore*, 28 S. C. 565, 6 S. E. 577, 22 Am. St. Rep. 615; *Deal v. Deal*, 85 S. C. 262, 67 S. E. 241.

Circuit court is without jurisdiction to

entertain motion for order perfecting appeal, where moving party had failed to serve case within time. *Kneece v. Hall*, 156 S. C. 73, 152 S. E. 815.

Motion for extension of time for perfecting appeal, under this section, must be made before expiration of time limited, and at least four days' notice must be given to opposite party. *Wade v. Gore*, 154 S. C. 262, 151 S. E. 470.

Relief under this section requires that notice of motion for extension of time be given before the expiration of the time limited. *Warren v. Wilson*, 89 S. C. 108, 71 S. E. 513.

As the only remedy thereafter is by § 785.—After having failed in apt time to apply for the desired extension under this section, the plaintiff's only remedy was an application to the Supreme Court for permission to perfect his appeal under the provisions of § 785. *Rylee v. Marett*, 121 S. C. 366, 113 S. E. 483, 485.

Which judge.—Order granting extension of time to file transcript by judge other than "the judge who heard the cause, or by any one of the justices of the Supreme Court" is a nullity. *Virginia-Carolina Chem. Corp. v. Mills*, 171 S. C. 99; 171 S. E. 477.

Strict compliance.—Statutory enactments relating to appeals to Supreme Court to be complied with strictly. *Id.*

Applied in *Horger v. Sims*, 131 S. C. 117, 126 S. E. 430.

§ 785. Appeal—how perfected.—When any party shall omit, through mistake or inadvertence, to do any act or acts necessary to perfect an appeal, or to stay proceedings, the Supreme Court may, in their discretion, permit such act or acts to be done at any time to perfect the appeal on such terms as may be just, provided that the court shall be satisfied that the appeal was taken *bona fide*, and provided that notice of the same was given as now required by law.

1932 Code, § 785; Civ. P. '22, § 650; Civ. P. '12, § 388; Civ. P. '02, § 349; 1880 (17) 368.

Section relates only to proceedings on appeal.—This section and the section preceding do not apply to an application to a judge of the circuit court to extend the time for serving an amended complaint after the time limited for that purpose in an order made by another judge has expired, since such sections relate only to proceedings on appeal. *Brown v. Easterling*, 59 S. C. 472, 38 S. E. 118.

And does not apply after appeal has been dismissed.—This section is only intended to supply defects, in order to perfect appeals; and, as after appeal has been dismissed, there is no appeal, it cannot apply. *Clark v. Wimberly*, 24 S. C. 138.

The relief cannot be obtained after a

motion to dismiss the appeal has been granted, and a petition for the rehearing of such motion has been considered and determined. *Chisolm v. Providence, etc., Ins. Co.*, 35 S. C. 599, 14 S. E. 349, 480.

This section does not apply to appellant's failure to file his points and authorities three days before the argument, as required by rule 8 of the Supreme Court; hence an appeal dismissed for this reason will not be reinstated on the ground of excusable neglect. *New England Mortgage Security Co. v. McMillan*, 41 S. C. 547, 19 S. E. 692.

So that appellant omitting to serve case in time should seek relief under this section.—Appellant who omitted to serve case within thirty days after notice of appeal should apply to Supreme

Court for relief under this section. *Kneece v. Hall*, 156 S. C. 73, 152 S. E. 815.

Where an appeal has been taken in good faith from a judgment not entered, the notice of appeal being served within due time, the Supreme Court should under this section grant the appellant an extension of time for serving his proposed case and exceptions, if his failure to serve them within the statutory period was occasioned by the appellee's failure to enter judgment. *Warren v. Wilson*, 89 S. C. 108, 71 S. E. 513.

Likewise the court may grant leave to perfect appeal for excusable neglect in failing to file exceptions within ten days after rising of court in case of jury trial. *Harle v. Morgan*, 30 S. C. 611, 9 S. E. 659.

For failure to file return in time prescribed.—The act of the clerk in dismissing an appeal for failure to file return in time prescribed is *ex parte*, and does not prevent the appellant from having his appeal reinstated on the docket where there is a proper showing of mistake or inadvertence within the meaning of this section, the doctrine of *res adjudicata* having no application to such a case. *Tribble v. Poore*, 28 S. C. 565, 6 S. E. 577, 578, 22 Am. St. Rep. 615.

A party who is unintentionally misled by another to believe that time will not be insisted on in perfecting an appeal, and who thus neglects to file the required return, so that a motion to dismiss is granted by the clerk, may have the appeal reinstated under this section. *Geddes v. Hutchinson*, 39 S. C. 550, 17 S. E. 560.

An appeal dismissed for default in filing return as required by court rules will be reinstated where it appears that there was a stipulation of the parties extending the time "for preparation and service of such appeal," which appellants construed to extend the time for filing the return; for, if not subject to such construction, the case is within this section. *Buerhaus v. De Saussure*, 39 S. C. 548, 17 S. E. 500.

It is not necessary that an appellant, to take advantage of this section, should give notice of a motion to extend the time for filing the return, before the appeal has been dismissed, and before the right to such extension has been waived by failure to comply with the rule regulating the time within which the return should be filed. *Tribble v. Poore*, 28 S. C. 565, 6 S. E. 577, 578, 22 Am. St. Rep. 615.

It appeared that the default of the appellants in filing their return was due to an honest mistake in supposing that the case prepared for argument in the Supreme Court constituted a part of the judgment roll, and that they could not file the return until such case was finally settled, and that by the diligence of

appellants' counsel in causing the necessary printing to be done to mature the appeal for hearing at the first term when it could be heard, the appeal was taken *bona fide*, and the purpose of appellant was not delay. It was held a proper case for the reinstatement of the appeal, the failure having occurred through mistake and inadvertence. *Tribble v. Poore*, 28 S. C. 565, 6 S. E. 577, 578, 22 Am. St. Rep. 615, followed in *Cummings v. Wingo*, 28 S. C. 610, 7 S. E. 48.

The jurisdiction of the Supreme Court, under this section, does not attach to the exclusion of the circuit court until after the return is filed. *State v. Johnson*, 52 S. C. 505, 30 S. E. 592.

Appeal would be dismissed for failure to perfect appeal where plaintiff did not intend to abandon appeal but merely intended to delay perfection of appeal pending negotiations for settlement of defendant's proposed amendment to plaintiff's proposed case for appeal. *Salley v. Western Fire Ins. Co.*, 177 S. C. 281, 181 S. E. 72.

For delay occasioned by counsel being engaged in important public duties.

—An extension of time in which to perfect an appeal will be allowed, under this section providing for such extension in the discretion of the court, where, though appellant's counsel made timely application for further time in which to prepare their case, they did so before but a single justice of the court, and their further delay was occasioned by their being engaged in the discharge of important public duties. *Price v. Price*, 42 S. C. 546, 20 S. E. 743.

Where appellant's attorneys showed *bona fide* mistake, and that during the time when the case should have been prepared they were engaged in the discharge of important public duties, the court would, in its discretion, grant further time to perfect the appeal. *Price v. Price*, 45 S. C. 57, 22 S. E. 790.

But not for delay occasioned by pressure of other office work.—Where an attorney, due to the pressure of other office work, failed to perfect his client's appeal, he was not entitled to an extension of time under this section. *Rylee v. Marett*, 121 S. C. 366, 113 S. E. 483.

Or mistake of law.—Failure to file case for appeal within ten days after settlement, which *cir. ct.* rule 49 provides shall be deemed an abandonment of the appeal, is not excused under this section, allowing relief from omissions occurring through mistake or inadvertence, by misapprehension on the part of counsel that it did not apply to cases agreed on, this being a mistake of law. *Simonds v. Marco*, 38 S. C. 554, 16 S. E. 830.

Provided in all such cases notice of appeal has been given.—Notice of appeal having been given, the court has power to relieve against the consequences of

other omissions. *Wardlaw v. Erskine*, 20 S. C. 582.

Where notice of appeal has not been given in writing, as required by law, no relief under the section can be had. *Abney v. Cole*, 30 S. C. 607, 10 S. E. 390.

Whenever this court is satisfied from the showing made that a party has in good faith given due notice of his intention to appeal within the time prescribed by law, and has through an honest mistake, either of law or fact, or through excusable inadvertence, or from sickness or other cause beyond his control, omitted to take some step necessary to perfect his appeal, this court will relieve the party from the effect of such omission, upon such terms as may seem to the court to be just under the circumstances of the case. But in doing so, care will be taken to prevent as far as possible any injury, by delay or otherwise, to the respondent, whose rights are as much entitled to be respected as are those of the appellant. *Croswell v. Connecticut Indemnity Ass'n*, 49 S. C. 374, 27 S. E. 388, 389.

And provided extension of time has been sought within proper time.—Applicant for reinstatement of appeal under provisions of this section should show that he has endeavored to secure extension of time within the proper

time, or that for some especially good reason he could not secure same. *Wade v. Gore*, 154 S. C. 262, 151 S. E. 470.

Compliance with section is necessary for relief to be given.—Party seeking relief under this section, must show clearly that acts, which were necessary for him to do, were omitted through mistake or inadvertence, that his appeal was taken bona fide, and, even though motion is granted, Supreme Court will impose such terms as are just to protect party who is being delayed in enforcement of his rights. *Wade v. Gore*, 154 S. C. 262, 151 S. E. 470.

The proper mode of obtaining such relief is by motion, based upon affidavits, copies of which should be duly served upon the opposite party, with the notice of such motion, at least eight days before the day on which such motion may be heard. *Cummings v. Wingo*, 28 S. C. 610, 7 S. E. 48.

As to rule against stenographer to obtain transcript, see *Love v. Turner*, 75 S. C. 547, 56 S. E. 232.

Applied in *Saverance v. Lockhart*, 66 S. C. 539, 45 S. E. 83; *Deal v. Deal*, 85 S. C. 262, 67 S. E. 241; *Willoughby v. Northeastern R. Co.*, 49 S. C. 372, 27 S. E. 273; *Harle v. Morgan*, 31 S. C. 600, 9 S. E. 742; *Bailey v. Blackmon*, 14 F. (2d) 16.

§ 786. Judgments for delivery of documents or personalty require its deposit or security.—If the judgment appealed from direct the assignment or delivery of documents or personal property, the execution of the judgment shall not be stayed by appeal, unless the things required to be assigned or delivered be brought into court, or placed in the custody of such officer or receiver as the court shall appoint, or unless an undertaking be entered into on the part of the appellant, by at least two sureties, and in such amount as the court, or a judge thereof, shall direct, to the effect that the appellant will obey the order of the Supreme Court upon the appeal.

1932 Code, § 786; Civ. P. '22, § 651; Civ. P. '12, § 389; Civ. P. '02, § 350; 1870 (14) § 361.

Where an appeal without bond is taken by the executor from an order appointing a receiver of the personal property of the estate, it does not operate to stay the execution of the order, under

this section. *Harman v. Wagner*, 33 S. C. 487, 12 S. E. 98, 72 Am. St. Rep. 66, 117 Am. St. Rep. 957, L. R. A. 1918C, 637, Ann. Cas. 13B, 35.

§ 787. Judgment to execute conveyance requires its execution and deposit.—If the judgment appealed from direct the execution of a conveyance or other instrument, the execution of the judgment shall not be stayed by the appeal until the instrument shall have been executed and deposited with the clerk with whom the judgment is entered, to abide the judgment of the Supreme Court.

1932 Code, § 787; Civ. P. '22, § 652; Civ. P. '12, § 390; Civ. P. '02, § 351; 1870 (14) § 362.

§ 788. When appeal will stay execution, and when not.—If the judgment appealed from direct the sale or delivery of possession of real property, the execution of the same shall not be stayed unless a written undertaking be executed on the part of the appellant, with two sureties, to the effect that, during the possession of such property by the appellant, he will not commit, or suffer to be committed, any waste thereon, and that if the judgment be affirmed, he will pay the value of the use and occupation of the property, from the time of the execution of the undertaking until the delivery of possession thereof, pursuant to the judgment, not exceeding a sum to be fixed by a judge of the court by which judgment was rendered, and which shall be specified in the undertaking. When the judgment directs the sale of land to satisfy a mortgage thereof or other lien, the undertaking shall provide that in case the judgment appealed from be affirmed, and the said land be finally sold for less than the judgment debt and costs, then the appellant shall pay for any waste committed, or suffered to be committed, on said lands, and shall pay a reasonable rental value for the use and occupation of said land from the time of the execution of said undertaking to the time of said sale, but not exceeding the amount of such deficiency, which said sum shall be duly entered as a payment on said judgment; and in case the said lands shall be unimproved lands, then in any action or proceedings now pending or hereafter begun in any of the courts of this State, said undertaking shall further provide for the payment by appellant (if the judgment be affirmed) of any taxes due at the time of such appeal, or already paid by the mortgagee, or becoming due during the pendency of said appeal, and also for the payment by appellant of the interest on the debt falling due during the pendency of such appeal.

1932 Code, § 788; Civ. P. '22, § 653; Civ. P. '12, § 391; Civ. P. '02, § 352; 1870 (14) 363; 1898 (22) 689; 1900 (23) 351.

In general.—Applications to Supreme Court or any justice thereof to stay proceedings of sale and delivery of possession of real property under decrees in foreclosure appealed from will be refused, since proper relief may be had under this section. *Ex parte Andrews*, 152 S. C. 325, 150 S. E. 313.

Rule permitting Supreme Court or any justice thereof to make order in any cause pending in Supreme Court staying proceedings in court from which appeal comes in proper cases, is not intended to interfere in any way with provisions of this section. *Ex parte Andrews*, 152 S. C. 325, 150 S. E. 313.

This section is imperative, requiring a written undertaking to be executed on the part of the appellant. *Stanley v. Stanley*, 35 S. C. 94, 14 S. E. 675, 676, 16 L. R. A. 234, 50 L. R. A. 583.

Stay of sale, pending appeal from decree of foreclosure, is not permitted unless the appellant has executed the written undertaking required. *City Council v. Caulfield*, 19 S. C. 201; *Gerald v. Gerald*, 30 S. C. 348, 9 S. E. 274.

Unless a bond is given on appeal from an order of sale in foreclosure, as re-

quired by this section, the sale is not stayed. *Muckenfuss v. Fishburne*, 68 S. C. 41, 46 S. E. 537.

When possession of premises is surrendered.—When defendant surrenders possession of the premises, at the sale, it constitutes "delivery of possession pursuant to the judgment," and the undertaking is then payable. *Gerald v. Gerald*, 30 S. C. 348, 9 S. E. 274; *Gerald v. Gerald*, 31 S. C. 171, 9 S. E. 792, 137 Am. St. Rep. 267.

And amount due on undertaking is properly paid into court.—Where such an undertaking was given by a purchaser from the mortgagor on appeal from a judgment of foreclosure, and the appeal resulted in an affirmance, the lower court properly ordered the amount due on the undertaking, for use and occupation, to be paid into court, instead of to the plaintiff; there being at that time no means of ascertaining how much, if any, of that amount plaintiff would require to make up the deficiency remaining after sale of the premises. *Gerald v. Gerald*, 30 S. C. 348, 9 S. E. 274.

This section plainly embraces appeals from judgments of foreclosure, and the

amount accruing from the use and occupation of the mortgaged premises pending appeal is to be applied, so far as may be necessary, to the payment of any deficiency remaining after the sale. *Gerald v. Gerald*, 30 S. C. 348, 9 S. E. 274. See also *Gerald v. Gerald*, 31 S. C. 171, 9 S. E. 792, 796, 137 Am. St. Rep. 267.

And section must be complied with to obtain relief.—Where appellant, under this section appealing from mortgage foreclosure decree directing sale of premises, has failed to procure stay of sale or delivery of possession by execution of undertaking therein provided for, master is to have duty to proceed with

sale, and purchaser, on complying with terms thereof, is entitled to possession, notwithstanding appeal from decree is pending in Supreme Court. *Ex parte Andrews*, 152 S. C. 325, 150 S. E. 313.

But the undertaking to stay sale applies only to that particular appeal.—Appellant's undertaking, under this section, to stay sale under mortgage foreclosure decree applies only to that particular appeal, and cannot operate to stay sale ordered under second decree, from which appeal has also been taken; first appeal being finally determined on reversal and remand of cause by Supreme Court. *Ex parte Andrews*, 152 S. C. 325, 150 S. E. 313.

§ 789. Stay of proceedings upon security being given.—Whenever the defendant executes the bond hereinbefore prescribed, or the appeal is perfected as provided by sections 782, 786, 787 and 788, it shall stay all further proceedings in court below upon the judgment appealed from, or upon the matter embraced therein; but the court below may proceed upon any other matter included in the action, and not affected by the judgment appealed from. And the court below may, in its discretion, dispense with or limit the security required by sections 782, 786 and 788, when the appellant is an executor, administrator, trustee, or other person acting in another's right; and may also limit such security to an amount not less than fifty thousand dollars, in the cases mentioned in sections 786, 787 and 788, where it would otherwise, according to those sections, exceed that sum.

1932 Code, § 789; Civ. P. '22, § 654; Civ. P. '12, § 392; Civ. P. '02, § 353; 1870 (14) § 364; 1873 (15) 501.

Discretion of court as to security not exercised without proper showing to justify it.—*Stanley v. Stanley*, 35 S. C. 94, 584, 14 S. E. 675, 16 L. R. A. 234, 50 L. R. A. 583.

Receiver's appeal from judgment declaring assignment valid not supersedeas upon proceedings involving debtor's exemption.—The question of debtor's right to a homestead exemption in funds, a part of which debtor had assigned as attorneys' fees, and the remainder of

which was sufficient to cover an exemption claim, was not affected by an appeal of debtor's receiver from a judgment declaring the assignment valid; and hence that appeal was not, under this section, a supersedeas upon proceedings involving that question. *Ex parte Arthur*, 128 S. C. 396, 122 S. E. 498.

This section applicable to appeal in workmen's compensation case.—*McDonald et al. v. Palmetto Theaters et al.*, 196 S. C. 38; 11 S. E. (2d) 444.

§ 790. Undertakings may be in one instrument or several.—The undertakings prescribed by sections 782, 783 and 788, may be in one instrument or several, at the option of the applicant, and a copy, including the names and residences of the sureties, must be served on the adverse party, with notice of appeal, unless a deposit is made as provided in section 783, and notice thereof given.

1932 Code, § 790; Civ. P. '22, § 655; Civ. P. '12, § 393; Civ. P. '02, § 354; 1870 (14) § 365; 1873 (15) 501.

§ 791. Securities to be approved and sureties to justify.—An undertaking upon an appeal shall be of no effect unless it be accompanied by the affidavit of the sureties that they are each worth double the amount specified therein. The respondent may, however, except to the sufficiency of the

sureties within ten days after the notice of appeal; and unless they or other sureties justify before a judge or clerk of the court below, as prescribed by sections 516 and 517, within ten days thereafter, the appeal shall be regarded as if no undertaking had been given. The justification shall be upon notice of not less than five days. No clerk shall take the justification of any surety or sureties in a case in which he may be interested, or when either of the parties or such surety or sureties shall be connected with him by affinity or consanguinity within the sixth degree, and in all cases where the clerk may have approved or disapproved of the sufficiency of a surety or sureties his action may be reviewed, on motion, after notice before a circuit judge. And in case at any time in any action now pending or hereafter brought a respondent shall be of opinion that the surety or sureties on any bond already approved are insufficient and shall make affidavit of the fact, setting out the grounds of such belief and serving a copy thereof upon appellant's attorney, then the said sureties or other sureties shall justify anew thereon in the same manner and with the same effect as though such new justification were an original justification on said bond.

1932 Code, § 791; Civ. P. '22, § 656; Civ. P. '12, § 394; Civ. P. '02, § 355; 1901 (23) 697.

§ 792. When appeal stays proceedings below—exceptions.—In cases not provided for in sections 782, 786, 788, and 789, the notice of appeal shall stay proceedings in the court below, upon the judgment appealed from, except that where it directs the sale of perishable property, the court below may order the property to be sold and the proceeds thereof to be deposited, or invested in this State or United States bonds, to abide the judgment of the Supreme Court: *provided*, an appeal from a judgment or decree overruling a demurrer shall stay the further hearing of the cause unless the presiding judge shall be satisfied that the ends of justice will be subserved by proceeding with the trial, and shall order the trial of the cause to proceed to judgment: *provided, further*, that nothing contained in the preceding proviso shall be construed to prevent a review upon appeal from the final order or judgment in the cause of any judgment or decree on demurrer.

1932 Code, § 792; Civ. P. '22, § 657; Civ. P. '12, § 395; Civ. P. '02, § 356; 1887 (18) 837; 1889 (20) 355.

Notice of appeal from an order sustaining a demurrer to an answer operates as a supersedeas until the appeal is disposed of. *Liles v. Harris-Grimes Co.* (S. C.), 76 S. E. 115.

The "presiding judge" who must be satisfied that the ends of justice will be subserved by proceeding with the trial within the meaning of this section is the judge who hears the demurrer, and not the judge presiding at a subsequent term of court. *Steele v. Atlantic Coast Line R. Co.*, 96 S. C. 460, 81 S. E. 144.

So also notice of appeal from order refusing oral demurrer.—A notice of appeal, orally given, from an order refusing an oral demurrer, stays the further hearing of the cause on the circuit. *Elliott v. Pollitzer*, 24 S. C. 81, 15 L. R. A. 851.

Appeal from order overruling demur-

rer to one cause of action shall stay proceedings as to second cause of action. *Hammond v. Port Royal, etc., Ry. Co.*, 15 S. C. 10, 57 Am. Rep. 67, 79 Am. St. Rep. 768, 93 Am. St. Rep. 575, 19 L. R. A. 263, 11 L. R. A. (N. S.) 524, 14 L. R. A. (N. S.) 1188, Ann. Cas. 15A, 549, 15 A. L. R. 1141, 19 A. L. R. 487.

And this is true of an appeal from order confirming sale in action for foreclosure.—When appeal from an order confirming the sale in an action for foreclosure has been taken, it operates to stay proceedings to put the purchaser in possession. *LeConte v. Irwin*, 23 S. C. 106.

So also as to an appeal from return of homestead appraisers.—Appeal from return of homestead appraisers operates as a supersedeas upon all the proceedings in the court below, and thereby

stays the hand of the sheriff until the appeal is disposed of. *Simonds v. Haithcock*, 26 S. C. 595, 2 S. E. 616.

But where order appealed from is not appealable, it does not act as a supersedeas. *McDaniel v. Atlantic Coast Line R. Co.*, 76 S. C. 189, 56 S. E. 956.

Nor does an appeal from order setting aside attachment stay trial of cause upon merits. *Cureton v. Dargan*, 16 S. C. 619.

Appeal from refusal of motion to strike out is not a supersedeas. *Bonner v. Western Union Tel. Co.*, 71 S. C. 303, 51 S. E. 117, 24 L. R. A. (N. S.) 1288.

An appeal from an order of injunction does not operate as a supersedeas, and in such case this section does not apply. *Jennings v. Jennings*, 104 S. C. 242, 88 S. E. 527, 28 A. L. R. 63.

Appeal from order sustaining demurrer to one of several specific defenses in answer, leaving other issues to be tried, which does not result in an immediate final judgment, does not act as a supersedeas of the entire proceedings of the case under this section, and hence court properly ordered case to trial as to other issues. *Waring v. Johnson*, 152 S. C. 317, 149 S. E. 840.

Appeal from order overruling demurrer.—Where the decision on a demurrer to the complaint was reserved until after adjournment of the term, and an order was then made overruling the demurrer, requiring defendant to answer by a specified date, and transferring the cause to the calendar for trial at the next term of court, there was no order requiring the trial to proceed to judgment pending an appeal from the order overruling the demurrer; it not appearing that the judge was satisfied that the ends of justice would be subserved by proceeding with the trial, and the order made after adjournment of court necessarily having the effect of a continuance until another term. *Steele v. Atlantic Coast Line R. Co.*, 96 S. C. 460, 81 S. E. 144.

Associate justice may suspend restraining order pending appeal. *Bruce v. Rice*, 67 S. C. 236, 237, 45 S. E. 153, 16 L. R. A. (N. S.) 1063, Am. Cas. 15D, 1010.

As to appeal from order granting mandamus, see *Matthews v. Nance*, 49 S. C. 322, 27 S. E. 100.

Applied in *Alston v. Limehouse*, 61 S. C. 1, 39 S. E. 192; *Southern Ry. Co. v. Sheppard*, 42 S. C. 543, 20 S. E. 481.

§ 793. Undertaking must be filed.—The undertaking must be filed with the clerk with whom the judgment or order appealed from was entered. The provisions of this chapter, as to the security to be given upon appeals, and as to the stay of proceedings, shall apply to appeals taken under subdivision three of section 26.

1932 Code, § 793; Civ. P. '22, § 658; Civ. P. '12, § 396; Civ. P. '02, § 357; 1870 (14) § 368.

CHAPTER 47

Appeals to the Circuit Court from an Inferior Court

794. Appeals from inferior courts.

795. Time within which to appeal.

796 and 797. Notice of appeal.

798 thru 800. Return.

801. Return when magistrate unavailable.

802. Hearing upon return.

803. Appeal heard on original papers.

804. Judgment on appeal and new trial.

805. Judgment roll.

806. Costs.

807. Reversal of paid judgment.

808. Setting-off cost and recovery.

809. Costs on appeal.

§ 794. Appeals from inferior courts—supersedeas—hearing on the papers.—When a judgment is rendered by a magistrate's court, by the county commissioners or any other inferior court or jurisdiction, save the probate court heretofore provided for in this code of procedure, the appeal shall be to the circuit court of the county wherein the judgment was rendered, and shall amount to a supersedeas, if the party against whom judgment is rendered shall execute a good and sufficient bond with surety to pay the amount of the judgment and costs in the event that he fail to sustain such appeal, and in all cases in which such bond with surety shall be filed no

executions shall issue until the termination of such appeal. The said appeal shall be heard by the court upon all the papers in the case, including the testimony on the trial, which shall be taken down in writing and signed by the witnesses, and the grounds of exception made, without the examination of witnesses in court: *provided*, that in those counties where county courts are now established or which may hereafter be established appeals in such cases, except those from the probate courts, and those that exceed the jurisdictional amounts of the respective courts, shall be to the county court of the county.

1932 Code, § 794; Civ. P. '22, § 659; Civ. P. '12, § 397; Civ. P. '02, § 358; 1870 (14) § 369; 1887 (19) 832; 1937 (40) 81.

In general.—This section as to hearing of appeal in circuit court is not retroactive. *McFadden v. Tant*, 20 S. C. 585.

Section provides only to what court and how appeal shall be made and heard.

—This section does not purport to confer the right of appeal in any case; but simply to provide to what court such appeal shall be made, how it shall operate as a supersedeas, and how it shall be heard. *Whipper v. Talbird*, 32 S. C. 1, 10 S. E. 578.

For example appeal must be taken to circuit court.—An appeal from an order made by two magistrates discharging a prisoner under habeas corpus proceedings cannot be taken to the Supreme Court; it must be taken to the circuit court. *State v. Duncan*, 22 S. C. 10 A. L. R. 396.

From an inferior court.—No appeal lies from the decision of a state board of canvassers, it not being an inferior court. *Whipper v. Talbird*, 32 S. C. 1, 10 S. E. 578.

Upon giving required bond.—The defendant having failed to give a bond with sureties to pay the amount of the judgment and cost in the event he should fail to sustain his appeal, the appeal did not act as a stay or supersedeas. *White v. Barberry*, 103 S. C. 223, 88 S. E. 132.

To consider questions raised by exceptions.—This section confines the circuit court, on the hearing, to the consideration of such questions only as are raised by the exceptions. *Burns v. Gowder*, 34 S. C. 160, 13 S. E. 331.

It may be taken without making motion for new trial.—Party may appeal from judgment of magistrate without making a motion for new trial before him. *Minnick v. Fort*, 13 S. C. 215.

And Supreme Court will assume affirmance by circuit court in absence of such showing.—Where there is evidence to sustain the judgment of a magistrate and nothing to show that the circuit court affirmed it by reason of any issues of law, the Supreme Court will assume the circuit court affirmed the judgment on the merits. *Stanford v. Cudd*, 93 S. C. 367, 368, 76 S. E. 986.

But the adjustment of costs by a clerk of court is not a judgment within this section. *State v. Town Council*, 44 S. C. 500, 22 S. E. 719.

And appeal will lie from city court to Supreme Court.—Appeals lie from the city court to the Supreme Court, notwithstanding the city court is an inferior court, the jurisdiction of the Supreme Court over appeals from the city court being exclusive. *City Council v. Weller*, 34 S. C. 357, 13 S. E. 628.

Inapplicable in criminal case.—Statutes, requiring appeals to circuit court from inferior court to be docketed at least eight days before court convenes inapplicable to a appeal from inferior court in a criminal case. *City of Sumter v. Owens*, 181 S. C. 540; 188 S. E. 192.

See generally, *McKinley Music Co. v. Glymph*, 100 S. C. 200, 84 S. E. 715.

Applied in *Dargan v. West*, 27 S. C. 156, 3 S. E. 68.

§ 795. Appeal—when to be taken.—The appellant shall within five days after written notice of judgment has been given him or his attorney by the magistrate (except when the judgment is announced at the trial in the presence of the appellant or his attorney, in which event no written notice shall be necessary), serve a notice of appeal, stating the grounds upon which the appeal is founded. If the judgment is rendered upon process not personally served, and the defendant did not appear, he shall have five days, after personal notice of the judgment, to serve the notice of appeal provided for in this and the next section.

1932 Code, § 795; Civ. P. '22, § 660; Civ. P. '12, § 398; Civ. P. '02, § 359; 1870 (14) § 370; 1911 (27) 140.

Appeal remedy of party against whom judgment is rendered.—The only remedy of a party against whom a judgment is rendered is either to appeal, or make a motion for a new trial, and appeal in case such motion is refused. The motion for a new trial must be made within five days from the rendition of the judgment; and, if it be refused, the appeal must be taken within five days from the refusal of such motion. If the judgment is rendered upon process not personally served, and the defendant does not appear, he shall have five days within which to appeal after personal notice of the judgment. If the magistrate does not render judgment on the day of trial, but reserves his decision, the party against whom judgment is rendered has the right to appeal or move for a new trial within five days after personal notice of the judgment. *O'Rourke v. Atlantic Paint Co.*, 91 S. C. 399, 74 S. E. 930, 932, Ann. Cas. 14A, 416.

Appeal proper remedy for review of magistrate's judgment taken by default. *O'Neal v. Atlas Assur. Co. of London, England*, 168 S. C. 174, 167 S. E. 227.

And time does not begin to run until written notice given by magistrate. *Ibid.*

Circuit judge cannot extend time within which to appeal.—The circuit judge has no power to extend this time within which to appeal. *Davis v. Vaughan*, 7 S. C. 342.

Nor jurisdiction to hear appeal in absence of proper notice.—Nor jurisdiction to hear an appeal where notice in writing was not served within that time. *Davis v. Vaughan*, 7 S. C. 342, 343; *Scott v. Pratt*, 9 S. C. 82; *Foot v. Williams*, 18

S. C. 601.

Under this section and the section following, an appeal from an order made by a justice overruling a motion for a new trial is properly dismissed by the circuit court where a notice and ground of appeal were served on the magistrate three days after the entry of the order overruling the motion for a new trial, but were not served on the attorney for the opposite party until seven days thereafter, and were returned by him as not having been served in time, though such order was not made until after the day on which the motion was argued, and appellant had no notice from plaintiff of the denial of such motion. *Manuel v. Loveless*, 56 S. C. 426, 35 S. E. 1.

The time to move for an appeal does not begin to run until the party affected by the judgment has had notice of it. *O'Rourke v. Atlantic Paint Co.*, 91 S. C. 399, 74 S. E. 930, 931, Ann. Cas. 14A, 416.

Which must state the grounds.—The notice of appeal must state the grounds in every case. *Sternberger v. McSween*, 14 S. C. 35, 23 L. R. A. 463, 9 A. L. R. 332.

The grounds of appeal being referred to in notice, as being made before the magistrate on motion for new trial and on the evidence and records, is a sufficient statement of the grounds. *Dargan v. West*, 27 S. C. 156, 3 S. E. 68.

But objections as to sufficiency of notice cannot be first raised in Supreme Court.—When no objection is raised in the circuit court as to the sufficiency of the notice of appeal, it cannot properly be raised on appeal to Supreme Court. *Dargan v. West*, 27 S. C. 156, 3 S. E. 68.

§ 796. Notice of appeal to be served on magistrate, and on respondent, agent, or attorney.—The notice of appeal must, within the same time, be served on the magistrate personally, if living and within the county, or on his clerk, if there be one, and upon the attorney for the respondent, or on the respondent personally, or by leaving it at his residence, with some person of suitable age and discretion; or in case the respondent is not a resident of such county, or cannot, after due diligence, be found therein, in the same manner, on the agent, if any, who is a resident of such county, who appeared for the respondent on the trial; and, if neither the respondent nor such agent or attorney can be found in the county, the notice may be served on the respondent by leaving it with the clerk of the appellate court.

1932 Code, § 796; Civ. P. '22, § 661; Civ. P. '12, § 399; Civ. P. '02, § 360; 1870 (14) § 371; 1873 (15) 501, § 20; 1880 (17) 306.

See the preceding section and notes thereto.

This section is mandatory.—This section, requiring notice of appeal from the judgment of a magistrate to be served within five days on the trial justice, personally, if living and within the county,

is mandatory, and is not satisfied by his verbal agreement to accept notice, or by mailing a notice to him, postpaid. *Bigham v. Holliday*, 52 S. C. 528, 30 S. E. 485.

And the time for notice thereunder is computed by statutory methods.—Un-

der this section, providing that notice of appeal from the judgment of a magistrate shall be served within five days, the time is computed by the statutory method of excluding the first day,—that on which the judgment is entered,—and including the last. *Bigham v. Holliday*, 52 S. C. 528, 30 S. E. 485.

And failure to give such required notice is fatal.—Failure to serve magistrate with such notice of appeal within the five days is fatal, and the circuit court will dismiss the appeal, being without jurisdiction to hear it. *Scott v. Pratt*, 9 S. C. 82; *Davis v. Vaughan*, 7 S. C. 342, 343; *Foot v. Williams*, 18 S. C. 601; *Manuel v. Loveless*, 56 S. C. 426, 35 S. E. 1.

For example service on Justice by mail is insufficient.—A service on the justice by mail is not the mode provided by this section and therefore not a sufficient compliance therewith. *Lynch v. Heyward*, 56 S. C. 562, 35 S. E. 220.

Service on non-resident agent of non-resident respondent is insufficient.—Where respondent was a non-resident, service of the notice on the agent who appeared for respondent, but who was also a non-resident of the county, was insufficient. *Sheldon v. Pearson*, 42 S. C. 111, 20 S. E. 26.

Nor can agreement of counsel waive these requirements.—An agreement of counsel affects themselves only and cannot waive for a court of law the requirements of this section to effectuate an ap-

peal. *Lynch v. Heyward*, 56 S. C. 562, 35 S. E. 220.

But acceptance of service or acknowledgment thereof in writing is equivalent to personal service. *Baker v. Irvine*, 58 S. C. 436, 36 S. E. 742, 743.

And while acceptance by magistrate is sufficient to satisfy section.—The requirement of this section is satisfied, where acceptance of service thereof is signed in the magistrate's name by one authorized by him to do so, though the magistrate is not present. *Baker v. Irvine*, 58 S. C. 436, 36 S. E. 742.

It is insufficient to show service on respondent.—Magistrate's return, showing notice of appeal, while sufficient to show service on the magistrate, is insufficient to show service on respondent. *Whetstone v. Livingston*, 54 S. C. 539, 32 S. E. 561.

Nevertheless admission by attorney of receipt by mail of notice gives circuit court jurisdiction.—Admission by respondent's attorneys of receipt by mail of notice of appeal in case before magistrate gives circuit court jurisdiction. *Wright v. Southern Ry.*, 74 S. C. 27, 30, 54 S. E. 211.

See generally, *Williams v. Rickembaker* 79 S. C. 467, 60 S. E. 1122; *O'Rourke v. Atlantic Paint Co.* 91 S. C. 399, 74 S. E. 930, Ann. Cas. 14A, 416; *Perkins v. Douglass*, 46 S. C. 6, 24 S. E. 42; *Speer v. Meschine*, 46 S. C. 505, 24 S. E. 329; *McKee v. Linton*, 74 S. C. 509, 54 S. E. 1016.

§ 797. Filing in lieu of service of notice of appeal.—When by reason of the death of a magistrate, or his absence from the county, or any other cause, the notice of appeal cannot be served as provided by section 796, it may be served by leaving the same with the clerk of the county.

1932 Code, § 797; Civ. P. '22, § 662; Civ. P. '12, § 400; Civ. P. '02, § 361; 1870 (14) § 376.

§ 798. Return—when and how made and compiled.—The court below shall thereupon, after ten days, and within thirty days after service of the notice of appeal, make a return to the appellate court of the testimony, proceedings, and judgment, and file the same in the appellate court. The return may be compelled by attachment.

1932 Code, § 798; Civ. P. '22, § 663; Civ. P. '12, § 401; Civ. P. '02, § 362; 1870 (14) § 377; 1880 (17) 306.

Amended or further return may be ordered within discretion of circuit judge.—Under this section and § 800, where a magistrate has made a return on appeal it is discretionary with the circuit judge to order a further or amended return. *Lynch v. Heyward*, 56 S. C. 562, 35 S. E. 220.

Where such return would be effective.—Where the testimony of the witness is

not taken in writing and certified to the appellate court, a further return would not be effective, and a new trial should be granted. *McKinley Music Co. v. Glymph*, 100 S. C. 200, 84 S. E. 715.

Applied in *Cothran v. Knight*, 47 S. C. 243, 25 S. E. 142; *Perkins v. Douglas*, 46 S. C. 6, 24 S. E. 42; *Dargan v. West*, 27 S. C. 156, 3 S. E. 68.

§ 799. Return—how made if magistrate be out of office.—When a magis-

trate, by whom a judgment appealed from was rendered, shall have gone out of office before a return is ordered, he shall, nevertheless, make a return in the same manner, and with the like effect, as if he were still in office.

1932 Code, § 799; Civ. P. '22, § 664; Civ. P. '12, § 402; Civ. P. '02, § 363; 1870 (14) § 378.

Applied in *Cothran v. Knight*, 47 S. C. 243, 25 S. E. 142.

§ 800. Further return—where defective.—If the return be defective, the appellate court may direct a further or amended return as often as may be necessary, and may compel a compliance with its order by attachment. And the court shall always be deemed open for these purposes.

1932 Code, § 800; Civ. P. '22, § 665; Civ. P. '12, § 403; Civ. P. '02, § 364; 1870 (14) § 379.

Amended or further return may be ordered within discretion of circuit judge.—See note to § 798.

Where such return would be effective.—See note to § 798.

Applied in *Lynch v. Heyward*, 56 S. C. 562, 35 S. E. 220; *McKinley Music Co. v. Glymph*, 100 S. C. 200, 84 S. E. 715; *Perkins v. Douglass*, 46 S. C. 6, 24 S. E. 42.

§ 801. Magistrate dead, insane or absent.—If a magistrate, whose judgment is appealed from, shall die, become insane, or remove from the State, before having made a return, the appellate court may examine witnesses on oath as to the facts and circumstances of the trial or judgment, and determine the appeal, as if the facts had been returned by the magistrate. If he shall have removed to another county within the State, the appellate court may compel him to make the return, as if he were still within the county where the judgment was rendered.

1932 Code, § 801; Civ. P. '22, § 666; Civ. P. '12, § 404; Civ. P. '02, § 365; 1870 (14) § 380.

Applied in *Cothran v. Knight*, 47 S. C. 243, 25 S. E. 142.

§ 802. Hearing upon return.—If a return be made, the appeal may be brought to a hearing by either party. It shall be placed upon the calendar, and continue thereon until finally disposed of. But if neither party bring it to a hearing before the end of the second term, the court shall dismiss the appeal, unless it continue the same by special order, for cause shown. At least eight days before the court, the party desiring to bring on the appeal shall file the return and accompanying papers, if any, with the clerk, and the clerk shall thereupon enter the cause on the calendar, according to the date of the return, and it shall stand for trial without any further notice.

1932 Code, § 802; Civ. P. '22, § 667; Civ. P. '12, § 405; Civ. P. '02, § 366; 1870 (14) § 381 (15) 498, § 20.

Section does not fix time when clerk shall place case on calendar.—The section does not fix the time when the clerk shall place the case on the calendar. *Marshall v. Mitchell*, 59 S. C. 523, 38 S. E. 158, Ann. Cas. 18D, 202.

But appeal must be prosecuted with due diligence.—One appealing from the judgment of a magistrate after respondent's attorney was elected as judge could not wait for notice of employment of a

new attorney, but it was his duty, under this section, to prosecute the appeal with due diligence. *Smith v. Southern Ry. Co.*, 109 S. C. 152, 95 S. E. 339.

And appellant must file return eight days before court.—The party desiring to bring the appeal is only required to file the return and accompanying papers in the office of the clerk of court eight days before court. *Marshall v. Mitchell*, 59 S. C. 523, 38 S. E. 158, Ann. Cas. 18 D, 202.

But it is not mandatory on court to dismiss appeal where case not brought to hearing by end of second term.—It is not mandatory on the court to dismiss an appeal where neither party brings it to a hearing by the end of the second term, and no order continuing it is granted, unless it is called by the court for trial at such term. *Manuel v. Lovelless*, 54 S. C. 346, 32 S. E. 421.

Except when dismissal is justified.—It must appear, to justify dismissal, that the case was called for trial at the second or some subsequent term and neither party, after opportunity to be heard, brought it to trial. *York Supply Co. v. Southern R. Co.*, 82 S. C. 350, 64 S. E. 387.

As where appeal is not brought to a hearing.—Where an appeal was continued by consent to the next term, when, on account of the absence of defendant's

attorney, it was continued by the court, a dismissal on the last day of the following term was properly made, on plaintiff's motion; the appeal not having been brought to a hearing. *Bell v. Pruit*, 51 S. C. 344, 29 S. E. 5, 6.

And it will be inferred that appeal was called for hearing before finally struck out.—Where an appeal from a magistrate's court was on the circuit court docket for three years without being prosecuted, it will be inferred that it had been called for hearing before it was finally struck from the docket. *Smith v. Southern Ry. Co.*, 109 S. C. 152, 95 S. E. 339.

As to dismissal for failure of magistrate to file return, see *Ramseur v. Moore*, 43 S. C. 304, 21 S. E. 81.

Appeals from inferior court in criminal case.—See notes under § 794.

§ 803. Appeal to be heard on original papers.—The appeal shall be heard on the original papers, and no copy thereof need be furnished for the use of the court.

1932 Code, § 803; Civ. P. '22, § 668; Civ. P. '12, § 406; Civ. P. '02, § 367; 1870 (14) § 382.

Applied in *Dargan v. West*, 27 S. C. 156, 3 S. E. 68.

§ 804. Judgment on appeal—new trial.

(1) Upon hearing the appeal, the appellate court shall give judgment according to the justice of the case, without regard to technical errors and defects which do not affect the merits. In giving judgment, the court may affirm or reverse the judgment of the court below, in whole or in part, and as to any or all the parties, and for errors of law or fact. If the appeal is founded on an error in fact in the proceedings, not affecting the merits of the action, and not within the knowledge of the magistrate, the court may determine the alleged error in fact on affidavits, and may, in its discretion, inquire into and determine the same upon examination of the witnesses. If the defendant failed to appear before the magistrate, and it is shown by the affidavits served by the appellant, or otherwise, that manifest injustice has been done, and he satisfactorily excuses his default, the court may, in its discretion, set aside or suspend judgment, and order a new trial, before the same or any other magistrate in the same county, at such time and place, and on such terms as the court may deem proper. Where a new trial shall be ordered before a magistrate, the parties must appear before him according to the order of the court, and the same proceedings must thereupon be had in the action as on the return of a summons personally served.

(2) If the issue joined before the magistrate was an issue of law, the court shall render judgment thereon according to the law of the case; and if such judgment be against the pleadings of either party, an amendment of such pleading may be allowed on the same terms, and in like case, as pleadings in actions in the circuit court, and the court may thereupon require the opposite party to answer such amended pleading, or join issue

thereon, as the case may require, summarily.

(3) If, upon an appeal in an issue of law, the court should adjudge the pleading complained of to be valid, it shall, in like manner, require the opposite party summarily to answer such pleading, or join issue thereon, as the case may require.

(4) Every issue of fact so joined or brought upon an appeal shall be tried in the manner as provided in section 794.

(5) The court shall have the same power over its own determinations, and shall render judgment thereon in the same manner, as the circuit court in actions pending therein, without trial by jury, and may allow either party to amend his pleadings upon such terms as shall be just; and in any appeal, either party may, at any time before the trial, serve upon the opposite party an offer, in writing, to allow judgment to be taken against him for the sum or property, or to the effect in such offer specified, and with or without costs, as said offer shall specify. If the party receiving such offer accept the same, and give notice thereof, in writing, within ten days, he may file the return and offer, with an affidavit of service of notice of acceptance thereof, and judgment shall be entered thereon according to said offer. If the notice of acceptance be not given, the offer is to be deemed withdrawn, and cannot be given in evidence. And if the party to whom such offer is made fail to obtain a judgment more favorable to him than that specified in said offer, then he shall not recover costs, but must pay the other party's costs from the date of the service of the offer.

(6) Either party may move for a new trial in said court on a case or exceptions, or otherwise, and such motion may be made before or after judgment has been entered; and the provisions of this code of procedure in relation to the proceedings, exceptions to the decisions of the court, making and settling cases and exceptions, motions for new trials, and making up the judgment roll in the circuit court, are hereby made applicable to all appeals brought up for trial, as in this chapter provided.

1932 Code, § 804; Civ. P. '22, § 669; Civ. P. '12, § 407; Civ. P. '02, § 368; 1870 (14) § 383; 1873 (15) 502, § 20.

I. In General.

II. On Appeal to Circuit Court.

III. On Appeal to Supreme Court.

I. IN GENERAL

See generally, *Marlboro, etc., Gro. Co. v. Brooke*, 70 S. C. 494, 496, 50 S. E. 186.

Applied in *Fraser v. Atlantic Coast Line R. Co.*, 93 S. C. 272, 76 S. E. 609; *McCaslan v. Nance*, 46 S. C. 568, 24 S. E. 812; *Teague v. Southern Ry. Co.*, 45 S. C. 27, 22 S. E. 779; *Jones v. Rosaman*, 123 S. C. 340, 116 S. E. 193; *Briggs v. Donaldson*, 91 S. C. 22, 74 S. E. 41.

II. ON APPEAL TO CIRCUIT COURT

The circuit court on appeal can review errors of fact in magistrate's court. *Redfearn v. Douglass*, 35 S. C. 569, 15 S. E. 244, Ann. Cas. 18D, 1205.

Upon affidavits.—Where the question of demand was not raised in an action to recover possession of cotton in a magistrate's court, it was not error for the circuit court on appeal to allow affidavits to be introduced to the effect that, before action was brought, plaintiff demanded

possession. *Burton v. Laurens Cotton Mills*, 64 S. C. 224, 41 S. E. 975.

The provisions of this section stating that the court may determine alleged error of fact on affidavits, etc., do not apply in criminal cases. *State v. Richardson*, 98 S. C. 147, 82 S. E. 353.

And can reverse findings of fact.—The circuit court has jurisdiction, under this section, on appeal from the magistrate's court, to reverse the findings of fact. *Dingle v. Northwestern R. Co.*, 112 S. C. 390, 99 S. E. 828.

And alter judgments.—Circuit judge may alter judgment making it greater than that rendered by magistrate. *Goldstein v. Southern Ry.*, 80 S. C. 522, 524, 61 S. E. 1007.

An appeal from magistrate's judgment in claim and delivery proceeding, where magistrate's jury found for the plaintiff the amount due on the debt and the execution of the mortgage was not denied, the circuit court may enlarge the verdict by giving judgment for possession of the

property or its value and fix the value. *Neville Bros. v. Kelley*, 94 S. C. 112, 77 S. E. 743.

Provided such findings are excepted to.—But the circuit court cannot review findings of fact by magistrate not excepted to. *Burns v. Gower*, 34 S. C. 160, 13 S. E. 331.

An exception to a magistrate's judgment on the ground that the verdict was contrary to the preponderance of the evidence was sufficient to authorize a review of the facts by the circuit court. *A. & E. Leather Goods Co. v. Sentz*, 87 S. C. 267, 69 S. E. 390.

Even though determined by a jury.—Under this section, on appeal from a magistrate's court, the circuit court has jurisdiction to review the facts, though they have been determined by a jury in the magistrate's court. *Trulock v. Atlantic Coast Line R. Co.*, 110 S. C. 92, 96 S. E. 254.

And provided magistrate had jurisdiction.—On appeal from a magistrate's court, if the circuit court decides that the magistrate had not acquired jurisdiction of defendant's person, it should dismiss the case, and not remand it for further action. *Riley v. Mutual Life Ins. Co.*, 68 S. C. 383, 47 S. E. 708.

Where the case was before the circuit court on appeal from a magistrate, it should have been decided on the jurisdictional facts as they existed in the magistrate's court, and an equitable remedy, not enforceable in the magistrate's court, was improperly granted. *Blackwell v. Faucett*, 117 S. C. 60, 108 S. E. 295.

And upon such appeal circuit court may render judgment according to justice of the case.—*A & E. Leather Goods Co. v. Sentz*, 87 S. C. 267, 69 S. E. 390.

Without regard to technical errors.—An appeal from magistrate's court judgment should be affirmed on its merits without regard for technical errors or defects. *McKinley Music Co. v. Glymph*, 100 S. C. 200, 84 S. E. 715; *Cullen v. Western Union Telegraph Co.*, 188 S. C. 480, 199 S. E. 702.

Technical rules of procedure are not applicable to magistrate's courts, even on appeal from them to circuit court. The latter is required to give judgment according to the justice of the case. *Green-ville Nursery Co. v. Southern R. Co.*, 112 S. C. 194, 99 S. E. 326; *Darby v. Southern R. Co.*, 108 S. C. 145, 93 S. E. 716.

Thus, failure to file notice and grounds of appeal from a trial justice to a circuit court, as part of the record on appeal, would be, in case such filing were required by statute, a technical error, within this section, providing that the appellate court shall give judgment on the merits "without regard to technical errors." *Perkins v. Douglass*, 46 S. C. 6, 24 S. E. 42.

A judgment of a magistrate will not be reversed because the summons served fails to state the trial day, where the defendant appeared and declined to answer after his motion to set the summons aside had been overruled. *Grant v. Clinton Cotton Mills*, 56 S. C. 554, 35 S. E. 193, Ann. Cas. 14A, 1087.

Which do not affect the merits.—Court must pass on exceptions affecting the merits. *Pierce v. Varn, etc., Co.*, 76 S. C. 359, 57 S. E. 184, 43 L. R. A. (N. S.) 541.

As the circuit court is required by this section to give judgment on appeal from a magistrate's court without regard to technical errors and defects not affecting the merits, the Supreme Court, where the record does not show the grounds upon which the circuit court rested its judgment, must assume that it was upon some sound and meritorious ground and sustain it if the record discloses any such ground. *Price v. Charleston, etc., R. Co.*, 93 S. C. 576, 77 S. E. 703, Ann. Cas. 16D. 335.

For example, refusal to correct mere irregularity is not reversible error.—A refusal to correct a mere irregularity is not reversible error, unless the party interposing the objection can satisfy the court that it was prejudicial to his rights, under this section. *Sanders v. Atlantic Coast Line R. Co.*, 114 S. C. 164, 103 S. E. 564.

Nor is complaint that action was tried in wrong county.—Under this section, defendant cannot complain that action was tried in wrong county; the place of trial being more convenient to defendant than the county where plaintiff resided, and plaintiff having waived the right to have the trial in the county of his residence. *Sanders v. Atlantic Coast Line R. Co.*, 114 S. C. 164, 103 S. E. 564.

Or that court erred in admitting evidence.—There being sufficient undisputed evidence to support the judgment of a magistrate, error in admitting other evidence will be considered harmless. *Charles v. Atlantic Coast Line R. Co.*, 78 S. C. 36, 58 S. E. 927, 125 Am. St. Rep. 762, 15 L. R. A. (N. S.) 983, 31 L. R. A. (N. S.) 106.

To be entitled to reversal for error committed on trial it must be shown that such error was prejudicial or it influenced the magistrate in giving judgment. *Stukes v. Life Insurance Co. of Va.*, 163 S. C., 216, 161 S. E. 478.

In action on insurance policy, failure of county court, on appeal from magistrate's court, to reverse judgment for error in admission of evidence as to representations of agent of defendant as terms of policy, is not error, in view of this section. *Hawkins v. N. C. Mut. Life Ins. Co.*, 170 S. C. 478, 170 S. E. 833.

In action for damage from collision of automobiles, failure of circuit court, on

appeal from magistrate's court, to reverse judgment for error in admission of evidence that defendant carried liability insurance, is not error, in view of this section, requiring circuit court to give judgment according to justice of case, without regard to technical errors. *Naufal v. Gergle*, 136 S. C. 366, 134 S. E. 463.

The admission of a printed offer of reward in evidence in a magistrate's court was harmless, if error, where everything it contained was testified to by one or more witnesses without objection, and such admission was not ground for exception in the circuit court, under this section. *Hampton v. Hughes*, 85 S. C. 343, 67 S. E. 311.

Where record fails to show objection to testimony at the time it was offered, such objection may be deemed waived and too late, when first made on appeal to circuit court. *Feinstein v. Politz*, 103 S. C. 238, 87 S. E. 1005.

Or that summons was not dated.—That a summons in a justice's court is not dated, is not ground for reversal, unless it gives no notice to defendant of the day of trial in the magistrate's court. *Butler Bros. v. Welch*, 76 S. C. 130, 56 S. E. 668.

Or deposition did not have title of case on container.—A judgment will not be reversed merely because a deposition did not have the title of the case indorsed on the package containing it. *Jenkins v. Atlantic Coast Line R. Co.*, 83 S. C. 473, 65 S. E. 636, 1 A. L. R. 906.

Appellant's failure to move before magistrate for new trial could be considered by circuit judge on appeal from default judgment of magistrate. *O'Neal v. Atlas Assur. Co. of London, Eng.*, 168 S. C. 174, 167 S. E. 227.

And circuit court can give judgment as to any or all parties.—It is not error for circuit court to give judgment against one member of partnership sued alone for partnership debt, as demurrer for defect of parties was technical and defendant was not deprived of any defence. *Wright Co. v. Hodges*, 87 S. C. 560, 70 S. E. 316.

And can set aside judgments by default.—The only mode of relief from a magistrate's judgment, rendered against a party through his excusable defaults, is by appeal to the circuit court. *Doty & Co. v. Duvall*, 19 S. C. 143; *Wolfe v. Port Royal, etc., Ry. Co.*, 25 S. C. 379; *Lawrence v. Isear*, 27 S. C. 244, 3 S. E. 222. See also *Miller v. Schmidt*, 20 S. C. 588; *Green v. County Comm'rs*, 27 S. C. 9, 2 S. E. 618.

Within its discretion.—Setting aside magistrate's default judgment is discretionary with the circuit judge, and is not appealable. *Carey v. Tolbert*, 79 S. C. 264, 265, 60 S. E. 674.

And order a new trial.—Where a default judgment is rendered in the magis-

trate's court, and it is shown by affidavits that a manifest injustice has been done, the court may, in its discretion, set aside the judgment and order a new trial. *Glover v. Heyward*, 106 S. C. 360, 91 S. E. 316.

After a magistrate, as allowed by law, has granted a new trial on defendants' motion within five days after rendering a default judgment, and defendants again make default, the judgment can only be set aside or suspended under the express provisions of this section by the circuit court, upon defendants' showing by affidavit or otherwise that manifest injustice has been done and upon satisfactory excuse for their default, and such relief cannot be granted when there is no showing that defendants did not have notice of the day of the second trial, nor that they suffered any other injustice, nor had any excuse for their default. *Williams v. Rickembaker*, 79 S. C. 467, 60 S. E. 1122.

The circuit court has power to review errors of fact in an order of a trial judge granting a new trial, the Code making provision for appeals from orders granting or refusing new trials, and the word "judgment," in this section, not being used in its technical sense of a final determination. *Redfearn v. Douglass*, 35 S. C. 569, 15 S. E. 244, Ann. Cas. 18D, 1205.

As the court has power to order such new trial.—Under this section the court on appeal has power to order a new trial before the magistrate. *Wideman v. Patton*, 64 S. C. 408, 42 S. E. 190.

The circuit court will, in order to do justice when the verdict in magistrate's court is not in proper form, send the case back there for new trial. *Du Bose v. Armstrong*, 29 S. C. 290, 6 S. E. 934.

Where a consideration of all the testimony does not warrant the sole conclusion of judgment for a plaintiff, the circuit court reviewing a case on appeal from the magistrate's court may order a new trial before the magistrate. *McKinley Music Co. v. Glymph*, 100 S. C. 200, 84 S. E. 715.

Or reduce sentence.—Where defendant was convicted in mayor's court of driving an automobile while intoxicated, with recommendation of mercy, circuit court could modify sentence by reducing fine from \$75.00 to \$37.50. *Town of Honea Path v. Wright*, 194 S. C. 461, 9 S. E. (2d) 924.

III. ON APPEAL TO SUPREME COURT

Findings of fact by the circuit court, on appeal from the magistrate's court, cannot be reviewed in the Supreme Court. *Dingle v. Northwestern R. Co.*, 112 S. C. 390, 99 S. E. 828.

On appeal from the county commissioners, the circuit court may review the facts, but its finding thereon is not reviewable. *Tinsley v. Union County*, 40 S. C. 276, 18 S. E. 794; *Aull v. Newberry*

County, 42 S. C. 321, 20 S. E. 61.

As the Supreme Court will assume affirmance on merits.—Where the testimony was sufficient to sustain the judgment of the magistrate's court for the plaintiff, and it was affirmed on appeal to the circuit court, the Supreme Court will assume that the circuit court affirmed the judgment on the merits, where it does not appear that the affirmance was controlled of affected by errors of law. *Bagnal v. Southern Exp. Co.*, 106 S. C. 395, 91 S. E. 334.

Where there is evidence warranting such conclusion.—Since under this section, the circuit court, in affirming a judgment, could have concluded that plaintiff was entitled to judgment regardless of errors, such affirmance will not be disturbed, where there is evidence warranting such a conclusion. *Stanford v. Cudd*, 93 S. C. 367, 76 S. E. 986.

However slight such evidence may be.—Under this section, the Supreme Court cannot question findings of fact in a magistrate's court approved by a circuit judge on appeal when there is any evidence whatever, however slight, tending to prove issues involved. *Ward v. Atlantic Coast Line R. Co.*, 155 S. C. 54, 151 S. E. 904; *O'Neal v. Atlas Assur. Co. of London, Eng.*, 168 S. C. 174, 167 S. E. 227.

Unless the judgment of the circuit court on appeal to it from a magistrate's court is without any evidence to support it, it is not reviewable by the Supreme Court. *A. & E. Leather Goods Co., v. Sentz*, 87

S. C. 267, 69 S. E. 390.

And the Supreme Court will not lend a ready ear to an objection based upon a mere matter of form. *Dargan v. West*, 27 S. C. 156, 3 S. E. 68, 69.

Thus, a magistrate's error in refusing to send a case to another magistrate does not necessarily require the Supreme Court to grant a new trial on appeal from a judgment of the circuit court affirming the magistrate's judgment. *Brown v. Kolb*, 92 S. C. 309, 75 S. E. 529.

The fact that circuit court heard an appeal on the same day on which it was docketed, where the return of the case had been filed thirteen days before, was no ground for reversing a dismissal of the appeal, where it did not appear that appellant was surprised, and the judgment was in accordance with the justice of the case. *Marshall v. Mitchell*, 59 S. C. 523, 38 S. E. 158, Ann. Cas. 18D, 202.

Or make an original finding. *Faust v. Southern Ry.*, 74 S. C. 360, 366, 54 S. E. 566; *Wilson v. Atlantic Coast Line R. Co.*, 79 S. C. 198, 60 S. E. 663.

Conclusion of circuit judge on appeal from magistrate's court should be given more weight in supreme court than almost anything else in consideration of appeals in cases originally heard in courts of magistrates. *Westbrook v. Jefferies*, 173 S. C. 178, 175 S. E. 433.

As to what alleged errors of circuit court Supreme Court will consider, see *Jenkins v. Southern Ry.*, 73 S. C. 289, 53 S. E. 480; 73 S. C. 292, 295, 53 S. E. 481.

§ 805. Judgment roll.—To every judgment upon an appeal there shall be annexed the return on which it was heard, the notice of appeal, with any offer, decision of the court, exceptions, case, and all orders and papers in any way involving the merits and necessarily affecting the judgment, which shall be filed with the clerk of the court, and shall constitute the judgment roll.

1932 Code, § 805; Civ. P. '22, § 670; Civ. P. '12, § 408; Civ. P. '02, § 369; 1870 (14) § 383.

The return may be used in evidence to show pendency of the case in the magistrate's court. *Cothran v. Knight*, 47 S. C. 243, 25 S. E. 142.

§ 806. Costs.—If the judgment be affirmed, costs shall be awarded to the respondent. If it be reversed, costs shall be awarded to the appellant. If it be affirmed in part, the costs, or such part as to the court shall seem just, may be awarded to either party.

1932 Code, § 806; Civ. P. '22, § 671; Civ. P. '12, § 409; Civ. P. '02, § 370; 1870 (14) § 384.

§ 807. Procedure where judgment below has been paid and is reversed.—If the judgment below, or any part thereof, be paid or collected, and the judgment be afterwards reversed, the appellate court shall order the amount paid or collected to be restored, with interest from the time of

such payment or collection. The order may be obtained on proof of the facts made at or after the hearing, upon a previous notice of six days; and if the order shall be made before the judgment is entered, the amount may be included in the judgment.

1932 Code, § 807; Civ. P. '22, § 672; Civ. P. '12, § 410; Civ. P. '02, § 371; 1870 (14) § 386.

§ 808. Setting off cost and recovery.—If, upon appeal, a recovery be had by one party, and cost be awarded to the other, the appellate court shall set off the one against the other, and render judgment for the balance.

1932 Code, § 808; Civ. P. '22, § 673; Civ. P. '12, § 411; Civ. P. '02, § 372; 1870 (14) § 387.

This section does not apply to an action for the possession of a cow awarded to the plaintiff with costs, on condition that she pay the defendant the amount

secured by bill of sale of the cow to him. *Williams v. Harden*, 104 S. C. 52, 88 S. E. 291.

§ 809. Costs on appeal.—Costs shall be allowed to the prevailing party, in judgments rendered on appeal, in all cases, with the following exceptions and limitations: In the notice of appeal, the appellant shall state in what particular, or particulars, he claims the judgment should have been more favorable to him. If he claims that the amount of judgment is less favorable to him than it should have been, he shall state what should have been its amount. Within fifteen days after the service of the notice of the appeal, the respondent may serve upon the appellant and magistrate an offer, in writing, to allow the judgment to be corrected in any of the particulars mentioned in the notice of appeal. The appellant may thereupon, and within five days thereafter, file with the magistrate a written acceptance of such offer, who shall thereupon make a minute thereof in his docket, and correct such judgment accordingly, and the same, so corrected, shall stand as his judgment, and be enforced accordingly; and any execution which has been issued upon the judgment appealed from shall be amended by the magistrate to correspond with the amended judgment. If such offer be not made, and the judgment in the appellate court be more favorable to the appellant than the judgment of the court below, or if such offer be made and not accepted, and the judgment in the appellate court be more favorable to the appellant than the offer of the respondent, the appellant shall recover costs: *provided, however*, that the appellant shall not recover costs unless the judgment appealed from shall be reversed on such appeal, or be made more favorable to him, to the amount of at least ten dollars. If the offer be made and accepted by the appellant, the appellant shall recover all his disbursements on appeal, and all his costs in the court below. But the appellant shall not recover costs, except as provided in this chapter. The respondent shall be entitled to recover costs where the appellant is not. Whenever costs are awarded to the appellant, and when the judgment in the suit before the court below was against such appellant, he shall further be allowed to tax the costs incurred by him which he would have been entitled to recover in case the judgment below had been rendered in his favor. If, upon an appeal, a recovery for any debt or damages be had by one party, and costs be awarded to the other party, the court shall set off such costs against such debt or damages, and render

judgment for the balance. The following fees and costs, and no others, except fees of officers, disbursements, and witnesses' fees, shall be allowed, on appeal, to the party entitled to costs, as herein provided, when the new trial is in the circuit court: for the proceedings before trial, three dollars; for trial of the cause, five dollars; when the amount sued for is under twenty dollars, only two dollars and fifty cents. If the judgment appealed from be reversed in part, and affirmed as to the residue, the amount of costs allowed to either party shall be such sum as the appellate court may award, not exceeding five dollars. If the appeal be dismissed for want of prosecution, as provided by section 802, no costs shall be allowed to either party. In every appeal, the magistrate, before whom the judgment appealed from was rendered, shall receive sixty cents for his return. If the judgment be reversed, for an error of fact in the proceedings, not affecting the merits, costs shall be in the discretion of the court. If, in the notice of appeal, the appellant shall not state in what particular, or particulars, he claims the judgment should have been more favorable to him, he shall not be entitled to costs, unless the judgment appealed from shall be wholly reversed.

1932 Code, § 809; Civ. P. '22, § 674; Civ. P. '12, § 412; Civ. P. '02, § 373; 1870 (14) § 388; 1873 (15) 502, § 20 (17) 297, §§ 2, 7.

In General.—Under the code of 1902 it was held that in appeals to circuit court from magistrate's court, attorneys and not the parties themselves are allowed \$3.00 for proceedings before trial and \$5.00 for trial of appeal. *Salley v. Seaboard, etc., Ry.*, 79 S. C. 454, 455, 60 S. E. 1123.

An application to the circuit court to correct errors in the adjustment of costs by a clerk is not an appeal within this section. *State v. Town Council*, 44 S. C. 500, 22 S. E. 719.

Appellant must state particulars to be entitled to costs.—Where a party appeals from judgment of a magistrate without stating in what particular or particulars the judgment should have been more favorable to him, he will not be entitled to costs, unless the judgment be wholly reversed. *Wall v. Davis*, 19 S. C. 455.

And amount of his recovery must be as required by section.—A defendant appealing from a judgment against him in claim and delivery which awards to plaintiff the right of possession of the

property in dispute or the value fixed at \$100, is entitled to cost, where the appellate court affirms the judgment, with the exception that it reduces the amount to \$77.50. *Brown v. Kolb*, 95 S. C. 217, 78 S. E. 894.

Otherwise respondent will be entitled to costs.—And where appellant is not entitled to costs, the respondent is. *Wall v. Davis*, 19 S. C. 455.

Likewise where appellant refuses offer and obtains judgment for less.—Where appellant refuses to accept offer of respondent to allow judgment for certain amount, and finally obtains judgment for less than defendant's offer, he is liable for all costs subsequent to the offer. *Williford v. Gadsden*, 27 S. C. 87, 2 S. E. 858, 30 Am. St. Rep. 461.

Or where appeal is dismissed by consent of parties.—When, on appeal from a justice's court, the parties consent in writing to a dismissal, with costs, appellant is estopped to claim that costs were erroneously allowed. *Ramseur v. Moore*, 43 S. C. 304, 21 S. E. 81.

TITLE 15

Miscellaneous Provisions Respecting Civil Actions

CHAPTER 48. Proceedings against Joint Debtors, § 810.

CHAPTER 49. Motions and Orders, § 816.

CHAPTER 50. Computation of Time, § 821.

CHAPTER 51. Miscellaneous Provisions, § 823.

CHAPTER 48

Proceedings against Joint Debtors

810. Joint contractors may be summoned after judgment.
811. Form of summons.

812. Affidavit of amount due.
813. Defense by party summoned.
814 and 815. Pleadings.

§ 810. Parties not summoned in action on joint contract may be summoned after judgment.—When a judgment shall be recovered against one or more of several persons jointly indebted upon a contract, by proceeding as provided in section 438, those who were not originally summoned to answer the complaint may be summoned to show cause why they should not be bound by the judgment, in the same manner as if they had been originally summoned.

1932 Code, § 810; Civ. P. '22, § 677; Civ. P. '12, § 415; Civ. P. '02, § 377; 1870 (14) § 392.

Form of judgment entered against party summoned to show cause.—Under this section, a judgment entered against a partner, absent from the state at the time of the entry of a judgment against the co-partnership and the co-partner, is an erroneous one, if entered for the

sum of the original judgment with interest to date. The judgment should be that the defendant "be bound" by the original judgment. *Adickes v. Allison*, 21 S. C. 245, wherein the court suggested the form of the original judgment.

§ 811. Form of summons.—The summons provided in section 810 shall be subscribed by the judgment creditor, his representative or attorney, shall describe the judgment, and require the person summoned to show cause, within twenty days after the service of the summons; and shall be served in like manner as the original summons.

1932 Code, § 811; Civ. P. '22, § 678; Civ. P. '12, § 416; Civ. P. '02, § 378; 1870 (14) § 394.

§ 812. Summons to be accompanied by affidavit of amount due.—The summons shall be accompanied by an affidavit of the person subscribing it, that the judgment has not been satisfied, to his knowledge or information and belief, and shall specify the amount due thereon.

1932 Code, § 812; Civ. P. '22, § 679; Civ. P. '12, § 417; Civ. P. '02, § 379; 1870 (14) § 395.

§ 813. Party summoned may answer and defend.—Upon such summons any party summoned may answer within the time specified therein, denying the judgment, or setting up any defense thereto, which may have arisen subsequently to such judgment; and, in addition thereto, if the party be proceeded against according to section 802, he may make any defense which he might have made to the action if the summons had been served on him at the time when the same was originally commenced and such defense had been then interposed to such action.

1932 Code, § 813; Civ. P. '22, § 680; Civ. P. '12, § 418; Civ. P. '02, § 380; 1870 (14) § 396.

Statute of limitations cannot be pleaded if claim not barred when action commenced.—The party summoned cannot, in answer to such summons, plead the statute of limitations to the claim upon

which judgment has been entered, if the claim is not barred when the action is commenced. *Adickes v. Allison*, 21 S. C. 245.

§ 814. Subsequent pleadings and proceedings the same as in an action.—The party issuing the summons may demur or reply to the answer, and the party summoned may demur to the reply; and the issues may be tried and judgment may be given in the same manner as in an action, and enforced by execution; or the application of the property charged to the payment of the judgment may be compelled by attachment, if necessary.

1932 Code, § 814; Civ. P. '22, § 681; Civ. P. '12, § 419; Civ. P. '02, § 381; 1870 (14) § 397.

§ 815. Answer and reply to be verified as in an action.—The answer and reply shall be verified in the like cases and manner, and be subject to the same rules as the answer and reply in an action.

1932 Code, § 815; Civ. P. '22, § 682; Civ. P. '12, § 420; Civ. P. '02, § 382; 1870 (14) § 398.

CHAPTER 49

Motions and Orders

816. Definition of order.

817. Definition of motion.

818. Notice of motion.

819. Transfer of hearing to another judge.

820. Enlarging time for proceeding.

§ 816. Definition of order.—Every direction of a court or judge, made or entered in writing, and not included in a judgment, is denominated an order.

1932 Code, § 816; Civ. P. '22, § 753; Civ. P. '12, § 439; Civ. P. '02, § 401; 1870 (14) § 416.

Refusal of motion for nonsuit is not an "order."—Under this section, the refusal of a motion for a nonsuit, not being "made or entered in writing," is not an order. *Agnew v. Adams*, 24 S. C. 86.

An order, under this section, passed in an equity cause is valid, although the cause is not on calendar. *Wright v. Herlong*, 16 S. C. 620.

A judge has no power of his own mere motion to make an order affecting the

rights of a party. *State v. Parker*, 7 S. C. 235.

The order of one court or judge cannot be set aside or disregarded for irregularity by another. *Furman v. Greenville, etc.*, R. Co., 3 S. C. 427, 438.

The order of one judge granting leave to a party to make a motion before another judge is without force. *Steele v. Charlotte, etc.*, R. Co., 14 S. C. 324.

§ 817. Motions—orders.

(1) **Defined.**—An application for an order is a motion.

(2) **Motions—how and when made.**—Motions may be made to a judge or justice out of court, except for a new trial on the merits.

(3) **Orders out of court without notice.**—Orders made out of court, without notice, may be made by the judge of the court, in any part of the State.

(4) **Motions—where made.**—Motions upon notice must be made within the circuit in which the action is triable, or, in the absence or inability of the judge of the circuit, may be made before the resident or presiding judge of a circuit adjoining that in which it is triable.

(5) **Preference of motions.**—A motion to modify or vacate a provisional remedy, and an appeal from an order allowing a provisional remedy, shall have preference over all other motions.

(6) **Stay of proceedings.**—No order to stay proceedings for a longer time than twenty days shall be granted by a judge out of court, except upon previous notice to the adverse party, of at least four days, unless the circuit judge prescribe a shorter period.

(7) **Appointment of referee to take requisite affidavits.**—When any party intends to make or oppose a motion in any court of record, and it shall be necessary for him to have the affidavit of any person who shall have refused to make the same, such court, or a judge thereof, may, by order, appoint a referee to take the affidavit or deposition of such person. Such person may be subpoenaed and compelled to attend and make an affidavit before such referee, the same as before a referee to whom it is referred to try an issue. And the fees of such referee for such service shall be three dollars per day.

(8) **Decision on motion.**—Whenever a motion shall be made in any cause or proceeding in any of the courts in this State to obtain an injunction order, order of arrest, or warrant of attachment, granted in any such case or proceeding, it shall be the duty of the judge, magistrate, or other officer before whom such motion is made, to render and make known his decision on such motion within twenty days after the day upon which such motion shall or may be submitted to him for his decision.

1932 Code, § 817; Civ. P. '22, § 754; Civ. P. '12, § 440; Civ. P. '02, § 402; 1870 (14) § 417; 1899 (23) 39.

I. Subdivision (2).

II. Subdivision (3).

III. Subdivision (4).

IV. Subdivision (6).

V. Subdivision (7).

I. SUBDIVISION (2).

Cross References.

As to provisions pertaining to the making and directing of motions, rules, orders, etc., by circuit courts, see § 33, and note thereto. As to specific section covering powers of judges holding courts in other circuits, see § 38, and note thereto.

Editor's note.—Few of the decided cases wherein this section has been cited have construed the provisions of this subsection. In most instances the cases merely illustrate what motions have, under the authority of this subdivision, been presented to a judge.

Under subdivision 2 of this section, a motion may be made to obtain relief in a cause not ended. *Wright v. Herlong*, 16 S. C. 620. As to appeals, see particular courts.

And must be made before judge having jurisdiction of case.—A motion for a writ of certiorari must, under this subdivision, be made before the Judge of the Court having jurisdiction of the case. *State v. Black*, 34 S. C. 194, 13 S. E. 361, 363.

A circuit judge, under subdivision 2 of this section has no jurisdiction to hear, at chambers, a motion to vacate a judgment, as he has no authority to hear a motion for a new trial, whether on the merits or not. *Turner v. Foreman*, 47 S.

C. 31, 24 S. E. 989; *Bank of Manning v. Mellett*, 44 S. C. 383, 22 S. E. 444, 445; *Clawson v. Hutchinson*, 14 S. C. 517; *Charles v. Jacobs*, 5 S. C. 348; *Coleman v. Keels*, 30 S. C. 614, 9 S. E. 270. Nor can he render a judgment at chambers. *Badham v. Brabham*, 54 S. C. 400, 32 S. E. 444, 445, Ann. Cas. 13A, 110, Ann. Cas. 16A, 1229, citing *Turner v. Foreman*, supra, with approval. As to powers of circuit and special judges at chambers, see § 37, and note thereto, and Const. 1895, art. 5, § 25.

Applied as to hearing at chambers; motion for order of reference, *Bank of Hampton v. Fennel*, 55 S. C. 379, 33 S. E. 485, 486; *Montague v. Best*, 65 S. C. 455, 458, 43 S. E. 963, 964; dissenting opinion, *Simms v. Phillips*, 46 S. C. 149, 24 S. E. 97, 99; **motion to amend complaint,** *Ellen v. Ellen*, 26 S. C. 99, 1 S. E. 413, 414, Ann. Cas. 16A, 1229; **motion for alimony pendente lite,** *Smith v. Smith*, 51 S. C. 379, 29 S. E. 227, 228, 77 Am. St. Rep. 244, 38 L. R. A. (N. S.) 955, Ann. Cas. 13D, 1135, Ann. Cas. 13E, 1087; *Messervy v. Messervy*, 80 S. C. 277, 61 S. E. 442, 444, Ann. Cas. 13A, 667, 6 A. L. R. 73, 193; **motion for writ of assistance,** *Murchison v. Miller*, 64 S. C. 425, 428, 42 S. E. 177, 178, Ann. Cas. 13D, 1123, 21 A. L. R. 360; **motion for discontinuance,** *Shelton v. Southern Ry.*, 20 S. C. 74, 61 S. E. 220, 222; **motion to dissolve an attachment upon notice,** *Cureton v. Dargan*, 12 S. C. 122; **motion for leave to file a supplemental complaint,** *Edwards v. Edwards*, 14 S. C. 11, 63 Am. Dec. 124, Ann. Cas. 16A, 1229;

motion to vacate a warrant of seizure to enforce an agricultural lien, *Segler v. Coward*, 24 S. C. 119; but not after the defendant has elected his remedy given him by the statute and the issues are made up and referred to the master; *Garlington v. Gilliam*, 31 S. C. 333, 9 S. E. 1037; also, a motion to authorize issuance of receiver's certificates, *State v. Port Royal, etc., Ry. Co.*, 45 S. C. 413, 23 S. E. 363.

II. SUBDIVISION (3).

Cross references.—As to specific sections covering functions of circuit judges, see §§ 38-39, and note thereto, and Const. 1895, art. 5, §§ 14-15. As to specific section covering making and directing of motions, rules, etc., by circuit courts, see § 33 and note thereto.

Writ of certiorari is a judgment and not an "Order."—It is doubtful whether subdivision 3 of this section has any application to the granting of a writ of certiorari, as a writ of certiorari is in the nature of a judgment rather than an order. *State v. Black*, 34 S. C. 194, 13 S. E. 361, 364.

Subdivision 3 of this section applies only to an order made "without notice," which, of course, means an order which can properly be made without notice. *State v. Black*, 34 S. C. 194, 13 S. C. 361, 364.

Order directing master to execute decree authorizing a conveyance is an order "Without Notice."—An order, under subdivision 3 of this section may be made to a master in chancery to execute a conveyance to the plaintiff, without giving notice to the parties in the original suit, where a decree has directed the executor of the parties, not given notice, to convey land to the plaintiffs. *Miller v. Cramer*, 48 S. C. 282, 26 S. E. 657, 662, 95 Am. St. Rep. 677, 132 Am. St. Rep. 995, 1022, 38 L. R. A. (N. S.) 5, 27, Ann. Cas. 13 D, 1315.

Order at chambers granting motion heard during term is not an order "Out of Court."—*Appleby v. South Carolina, etc., R. Co.*, 58 S. C. 33, 36 S. E. 109, 110.

Order of one judge cannot be disregarded for irregularity by another judge. *Furman v. Greenville, etc., R. Co.*, 3 S. C. 427, 438.

But one judge cannot grant leave to make motions before another.—A judge cannot, under this section grant leave to a party to make a motion before another judge—such an order being one without force. *Steele v. Charlotte, etc., R. Co.*, 14 S. C. 324.

Nor can a judge of his own motion make an order affecting the rights of a party.—*State v. Parker*, 7 S. C. 235.

Merits of cause cannot be considered in hearing at chambers.—In hearing, at chambers, a motion to dissolve an attachment, a judge may not, under the authority granted him by subdivision 3 of

this section, consider the merits of the cause, even though he may decide whether the plaintiff has a cause of action. *Williamson v. Eastern Bldg., etc., Ass'n*, 54 S. C. 582, 32 S. E. 765, 768, 71 Am. St. Rep. 822, 70 Am. St. Rep. 168, L. R. A. 1917A, 880, 947, Ann. Cas. 16E, 364; *Moore v. Rountree*, 57 S. C. 75, 35 S. E. 386, 387.

As to section covering powers of circuit judges at chambers, see § 37, and note thereto.

But a rule to show cause is not adjudication of merits.—A circuit judge, under this section, has jurisdiction to issue a rule for contempt proceedings in a county in which he resides, in chambers, against a party residing in another county, the return to be made in such other county, since a rule to show cause adjudges nothing. *State v. Cape Fear Lbr. Co.*, 72 S. C. 322, 51 S. E. 873, 874, Ann. Cas. 13B, 36.

Applied as to granting at chambers: order of reference, *Montague v. Best*, 65 S. C. 455, 43 S. E. 963, 964; order bringing in new parties, *Hellams v. Prior*, 64 S. C. 543, 544, 43 S. E. 25; order correcting mere clerical error in decree on ex parte application, *Chafee & Co. v. Rainey*, 21 S. C. 11, 4 L. R. A. (N. S.) 368, 10 A. L. R. 533, 544, 585.

III. SUBDIVISION (4).

As to jurisdiction of circuit judges, see § 39, and note thereto.

Circuit judge not given power to perform judicial duties outside of circuit.—*Ex parte Parker*, 6 S. C. 472.

Therefore, a petition in mandamus arising in one circuit cannot, under this subdivision, be heard by a circuit judge of another circuit, the courts of which he is not holding. *State v. Williams*, 52 S. C. 416, 29 S. E. 814, 815.

As to section covering powers of circuit judges at chambers, see § 37, and note thereto. See also, the note to the next foregoing subsection.

Nor can judge holding courts in another circuit hear cause arising in his circuit.—A circuit judge, under subdivision 4 of this section, while holding court in a circuit other than his own, has no jurisdiction to hear and determine, at chambers in such other circuit, an application for mandamus in a cause which arose in his circuit. *La Motte v. Smith*, 50 S. C. 558, 27 S. E. 933, 934, Ann. Cas. 13E, 391.

As to specific section covering powers of judges holding courts in other circuits, see § 38, and note thereto.

But a decree may be rendered in cause which judge heard before leaving his circuit.—A circuit judge, under this subdivision, may render a decree in a cause heard by him in one circuit after he has entered upon his duties in another circuit. *Chafee & Co. v. Rainey*, 21 S. C. 11, 4 L. R. A. (N. S.) 368, 10 A. L. R.

533, 544, 585.

And a motion marked "heard" but not disposed of may be heard by another circuit judge. In re Doran, 129 S. C. 26, 123 S. E. 501, 503.

Receiver may be appointed in a circuit having no judge.—This subdivision does not limit the authority of a circuit judge to appoint receiver, in chambers, in another circuit, when that circuit has no resident judge and when the parties consent. Truesdell v. Johnson, 144 S. C. 188, 142 S. E. 343, 346.

As to appointment of receivers by judges of circuit court, see § 584, and note thereto.

But one circuit judge cannot review action of another.—This subdivision, however, does not give a circuit judge power to review the action of another circuit judge, and he transcends the limits of his authority when he issues an order changing custody as fixed by order of another circuit judge. In re Doran, 129 S. C. 26, 123 S. E. 501, 504. See also, Odom v. Burch, 52 S. C. 305, 29 S. E. 726, 727.

Relief granted limited by terms of notice.—The view has been taken, under this section, that it is error to grant relief beyond the terms of the notice given. De Walt v. Kinard, 19 S. C. 286, 72 Am. St. Rep. 92, 41 L. R. A. (N. S.) 813.

Applied, as to motion to set aside a decree of foreclosure, Thomas v. Raymond, 4 S. C. 347.

IV. SUBDIVISION (6).

Applies only to court proceedings.—

This subdivision has been construed as relating to the proceedings of some court or some process issued by its authority, and does not refer to an injunction addressed to a private individual. Strom v. American, etc., Co., 42 S. C. 97, 20 S. E. 16, 18, Ann. Cas. 17D, 127.

But Supreme Court proceedings are not included.—This subdivision has been

construed as applying only to circuit court practice, and not to the Supreme Court. Salinas v. Aultman & Co., 49 S. C. 378, 27 S. E. 407, 408, Ann. Cas. 13E, 391.

Extending time for answer not a "stay of proceedings."—Enlarging the time for an answer does not operate as a "stay of proceedings" under this subdivision, so as to require notice. Wilcox, etc., Guano Co. v. Phoenix Ins. Co., 60 F. 929, 933.

As to specific section covering extension of time for proceedings in an action, see § 820, and note thereto.

Defect as to notice waived by petition filed within statutory period to vacate injunction.—Defect as to notice required, under this subdivision, of staying of proceedings, is waived by defendant where he petitions to vacate an ex parte injunction within twenty days after it is made. Meinhard v. Youngblood, 37 S. C. 223, 15 S. E. 947, 948, 35 L. R. A. 772, Ann. Cas. 13E, 463.

But failure to give notice does not render an injunction void ab initio.—A restraining order is not rendered irregular ab initio by failure to give the notice required by this subdivision, but is only made nugatory after the lapse of twenty days. Strom v. American, etc., Co., 42 S. C. 97, 20 S. E. 16, 18, Ann. Cas. 17D, 127.

V. SUBDIVISION (7)

Supreme Court may appoint referee to take after-discovered evidence.—The Supreme Court may, under this section, appoint a referee to take the after-discovered evidence of a party who refuses to make an affidavit to be used in a motion to suspend an appeal in a criminal case, and for leave to move for a new trial. State v. Marks, 70 S. C. 448, 50 S. E. 14, 15.

As to section covering motions for new trials, see § 26, and note thereto.

§ 818. Notice of motion.—When a notice of a motion is necessary, it must be served four days before the time appointed for the hearing; but the court or judge, may, by an order to show cause, prescribe a shorter time.

1932 Code, § 818; Civ. P. '22, § 755; Civ. P. '12, § 441; Civ. P. '02, § 403; 1870 (14) § 418.

As to section covering motions for change of venue, see § 35, and note thereto.

Notice not required of all motions.—This subdivision has been construed as implying that certain motions, such as enlarging time for an answer, may be made without notice. This is put upon the theory that they do not operate to the prejudice of the other party. Fishburne v. Minott, 72 S. C. 567, 52 S. E. 648, 649.

As to specific section covering motions for enlarging time for proceedings in an action, see § 820, and note thereto.

But notice is "necessary" of orders prejudicial to interests of party.—State v. Parker, 7 S. C. 235.

And motions raising issues of fact are included.—Whether there has been in fact an extension of time by competent authority, raises an issue of fact on which party is entitled to be heard, and he must be given notice under this subdivision. Horger v. Sims, 131 S. C. 117, 126 S. E. 430.

But "notice" is not given when order grants relief different from motion.—The view was taken in the dissenting opinion in Goodlett v. Goodlett, 88 S. C.

456, 70 S. E. 437, 439, that an order directing a master to take testimony and report as to attorney's fees, violated the provisions of this section inasmuch as the order granted a relief different from that asked for, and thus did not give the defendant an opportunity to resist the order.

Notice given on day of hearing is invalid.—A notice to plaintiff's attorney, on the day set for testimony to be taken, that the notice as to the testimony has been withdrawn and that the case will proceed to trial that day, is too short a notice under this subdivision. In re Shier's Estate, 35 S. C. 417, 14 S. E. 931, 933, 127 Am. St. Rep. 554, Ann. Cas. 17B,

904.

An order made under a notice not complying with this subdivision, is an invalid one. In re Shier's Estate, 35 S. C. 417, 14 S. E. 931, 933, 127 Am. St. Rep. 554, Ann. Cas. 17B, 904.

Applied, as to motion for change of venue, Willoughby v. Northeastern R. Co., 46 S. C. 317, 24 S. E. 308, 309; Fishburne v. Minott, 72 S. C. 567, 572, 52 S. E. 646, 647; motion to have proposed appeal declared waived for failure to perfect, Horger v. Sims, 131 S. C. 117, 126 S. E. 430; motion to enjoin decree for sale of mortgaged premises, Rice v. Mahaffey, 9 S. C. 281; motion for security of costs, Dulany & Co. v. Elford, 22 S. C. 304.

§ 819. Motion may be transferred in absence of judge from chambers, etc.—When notice of a motion is given, or an order to show cause is returnable before a judge out of court, and at the time fixed for the motion he is absent or unable to hear it, the same may be transferred, by his order, to some other judge, before whom the motion, in case of his absence or inability, might originally have been made.

1932 Code, 819; Civ. P. '22, § 756; Civ. P. '12, § 442; Civ. P. '02, § 404; 1870 (14) § 419.

As to powers of judge at chambers, see § 37 and note.

Provinces of section 817 extended to motions heard in proper circuit.—This section extends the provision of § 817, subdivision 4, to the case of a motion already noticed or ordered to be heard in the proper circuit. Ex parte Parker, 6 S. C. 472.

But authority of judges to perform acts outside of circuit is not enlarged.—Ex parte Parker, 6 S. C. 472.

And mandamus proceedings are not included.—This subdivision does not per-

mit a circuit judge of one circuit to hear a petition in a mandamus proceeding arising in another circuit, the courts of which he is not holding. State v. Williams, 52 S. C. 416, 29 S. E. 814, 816.

As to specific section covering powers of adjoining circuit judge, see § 37, and note thereto. See also, § 817 (subd. 4).

Applied, as to hearing of demurrer, Ross v. Pickens County, 146 S. C. 24, 143 S. E. 366; motion to dissolve an attachment, Campbell v. Hill, 158 S. C. 151, 155 S. E. 273, 276.

§ 820. Enlarging time for proceeding in an action.—The time within which any proceeding in an action must be had, after its commencement, except the time within which an appeal must be taken, may be enlarged, upon an affidavit showing grounds thereof, by a judge of the circuit court. The affidavit, or a copy thereof, must be served with a copy of the order, or the order may be disregarded.

1932 Code, § 820; Civ. P. '22, § 757; Civ. P. '12, § 443; Civ. P. '02, § 405; 1870 (14) § 420.

Enlargement of time of proceeding does not require notice.—This section does not require notice of an application for the enlargement of the time of a proceeding in an action. This is indicated by the fact that the order may be disregarded unless a copy of the affidavit is served with the order. Fishburne v. Minott, 72 S. C. 567, 52 S. E. 646, 648, 649.

Enlarging time to answer does not stay

proceedings, so as to require notice. Wilcox, etc., Guano Co. v. Phoenix Ins. Co., 60 F. 929, 933.

Applied, as to filing of bond in attachment proceedings, Chesterfield Gro. Co. v. Birch (S. C.), 101 S. E. 645.

See White v. Harby, 176 S. C., 36; 179 S. E., 671, as to liberality of court in applying this section.

CHAPTER 50

Computation of Time

821. General rule.

822. Time for publication of notice.

§ 821. Time—how compute.—The time within which an act is to be done, as herein provided, shall be computed by excluding the first day and including the last. If the last day be Sunday, it shall be excluded.

1932 Code, § 821; Civ. P. '22, § 759; Civ. P. '12, § 445; Civ. P. '02, § 407; 1870 (14) § 422.

Fractions of days are not recognized in the computation of time under this section. *Williams v. Halford*, 64 S. C. 396, 42 S. E. 187, 189.

"Within" a period permits party to act on last day of period.—When a party is required to act "within" ten days, he is in time if he acts on the tenth day. *Williams v. Halford*, 67 S. C. 296, 45 S. E. 207, 210.

But "not less than" enables act to be done after expiration of time prescribed.—Where a party is entitled to a notice of "not less than ten days," he is not required to act until the expiration of ten days. *Williams v. Halford*, 67 S. C. 296, 45 S. E. 207, 210.

And taking of depositions is included.—A notice served as to the taking of depositions, under a statute (§ 706) requiring that reasonable notice, not less than ten days, must be given in writing by the party proposing to take a deposition, does not come within the provisions of this section, so as to be a valid notice, where notice is served on the tenth to take testimony on the twentieth. *Williams v. Halford*, 67 S. C. 296, 45 S. E. 207, 210.

A different conclusion from this was reached when the above mentioned case first appeared before the Supreme Court in *Williams v. Halford*, 64 S. C. 396, 42 S. E. 187, 189.—Ed note.

"Sight" of indictment by accused.—Under a statute (§ 978) allowing the accused three days sight of the indictment after service, the trial, under this section, may properly be held on Thursday where a copy of the indictment was served on Monday. *State v. Platt*, 154 S. C. 1, 151 S. E. 206, 209.

Filing of pledges by candidates.—In view of this section, the rule of a political party that candidates for nominations should file a pledge with the chairman of the executive committee five days before a primary election to be held on January 7th, was complied with by filing the pledge with the chairman of the committee on January 2d. *Holt v. Settlementmeyer*, 79 S. C. 263, 60 S. E. 659, 15 L. R. A. (N. S.) 691.

As to specific section covering filing of pledges by candidates, see § 1417, and note thereto.

Motion for new trial may be made on

day following period set where period ends on Sunday.—Where the last day of the five days allowed by statute (§ 274) for the moving of a new trial falls on Sunday, the motion, under this section, may be made on Monday. *Ashe v. State*, 41 S. C. 92, 19 S. E. 297, 299.

And same provision applies to service of complaint after demand.—The statute (§ 430) providing twenty days for service of complaint after demand, is properly complied with, under this section, where a complaint is put in the mail on the 21st day, the 20th day being Sunday. *Royal Exchange Assur. v. Bennettsville*, etc., R. Co., 95 S. C. 375, 79 S. E. 104, 105.

But Sunday not excluded if not the last day.—This section implies that if Sunday is not the last day, it shall be included in the computation of time. *Salley v. Seaboard*, etc., Ry., 76 S. C. 173, 56 S. E. 782, 783, 31 L. R. A. (N. S.) 91, Ann. Cas. 17E, 937; *Royal Exchange Assur. v. Bennettsville*, etc., R. Co., 95 S. C. 375, 79 S. E. 104, 105.

Under § 493, permitting the filing of an amendment to a complaint within twenty days after a demurrer to such, an amendment may, under this section, be filed within twenty days after the filing of the remittitur in the trial court. *Hubbard v. Furman University*, 80 S. C. 63, 61 S. E. 210.

An answer filed under a statute (§ 457) permitting the filing of an answer within twenty days after the service of the complaint, is properly filed under this section, if it is filed within twenty days after the remittitur reaches the trial court. *Barnwell v. Marion*, 56 S. C. 54, 33 S. E. 719.

Computing grace period in insurance policies, where last day falls on Sunday.

—Where life policy provided premiums were due on first day of month and allowed until and including last day of day fell on Sunday, insured had until month as period of grace and the last and through Monday in which to pay premium, especially in view of statutes concerning Sundays; and hence where insured died on Monday and beneficiary tendered premium on same day, insurer was liable under policy. *Linforts v. Unity Life Ins. Co.*, 189 S. C. 527, 1 S. E. (2d) 781.

§ 822. Time for publication of notices—how computed.—The time for publication of legal notices shall be computed so as to exclude the first day of publication, and include the day on which the act or event, of which notice is given, is to happen, or which completes the full period required for publication.

1932 Code, § 822; Civ. P. '22, § 773; Civ. P. '12, § 459; Civ. P. '02, § 421; 1870 (14) § 440.

Publication of notice of election on bond issue.—Under a special act, relating to an election on the question of the issuance of sewerage bonds by a municipality, providing that the city council shall give "at least three weeks" notice by advertisement in one of the papers of the city, a publication made August 25th

is, under this section, a valid notice as to an election to be held on September 15th. *Cleveland v. Calvert*, 54 S. C. 83, 31 S. E. 871, 872.

As to section covering notice required of election as to issuance of bonds by municipality, see § 7327, and note thereto.

CHAPTER 51

Miscellaneous Provisions

823. When copy of paper may be used. 824. Where undertakings filed.
825. Defectively entitled affidavits.

§ 823. Papers lost or withheld—how supplied.—If an original pleading or paper be lost or withheld by any person, the court may authorize a copy thereof to be filed and used instead of the original.

1932 Code, § 823; Civ. P. '22, § 771; Civ. P. '12, § 457; Civ. P. '02, § 419; 1870 (14) § 437.

Section confers no new powers.—This section confers no new powers, but simply recognizes the general power, already existing in the court, of so sub-

stituting new records. *Du Bois v. Thomas*, 14 S. C. 30, 33. Such general authority includes judgments. *Id.*

§ 824. Where undertakings to be filed except in claim and delivery actions.—The various undertakings required to be given by this Code of Procedure must be filed with the clerk of the court, unless the court expressly provides for a different disposition thereof, except that the undertakings provided for by the chapter on the claim and delivery of personal property, shall, after the justification of the sureties, be delivered by the sheriffs to the parties, respectively, for whose benefit they are taken.

1932 Code, § 824; Civ. P. '22, § 772; Civ. P. '12, § 458; Civ. P. '02, § 420; 1870 (14) § 438.

§ 825. Affidavits defectively entitled valid.—It shall not be necessary to entitle an affidavit in an action; but an affidavit made without a title, or with a defective title, shall be as valid and effectual, for every purpose, as if it were duly entitled, if it intelligibly refer to the action or proceeding in which it is made.

1932 Code, § 825; Civ. P. '22, § 758; Civ. P. '12, § 444; Civ. P. '02, § 406; 1870 (14) § 421.

Affidavit defined.—The definition of an affidavit, given in 1 Am. & Eng. Enc. Law 307, as being "a formal written (or

printed) voluntary ex parte statement sworn (or affirmed) to before an officer authorized to take it, to be used in legal

proceedings," was approved in *Marine Wharf, etc., Co. v. Parsons*, 49 S. C. 136, 26 S. E. 956, 966, 45 L. R. A. 499.

Affidavit may be taken before any officer qualified by law to take affidavits where made.—In the absence of some statute or rule of court providing otherwise, proof of service on a nonresident may be made by affidavit taken before any officer qualified by law to take affidavits where the affidavit is made. *Marine Wharf, etc., Co. v. Parsons*, 49 S. C. 136, 26 S. E. 956, 966.

As to specific section providing for proof of service on nonresidents, see § 436, and note thereto.

Swearing of affidavit may be proved by magistrate.—The fact that an affidavit was sworn to, may be proved by the magistrate before whom it was made. *State v. Williams*, 76 S. C. 135, 56 S. E. 783, 785, 122 Am. St. Rep. 759, 24 L. R. A. (N. S.) 785, Ann. Cas. 13C, 488.

Venue does not have to be stated in af-

fidavit.—While there are cases to the contrary, the South Carolina courts are inclined to follow the rule that it is not necessary to state the venue in an affidavit. *Clemson Agricultural College v. Pickens*, 42 S. C. 511, 20 S. E. 401, 404, 60 Am. St. Rep. 655. This is especially true where the only defect is the omission of the word "County" after the name of the county. Id.

Nor does failure of affiant to sign invalidate it.—The failure of the affiant to sign an affidavit, sworn to before the proper officer, does not invalidate it in the absence of a rule requiring such. *Armstrong v. Austin*, 45 S. C. 69, 22 S. E. 763, 767, 29 L. R. A. 772, 96 Am. St. Rep. 401.

See généralement, *Doty v. Boyd*, 46 S. C. 39, 24 S. E. 59, 1 A. L. R. 1572; *McCreary v. Coggeshall*, 74 S. C. 42, 53 S. E. 978, 7 L. R. A. (N. S.) 433, 18 L. R. A. (N. S.) 523, Ann. Cas. 17A, 910, 29 A. L. R. 976.

TITLE 16

Actions in Particular Cases and Extraordinary Remedies

CHAPTER 52. Actions against Foreign Corporations, § 826.

CHAPTER 53. Substitutes for Scire Facias, Quo Warranto, and Informations in the Nature of Quo Warranto, § 827.

CHAPTER 54. The Writ of Mandamus, § 847.

CHAPTER 52

Actions against Foreign Corporations

§ 826. Where and by whom action brought.—An action against a corporation created by or under the laws of any other State, government, or country made be brought in the circuit court:

(1) By any resident of this State, for any cause of action.

(2) By a plaintiff not a resident of this State, when the cause of action shall have arisen, or the subject of the action shall be situated, within this State.

1932 Code, § 826; Civ. P. '22, § 774; Civ. P. '12, § 461; Civ. P. '02, § 423; 1870 (14) § 442.

See sections 420 and 421 and notes thereto.

Section is constitutional.—This section does not violate U. S. Const. art. 4, sec. 2, which secures to the citizens of each state all the privileges and immunities of citizens in the several states, as the provisions of this section relate only to residence, and not to citizenship. Following *Cummings v. Wingo*, 31 S. C. 427, 10 S. E.

107, 25 Am. St. Rep. 873, Ann. Cas. 13D, 576; *Central R., etc., Co. v. Georgia Constr., etc., Co.*, 32 S. C. 319, 11 S. E. 192, 202, 25 Am. St. Rep. 873, 85 Am. St. Rep. 914, 14 L. R. A. 583, 17 L. R. A. 87, 70 L. R. A. 544, Ann. Cas. 17C, 877. Nor does it conflict with Const. S. C. art. 1, sec. 15.

Nor is the section unconstitutional as impairing the obligation of contracts, as

a corporation, being the mere creation of the local law, depends for a recognition of its legal existence by other states on the assent of the states; and a state may make such regulations in regard to corporations created in another state as it deems best, or it may exclude them. *Central R., etc., Co. v. Georgia Constr., etc., Co.*, 32 S. C. 319, 11 S. E. 192, 203, 25 Am. St. Rep. 873, 85 Am. St. Rep. 914, 14 L. R. A. 583, 17 L. R. A. 87, 70 L. R. A. 544, Ann. Cas. 17C, 877.

Plaintiff may elect county for action.—Under this section, a plaintiff may elect in which county to sue a foreign corporation; and the jurisdiction of a court of a county in which the corporation does not have an agent cannot be overthrown by showing the corporation has become domesticated. *Elms v. Southern Power Co.*, 78 S. C. 323, 58 S. E. 809, 810.

Magistrate's court may entertain actions when otherwise within jurisdiction.—In view of other legislation subjecting foreign corporations to jurisdiction of the state courts, this section has been construed as not limiting all actions against foreign corporations to the circuit courts; and a magistrate's court may entertain actions against such corporations, when the action is otherwise within the jurisdiction of the magistrate. *Best v. Seaboard, etc., Ry.*, 72 S. C. 479, 52 S. E. 223, 225.

But federal court cannot hear removals where circuit courts did not have jurisdiction.—This section does not enable a cause of action to be removed to the federal court, where the circuit court did not have jurisdiction under this section, even though the cause might have been brought in the federal court in the first instance. *Lightfoot v. Atlantic Coast Line R. Co.*, 33 F. (2d) 765.

Failure to show plaintiff resident of state waived by defendant pleading to merits.—A foreign corporation waives the defect in a complaint failing to state that plaintiff was a resident of South Carolina by appearing in court and answering to the merits, as the appearance presumes jurisdiction by the court over the plaintiff. *Chafee v. Postal Tel. Co.*, 35 S. E. 372, 14 S. E. 764.

But complaint not showing plaintiff is not resident of state is not defective.—A complaint in a court of general jurisdiction is not demurrable, under this section, on the ground of want of jurisdiction because of nonresidence of the plaintiff, it not appearing therefrom what his residence is. *Pollock v. Carolina Interstate Bldg., etc., Ass'n*, 48 S. C. 65, 25 S. E. 977, 980, 59 Am. St. Rep. 695, 85 Am. St. Rep. 934, 70 L. R. A. 698, 47 L. R. A. (N. S.) 181.

And state of incorporation of defendant does not have to be shown.—Machen

v. Western Union Tel. Co., 63 S. C. 363, 41 S. E. 448, 450.

"Any cause of action" includes one arising out of state.—Jurisdiction of a foreign corporation doing business in the state through agents amenable to process, though it has not complied with the state laws nor intended to subject itself to the jurisdiction of the state courts, is acquired, under this section, in an action brought by a resident of the state, though the cause of action arose without the state. *Lipe v. Carolina, etc., R. Co.*, 123 S. C. 515, 116 S. E. 101, 102, 30 A. L. R. 248.

But corporation must be "doing business" in this state.—For a circuit court to have jurisdiction against a foreign corporation where the cause of action arises without the state, it must be shown that the corporation is "doing business" within the state. *Thompson v. Queen City Coach Co.*, 169 S. C. 231, 168 S. E. 693.

When cause of action did not arise in this state, nor is the subject of the action situated within this state, then court is without jurisdiction. *Salway v. Maryland Casualty Co.*, 176 S. C., 215; 179 S. E., 787.

Cause of action "within the state" includes breach of contract at place of performance in state.—Failure to pay a loss under a contract of a foreign insurance company with a nonresident, where the loss is payable in the state, creates a cause of action "within the state" under this section, as a cause of action arises at the place of performance, which is presumably the place of making. *Carpenter v. American Acci. Co.*, 46 S. C. 541, 24 S. E. 500, 501, 139 Am. St. Rep. 704, 40 L. R. A. 436, 70 L. R. A. 546, 699, 16 L. R. A. (N. S.) 1235, 1250, 29 A. L. R. 100; *Curnow v. Phoenix Ins. Co.*, 37 S. C. 406, 407, 16 S. E. 132, 133, 34 Am. St. Rep. 766, 46 Am. St. Rep. 448, 63 L. R. A. 840, 70 L. R. A. 546. See also, *Tillinghast v. Boston, etc., Lbr. Co.*, 39 S. C. 484, 18 S. E. 120, 122, 22 L. R. A. 49, 55 Am. St. Rep. 47, 61 Am. St. Rep. 494, 50 L. R. A. 594, 65 L. R. A. 90.

As to specific section covering jurisdiction as to foreign insurance companies, see § 7964, and note thereto.

"Subject of the action" does not include property seized under attachment proceedings.—Under this section, the property seized under attachment proceedings does not constitute "the subject of the action," so as to give the court jurisdiction of an action by a nonresident against a foreign corporation, when there is no allegation in the complaint filed in the action of any title to, or any interest in, the property levied on. *Central R., etc., Co. v. Georgia Constr., etc., Co.*, 32 S. C. 319, 11 S. E. 192, 25 Am. St. Rep. 873, 85 Am. St. Rep. 914, 14 L. R. A.

583, 17 L. R. A. 87, 70 L. R. A. 544, Ann. Cas. 17C, 877.

Because an attachment proceeding is only a provisional remedy.—An attachment is only a provisional remedy, which requires an action legally instituted as a necessary condition precedent to the right to maintain it, and the real subject of the action must necessarily be the subject of the complaint. *Central R., etc., Co. v. Georgia Constr., etc., Co.*, 32 S. C. 319, 11 S. E. 192, 25 Am. St. Rep. 873, 85 Am. St. Rep. 914, 14 L. R. A. 583, 17 L. R. A. 87, 70 L. R. A. 544, Ann. Cas. 17C, 877.

As to specific section governing issuance of warrants of attachment, see § 529, and note thereto.

And failure to bring action within section causes provisional remedies to fail.—As an action cannot be commenced by attachment, which is only a provisional remedy in aid of an action, it follows necessarily that, if the action fails for want of jurisdiction, under this section, the provisional remedy by attachment, in aid of such action, must fall with it. *Central R., etc., Co. v. Georgia Constr., etc., Co.*, 32 S. C. 319, 11 S. E. 192, 201, 25 Am. St. Rep. 873, 85 Am. St. Rep. 914, 14 L. R. A. 583, 17 L. R. A. 87, 70 L. R. A. 544, Ann. Cas. 17C, 877.

Nonresident limited in actions to cases specified in section.—The effect of this section is to declare that a nonresident can sue a foreign corporation only in the two cases specified in this section. *Central R., etc., Co. v. Georgia Constr., etc., Co.*, 32 S. C. 319, 11 S. E. 192, 201, 25 Am. St. Rep. 873, 85 Am. St. Rep. 914, 14 L. R. A. 583, 17 L. R. A. 87, 70 L. R. A. 544, Ann. Cas. 17C, 877.

And does not include cause of action arising outside of state.—The circuit court, under this section, has no juris-

diction of an action by one foreign corporation against another foreign corporation on a cause of action arising outside of the state. *Blue Ridge Power Co. v. Southern R. Co.*, 122 S. C. 222, 115 S. E. 306, 308; *Hodges v. Lake Summit Co.*, 155 S. C. 436, 152 S. E. 658, 661; *Solway v. Maryland Casualty Co.*, 176 S. C. 215, 179 S. E. 787.

Nor can assignment be made to resident of cause of action arising outside of state.—An assignment of a cause of action arising outside of the state cannot be made by a foreign corporation to a resident of the state to enable suit to be brought when the transaction is purely a colorable one. *Hodges v. Lake Summit Co.*, 155 S. C. 436, 152 S. E. 658, 662.

Plaintiff may elect county for action in suit against undomesticated foreign corporations and having obtained service on its agent jurisdiction was acquired in county elected. *McIntyre v. United Five Cent & Ten Cent Stores, Inc.*, 171 S. C. 273; 172 S. E. 220.

Nonresident allegedly ejected by bus driver within the state where she had boarded bus for trip, cause of action against bus company, a foreign corporation, arose at place where nonresident ejected, and circuit court of county where ejection took place had jurisdiction. *Cornelius v. Atlantic Greyhound*, 177 S. C., 93; 180 S. E. 791.

See *Knight v. Fidelity & Casualty Co. of New York*, 184 S. C. 362; 192 S. E. 558 and *Chappell v. Fidelity & Deposit Co. of Maryland*, 194 S. C. 124, 9 S. E. (2d) 592 under §§ 420 and 421.

To have jurisdiction of the entire case, court must have jurisdiction not only of defendant but of subject-matter as well. *Knight v. Fidelity & Casualty Co. of New York*, 184 S. C. 362; 192 S. E. 558.

CHAPTER 53

Substitutes for Scire Facias, Quo Warranto, and Informations in the Nature of Quo Warranto

- 827. Scire facias and quo warranto abolished.
- 828 thru 830. Action to annul corporate charter.
- 831. When attorney general may sue in state's name.
- 832. Action to vacate letters patent.
- 833. When private person joined as co-plaintiff.
- 834 and 835. Usurpation of office.
- 836. Assumption of office.
- 837. Defendant refusing to deliver books

- and papers.
- 838. Damages.
- 839. One action against several claiming office.
- 840. Penalty for usurping office or franchise.
- 841. Judgment of forfeiture against corporation.
- 842. Costs against corporation.
- 843. Appointment of receiver.
- 844 and 845. Filing judgment roll.
- 846. Forfeiture of property to State.

§ 827. Scire facias and quo warranto abolished, and provisions of this chapter substituted.—The writ of scire facias, the writ of quo warranto, and proceedings by information in the nature of quo warranto, are abolished; and the remedies heretofore obtainable in those forms may be obtained by civil actions under the provisions of this chapter. But any proceeding heretofore commenced, or judgment rendered, or right acquired, shall not be affected by such abolition.

1932 Code, § 827; Civ. P. '22, § 775; Civ. P. '12, § 462; Civ. P. '02, § 424; 1870 (14) § 443.

As to specific section covering actions upon information or complaint, see § 831, and note thereto.

Actions commenced under this section must be commenced by service of summons. State v. Sanders, 118 S. C. 498, 110 S. E. 808, 809.

As to when actions are deemed commenced, see § 357, and the note thereto.

And issue in the action must be made by complaint and answer.—Under this section, in an action to try title to an office, the issue shall be made by complaint and answer, and not on the coming in of the return to the rule to show cause. State v. Rice, 66 S. C. 1, 44 S. E. 80, 81; Darling v. Brunson, 94 S. C. 207, 77 S. E. 860, 861, L. R. A. 1917A, 234, Ann. Cas. 15A, 527; State v. Tollison, 95 S. C. 58, 78 S. E. 521, 522; State v. Evans, 33 S. C. 612, 12 S. E. 816, 817.

As to specific section covering proceedings to try title to office, see § 831, and note thereto.

Scire facias is abolished both as public and private remedy. Lawton v. Perry, 40 S. C. 255, 18 S. E. 861, 864, 92 Am. St. Rep. 778, 53 L. R. A. 703, Ann. Cas. 14A, 368.

But only as to civil action.—Writs of scire facias are affected by this section only when used as civil remedies, and the writ may be used to estreat a re-

cogniance given to secure the appearance of a person charged with crime. State v. Wilder, 13 S. C. 344, 345, 122 Am. St. Rep. 74.

Supreme Court has power to issue mandamus.—The Supreme Court has power, under this section and Const. art. 5, § 4, to issue original writs of mandamus, and such proceedings are not actions requiring summons for their commencement, but may properly be commenced by petition and rule to show cause. Walpole v. Wall, 153 S. C. 105, 149 S. E. 760, 762.

And jurisdiction to hear quo warranto proceedings is not affected.—This section, in abolishing the writ of quo warranto, does not limit the jurisdiction of the Supreme Court to hear such proceedings, as the section abolishes only the formal characteristics of the writ. Alexander v. McKenzie, 2 S. C. 81, 86, 25 Am. Dec. 703; State v. Bowen, 8 S. C. 382, 385.

As to jurisdiction of Supreme Court, see § 26, and the note thereto.

See generally, as to proceedings in quo warranto: trial of title to office. State v. Stickley, 80 S. C. 64, 61 S. E. 211, 128 Am. St. Rep. 855, 16 L. R. A. (N. S.) 1059, L. R. A. 1918A, 38, Ann. Cas. 13C, 604, Ann. Cas. 18D, 214.

§ 828. Action by attorney general to vacate or annul charter when Legislature directs.—An action may be brought by the attorney general in the name of the State, whenever the Legislature shall so direct, against a corporation, for the purpose of vacating or annulling the act of incorporation, or an act renewing its corporate existence, on the ground that such act or renewal was procured upon some fraudulent suggestion or concealment of a material fact, by the persons incorporated, or by some of them, or with their knowledge and consent.

1932 Code, § 828; Civ. P. '22, § 776; Civ. P. '12, § 463; Civ. P. '02, § 425; 1870 (14) § 444.

§ 829. Action to annul corporation by attorney general, by leave of Supreme Court.—An action may be brought by the attorney general in the name of the State, on leave granted by the Supreme Court or a justice thereof, or a circuit judge, for the purpose of vacating the charter or annulling the existence of a corporation, other than municipal, whenever such corporation shall:

- (1) Offend against any of the provisions of this Code of Procedure, or the acts creating, altering, or renewing such corporation; or,
- (2) Violate the provisions of any law by which such corporation shall have forfeited its charter by abuse of its powers; or,
- (3) Whenever it shall have forfeited its privileges or franchises by failure to exercise its powers; or,
- (4) Whenever it shall have done or omitted any act which amounts to a surrender of its corporate rights, privileges, and franchises; or,
- (5) Whenever it shall exercise a franchise or privilege not conferred upon it by law.

And it shall be the duty of the attorney general, whenever he shall have reason to believe that any of these acts or omissions can be established by proof, to apply for leave, and, upon leave granted, to bring the action, in every case of public interest, and, also, in every other case in which satisfactory security shall be given, to indemnify the State against the costs and expenses to be incurred thereby.

1932 Code, § 829; Civ. P. '22, § 777; Civ. P. '12, § 464; Civ. P. '02, § 426; 1870 (14) § 445.

Charter of corporation cannot be forfeited on motion.—It would be inconsistent with the scheme provided for the annulment of the charter of a corporation, under this section, to declare a forfeiture of a charter on mere motion, or that a cause of forfeiture should ipso facto dissolve the corporation. *Atlantic Coast Line R. Co. v. Epperson*, 85 S. C. 134, 67 S. E. 235, 236, 33 L. R. A. (N. S.) 356.

Nor attacked collaterally.—The right

of a railroad company to operate its road cannot be attacked by an individual in a collateral proceeding. *Atlantic Coast Line R. Co. v. Epperson*, 85 S. C. 134, 67 S. E. 235, 236, 33 L. R. A. (N. S.) 356.

State a necessary party to action to determine whether public utility has forfeited its franchise. *Twin City Power Co. v. Savannah River Electric Co.*, 163 S. C. 438, 161 S. E. 750.

§ 830. Leave to sue—how obtained.—Leave to bring the action may be granted upon the application of the attorney general; and the court or judge may, at discretion, direct notice of such application to be given to the corporation or to its officers, previous to granting such leave, and may hear the corporation in opposition thereto.

1932 Code, § 830; Civ. P. '22, § 778; Civ. P. '12, § 465; Civ. P. '02, § 427; 1870 (14) § 446.

§ 831. Action upon information, or complaint of court.—An action may be brought by the attorney general in the name of the State, upon his own information, or upon the complaint of any private party, or by a private party interested, on leave granted by a circuit judge, against the parties offending, in the following cases:

- (1) When any person shall usurp, intrude into, or unlawfully hold or exercise any public office, civil or military, or any franchise within this State, or any office in a corporation created by the authority of this State; or,
- (2) When any public officer, civil or military, shall have done or suffered an act which, by the provisions of law, shall make a forfeiture of his office; or,
- (3) When any association or number of persons shall act within this State as a corporation, without being duly incorporated.

1932 Code, § 831; Civ. P. '22, § 779; Civ. P. '12, § 466; Civ. P. '02, § 428; 1870 (14) § 447.

Provision as to "obtaining leave" does not apply to actions by attorney general.

—The provision as to obtaining leave from a circuit judge does not apply to suits by the attorney general, but only to actions by private parties. *State v. Sanders*, 118 S. C. 498, 110 S. E. 808, 809.

Nor to actions brought in original jurisdiction of Supreme Court.—Actions brought in the original jurisdiction of the Supreme Court do not come under the provision as to obtaining leave from a circuit judge, as that provision applies only to actions begun in the circuit courts. *State v. Sanders*, 118 S. C. 498,

110 S. E. 808, 809.

Petition to have election declared void not an action to try title.—A petition, not seeking to have any candidate declared mayor or alderman, but simply to have an election declared null and void, is not an action to try title under this section. *Whisonant v. Belue*, 127 S. C. 483, 121 S. E. 360.

Applied, as to trying title of game warden, *Gibbes v. Richardson*, 107 S. C. 191, 92 S. E. 333, 334; as to trying title of mayor, *Green v. James*, 110 S. C. 263, 96 S. E. 400, 401.

§ 832. Action—when and how brought to vacate letters patent.—An action may be brought by the attorney general, in the name of the State for the purpose of vacating or annulling the letters patent granted by the people of this State in the following cases:

(1) When he shall have reason to believe that such letters patent were obtained by means of some fraudulent suggestion or concealment of a material fact, made by the person to whom the same were issued or made, or with his consent or knowledge; or,

(2) When he shall have reason to believe that such letters patent were issued through mistake, or in ignorance of material fact; or,

(3) When he shall have reason to believe that the patentee, or those claiming under him, have done or committed an act in violation of the terms and conditions on which the letters patent were granted, or have, by any other means, forfeited the interest acquired under the same.

1932 Code, § 832; Civ. P. '22, § 780; Civ. P. '12, § 467; Civ. P. '02, § 429; 1870 (14) § 448.

§ 833. Relator—When to be joined as plaintiff.—When an action shall be brought by the attorney general, by virtue of this chapter, on the complaint of any private party, or by a person having an interest in the question, the name of such person shall be joined with the State as plaintiff; and, in every case, the attorney general, or circuit judge, as the case may be, may require as a condition precedent to bringing such action, that satisfactory security shall be given to indemnify the State against the costs and expenses to be incurred thereby; and in every case brought by the attorney general where such security is given, the measure of compensation to be paid by such person to the attorney general shall be left to the agreement, express or implied, of the parties.

1932 Code, 833; Civ. P. '22, § 781; Civ. P. '12, § 468; Civ. P. '02, § 430; 1870 (14) § 449.

§ 834. Complaint and arrest of defendant in action for usurping office.—When such an action shall be brought against a person for usurping an office, the attorney general, or private party bringing the same, in addition to the statement of the cause of action, may also set forth in the complaint the name of the person rightfully entitled to the office, with a statement of his right thereto; and in such case, upon proof by affidavit that the defendant has received fees or emoluments belonging to the office, and by means of his usurpation thereof, an order may be granted by a judge of the circuit or justice of the Supreme Court for the arrest of such defend-

ant. and holding him to bail; and thereupon he shall be arrested and held to bail in the manner, and with the same effect, and subject to the same rights and liabilities, as in other civil actions where the defendant is subject to arrest.

1932 Code, § 834; Civ. P. '22, § 782; Civ. P. '12, § 469; Civ. P. '02, § 431; 1870 (14) § 450.

Quo warranto is the proper remedy to recover possession of public office. *Sanders v. Belue*, 78 S. C. 171, 58 S. E. 762, L. R. A. 1915E, 582, Ann. Cas. 12C, 375, Ann. Cas. 14B, 525.

§ 835. Judgment in such actions.—In every case, judgment shall be rendered upon the right of the defendant, and also upon the right of the party so alleged to be entitled, or only upon the right of the defendant as justice shall require.

1932 Code, § 835; Civ. P. '22, § 783; Civ. P. '12, § 470; Civ. P. '02, § 432; 1870 (14) § 451.

§ 836. Assumption of office, etc., by relator, when judgment is in his favor.—If the judgment be rendered upon the right of the person so alleged to be entitled, and the same be in favor of such person, he shall be entitled after taking the oath of office, and executing such official bond as may be required by law, to take upon himself the execution of the office; and it shall be his duty, immediately thereafter, to demand of the defendant in the action all the books and papers in his custody, or within his power, belonging to the office from which he shall have been excluded.

1932 Code, § 836; Civ. P. '22, § 784; Civ. P. '12, § 471; Civ. P. '02, § 433; 1870 (14) § 452.

§ 837. Proceedings against defendant on his refusal to deliver books or papers.—If the defendant shall refuse or neglect to deliver over such books or papers, pursuant to the demand, he shall be guilty of a misdemeanor, and the following proceedings shall be had, to compel delivery of such books or papers:

(1) Whenever any person shall be removed from office, or the term for which he shall have been elected or appointed shall expire, he shall, on demand, deliver over to his successor all the books and papers in his custody as such officer, or in any way appertaining to his office. Every person violating this provision shall be deemed guilty of a misdemeanor.

(2) If any person shall refuse or neglect to deliver over to his successor any books or papers, as required in section 836, such successor may make complaint thereof to any judge of the circuit court, or justice of the Supreme Court, where the person so refusing shall reside; and if such officer be satisfied by the oath of the complainant, and such testimony as shall be offered, that any such books or papers are withheld, he shall grant an order directing the person so refusing to show cause before him, within some short reasonable time, why he should not be compelled to deliver the same.

(3) At the time so appointed, or at any other time to which the matter may be adjourned, upon due proof being made of the service of the said order, such officer shall proceed to inquire into the circumstances. If the person charged with withholding such books or papers shall make affidavit before such officer that he has truly delivered over to his suc-

cessor all such books and papers in his custody, or appertaining to his office, within his knowledge, all further proceedings before such officer shall cease, and the person complained against shall be discharged.

(4) If the person complained against shall not make such oath, and it shall appear that any such books or papers are withheld, the officer before whom such proceedings shall be had shall, by warrant, commit the person so withholding to the jail of the county, there to remain until he shall deliver such books and papers or be otherwise discharged according to law.

(5) In the case stated in the last section, if required by the complainant, such officer shall also issue his warrant, directed to any sheriff or constable, commanding him in the day time to search such places as shall be designated in such warrant for such books and papers as belong to the officer so removed, or whose term of office expired, in his official capacity, and which appertained to such office, and seize and bring them before the officer issuing the warrant.

(6) Upon any books or papers being brought before such officer, by virtue of such warrant, he shall inquire and examine whether the same appertained to the office from which the person so refusing to deliver was removed, or of which the term expired, and he shall cause the same to be delivered to the complainant.

(7) If any person appointed or elected to any office shall die, or his office shall in any way become vacant, and any books or papers belonging or appertaining to such office shall come to the hands of any person, the successor to such office may, in like manner as hereinbefore prescribed, demand such books or papers from the person having the same in his possession; and on the same being withheld an order may be obtained, and the person charged may, in like manner, make oath of the delivery of all such books and papers that ever came to his possession; and in case of omission to make such oath, and to deliver up the books and papers so demanded, such person may be committed to jail, and a search warrant may be issued, and the property seized by virtue thereof may be delivered to the complainant, as hereinbefore prescribed.

1932 Code, § 837; Civ. P. '22, § 785; Civ. P. '12, § 472; Civ. P. '02, § 434; 1870 (14) § 453.

Editor's note.—See subsection (7) of this section for reference "last section" in subsection (5). The reference to "last section" was in 1932 Code.

Party declared legally elected has prima facie title and is entitled to order.—One who has been legally declared duly elected to an office, and has been legally commissioned and qualified, has a clear prima facie title, sufficient to authorize an application for possession of the official records and the commitment of the incumbent for withholding them, as provided for under subsds. 2, 3 and 4 of this section. This is true even though the title to the office has not yet been decided in an action for that purpose. In re Whipper, 32 S. C. 5, 10 S. E. 579, 31 L. R. A. 360, L. R. A. 1915A, 833; McMillan v. Bullock, 53 S. C. 161, 31 S. E. 860, 864; Carrison v. Young, 125 S.

C. 42, 118 S. E. 32, 37.

And applies to appointive offices.—A party having prima facie title to an appointive office is entitled to a summary order against the party in possession of the books belonging to the office. Verner v. Seibel, 60 S. C. 572, 39 S. E. 274, 275, L. R. A. 1915A, 833.

But not when issues of fact are involved.—When serious issues of fact are involved, summary proceedings to determine the title to public office should not, as a general rule, be entertained under this section. Darling v. Brunson, 94 S. C. 207, 77 S. E. 860, 861, L. R. A. 1917A, 234, Ann. Cas. 15A, 527.

For remedy then is by a civil action.—If the title to an office is not clear, the remedy for the withholding of books, etc., is by an action in the nature of quo warranto. In re Whipper, 32 S. C. 5, 10

S. E. 579, 581, 31 L. R. A. 360, L. R. A. 1915A, 833.

Application for order premature where party in office not properly discharged.—An application, under this section, to a circuit judge for books or papers, is a premature one, when the party refusing to turn over the books and papers has not been properly discharged from his office. *McMillan v. Bullock*, 53 S. C. 161, 31 S. E. 860, 863.

The Supreme Court has no original jurisdiction to determine the title to an office on petition and rule to show cause in less than twenty days, when the one in possession of the office demurs to the jurisdiction of the court on the ground that the proper proceeding is by a civil action. *State v. Tollison*, 95 S. C. 58, 78

S. E. 521.

Mandamus to obtain custody of records. *Burnett v. Langston*, 164 S. C., 99, 162 S. E. 72.

In original summary proceeding for possession of books, papers, moneys and records of office of county comptroller of Oconee county by petitioner who had been appointed under statute providing that comptroller shall be person fully capable of keeping and auditing books of county, court had no duty to inquire into qualifications of the petitioner. *Bruner v. Smith*, 188 S. C. 75, 198 S. E. 184.

Applied, as to obtaining possession of office of judge of probate, *Smith v. McConnell*, 44 S. C. 491, 22 S. E. 721, 50 L. R. A. (N. S.) 339.

§ 838. Damages—how recovered.—If judgment be rendered upon the right of the person so alleged to be entitled, in favor of such person, he may recover, by action, the damages he shall have sustained by reason of the usurpation by the defendant of the office from which such defendant has been excluded.

1932 Code, § 838; Civ. P. '22, § 786; Civ. P. '12, § 473; Civ. P. '02, § 435; 1870 (14) § 454.

§ 839. One action against several persons claiming office and franchise.—Where several persons claim to be entitled to the same office or franchise, one action may be brought against all such persons, in order to try their respective rights to such office or franchise.

1932 Code, § 839; Civ. P. '22, § 787; Civ. P. '12, § 474; Civ. P. '02, § 436; 1870 (14) § 455.

§ 840. Penalty for usurping office or franchise—how awarded.—When a defendant, whether a natural person or corporation, against whom such action shall have been brought, shall be adjudged guilty of usurping or intruding into, or unlawfully holding or exercising, any office, franchise, or privilege, judgment shall be rendered that such defendant be excluded from such office, franchise, or privilege, and also that the plaintiff recover costs against such defendant. The court may also, in its discretion, fine such defendant a sum not exceeding two thousand dollars, which fine, when collected, shall be paid into the treasury of the State.

1932 Code, § 840; Civ. P. '22, § 788; Civ. P. '12, § 475; Civ. P. '02, § 437; 1870 (14) § 456.

§ 841. Judgment of forfeiture against corporation.—If it shall be adjudged that a corporation against which an action shall have been brought pursuant to this chapter, has, by neglect, abuse, or surrender, forfeited its corporate rights, privileges, and franchises, judgment shall be rendered that the corporation be excluded from such corporate rights, privileges, and franchises, and that the corporation be dissolved.

1932 Code, § 841; Civ. P. '22, § 789; Civ. P. '12, § 476; Civ. P. '02, § 438; 1870 (14) § 457.

§ 842. Costs against corporation, or persons claiming to be such—how collected.—If judgment be rendered in such action against a corporation, or against persons claiming to be a corporation, the court may cause the costs herein to be collected by execution against the persons claiming to be a corporation, or by attachment or process against the directors or other officers of such corporation.

1932 Code, § 842; Civ. P. '22, § 790; Civ. P. '12, § 477; Civ. P. '02, § 439; 1870 (14) § 458.

§ 843. Restraining corporation, and appointment of receiver.—When such judgment shall be rendered against a corporation, the court shall have power to restrain the corporation, to appoint a receiver of its property, and to take an account and make distribution thereof among its creditors; and it shall be the duty of the attorney general, immediately after the rendition of such judgment, to institute proceedings for that purpose.

1932 Code, § 843; Civ. P. '22, § 791; Civ. P. '12, § 478; Civ. P. '02, § 440; 1870 (14) § 459.

§ 844. Copy of judgment roll against corporation—where to be filed.—Upon the rendition of such judgment against a corporation, or for the vacating or annulling of letters patent, it shall be the duty of the attorney general to cause a copy of the judgment roll to be forthwith filed in the office of the secretary of state.

1932 Code, § 844; Civ. P. '22, § 792; Civ. P. '12, § 479; Civ. P. '02, § 441; 1870 (14) § 460.

§ 845. Entry of judgment relating to letters patent.—Such secretary shall thereupon, if the record relates to letters patent, make an entry in the records of the office of the secretary of state, of the substance and effect of such judgment, and of the time when the record thereof was docketed; and the real property granted by such letters patent may thereafter be disposed of in the same manner as if such letters patent had never been issued.

1932 Code, § 845; Civ. P. '22, § 793; Civ. P. '12, § 480; Civ. P. '02, § 442; 1870 (14) § 461.

§ 846. Action for forfeiture of property to State.—Whenever, by the provisions of law, any property, real or personal, shall be forfeited to the State, or to any officer for its use, an action for the recovery of such property, alleging the ground of the forfeiture, may be brought by the proper officer in the circuit court.

1932 Code, § 846; Civ. P. '22, § 794; Civ. P. '12, § 481; Civ. P. '02, § 443; 1870 (14) § 462.

CHAPTER 54

The Writ of Mandamus

847. Returns to first writ.
 848. Pleading.
 849. Trial, damages, and costs.

850. No liability in other action if damages recovered.

§ 847 Returns to first writ—court may allow time.—Where any writ of mandamus shall issue out of any of the courts of this State, such person or persons as are required to make a return to such writ of mandamus shall make his or their return to the first writ of mandamus: *provided*, that it shall and may be lawful to and for the said courts, or the judges thereof, to allow such person or persons, respectively, to whom any writ of mandamus shall be directed, such convenient time to make a return, plead, reply, rejoin, or demur, as to them shall seem just and reasonable.

1932 Code, § 847; Civ. P. '22, § 795; Civ. C. '12, § 4099; Civ. C. '02, § 2998; G. S. 2342; R. S. 2457; 9 Ann. C. 20; 1712 (2) 568, 570.

Editor's note.—It is apparent from the nature of this section, that the practitioner must consult the various sections of the code as to the issuance of mandamus, etc. To put numerous illustrations under this section would be of little value. However, under the catchline "see generally," has been placed a list of a few cases on mandamus, with a brief note as to the facts in each one.

Issue of fact may be referred. *State v. Columbia*, 22 S. C. 582, 583.

But a judge cannot hear issues in mandamus in any other county than the one in which defendant resides. *State v. Scarborough*, 70 S. C. 288, 49 S. E. 860, 16 L. R. A. (N. S.) 1065, Ann. Cas. 13B, 35; *State v. Williams*, 52 S. C. 416, 29 S. E. 814; *LaMotte v. Smith*, 50 S. C. 558, 27 S. E. 933, Ann. Cas. 13E, 391.

Mandamus will not issue to compel dispenser of a county to operate dispensary where court would have to set aside election in favor of no dispensary. *Wilson v. Cox*, 73 S. C. 398, 53 S. E. 613.

Mandamus against state treasurer to compel exchange of certificate for bond does not constitute suit against state. *Ehrlich v. Jennings*, 78 S. C. 269, 58 S. E. 922, 925, 125 Am. St. Rep. 795, 813, 128 Am. St. Rep. 705, 19 L. R. A. (N. S.) 112, 39 L. R. A. (N. S.) 447, 44 L. R. A. (N. S.) 203, 52 L. R. A. (N. S.) 442, L. R. A. 1918E, 183, 1 A. L. R. 717.

An action for mandamus to enforce a private right may be brought in the name of the private citizen. *State v. Cain*, 78 S. C. 348, 58 S. E. 937, Ann. Cas. 12D, 153.

See generally, as to mandamus, *State v. Durant*, 71 S. C. 311, 51 S. E. 146; as to mandamus not being a remedy, where county board of education refuses to issue certificate to teacher, *Greenville College for Women v. Board of Education*, 75 S. C. 93, 55 S. E. 132; as to mandamus against state officers to compel compliance with Appropriation Act, *State*

v. State Dispensary Comm., 79 S. C. 316, 60 S. E. 928, 44 L. R. A. (N. S.) 198; as to mandamus to compel performance of official act forbidden by an unconstitutional statute, *State v. Burley*, 80 S. C. 127, 61 S. E. 255, 16 L. R. A. (N. S.) 266; as to lack of available funds constituting a defense in mandamus, *State v. Burley*, 80 S. C. 127, 61 S. E. 255, 16 L. R. A. (N. S.) 266; as to mandamus refused, when duty is discretionary, *Lanford v. Drummond*, 81 S. C. 174, 62 S. E. 10, L. R. A. 1918C, 420; as to mandamus and certiorari against executive committee of Democratic party, *Moore v. Griffin*, 81 S. C. 393, 62 S. E. 545; *Holt v. Democratic Executive Committee*, 79 S. C. 263, 60 S. E. 659, 15 L. R. A. (N. S.) 691; as to mandamus against state board of pharmaceutical examiners to compel issuance of license, *State v. Matthews*, 81 S. C. 414, 62 S. E. 695, 128 Am. St. Rep. 919, 129 Am. St. Rep. 294, 22 L. R. A. (N. S.) 735, distinguished in *Ex parte Hollis*, 82 S. C. 230, 64 S. E. 232; as to mandamus to compel payment of claim against county, *State v. Goodwin*, 81 S. C. 419, 62 S. E. 1100; as to mandamus to compel water company to furnish customer (right to cut off service considered), *Poole v. Parish Mountain Water Co.*, 81 S. C. 438, 62 S. E. 874, 128 Am. St. Rep. 923, 31 L. R. A. (N. S.) 301, 47 L. R. A. (N. S.) 655, Ann. Cas. 14A, 543, 13 A. L. R. 354, 28 A. L. R. 473, 486; as to mandamus to compel member board of canvassers to act, *State v. Jones*, 82 S. C. 432, 65 S. E. 444; as to mandamus to compel county chairman to put name on party ticket, *Fooshe v. McDonald*, 82 S. C. 22, 63 S. E. 3, 4 A. L. R. 216; as to mandamus against Governor being refused, *Brown v. Ansel*, 82 S. C. 141, 63 S. E. 449, 32 L. R. A. (N. S.) 356; *State v. Scarborough*, 70 S. C. 288, 49 S. E. 860, 16 L. R. A. (N. S.) 1065, Ann. Cas. 13B, 35.

§ 848. When return is made, the prosecutor may plead, etc.—As often as in any of the cases aforesaid any writ of mandamus shall issue out of any of the said courts, and return shall be made thereto, it shall and may be lawful to and for the person or persons suing or prosecuting such writ of mandamus to plead to or traverse all or any of the material facts contained within the said return; to which the person or persons making such return shall reply, take issue, or demur; and such further proceedings, and in such manner, shall be had therein as may be necessary, for the determination thereof.

1932 Code, § 848; Civ. P. '22, § 796; Civ. C. '12, § 4100; Civ. C. '02, § 2999; G. S. 2343; R. S. 2458; 1712 (2) 569.

Prosecutor not required to traverse return.—The view was taken in the dissenting opinion in *Pendarvis v. Orangeburg*, 157 S. C. 496, 154 S. E. 756, 763, that

altho the petitioner is given the privilege of traversing the return, he is not required to do so by this section.

§ 849. Place of trial, damages and costs.—If any issue shall be joined on such proceedings, the person or persons suing such writ shall and may try the same in such place as a civil action should or might have been tried; and in case of verdict shall be found for the person or persons suing such writ, or judgment given for him or them upon a demurrer, or by default, or for want of a replication or other pleading, he or they shall recover his or their damages and costs in such manner as he or they might have done in a civil action; and a peremptory writ of mandamus shall be granted without delay for him or them for whom judgment shall be given, as might have been if such return had been adjudged insufficient; and in case judgment shall be given for the person or persons making such return to such writ, he or they shall recover his or their costs of suit.

1932 Code, § 849; Civ. P. '22, § 797; Civ. C. '12, § 4101; Civ. C. '02, § 3000; G. S. 2344; R. S. 2459; 1712 (2) 569.

As to specific section covering place of trial of civil actions, see § 421, and note thereto.

This section, in effect, says that an issue joined on mandamus proceedings must be tried in the county where the respondent resides. *La Motte v. Smith*, 50 S. C. 558, 27 S. E. 933, 934, Ann. Cas. 13E, 391; *State v. Scarborough*, 70 S. C. 288, 49 S. E. 860, 862, 16 L. R. A. (N. S.) 1065, Ann. Cas. 13B, 35.

"Civil Action" is practice in use before code.—The term "civil action" means, under this section, "action on the case" under the practice before the Code. *State v. County Treasurer*, 10 S. C. 40, 42, Ann. Cas. 15D, 563.

And costs are allowed under that practice.—Costs allowed under this section are such as were allowed under the practice before the Code, and not those

in civil actions under the code. *State v. County Treasurer*, 10 S. C. 40, 43, Ann. Cas. 15D, 563.

But not allowed when court tries issue.—*State v. County Treasurer*, 10 S. C. 40, 43, Ann. Cas. 15D, 563; *State v. County Commissioners*, 18 S. C. 597.

Applied in State ex rel. Daniel v. Broad River Power Co., 164 S. C. 208, 162 S. E. 74, where attorneys' fees were taxed against public utility after successful litigation requiring continued operation of street cars in city of Columbia.

Teacher, entitled to mandamus to compel county superintendent of education to approve pay warrants, was held not entitled to recover attorney's fee, where defendant was actuated by honest motives. *Pressley v. Nunnery*, 169 S. C. 509, 169 S. E. 413.

§ 850. Not liable in other actions, if damages are recovered, etc.—If any damages shall be recovered by virtue of this chapter against any such person or persons making return to such writ, as aforesaid, he or they

shall not be liable to be sued in any other action or suit, for making such return.

1932 Code, § 850; Civ. P. '22, § 798; Civ. C. '12, § 4102; Civ. C. '02, § 3001; G. S. 2345; R. S. 2460.

TITLE 17

Proceedings for Relief of Persons Arrested in Civil Actions

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| 851. Petition of person arrested. | 858 thru 860. Jury trial in case of fraud. |
| 852. Summoning of creditors. | 861. Exceptions to clerk's rulings. |
| 853. Examination and oath of prisoner. | 862. Clerk's fees. |
| 854. Exemptions. | 863. Sheriff's fees. |
| 855. Prisoner discharged on making assignments. | 864. Appeal. |
| 856. Prisoner remanded for refusal to assign. | 865, 866. Examination by creditors. |
| 857. Penalty for false schedules. | 867. Submission of issues to jury. |
| | 868. No discharge until property delivered. |
| | 869. Expenses of imprisonment. |

§ 851. Persons under arrest wishing to surrender property, to petition courts, etc.—Any person arrested on mesne or final process in any civil action, as provided by chapter 24, title 9, of this code of procedure, being unable or unwilling to give the bail therein provided, may petition the court of common pleas of the county wherein he is confined, certifying the causes of his arrest, together with an account of his real and personal estate, with the dates of the securities wherein any part of it consists, and the deeds, notes, or vouchers relating thereto, and the names of the witnesses to the same, as far as his knowledge extends therein.

1932 Code, § 851; Civ. P. '22, § 799; Civ. C. '12, § 4176; Civ. C. '02, § 3072; G. S. 2405; R. S. 2524; 1759 (4) 86; 1788, V, 79; Const., Art. I, § 20.

Cross reference.—See §§ 499-526, and the notes thereto, for the general provisions concerning the arrest and bail of persons in civil actions. See § 741, providing for execution against the person, and the note thereto. See § 500, providing in what cases persons may be arrested in civil actions, and the note thereto treating this case. See § 499 for reference "Chapter 24, Title 9."

Editor's note.—Under the standing of this section in 1872 the provision included persons "arrested under either mesne or final process." In 1882 the wording was changed to read "any person arrested in any civil action," but has been again changed, under the present standing, to the earlier form. See *Hurst v. Samuels*, 29 S. C. 476, 7 S. E. 822, for a detailed and comprehensive discussion of the changes from 1872 to 1882. In this case it was held that persons arrested under final process under the provisions of § 741, relating to executions against the person of a debtor, might, in an enlarged sense, be regarded as persons arrested by virtue of the provisions of § 500 and § 507, so as to come within the relief, referred to in the latter section, for insolvent debtors under the instant section.

Provisions of section suspended by National bankruptcy act.—This and the following sections of this act providing for the discharge of insolvent debtors, in so far as they purport to discharge a debtor from his obligations, were suspended by the passage of the Federal Bankruptcy Law, and to that extent, are inoperative and void. *Rayborn v. Reid*, 139 S. C. 529, 138 S. E. 294.

A judgment debtor, seeking relief from his obligations under this section, must show that the debt was not dischargeable in bankruptcy. *Id.*

Discharge or modification of imprisonment does not affect contract.—The provisions of this and the following sections for modification of imprisonment or discharge of one arrested under the provisions of § 500 are illustrative of the principle that such imprisonment is a punishment for the misconduct of a debtor and lies at the pleasure of the legislature to change without in any way affecting the contract. *Lowden v. Moses*, 3 McC. 93.

See § 500 and the note thereto for provisions as to when a party may be subject to arrest in a civil action.

Debtor guilty of fraud may avail himself of section.—A debtor may take ad-

advantage of this section, although guilty of fraud in obtaining goods for the value of which he is sued. *Fleming v. Close*, 3 Strob. 362.

As well as a debtor surrendered by his Bail.—*Ex parte Ridgill*, 5 Rich. 427.

But section does not apply to one not in confinement.—Where the defendant has been discharged from arrest after he has filed his schedule and given notice to his creditors, he is not entitled to the benefit of this section. *Clark v. Simpson*, 1 McM. 286, 38 Am. Rep. 719.

Under this section, a person in arrest, under either mesne or final process, may apply for the benefit of the insolvent debtor's act under §§ 851-869. *Hurst v. Samuels*, 29 S. C. 476, 7 S. E. 822, 826.

One schedule is sufficient.—Under this section, where a debtor files his schedule for release from confinement, he need not file another, under arrest in a second case. *Banks v. Ingram*, 10 Rich. 28.

And the schedule filed under this section may be amended after filing.—*Bingley v. Smart*, 1 McC. 29; *Prescott v. Hubbell*, 2 McC. 64.

Vague description in schedule will prevent discharge.—Where the description of property in a schedule filed under this section is vague and uncertain, it is no ground to oppose the debtor's discharge, unless he refuse to amend it. *Yeakle v. George*, 12 Rich. 153.

§ 852. Creditors to be summoned by public notice, etc.—Upon such petition, the clerk is hereby required, by order or rule, to cause the petitioner to be brought before the court, and also the creditors at whose suit such person shall stand charged, as well as all other creditors to whom he shall be indebted, to be summoned by public notice, to be given three weeks at least in some newspaper of the county wherein the debtor is confined, and if there be no newspaper published in such county, then in some newspaper of general circulation therein, personally, or by their attorney, to appear before him, at a day for that purpose appointed, at or after the expiration of the said three weeks.

1932 Code, § 852; Civ. P. '22, § 800; Civ. C. '12, § 4177; Civ. C. '02, § 3073; G. S. 2406; R. S. 2525; 1759 (4) 87.

The clerk may issue such order or rule as is required by this section.—*Bettis v. Nixon*, 1 Strob. 148.

Three weeks' notice required to entitle to benefits of act.—Under this section the debtor is not entitled to the benefits provided for in this act until after three weeks' notice to his creditors. *Alexander v. Gibson*, 1 N. & McC. 480; *George v. Catherwood*, 1 McC. 339.

And such notice is sufficient.—*Cavan v. Dunlay*, Chev. 241.

But must be published as required.—

Mordecai v. La Rissey, 1 Rich. 192.

But it need not be published immediately after filing of petition.—*Ex parte Cantey*, 11 Rich. 520.

The notice provided for in this section should certainly fix the day for appearance before the clerk. *Bettis v. Nixon*, 1 Strob. 148.

A debtor, under this section, is allowed to swear at the time of his discharge nunc pro tunc. *Brevard v. Wylie*, 1 Rich. 38.

§ 853. Clerk to examine as to discharge of prisoner—oath of petitioner.—Upon the day of such appearance, if any of the creditors so summoned shall neglect or refuse to appear, upon affidavit made of the service of such rule or order, in manner aforesaid, the clerk shall, in a summary way, examine into the matter of the said petition, and hear what shall be alleged for or against the discharge of the said petitioner; and, upon such examination, the clerk may, and is hereby required to administer or tender to the petitioner an oath in the following words:

"I, (A. B.), do solemnly swear that the account by me delivered into this honorable court, with my petition, doth contain a true and full account of all my real and personal estate, debts, credits, and effects whatsoever, without exception, which I, or any person in trust for me, have, or at the time of my said petition had, or am, or was, in any respect, entitled unto, in possession, remainder, or reversion; and that I have not at any time

since my being sued, arrested, or imprisoned, or before, directly or indirectly, sold, leased, assigned, or otherwise disposed of, or made over, in trust for myself or otherwise, other than is mentioned in such account, any part of my lands, estate, goods, stock, money, debts, or other real or personal estate, whereby to have or expect any benefit or profit to myself, or to defraud any of my creditors to whom I am indebted; and that I will, to the utmost of my power, endeavor to collect all and singular the title deeds to my lands, together with the remainder of my goods and effects contained in my said account, and the vouchers relating to or concerning the same, wheresoever, or in whosoever hands they may be within this State, and will surrender the same to my assignee or assignees as soon as possible after my discharge. So help me God."

1932 Code, § 853; Civ. P. '22, § 801; Civ. C. '12, § 4178; Civ. C. '02, § 3074; G. S. 2407; R. S. 2526; 1759 (4) 87.

§ 854. Petitioner allowed certain property, etc., and rest assigned, etc.—homestead.—In case the prisoner shall take the said oath, and upon examination the clerk shall be satisfied with the truth thereof, he shall order the lands, goods, and effects contained in the said accounts, or so much of them as may be sufficient to satisfy the debts wherewith such petitioner shall be charged, and the fees of the keeper of the jail where he shall be in custody, together with the costs of suit which shall be incurred on the suit or prosecution commenced against him, and all other costs and fees which shall arise or become due upon prosecuting and obtaining his discharge, by a short indorsement on the back of his petition, signed by the petitioner, to be assigned to some suitable person, to be selected by the clerk, as assignee for the benefit of the plaintiff and such creditors as may appear or establish claims against the debtor: *provided, however*, that if the petitioner be the head of a family, there shall be reserved to him, out of his real and personal property, a homestead, and such articles as are exempt from attachment, levy and sale under the provisions of the Constitution and laws of this State.

1932 Code, § 854; Civ. P. '22, § 802; Civ. C. '12, § 4179; Civ. C. '02, § 3075; G. S. 2408; R. S. 2527; 1759 (4) 87; Const., Art. II, § 32.

Assignment vests all estate in assignee.—An assignment as provided for in this section vests in the assignee all the estate capable of being conveyed, whether vested or contingent. *Cohen v. Gibbes*, 1 Hill 206.

Provided assignee accepts the trust.—*Tunno v. Edwards*, 3 Brev. 510; *Belden v. Plate*, 12 Rich. 358; *Brooks v. Brooks*, 12 S. C. 422, 13 L. R. A. (N. S.) 515, 33 L. R. A. (N. S.) 669.

And the assignment passes a life estate.—Under this section a life estate passes from the debtor to assignee upon assignment. *Verdier v. Youngblood*, Rich.

Eq. Cas. 220.

Which is subject to set-off existing before assignment.—The assignee, under this section, takes property subject to any rights of set-off existing before assignment. *Lowrie v. Williamson*, 3 McC. 247.

And the assignee takes the property subject to existing circumstances.—The assignee, under this section, takes the property subject to all the circumstances and applies it to the debts in their order of rank. *Mairs v. Smith*, 3 McC. 52; *McLeish v. Tylee*, 4 Strob. 287.

§ 855. On making assignments, etc., prisoner to be discharged.—The petitioner, upon executing such assignment (and when he shall have delivered unto the hands of the assignee or assignees all and singular his title-deeds, vouchers, and effects contained in his said account, so far as in his power so to do), shall be forthwith discharged, by order, from such suit or

suits, and shall also thenceforth be acquitted and discharged of, from and against all such other of his creditors as shall have appeared or established their demands before the court, or assignee, for all debts, contracts, and demands whatsoever.

1932 Code, § 855; Civ. P. '22, § 803; Civ. C. '12, § 4180; Civ. C. '02, § 3076; G. S. 2409; R. S. 2528; 1759 (4) 88.

Proceedings must be strictly pursued.—before discharge is possible under this section, the applicant must have strictly pursued the prescribed proceeding. *Carpenter v. Kenedy*, 1 Brev. 25.

Which pursuance entitles debtor to immediate discharge.—*Wall v. The Court*, 1 Bay 434.

And the discharge extends to suits in all courts.—*Hunt v. Simons*, 2 Bay 104.
Barring subsequent arrest for same debt.—*Man v. Lowden*, 4 McC. 485.

And operating to discharge debtor's Bail.—*Saunders v. Bobo*, 2 Bail. 492; *Hibler v. Hammond*, 2 Strob. 105.

As well as embracing judgments already obtained.—*Mayrant v. Myers*, 2 Mill 419.

As to judgments not barred by this section, see note of Rayborn v. Reid, 139 S. C. 529, 138 S. E. 294, treated under § 851, catchline "Provisions of section sus-

pended by National Bankruptcy Act."

And it applies to judgments entered after discharge.—Under this section a judgment entered in a pending suit, after discharge, will be set aside. *Crane v. Martin*, 4 Rich. 251.

But it does not divest property rights acquired before discharge.—A discharge under this section does not divest a right of property acquired by a creditor by virtue of a mortgage debt secured before such discharge is granted. *Hamilton v. Bredeman*, 12 Rich. 464, 14 A. L. R. 508.

Being limited to pending suits and to creditors who may receive a dividend.—*Duncan v. Brown*, 1 McC. 375, 10 Am. Dec. 679. Nor does the discharge affect suits on debts occurring after the discharge. *Id.*

Although the creditor may dismiss this suit and avoid effect of the discharge.—*Gamble v. Jenkins*, 12 Rich. 692.

§ 856. Prisoner to be remanded for refusal to assign.—In case any such debtor shall neglect or refuse so to do within the time aforesaid, it shall and may be lawful for the judge of said court, upon application upon oath, of the assignee or assignees, again to remand the said debtor to prison there to remain, unless good cause shall be shown by him or them to the contrary, until he shall fully comply with the terms of section 853.

1932 Code, § 856; Civ. P. '22, § 804; Civ. C. '12, § 4181; Civ. C. '02, § 3077; G. S. 2410; R. S. 2529; 1759 (4) 88.

Order of Court is necessary to rearrest. —*Aiken v. Moore*, 1 Hill 432.

§ 857. Penalty for false schedules.—Any person who shall deliver in a false schedule of his effects shall suffer the penalties of wilful perjury, shall be liable to be arrested again for the action on which he was discharged, and shall forever be disabled to take any benefit from this title.

1932 Code, § 857; Civ. P. '22, § 805; Civ. C. '12, § 4182; Civ. C. '02, § 3078; G. S. 2411; R. S. 2530; 1759 (4) 93; 1788 (5) 79.

§ 858. Manner of summoning jury in cases of alleged fraud.—Whenever a debtor in custody under the provisions of this title shall be accused by the plaintiff of fraud, or of having given an undue preference to one creditor to the prejudice of another, or of having made a false return, it shall be lawful for the clerk of the circuit court, who shall hear the prisoner's application, to place the names of twenty-four persons qualified as jurors in a box, and from them draw eighteen, and to direct the sheriff of the county to summon the said eighteen whose names shall be thus drawn to attend at the place where the prisoner is confined, and at such time as the said clerk shall appoint; and from them shall be drawn twelve

in the same manner, who shall be empaneled to try the facts required by this title.

1932 Code, § 858; Civ. P. '22, § 806; Civ. C. '12, § 4183; Civ. C. '02, § 3079; G. S. 2412; R. S. 2531; 1833 (6) 491.

Plaintiff entitled to demand jury trial on questions of fraud.—Where a defendant, arrested under the provisions of § 500, providing for arrest in civil actions, seeks to be released under the general provisions of this act, the plaintiff may demand a jury trial on these issues: fraud, giving undue preference to one creditor, and making a false schedule. *Hartsville Oil Mill v. DuRose*, 105 S. C. 120, 88 S. E. 446.

But allowing jury trial is sometimes within discretion of court.—It has been said that if a case is complicated, it should be tried by a jury, but otherwise it may be tried by a court. *Fabre v. Zylstra*, 2 Bay 147.

Clerk may select the jury.—Under the provisions of this section, the clerk has the right to select the jury. *Rice v. Sims*, 3 Hill 5, Ann. Cas. 13D, 331. And his discretion in regard to notice and the time of trial must govern. *Id.*

Under this section the question of continuance is addressed to the discretion of the clerk. *Bentley v. Page*, 2 McM. 52.

Accusations should be upon suggestion, stating the facts.—*Fabre v. Zylstra*, 2 Bay 147; *Sherman v. Barrett*, 1 McM. 147, 14 Am. St. Rep. 742, 128 Am. St. Rep. 773; *Rosser v. Noye*, 1 Rich. 62; *Ex parte Maffett*, 11 Rich. 359.

But defendant may waive such requirement.—*Baker v. Bushnell*, 1 McM. 66.

Objection to notice of application must be before trial.—Under this section, after the prisoner has been put on trial, it is too late to object that legal notice of application has not been given. *Rice v. Sims*, 3 Hill 5, Ann. Cas. 13D, 331.

Any fraudulent device to swindle creditors is such fraud as is contemplated by this section. *Hyams v. Valentine*, 4 Strob. 408.

Fraudulent removal of goods bars benefit of act.—*Wiley v. Lawson*, 7 Rich. 152; *Branden v. Gowing*, 7 Rich. 459, 66 Am. St. Rep. 216, 34 L. R. A. (N. S.) 579, Ann. Cas. 13A, 14.

But this does not always apply where goods are recovered by creditor.—Under this section where the creditors recover goods fraudulently removed from the state by the debtor, such debtor is not barred from the benefits of this act. *Mairs v. Smith*, Harp. 128.

Nor is debtor barred from benefits of act for fraud in contracting the debt.—*Fleming v. Close*, 3 Strob. 362.

Applicant may not withdraw after

filing of accusation of fraud.—Under this section, after accusation by suggestion of fraud has been filed, an applicant cannot withdraw his application for discharge. *Sherman v. Barrett*, 1 McM. 147, 14 Am. St. Rep. 742, 128 Am. St. Rep. 773.

Except on payment of debt and costs for which imprisonment.—After suggestions of fraud has been entered, and applicant under this section may withdraw his application for discharge on payment of the debt for which he is arrested, and costs. *Sleeper v. Cohen*, 12 Rich. 112.

"Preference" must be fraudulent to deprive debtor of benefit of section.—*Stover v. Duren*, 2 McC. 266; *Creyton v. Dickerson*, 3 McC. 438; *Dobson v. Teasdale*, 4 McC. 81; *Bulwinkle v. Grube*, 5 Rich. 286.

And this is a question for the jury.—The question of "undue preference," as provided for in this section, must be decided by a jury. *Weed v. Evens*, 2 Speers 232.

Conviction of false return prevents discharge.—*Dixon v. Vanezara*, 1 McC. 373; *McElmoyle v. Florence*, 2 McC. 29.

Schedule may be amended at trial.—Under this section the schedule may be amended at the trial, if it appear that the omissions in it arose from ignorance, inadvertence, or mistake, and such amendment will not surprise or delay. *Sherman v. Barrett*, 1 McM. 147, 14 Am. St. Rep. 742, 128 Am. St. Rep. 773; *Craig v. Pinson*, 2 Speers 176.

Mention of fraudulent assignment in schedule is not false return.—A finding that an assignment of some of the defendant's property mentioned in his schedule, was fraudulent, is not a conviction of a false return within the meaning of this section. *Cavan v. Dunlay*, Chev. 241.

Nor is omission to mention fraudulent assignment a false return.—*Brandon v. Rogers*, 10 Rich. 9.

No new suggestions may be added after issue made up.—*Bentley v. Page*, 2 McM. 52; *Morein v. Solomons*, 7 Rich. 97.

Under this section the verdict of "not guilty" finds the schedule to be a true one. *Rice v. Sims*, 3 Hill 5, Ann. Cas. 13D, 331.

And the verdict of "guilty generally," of various charges of fraud, under this section, is sufficient. *Hyams v. Valentine*, 4 Strob. 408.

§ 859. Filling vacancies in panel.—If, from the eighteen persons so sum-

moned, twelve cannot, from any cause be empaneled, then the said clerk is authorized to complete that number from the other freeholders originally selected.

1932 Code, § 859; Civ. P. '22, § 807; Civ. C. '12, § 4184; Civ. C. '02, § 3080; G. S. 2413; R. S. 2532; 1833 (6) 491.

§ 860. Liability for non-attendance of jurors.—The freeholders so summoned shall be liable to the same objection, to be made by either party in the case, which may be made to jurors in the court of common pleas, and shall be liable to the same fines for non-attendance without sufficient cause to which jurors are for non-attendance at the courts, the said fines to be imposed by the court of common pleas of the county; and it shall be the duty of the clerk to return to the said court the names of the freeholders who shall so neglect to attend, to be proceeded against as in the case of non-attending jurors.

1932 Code, § 860; Civ. P. '22, § 808; Civ. C. '12, § 4185; Civ. C. '02, § 3081; G. S. 2414; R. S. 2533; 1833 (6) 492.

§ 861. Issues on exceptions to clerk's rulings to be summarily heard by judge.—In case exceptions be taken to any order or ruling of the clerk while discharging the duties imposed by this title, the issues therein may be summarily heard and tried by the judge of the circuit, or by any circuit judge then holding the courts in such circuit, or if there be no judge within such circuit, by any other circuit judge named in the notice for such hearing.

1932 Code, § 861; Civ. P. '22, § 809; Civ. C. '12, § 4186; Civ. C. '02, § 3082; G. S. 2415; R. S. 2534.

§ 862. Fees allowed clerk for hearing application.—The clerk who may hear and determine the application of a debtor for the benefit of the provisions of this title, shall, if the same be unlitigated, be entitled to receive the sum of two dollars out of the property that may be assigned, as a compensation for his services; and, whenever the same is litigated, the said clerk shall be entitled to receive the sum of four dollars as a compensation for his services, out of the property of the debtor, if the final decision be against him; but if it be in his favor, then the said sum shall be paid by the plaintiff.

1932 Code, § 862; Civ. P. '22, § 810; Civ. C. '12, § 4187; Civ. C. '02, § 3083; G. S. 2416; R. S. 2535; 1833 (6) 491.

§ 863. Fees allowed sheriff.—The sheriff shall receive the sum of five dollars as a compensation for summoning the said freeholders, to be paid out of the property of the debtor, if his application be refused, and, if granted to be paid by the plaintiff.

1932 Code, § 863; Civ. P. '22, § 811; Civ. C. '12, § 4188; Civ. C. '02, § 3084; G. S. 2417; R. S. 2536; 1833 (6) 491.

§ 864. Proceedings in cases of appeal.—If the verdict of the jury aforesaid be in favor of the debtor, and the plaintiff should appeal, the debtor shall be entitled to be discharged from confinement, on his giving bond and sufficient sureties to the plaintiff, to be forthcoming and to abide by the decision of the Supreme Court; and if the said appeal shall be determined

against the debtor, and he be not surrendered (which the surety is hereby authorized to do) before the first day of the circuit court next succeeding the determination of such appeal, then the clerk of the court shall, on the application of the plaintiff or his agent, forthwith issue an order on the said bond against the prisoner and his sureties, as in cases of estreated recognizances; but in case the said prisoner should appear, or be surrendered, as aforesaid, then the said clerk shall forthwith proceed with the case as provided in the preceding sections.

1932 Code, § 864; Civ. P. '22, § 812; Civ. C. '12, § 4189; Civ. C. '02, § 3085; G. S. 2418; R. S. 2537; 1833 (6) 491.

No appeal lies except from such verdict of jury.—Martin v. Stribling, 2 Speers 65.

Notice of such appeal may be given after judgment on verdict.—Bulwinkle v. Grube, 5 Rich. 286.

Upon judgment granting his discharge, the prisoner is entitled to go at large,

pending appeal.—Baker v. Bushnell, 1 McM. 272; Bulwinkle v. Grube, 5 Rich. 286.

But upon renewal of appeal he must return to prison or forfeit his right to discharge.—Bulwinkle v. Grube, 5 Rich. 286.

§ 865. Creditors allowed to examine applicants for discharge—penalty for refusal to answer.—It shall and may be lawful for the creditor or creditors of any person applying for the benefit of this title, either in person or by attorney, to examine and cross-examine such applicant, on oath, in the presence of the judge, or the clerk of the court, before whom he shall move for his discharge from imprisonment, touching the truth of his schedule, and touching the nature and extent of his property, rights and credits, liable to be assigned for the benefit of his creditors. And the refusal of any such applicant to answer, fully and directly, all or any proper questions put to him in the course of such examination, shall prevent his discharge, if otherwise entitled thereto, until he shall have fully answered the same.

1932 Code, § 865; Civ. P. '22, § 813; Civ. C. '12, § 4190; Civ. C. '02, § 3086; G. S. 2419; R. S. 2538; 1836 (6) 556.

Such examination by the creditor may be followed by his filing suggestions of fraud to be tried by the jury.—Ex parte

McDonald, 13 Rich. 250.

See generally. Rosser v. Moye, 1 Rich. 62; Fleming v. Close, 3 Strob. 362.

§ 866. Debtor to produce books, etc.—If, on such examination, it should appear that he has kept books, in relation to his trade, profession, or occupation, he shall be required to produce the same, if in his possession or power; and on failure to do so, he shall be deprived of his discharge until he shall produce the same.

1932 Code, § 866; Civ. P. '22, § 814; Civ. C. '12, § 4191; Civ. C. '02, § 3087; G. S. 2420; R. S. 2539; 1836 (6) 556.

§ 867. Submission of issues to jury, etc.—Nothing contained in this chapter shall be construed to deprive a judge, sitting in open court, of the power to submit to the jury already empaneled all issues arising under section 858, in the same manner as is now practiced; but in all cases where the plaintiff shall appeal, the defendant shall be entitled to his enlargement, pending the appeal, on the terms prescribed in section 864.

1932 Code, § 867; Civ. P. '22, § 815; Civ. C. '12, § 4192; Civ. C. '02, § 3088; G. S. 2421; R. S. 2540; 1833 (6) 493.

§ 868. No discharge to be granted until delivery of property to assignee.

—In all cases where a debtor applies for his discharge, the judge, or clerk of the court, before whom the application shall be made, shall not discharge him from the confinement until the property contained in his schedule is produced and delivered to the assignee, if it be, or has been, within the power of the debtor to deliver the same since the time of his arrest.

1932 Code, § 868; Civ. P. '22, § 816; Civ. C. '12, § 4193; Civ. C. '02, § 3089; G. S. 2422; R. S. 2541; 1833 (6) 493.

It is not in the power of debtor to deliver property removed to another State, and he must be discharged unless it was fraudulently removed. *Martin v. Stribling*, 2 Speers 65.

§ 869. Expenses of imprisonment paid weekly in advance by plaintiff, or debtor discharged.

—Every debtor arrested and held in the custody of the sheriff, under the provisions of this title, shall be maintained in the common jail at the expense and charge of the person causing the arrest. And if such charges are not paid to the keeper of the jail weekly, in advance, the clerk or judge may, upon proper evidence thereof, direct that such debtor be released from further custody.

The charges for keeping such debtor in the common jail shall be the same as are allowed by law for dieting prisoners confined under process in the court of sessions; and if the plaintiff recover judgment against the debtor, or an assignment of his effects be made as herein provided, such charges may be recovered as disbursements in the action, or paid out of the estate assigned, before any dividend is declared.

1932 Code, § 869; Civ. P. '22, § 817; Civ. C. '12, § 4194; Civ. C. '02, § 3090; G. S. 2423; R. S. 2542.

Provisions of section not for debtor's benefit.—The provisions of this section as to deposit by the plaintiff of jail fees for the confinement of the debtor are not available as a defense to such debtor on mandamus proceedings to compel the

sheriff to incarcerate the debtor. *Harrison v. Caudle*, 141 S. C. 407, 139 S. E. 842.

See generally, *Schroter v. Crawford*, 1 Hill 422; *Love v. Lowry*, 1 McC. 181; *Brien v. Ellis*, *Dud.* 71.

TITLE 18

Remedies Relating to Real Property

CHAPTER 55. Remedies against Guardians, Disseizors, Etc., § 870.

CHAPTER 56. Forcible Entry and Detainer, and Ejectment of Trespassers, § 885.

CHAPTER 55

Remedies against Guardians, Disseizors, Etc.

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| 870. Guardian may be compelled to produce minor. | 875. Guardians holding over. |
| 871. Effect of failure to produce minor. | 876. Damages. |
| 872. Proceedings when minor out of State. | 877. Writ of entry against heirs of disseizor. |
| 873. Rights of absent or concealed person preserved. | 878. Party entitled to bring action to quiet title. |
| 874. Proof that person sought is alive. | 879. Publication of summons. |
| | 880. Service on unknown parties and |

minors.
 881. Costs.
 882. Effect of judgment.

883. Time limit for reopening judgment.
 884. Immaterial procedural errors.

§ 870. Remaindermen, etc., may compel guardians, etc., to produce the minor, etc.—Any person who shall have any claim or demand in or to any remainder, reversion, or expectance in or to any estate after the death of any person within age, married woman, or any other person whatsoever, upon affidavit made by the person so claiming such estate, of his or her title, and that he or she has cause to believe that such minor, married woman, or other person is dead, and that his or her death is concealed by such guardian, trustee, husband, or any other person, may, once a year, apply to the court of common pleas for an order requiring such guardian, trustee, husband, or other person concealing, or suspected to conceal, the death of such person, at such time and place as the said court shall direct, on due service of such order, to produce and show to such person and persons (not exceeding two) as shall, in such order, be named by the party prosecuting such order, such minor, married woman, or other person as aforesaid.

1932 Code, § 870; Civ. P. '22, § 818; Civ. C. '12, § 4056; Civ. C. '02, § 2955; G. S. 2275; R. S. 2415; 6 Ann. C. 18; 1712 (2) 561.

§ 871. If not produced, minor, etc., taken to be dead—claimant may enter on land, etc.—If the person proceeded against shall fail to produce such infant, married woman, or other person, according to the direction made, the court may appoint commissioners, before whom such infant, married woman, or other person, may be produced. If the said person cannot be produced, or there should be other satisfactory proof before the commissioners of the death of such person, they shall make return of the fact on oath; and such person sought shall be taken to be dead; and any lawful claimant of any estate held by or for such person, shall be let into the possession of the same.

1932 Code, § 871; Civ. P. '22, § 819; Civ. C. '12, § 4057; Civ. C. '02, § 2956; G. S. 2276; R. S. 2416; 6 Ann. C. 18; 1712 (2) 561.

§ 872. Proceedings on affidavit that minor, etc., is beyond limits of State.—Should it appear by affidavit that the person sought is, or lately was, at some certain place beyond the limits of this State, the court may direct the commissioners to make personal search at the place or places named: *provided*, that the person prosecuting such order shall provide the necessary expenses of such search. And upon return of the commissioners, duly made and filed, of their failure to view such person alleged concealed or absent, or other satisfactory proof of death, such person shall be taken to be dead; and any lawful claimant of any estate held by or for such person, shall be let into possession of the same.

1932 Code, § 872; Civ. P. '22, § 820; Civ. C. '12, § 4058; Civ. C. '02, § 2957; G. S. 2277; R. S. 2417; 1712 (2) 561.

§ 873. Right preserved where it appears that concealed or absent person sought is living.—In case it should afterwards appear that such concealed or absent person sought was living at the time any proceedings under the provisions of this chapter were had, such person, or any and all persons claiming title under or through such person concealed or absent, may re-

enter upon said estate, and may have their action of damages for the rents and profits during eviction.

1932 Code, § 873; Civ. P. '22, § 821; Civ. C. '12, § 4059; Civ. C. '02, § 2958; G. S. 2278; R. S. 2418; 1712 (2) 561.

§ 874. Guardian to continue in possession, etc., in certain cases.—Nothing herein contained shall prevent any guardian, husband, or trustee, from showing by satisfactory proof that the infant, married woman, or other person sought, was actually living at the time proceedings for a view of such person were commenced.

1932 Code, § 874; Civ. P. '22, § 822; Civ. C. '12, § 4060; Civ. C. '02, § 2959; G. S. 2279; R. S. 2419; 1712 (2) 561.

§ 875. Guardians, etc., holding estates after determination of life of minor, etc., adjudged trespassers.—Every person who, as guardian or trustee for any infant, and every other person having any estate determinable upon any life or lives, who, after the determination of such particular estate or interests, without the express consent of him, her, or them, who are, or shall be, next and immediately entitled upon and after the determination of such particular estates or interests, shall hold over and continue in possession of any lands, tenements, or hereditaments, shall be, and are hereby, adjudged to be trespassers.

1932 Code, § 875; Civ. P. '22, § 823; Civ. C. '12, § 4061; Civ. C. '02, § 2960; G. S. 2380; R. S. 2420; 1712 (2) 563.

§ 876. Heirs, etc., may recover damages.—Every person and persons, his, her, and their executors and administrators, who are, or shall be, entitled to any such lands, tenements, and hereditaments, upon or after the determination of such particular estates or interests, shall and may recover in damages against every such person or persons so holding over as aforesaid, and against his, her, or their executors or administrators, the full value of the profits received during such wrongful possession as aforesaid.

1932 Code, § 876; Civ. P. '22, § 824; Civ. C. '12, § 4062; Civ. C. '02, § 2961; G. S. 2281; R. S. 2421; 1712 (2) 563.

§ 877. Right of entry of lawful owner or heirs against heirs of disseizor—exception.—The dying of any disseizor, seized of or in any lands, tenements, or other hereditaments, having no right or title therein, shall not be taken or deemed any such descent as to take away the entry of any such person or persons, or their heirs, which, at the time of the same descent, had good and lawful title of entry into said lands, tenements, or hereditaments, except such disseizor has had the peaceable possession of such lands, tenements, or hereditaments, for the space of ten years next after the disseizin therein by him committed, without entry or continual claim by or of such person or persons as have lawful title thereunto.

1932 Code, § 877; Civ. P. '22, § 825; Civ. C. '12, § 4063; Civ. C. '02, § 2962; G. S. 2282; R. S. 2422; 32 H. 8, c. 33; 1712 (2) 474.

§ 878. Who may bring action to determine adverse claim, and quiet titles to real estate.—Any person in possession of real property, by himself or his tenant, or any person having or claiming title to vacant or unoccupied

real property, may bring an action against any person who claims, or who may or could claim, an estate or interest therein, or a lien thereon, adverse to him for the purpose of determining such adverse claim and the rights of the parties, respectively.

1932 Code, § 878; Civ. P. '22, § 826; 1916 (29) 928.

To rely on adverse possession the evidence must show such open, notorious, exclusive, hostile, continuous, and unbroken possession for the whole period as is required by law to defeat the legal

title. *Weston v. Morgan*, 162 S. C. 177; 160 S. E., 436. *Forshur Timber Co. v. Santee River Cypress Lumber Co.* S. C., ...; 178 S. E., 329.

§ 879. Publication of summons—certain personal service sufficient.—When any action is commenced to determine adverse claims, publication of the summons may be made and service upon parties outside of the State and unknown claimants obtained, in the following manner. When the sheriff of the county in which the action is brought shall have duly determined that the defendant cannot be found therein, and an affidavit of the plaintiff, or his attorney, shall have been filed with the clerk stating that a cause of action exists to determine adverse claims to certain property, within said county, and that he believes the defendant, or defendants, naming them, is not a resident of the State, or cannot be found therein, and either that he has mailed a copy of the summons, by registered mail, to the defendant at his place of residence or that such residence is not known to him, service of the summons may be made upon the defendant by three weeks' public notice thereof in the manner provided by law for publication of summons in civil actions: *provided*, that personal service of such summons without the State, made after order for publication proved by the affidavit of the person making the same, made before an authorized officer having a seal, shall have the same effect as the publication of the summons herein provided.

1932 Code, § 879; Civ. P. '22, § 827; 1916 (29) 928.

§ 880. Service on unknown parties—lis pendens—matter to be referred to master—rights of certain minors and non-residents.—In any action brought to determine adverse claims of real property within this State, the plaintiff may insert in the title thereof, in addition to the names of such persons as are known or appear of record to have some right, title, interest, estate or lien in or on the real property in controversy the following: "Also all other persons unknown, claiming any right, title, estate, interest in, or lien upon, the real estate described in the complaint herein." Service of the summons may be had upon all such unknown persons defendant by publication in the same manner as against non-resident defendants, upon the filing of an affidavit of the plaintiff, his agent or attorney, stating the existence of a cause of action to try adverse claims within this State. The plaintiff shall, before commencement of such publication, file with the clerk of the court a notice of the pendency of the action, copy of which shall be published in the same newspaper with, and immediately following the summons. All such unknown persons so served shall have the same rights to appear and defend before and after judgment as would named defendants upon whom service is made by publication, and any order or judgment in the action shall be binding upon them, who have been served or who shall appear and defend, whether they be of age or minors; and, if

they be minors when judgment is rendered, they may be allowed to defend at any time within three years after coming of age: *provided*, that in all actions brought under this statute, it shall be the duty of the court, or a judge thereof, to refer the same to a master or special referee, to take the testimony as to the plaintiff's claim or title, and as to all the facts and circumstances (unless the same shall be taken in open court), and carefully inquire as to the existence of claim by and residence of all non-residents, and if it shall appear to the court or judge that there probably exists a bona fide claim or lien on the part of any such non-resident or minor, whose name and whereabouts can be ascertained, no decree adjudicating the rights of such minor, or affecting or quieting the title (as against him or her) shall be rendered unless personal service upon him or her outside of the State after order for publication shall first be made and proved as hereinbefore provided.

1932 Code, § 880; Civ. P. '22, § 828; 1916 (29) 929.

See § 436 as to service also.

§ 881. Costs.—If the defendant in his answer disclaim any interest in the property, or suffer judgment to be taken against him without answer, the plaintiff cannot recover costs, but if the summons has been served upon the defendant personally, and it is made to appear that, after the accrual of the cause of action and before commencement thereof, the plaintiff demanded in writing of the defendant, and the defendant neglected to execute within a reasonable time thereafter, a good and sufficient quit-claim deed of the property described in the complaint, upon tender of such deed ready for execution, the plaintiff shall nevertheless recover his costs.

1932 Code, § 881; Civ. P. '22, § 829; 1916 (29) 930.

§ 882. Effect of judgment—whom bound.—Any judgment entered in an action to try adverse claims shall be binding upon all of the defendants, joined in said action, and when unknown owners and claimants are joined as defendants, it shall be binding upon any and all persons or parties having or claiming, or who might or could claim, an interest in or lien upon said property adverse to the plaintiff, who have been served or who shall appear and defend, whether residents of this State or non-residents.

1932 Code, § 882; Civ. P. '22, § 830; 1916 (29) 930.

§ 883. Time limitation upon reopening matter.—No judgment or decree quieting title to land or determining the title thereto, or adverse claims therein, heretofore entered or hereinafter to be entered, shall be adjudged invalid or set aside for any reason, unless the action or proceeding to vacate or set aside such judgment or decree shall be commenced, or application for leave to defend be made within three years from the time of filing for a record a certified copy of such judgment or decree, in the office of the clerk of court of the county in which the lands affected by such judgment or decree are situated or in case of minors, within three years after coming of age.

1932 Code, 883; Civ. P. '22, § 831; 1916 (29) 930.

§ 884. Immaterial procedural errors to be disregarded—certain existing

law unchanged.—At every stage of an action the court shall disregard all errors or defects in pleadings and proceedings which do not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason thereof: *provided*, that nothing in sections 878 to 884, inclusive, shall be construed or held to change the existing law in reference to trials by jury in all actions of ejectment, or trespass to try titles or trespass quare clausum fregit, or in any action to recover possession of real estate.

1932 Code, § 884; Civ. P. '22, § 832; 1916 (29) 930.

CHAPTER 56

Forcible Entry and Detainer, and Ejectment of Trespassers

ARTICLE 1. Forcible Entry and Detainer, § 885.

ARTICLE 2. Summary Ejectment of Trespassers, § 894.

ARTICLE 1

Forcible Entry and Detainer

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| 885. Peaceable entry. | 890. Treble damages recovered. |
| 886 and 887. Jurisdiction of forcible entries and detainers. | 891. Proceedings in case of forcible entry. |
| 888. Feoffments by persons wrongfully in possession. | 892. Restitution of possession. |
| 889. Action against wrongful disseizor. | 893. Tenants holding three years by force. |

§ 885. None but lawful and peaceable entry to be made.—No person shall make any entry into any lands and tenements, but in case where entry is given by law; and in such case not with strong hand, nor with multitude of people, but only in peaceable and easy manner.

1932 Code, § 885; Civ. P. '22, § 833; Civ. C. '12, § 4064; Civ. C. '02, § 2963; G. S. 2290; R. S. 2423; 5 R. 2, c. 2; 1712 (2) 442.

Possession and not title protected.—Under this section, one who enters and takes land from the possession of another, is guilty of forcible entry and detainer if the entry is not given by law, even though he has legal title to the land, the statute protecting possession, and not title. *State v. Bates*, 87 S. C. 527, 70 S. E. 170. See also, *Vance v. Ferguson*, 101 S. C. 125, 85 S. E. 241, L. R. A. 1918B, 671.

And possession must not be a constructive one.—Possession of lands and tenements, must be an actual and not a constructive one in order to come under the provisions of this section. *State v. Burt*, 3 Brev. 413, 121 Am. St. Rep. 392.

But *pedis possessio* is not necessary where party has all possession possible.—The plaintiff does not have to have actual possession of a cemetery lot in order for there to be an unlawful entry into it by another, as the possession of the keeper of the cemetery is that of the plaintiff. *Vance v. Ferguson*, 101 S. C. 125, 85 S. E. 241, 243, L. R. A. 1918B, 671.

Therefore easements are included.—One enjoying an easement, is, under this section, entitled to enjoy it free from molestation just as if he held a fee simple. *Vance v. Ferguson*, 101 S. C. 125, 85 S. E. 241, 243, L. R. A. 1918B, 671.

Entry made over protest of party is an "Unlawful" one.—An entry of the defendant, over the protest of the plaintiff, on premises abandoned by the plaintiff's tenant, to remove furniture bought from the defendant by tenant but not paid for, constitutes an unlawful entry even though there was no breach of the peace. *Lark v. Cooper Furniture Co.*, 114 S. C. 37, 102 S. E. 786.

Where furniture store manager entered plaintiff's locked house through window and carried away furniture sold through title-retaining contract under which buyers defaulted, it was for jury to say whether or not such defendant's entry was unlawful. *Lydia v. Cooper, et al.*, 169 S. C. 451, 169 S. E. 236.

"Forcible" entry defined.—Generally, an "entry" to be "forcible" within forc-

ible entry and detainer statute must be accompanied with circumstances tending to excite terror in the occupant, and to prevent him from maintaining his rights, but an "entry" which has no force other than such as is implied in every "trespass" is not within the statute. *Busbee v. Winnsboro Granite Corporation*, 190 S. C. 245, 2 S. E. (2d) 737.

And does not have to be made by a "multitude."—It has been held under this section, that it is not actually necessary,

in order to have an unlawful entry, that it be made by a multitude. Any actual unlawful taking possession is such an entry. *State v. Burt*, 3 Brev. 413, 121 Am. St. Rep. 392.

And burial of dead in cemetery lot of another included.—Entry and burial in a cemetery lot containing the dead of another constitutes an unlawful entry under this section. *Vance v. Ferguson*, 101 S. C. 125, 85 S. E. 241, 243, L. R. A. 1918B, 671.

§ 886. Magistrate to have jurisdiction of forcible entries and detainers.—

Any two magistrates of the county wherein such lands and tenements may be situated, shall have authority and power to inquire by the people of the same county, as well of them that make forcible entries in lands and tenements, as of them which hold the same with force.

1932 Code, § 886; Civ. P. '22, § 834; Civ. C. '12, § 4065; Civ. C. '02, § 2964; G. S. 2291; R. S. 2424; 8 H. 6, c. 9; 1712 (2) 444.

Entry does not have to be made by a multitude.—See this catchline under § 885.

§ 887. To put party ousted in possession.—If it be found, before any of them, that any do contrary to this chapter, then the said magistrates shall cause to be resealed the lands and tenements so entered or holden, as aforesaid, and shall put the party so put out in full possession of the same lands and tenements so entered or holden, as before.

1932 Code, § 887; Civ. P. '22, § 835; Civ. C. '12, § 4066; Civ. C. '02, § 2965; G. S. 2292; R. S. 2425; 1712 (2) 444.

Restitution should not be made, under this section, until the issue as to the force, if made, is tried. *State v. Dayley*, 2 N. & McC. 121.

§ 888. Feoffments made by person wrongfully in possession void.—If any person, after such entry into lands or tenements holden with force, make a feoffment or other discontinuance to any person, to have maintenance, or to take away and defraud the possessor of his recovery in any wise, and afterwards in an action thereof to be taken or pursued before magistrates by due inquiry thereof, such feoffments and discontinuances are duly proved to be made for maintenance as aforesaid, then such feoffments or other discontinuances shall be void, frustrate, and of none effect.

1932 Code, § 888; Civ. P. '22, § 836; Civ. C. '12, § 4067; Civ. C. '02, § 2966; G. S. 2293; R. S. 2426; 8 H. 6, c. 9; 1712 (2) 444.

§ 889. Action may be had against person wrongfully disseizing.—If any person be put out or disseized of any lands or tenements in forcible manner, or put out peaceably, and be afterwards holden out with strong hand, or, after such entry, any feoffment or discontinuance in any wise thereof be made, to defraud and take away the right of the possessor, the party grieved in this behalf shall have an action against such disseizor.

1932 Code, § 889; Civ. P. '22, § 837; Civ. C. '12, § 4068; Civ. C. '02, § 2967; G. S. 2294; R. S. 2427; 1712 (2) 445.

Editor's note.—This section deals largely with the elements necessary to sustain an action of forcible entry and detainer. The next succeeding section per-

tains to the damages recoverable in such action. The two sections are therefore closely related. Reference is made to the note to the following section.

"Lands or tenements" do not include iron rails temporarily laid.—An action of forcible entry and detainer cannot be maintained under this section, where an entry is made to remove iron rails temporarily laid on the land of the plaintiff. This is so, for the plaintiff is in quiet possession of all his real estate, as the rails never became fixtures. *De Laine v. Alderman*, 31 S. C. 267, 9 S. E. 950, 952, 121 Am. St. Rep. 382.

Party must be in possession at time of entry where later detention is not forcible.—Under this section, an action cannot be sustained without proof of possession by the plaintiff at the time of the forcible ejection, or after peaceable possession by the defendant, without forcible detention. *Fleming v. Chappell*, 118 S. C. 290, 110 S. E. 148, 149.

Plaintiff not "disseized" by entry for purpose of cutting timber.—An entry upon land for the purpose of cutting and removing timber merely, would be trespass, and not sufficient to sustain an action of forcible entry and detainer under this section. *Du Pre v. Tilghman Lbr. Co.*, 114 S. C. 269, 103 S. E. 526; *Sease v. Barnwell Lbr. Co.*, 113 S. C. 105, 101 S. E. 567, 568.

And negligent acts do not constitute "forcible" ones.—There has been no forcible entry and detainer under this section, where a railroad company breaks down a fence of the plaintiff in digging a well on its right of way. *Brown v. Southern R. Co.*, 136 S. C. 214, 131 S. E. 681, 682.

Trespass may be brought in addition

to forcible entry and detainer.—An action of trespass may be maintained, under this section, in addition to an act of forcible entry and detainer. *Vance v. Ferguson*, 101 S. C. 125, 85 S. E. 241, 243, L. R. A. 1918B, 671.

Whether furniture store manager, entering locked house through window and carrying away furniture sold under title retaining contract under which buyers defaulted, committed trespass and breach of the peace, is for jury. *Lydia V. Cooper, et al.*, 169 S. C. 451, 169 S. E. 236.

"Forcible entry" defined.—Generally, an "entry" to be "forcible" within forcible entry and detainer statute must be accompanied with circumstances tending to excite terror in the occupant, and to prevent him from maintaining his rights, but an "entry" which has no force other than such as is implied in every "trespass" is not within the statute. *Barbee v. Winnsboro Granite Corporation*, 190 S. C. 245, 2 S. E. (2d) 737.

Where landlord peacefully re-entered demised premises after vainly attempting, by inquiring of tenant's former employer and by resort to the sheriff's services, to locate tenant who had not paid rent for seven months and who had vacated the premises several months before re-entry, and where landlord carefully removed and stored tenant's property, landlord did not commit a "trespass" for which tenant could recover damages, notwithstanding absence of notice to quit, as lack of notice was tenant's fault. *Ibid.*

§ 890. In case of recovery, plaintiff to have treble damages.—If the party grieved recover in such action, and it be found by verdict, or in other manner by due form of law, that the party defendant entered with force into the lands and tenements, or, after his entry, did hold them with force, the plaintiff shall recover treble damages against the defendant.

1932 Code, § 890; Civ. P. '22, § 838; Civ. C. '12, § 4069; Civ. C. '02, § 2968; G. S. 2295; R. S. 2428; 1712 (2) 445.

See the next foregoing section for elements necessary to maintain an action of forcible entry and detainer.

Provisions do not apply to detention of personal property.—Damages cannot, under this section, be recovered for the detention of personal property. *De Laine v. Alderman*, 31 S. C. 267, 9 S. E. 950, 952, 121 Am. St. Rep. 382.

Treble damages not allowed for injuries suffered under entry not forcible.—Treble damages cannot, under this section, be recovered for timber cut on property of plaintiff, where entry was not made with force and plaintiff was in possession of real estate. *Sease v. Barnwell Lbr. Co.*, 113 S. C. 105, 101 S. E. 567, 568; *Du Pre v. Tilghman Lbr. Co.*, 114

S. C. 269, 103 S. E. 526.

Nor for injuries suffered in malicious trespass.—This section does not apply in ascertaining damages in an action for malicious trespass. *Baxley v. Barnwell Lumber Co.*, 113 S. C. 109, 101 S. E. 646.

Or for results of negligent acts.—Damages suffered as a result of allowing landowner's cattle to escape through fence broken by a railroad in repairing its right of way, cannot be recovered as treble damages, as this section does not cover negligent acts. *Brown v. Southern R. Co.*, 136 S. C. 214, 131 S. E. 681, 682.

Exemplary and treble damages both can not be recovered. *Vance v. Ferguson*, 101 S. C. 125, 85 S. E. 241, 244, L. R. A. 1918B, 671.

§ 891. Proceedings in cases of forcible entry, etc., same as tenants holding over.—The forms and proceedings before magistrates in cases of forcible entry and detainer, shall be the same as are prescribed by law in cases where tenants hold over after the expiration of their leases.

1932 Code, § 891; Civ. P. '22, § 839; Civ. C. '12, § 4070; Civ. C. '02, § 2969; G. S. 2296; R. S. 2429; 1829 (6) 338.

§ 892. Restitution of possession given to avoid entries with force, in estates for years, etc.—Any two magistrates, authorized and enabled, upon inquiry, to give resitution of possession unto tenants of any estate of freeholder of their lands or tenements which shall be entered upon with force, or from them withholden by force, shall have the like and the same authority and ability (upon indictment of such forcible entries or forcible withholdings before them duly found) to give like restitution of possession unto tenants for term of years, of lands or tenements by them so holden, which shall be entered upon by force, or holden from them by force.

1932 Code, § 892; Civ. P. '22, § 840; Civ. C. '12, § 4071; Civ. C. '02, § 2970; G. S. 2297; R. S. 2430; 21 J. 1, c. 15; 1712 (2) 445.

§ 893. Provisions not to affect tenants who have held by force three years.—They which keep their possessions with force in any lands and tenements whereof they or their ancestors, or they whose estate they have in such lands and tenements, have continued their possessions in the same by three years or more, shall not be endangered by force of this chapter.

1932 Code, § 893; Civ. P. '22, § 841; Civ. C. '12, § 4072; Civ. C. '02, § 2971; G. S. 2298; R. S. 2431; 8 H. 6, c. 9; 1712 (2) 445.

ARTICLE 2

Summary Ejectment of Trespassers

894. Magistrate's duty in case of trespass.

895. Fees.

896. Appeal and injunction.

§ 894. Duty of magistrate in case of trespass—proviso.—If any person shall have gone into or shall hereafter go into possession of any lands or tenements of another without his consent or without warrant of law, it shall be lawful for the owner of the land so trespassed upon to apply to any magistrate to serve a notice on such trespasser to quit the premises, and if, after the expiration of five days from the personal service of such notice, such trespasser refuses or neglects to quit, it shall then be the duty of such magistrate to issue his warrant to any sheriff or constable, requiring him forthwith to eject such trespasser, using such force as may be necessary: *provided, however*, that if the person in possession shall, before the expiration of the said five days, appear before such magistrate and satisfy him that he has a "bona fide" color of claim to the possession of such premises, and enter into bond to the person claiming the land, with good and sufficient security, to be approved by the magistrate, conditioned for the payment of all such costs and expenses as the person claiming to be the owner of the land may incur in the successful establishment of his claim, and also for any damages which the owner of the land may sustain by reason of the possession being withheld from him, by any of the modes

of proceeding now provided by law, the said magistrate shall not issue his warrant as aforesaid.

1932 Code, § 894; Civ. P. '22, § 842; Civ. C. '12, § 4073; Civ. C. '02, § 2972; R. S. 2432; 1883 (18) 556; 1912 (23) 577.

Agent of owner may bring action.—An agent shown to have acted as such for many years in renting and managing the land for the owner, can recover, under this section, its possession from trespassers. *Bradley v. Bell*, 34 S. C. 107, 12 S. E. 1071, 121 Am. St. Rep. 373.

Notice to quit premises given by order to show cause is sufficient.—An order issued by a magistrate reciting an affidavit by plaintiff that defendant had gone into possession of certain lands of plaintiff without his consent or warrant of law, and had refused to yield possession, and requiring defendant to show cause at the magistrate's office, at a time stated, why defendant should not be ejected from the premises, was a sufficient notice to quit, and the part as to showing cause was surplusage. *Sires v. Mosley*, 60 S. C. 504, 39 S. E. 7, 8; *Lee v. Chaplin*, 70 S. C. 561, 50 S. E. 501, 503; *Cotton v. Johnson*, 71 S. C. 413, 51 S. E. 245, 247.

And notice to quit within a certain period does not have to be given.—A notice to quit "within five days" is not required under this section. *Sires v. Mosley*, 60 S. C. 504, 39 S. E. 7, 8.

And magistrate acquires jurisdiction by such an order.—Filing of an affidavit by the plaintiff with a magistrate showing that the land was plaintiff's, and was situated in the county of which the magistrate was a judicial officer, and was in possession of the defendant, was a sufficient description to give jurisdiction, under this section. *Sires v. Mosley*, 60 S. C. 504, 39 S. E. 7, 9; *Lee v. Chaplin*, 70 S. C. 561, 50 S. E. 501, 503; *Cotton v. Johnson*, 71 S. C. 413, 51 S. E. 245, 247.

Plea to merits waives question as to proper notice.—An appearance by defendant to raise question of title as a defense, waives question as to service of notice to quit, and gives the magistrate jurisdiction, under this section. *Lynch v. Ball*, 79 S. C. 243, 60 S. E. 691, 692. See also, *Lee v. Chaplin*, 70 S. C. 561, 50 S. E. 501, 503.

And mandamus will not be issued to compel magistrate to issue writ.—Mandamus will not be issued against a magistrate to compel him to issue a warrant of

ejectment, under this section, where he has not made a decision on the question as to the ownership of the premises in dispute. *Richland Drug Co. v. Moorman*, 71 S. C. 236, 50 S. E. 792, 793.

Party claiming right of ejectment must make prima facie showing that he is owner of premises.—Where trespasser appeared before magistrate before expiration of five days and claimed title and asked for a hearing, but refused to give bond, the plaintiff is not entitled under this section, to a writ of ejectment as he must make such proof as should satisfy the magistrate that the case is one falling within the statute. *Richland Drug Co. v. Moorman*, 71 S. C. 236, 50 S. E. 792, 793.

Judgment in ejectment proceedings is res adjudicata in action for damages.—A judgment obtained under this section for the party in possession is conclusive, in a later action for damages, that the relationship of landlord and tenant existed between the parties. *Broadway v. Rosen*, 124 S. C. 428, 117 S. E. 417, 419.

No concurrent jurisdiction, Richland County court.—Under the statutes providing for summary ejectment of trespassers by magistrate and authorizing appeal in such proceedings, and the statute conferring, on county court of Richland county, concurrent jurisdiction with circuit court to hear appeals from magistrate's courts, the county court of Richland county had no concurrent jurisdiction with magistrate's court in summary proceeding against trespasser and hence was without authority to issue rule to show cause, or writ in such proceeding, and all proceedings thereunder were of no force and effect. *Moore v. Moore*, 187 S. C. 144, 197 S. E. 507.

Lack of jurisdiction not waived.—In proceeding for summary ejectment of trespassing commenced in the county court of Richland county, action of defendant in appearing and pleading to the petition and defending action on merits did not constitute waiver of question of jurisdiction of court, since court had no jurisdiction of subject matter of action under statutes. *Ibid*.

§ 895. Fee of magistrate and sheriff or constable.—The magistrate shall be entitled to demand and receive from the person applying for such warrant a fee of two dollars before issuing the same, and the sheriff or constable shall in like manner be entitled to demand and receive a fee of two dollars and mileage before executing such warrant, from the person applying for the same.

1932 Code, § 895; Civ. P. '22, § 843; Civ. C. '12, § 4074; Civ. C. '02, § 2973; R. S. 2433; 1883 (18) 556.

§ 896. Either party has right of appeal—injunction—time of decision.—Either party to these proceedings shall have the right of appeal. The magistrate shall not issue his warrant until the expiration of five days after he announces his decision, and in the meantime the defendant may apply for an injunction, as in other cases, upon giving the bond required by section 894, restraining the execution of such warrant pending the determination of his appeal by the circuit court.

1932 Code, § 896; Civ. P. '22, § 844; Civ. C. '12, § 4075; Civ. C. '02, § 2974; R. S. 2434; 1883 (18) 556; 1911 (27) 134.

Allegation that defendant is a trespasser entitles him to appeal.—In a proceeding under this section, an allegation in the complaint that the defendant is in possession of the premises without

warrant or authority of law constitutes a charge that he is a trespasser, and entitles him to an appeal. *Moultrie v. Dixon*, 26 S. C. 296, 297, 2 S. E. 24.

TITLE 19

Definitions and General Principles

897. Definition of real property.
898. Definition of personal property.
899. Definition of property.
900. Definition of clerk.
901. Substitutions for undertakings.
902. Rules of construction.

903. Inconsistent statutory provisions.
904. Circuit court rules.
905. Supreme Court rules.
906. Equity rule prevails in case of conflict.

§ 897. Definition of real property.—The words “real property” and “real estate,” as used in this code of procedure are coextensive with lands, tenements and hereditaments.

1932 Code, § 897; Civ. P. '22, § 845; Civ. P. '12, § 482; Civ. P. '02, § 444; 1870 (14) § 466.

§ 898. Definition of personal property.—The words “personal property,” as used in this code of procedure, include money, goods, chattels, things in action, and evidences of debt.

1932 Code, § 898; Civ. P. '22, § 846; Civ. P. '12, § 483; Civ. P. '02, § 445; 1870 (14) § 467.

“Things in action” include tort actions.—The tort action of a wife against her husband for willfully beating her, is a “thing in action,” being a wrong to her person, and is construed as being “property” in view of this section. *Prosser v. Prosser*, 114 S. C. 45, 102 S. E. 787, 788. See also, *Messervy v. Messervy*, 82 S. C. 559, 560, 64 S. E. 753, 754, 29 L. R. A. (N. S.) 843, Ann. Cas. 12C, 1181, Ann. Cas. 17E, 1019.

As to specific sections giving right of

action to wife against husband, see §§ 352, 397, 400, and notes thereto.

Notes and bonds “evidences of debt”.—Under a statute (§ 532) authorizing the attachment of the “personal estate” of the debtor, debts evidenced by notes and bonds may, under this section, be attached “as personal property.” *Williamson v. Eastern Bldg., etc., Ass’n*, 54 S. C. 582, 32 S. E. 765, 71 Am. St. Rep. 822, 70 Am. St. Rep. 168, L. R. A. 1917A, 880, 947, Ann. Cas. 16E, 364.

§ 899. Definition of property.—The word “property,” as used in this code of procedure, includes property, real and personal.

1932 Code § 899; Civ. P. '22, § 847; Civ. P. '12, § 484; Civ. P. '02, § 446; 1870 (14) § 468.

§ 900. Definition of clerk.—The word “clerk,” as used in this code of procedure, signifies the clerk of the court where the action is pending, and, in the Supreme Court, the clerk of the county mentioned in the title of the complaint, or in another county to which the court may have changed the place of trial, unless otherwise specified.

1932 Code, § 900; Civ. P. '22, § 848; Civ. P. '12, § 485; Civ. P. '02, § 447; 1870 (14) § 469.

§ 901. Undertakings in civil actions or special proceedings.—In all cases in which an undertaking is or may be required by any party to a civil action or special proceeding with sureties, such person or persons may in lieu thereof, secure and furnish a bond of indemnity or policy of assurance or insurance for the amount of such undertaking written by any surety or indemnity company duly incorporated and authorized to do business in this State.

1932 Code, § 901; Civ. P. '22, § 849; Civ. P. '12, § 486; 1910 (26) 755.

§ 902. Rules of construction.—The rule of common law, that statutes in derogation of that law are to be strictly construed, has no application to this code of procedure.

1932 Code, § 902; Civ. P. '22, § 850; Civ. P. '12, § 487; Civ. P. '02, § 448; 1870 (14) § 470.

Applied as to sections 352, 397, 400, giving to wife right of action against husband. *Prosser v. Prosser*, 114 S. C. 45, 102 S. E. 787, 788.

§ 903. Inconsistent statutory provisions repealed.—All statutory provisions inconsistent with this code of procedure are repealed; but this repeal shall not revive a statute or law which may have been repealed or abolished by the provisions hereby repealed. And all rights of action given or secured by existing laws may be prosecuted in the manner provided by this code of procedure. If a case shall arise in which an action for the enforcement or protection of a right, or the redress or prevention of a wrong, cannot be had under this code of procedure, the practice heretofore in use may be adopted so far as may be necessary to prevent a failure of justice.

1932 Code, § 903; Civ. P. '22, § 851; Civ. P. '12, § 488; Civ. P. '02, § 449; 1870 (14) § 471.

See § 355-1 herewith.

As to section governing appeals to Supreme Court, see sec. 781, and note thereto.

“Practice heretofore in use” governs certiorari proceedings.—Since no provision is made as to proceedings in the case of certiorari, the “practice heretofore in use,” must govern, under this section, in such a case. *State v. Black*, 34 S. C. 194, 13 S. E. 361, 364.

And old remedy may be had in action pending in order to prevent “failure of justice.”—Under this section, a remedy can be had in an action already

pending according to its new forms of proceeding if practicable; if not practicable, in order to prevent failure of justice, resort may be had to the former mode of practice. *Parnell v. Maner*, 16 S. C. 348, 33 L. R. A. (N. S.) 578; *Arthur v. Allen*, 22 S. C. 432, 33 L. R. A. (N. S.) 578.

Scire facias to revive judgment considered as “right of action.”—A scire facias to revive a judgment and have execution thereon, is regarded as an “action,” and may be prosecuted as provided by this section. *Lawton v. Perry*, 40 S. C. 255, 18 S. E. 861, 865, 92 Am. St. Rep. 778, 53 L. R. A. 703, Ann. Cas. 14A, 368.

§ 904. Judges to meet and make general rules. — The justices of the Supreme Court and the judges of the circuit courts shall meet in general convention on such day and at such place as may be designated by the Chief Justice, at least once in every two years, counting from the year of our Lord one thousand eight hundred and eighty-two, for the purpose of revising and amending the rules of the circuit court, and establishing such additional rules as may be deemed necessary to regulate the practice in the circuit courts: *provided*, such alterations or additions be not inconsistent with any of the statutes of this State: *provided, further*, that said judges shall cause to be transmitted to all the clerks of the circuit courts of this State copies of all rules amended and revised, and of all new rules made by them, within ten days from such amendment, revision or adoption.

1932 Code, § 904; Civ. P. '22, § 852; Civ. P. '12, § 489; Civ. P. '02, § 450; 1870 (14) § 473; 1882 (18) 56; 1908 (25) 1035.

Convention not given authority to prescribe rules for exercise of special jurisdiction.—This section does not give such a convention power to prescribe rules for the exercise of any special jurisdiction conferred by statute upon a clerk or magistrate. *Sharp v. Palmer*, 31 S. C.

444, 10 S. E. 98, 100.

But courts cannot dispense with those prescribed for them.—The court cannot, in view of this section, dispense with the rules adopted by such a convention. *Ketchen v. Landecker*, 32 S. C. 155, 10 S. E. 936.

§ 905. Justices of Supreme Court may make rules.—The justices of the Supreme Court shall, from time to time, make such rules for the orderly conduct of business in said court as they may deem proper, not inconsistent with this Code of Procedure.

1932 Code, § 905; Civ. P. '22, § 853; Civ. P. '12, § 490; Civ. P. '02, § 451; 1870 (14) § 474.

The rule-making power is constitutional. *King, Insurance Commissioner,*

v. Aetna Ins. Co., 168 S. C. 84, 167 S. E. 12.

§ 906. Equity rules to prevail in cases of conflict.—Generally in all matters in which there is any conflict or variance between the rules of equity and the rules of the common law, with reference to the same matter, the rules of equity shall prevail.

1932 Code, § 906; Civ. P. '22, § 854; Civ. P. '12, § 492; Civ. P. '02, § 453; 1870 (14) § 476.

Equity rule applies to discontinuances in legal actions.—In view of this section, the rule of practice in equity making discontinuance depend on the discretion of the court should be applied to legal ac-

tions. *State v. Southern Ry.*, 82 S. C. 12, 62 S. E. 1116, 1117, Ann. Cas. 14D, 155; *Barr v. Witsell*, 173 S. C. 199, 175 S. E. 436.

CODE OF CRIMINAL PROCEDURE

TITLE 20

- CHAPTER 57. Arrest, Examination, Commitment and Bail, § 907.
 CHAPTER 58. Jurisdiction of Magistrates and Their Courts, § 922.
 CHAPTER 59. Criminal Proceedings in Municipalities, § 952.
 CHAPTER 60. Proceedings in Courts of General Sessions, § 973.
 CHAPTER 61. Procedure against Corporations, 989.
 CHAPTER 62. Rights of Persons Accused, § 993.
 CHAPTER 63. Indictments and Trials, § 1000.
 CHAPTER 64. Appeals and New Trials, § 1024.
 CHAPTER 65. Judgment and Execution, § 1034.
 CHAPTER 66. The Writ of Habeas Corpus, § 1047.
 CHAPTER 67. Inquests on the Dead, § 1067.

CHAPTER 57

Arrest, Examination, Commitment and Bail

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| 907. Who may arrest felon. | 914-1. Attorney general take testimony extradition hearings. |
| 908. Arrest by citizen at night. | 915. Bail granted by clerks of court. |
| 909. Arrest without warrant by sheriffs and deputies. | 916. Discharge of prosecutor on recognition. |
| 910. Arrest by city police within one mile of limits. | 917. Discharge of witness on recognition. |
| 912. Exemption of persons attending musters. | 918. Penalty for failure to appear. |
| 913. Warrants issued by officers for fugitives. | 919. Clerk's costs. |
| 914. Compensation of agents appointed by governor. | 920. Who may be confined. |
| | 921. Sureties, Charleston County. |

§ 907. Who may arrest a felon, and where.—Upon view of a felony committed, or upon certain information that a felony has been committed, or upon view of a larceny committed, any person may arrest the felon or thief, and take him to a judge or magistrate, to be dealt with according to law.

1932 Code, § 907; Cr. P. '22, § 1; Cr. C. '12, § 1; Cr. C. '02, § 1; G. S. 2616; R. S. 1; 1866 (13) 406; 1898 (22) 809.

Cross references.—As to sections providing for arrest by railroad employees, see § 8420 and note thereto. As to specific section providing for arrest by special officers appointed by magistrates, see § 934 and note thereto. As to specific section providing for arrest by sheriffs, see § 909 and note thereto. As to specific section providing for arrest by municipal officers, see § 958 and note thereto.

Common law rule.—At common law a private person had the right to arrest, without warrant, any person who committed, or attempted to commit, a felony in his view. *State v. Davis*, 50 S. C. 405,

27 S. E. 905, 912, 4 L. R. A. (N. S.) 156, 5 L. R. A. (N. S.) 811.

Private person may arrest under reasonable belief felony has been committed.—Under this section, a private person may arrest one because of a supposed felony committed, on such information as to convince a reasonable man that the felony has been committed, even though the information be false. *State v. Griffin*, 74 S. C. 412, 54 S. E. 603, 604.

The word "certain" is used in the sense of trustworthy, capable of being depended upon, credible, positive, or reliable, and has reference to the evidence

or information upon which the person making the arrest is allowed to act, and not to the actual fact that a felony has been committed. *Burton v. McNeill*, 196 S. C. 250, 13 S. E. (2d) 10.

It is unnecessary as an actual fact that felony had been committed in order to permit defendant as a private citizen to arrest plaintiff and take him before proper officers of the law. *Ibid*.

Prior to the amendment of this section in 1866, the rule of law prevailing was that in order for a private person to arrest without a warrant, he must show that a legal felony was committed and that the prisoner was the perpetrator. *State v. Anderson*, 1 Hill 327, 340, 61 Am. Dec. 163, 46 Am. St. Rep. 415, 84 Am. St. Rep. 698, 26 L. R. A. 34, 42 L. R. A. 674, 66 L. R. A. 365, 67 L. R. A. 300, 2 L. R. A. (N. S.) 731, L. R. A. 1918D, 979; *State v. Cook*, 78 S. C. 253, 59 S. E. 862, 864, 125 Am. St. Rep. 788, 4 L. R. A. (N. S.) 145, 15 L. R. A. (N. S.) 1013.—Ed. Note.

And may arrest fugitive from justice from sister state on showing prima facie felony has been committed.—A private person may arrest without a warrant, under this section, a fugitive from justice from a sister state, on showing that prima facie a felony or some crime punishable either capitally, or by imprisonment for one year or upwards in a state prison, was in fact committed, and the prisoner was the perpetrator. *State v. Whittle*, 59 S. C. 297, 37 S. E. 923, 927, 67 L. R. A. 309.

As to specific section providing for arrest of fugitives from justice, see § 913 and note thereto.

But a private person has no right, under this section, to arrest without a warrant for a simple petit larceny. *State v. Davis*, 50 S. C. 405, 27 S. E. 905, 913, 4 L. R. A. (N. S.) 156, 5 L. R. A. (N. S.) 811.

And it is error to charge jury as to right of arrest without distinguishing larceny that is misdemeanor from larceny that is felony.—*State v. Davis*, 50 S. C. 405, 27 S. E. 905, 913, 4 L. R. A. (N. S.) 156, 5 L. R. A. (N. S.) 811.

This section has no application to one who kills in assisting another. *State v. Cook*, 78 S. C. 253, 59 S. E. 862, 864, 125 Am. St. Rep. 788, 4 L. R. A. (N. S.) 145, 15 L. R. A. (N. S.) 1013.

This section cannot be held to be in derogation of the common-law right of a peace officer to arrest in felony cases. *Bushardt v. United Inv. Co.*, 121 S. C. 324, 113 S. E. 637, 640, 35 A. L. R. 637.

As to specific section covering arrest by peace officers, see § 3505 and note thereto.

Technical accuracy of an indictment is not required in a commitment. *State v. Killet*, 2 Bail. 289.

A warrant must be subscribed by the officer issuing it. *Davis v. Sanders*, 40 S. C. 507, 19 S. E. 138. But it need not be under seal. *State v. Vaughn*, Harp. 313.

Though it need not fully set out the charge. *State v. Hallback*, 40 S. C. 298, 18 S. E. 919, L. R. A. 1916A, 816; *State v. Killet*, 2 Bail. 289; *State v. Rowe*, 8 Rich. 17, 27 L. R. A. (N. S.) 946, 38 L. R. A. (N. S.) 325. But the nature of the offense should be stated. *State v. Everett*, Dud. 295, 10 A. L. R. 388.

See generally, as to when objection to the jurisdiction of the Court over the person is waived by appearing, and defending a prosecution upon the merits, *State v. Browning*, 70 S. C. 466, 50 S. E. 185; *State v. Mays*, 24 S. C. 190; *Ridgeland v. Gens*, 83 S. C. 562, 564, 65 S. E. 828.

Must take before a magistrate or other officer.—A private person who makes an arrest may hold his prisoner in custody only for a reasonable time and he must without unreasonable delay either take him before a magistrate, turn him over to an officer, or place him in jail, and if he fails to do so, he cannot justify the arrest.—*Westbrook v. Hutchison*, 195 S. E. (2d) 101, 10 S. E. (2d) 145.

In action for false imprisonment of 11 year old boy who was held in room of home for questioning concerning money stolen from home, whether defendants were justified in detaining plaintiff on ground that they intended to take him to a magistrate or other officer, and that they would have done so except for statement of plaintiff's brother that he would visit defendants that night and straighten out the matter, was for jury. *Ibid*.

In false imprisonment action, an instruction that if a person arrests another with no intention of taking him to a magistrate or judge, it makes no difference if arresting party was acting upon information that felony had been committed, since a private person can only arrest for purpose of taking arrested party to a magistrate or judge for purpose of having him dealt with according to law was proper. *Ibid*.

But sufficient to turn over to police headquarters. *Burton v. McNeill*, 196 S. C. 250, 13 S. E. (2d) 10.

§ 908. When citizens may arrest and the means to be used.—It shall be lawful for any citizen to arrest any person in the night-time, by such efficient means as the darkness and the probability of his escape render necessary, even if his life should be thereby taken, in cases where he has com-

mitted a felony, or has entered a dwelling house with evil intent, or has broken or is breaking into an outhouse, with a view to plunder, or has in his possession stolen property, or, being under circumstances which raise just suspicion of his design to steal or to commit some felony, flees when he is hailed.

1932 Code, § 908; Cr. P. '22, § 2; Cr. C. '12, § 2; Cr. C. '02, § 2; G. S. 2617; R. S. 2; 1866 (13) 406.

This section applies only to arrest in the night-time, and under the circumstances named. State v. Davis, 50 S. C. 405, 27 S. E. 905, 913, 4 L. R. A. (N. S.) 156, 5 L. R. A. (N. S.) 811.

This section does not justify a killing, where the deceased failed to answer upon being hailed in the night-time upon the premises of the defendant. State v. Jones, 104 S. C. 141, 88 S. E. 444, 445.

Instruction that before a citizen would be justified in attempting to arrest one whom he suspected of having in his possession stolen property, he must have reasonable ground for such suspicion, is proper where accused is charged with murder of deceased, who, along with another, attempted to arrest accused who had in his possession stolen goods. State v. Irby, 166 S. C. 430, 164 S. E. 912.

§ 909. Sheriffs and deputies to arrest for offenses committed in view.—

It shall be lawful for the sheriffs and deputy sheriffs of this State to arrest without warrant any and all persons who, within their view, violate any of the criminal laws of this State: *provided*, such arrest may be made at the time of such violation of law or immediately thereafter.

1932 Code, § 909; Cr. P. '22, § 3; Cr. C. '12, § 3; Cr. C. '02, § 3; 1898 (22) 808.

Peace officers may arrest for breach of peace in their presence.—Peace officers have at common law the right to arrest without warrant, upon view of an offense committed, all persons guilty of breach of the peace or other violation of the criminal laws. City Council v. Payne, 2 N & McC. 475; State v. Sims, 16 S. C. 486; 94 Am. Dec. 138, 84 Am. St. Rep. 692; State v. Bowen, 17 S. C. 58, 84 Am. St. Rep. 680, 691; State v. Williams, 36 S. C. 493, 15 S. E. 554, 55 Am. St. Rep. 499; Loggins v. Southern Ry., 64 S. C. 321, 42 S. E. 163, 25 L. R. A. (N. S.) 1194, 1 A. L. R. 588; State v. Byrd, 72 S. C. 104, 109, 51 S. E. 542, 33 L. R. A. (N. S.) 144, 38 L. R. A. (N. S.) 1099, 1 A. L. R. 587; State v. Moody, 70 S. C. 56, 49 S. E. 8.

And railway and street railway conductors, etc., may arrest for offenses committed in their view. Loggins v. Southern Ry., 64 S. C. 321, 42 S. E. 163, 24 L. R. A. (N. S.) 1194, 1 A. L. R. 588.

As to sections providing for arrest by railroad employees, see § 683 and § 8420 and their respective notes.

But an arrest for a misdemeanor, not committed in view of the officer, is unlawful, if without warrant. Percival v. Bailey, 70 S. C. 72, 49 S. E. 7.

Section is not limited to offenses committed in the sight of the officer to the exclusion of those committed within his hearing. State v. Williams, 36 S. C. 493, 15 S. E. 554, 55 Am. St. Rep. 499.

The jury is the judge as to how much

force was necessary to be used in making the arrest. Golden v. State, 1 S. C. 292; State v. Anderson, 1 Hill 327, 61 Am. Dec. 163, 46 Am. St. Rep. 415, 84 Am. St. Rep. 698, 26 L. R. A. 34, 42 L. R. A. 674, 66 L. R. A. 365, 67 L. R. A. 300, 2 L. R. A. (N. S.) 731, L. R. A. 1918D, 979.

As to how arrest should be made, see State v. Anderson, 1 Hill 327, 61 Am. Dec. 163, 46 Am. St. Rep. 415, 84 Am. St. Rep. 698, 26 L. R. A. 34, 42 L. R. A. 674, 66 L. R. A. 365, 67 L. R. A. 300, 2 L. R. A. (N. S.) 731, L. R. A. 1918D, 979.

An attorney at law is not a suitable person to act as a sheriff's deputy in making an arrest. State v. Boyles, 80 S. C. 352, 60 S. E. 233, Ann. Cas. 16A, 554.

As to when prosecutor or third person may go to assistance of an officer assaulted while making an arrest, see State v. Williams, 76 S. C. 135, 141, 56 S. E. 783, 122 Am. St. Rep. 759, 24 L. R. A. (N. S.) 785, Ann. Cas. 13C, 488.

A person has the same right to resist an unlawful arrest as to resist an assault. State v. Davis, 53 S. C. 150, 31 S. E. 62, 69 Am. St. Rep. 845, 74 Am. St. Rep. 726, 84 Am. St. Rep. 702, 61 L. R. A. 299, 66 L. R. A. 355, 365.

As to resisting arrest, see State v. Brown field, 60 S. C. 509, 39 S. E. 2, 66 L. R. A. 369; State v. Franklin, 80 S. C. 332, 60 S. E. 953, 19 L. R. A. (N. S.) 493, 33 L. R. A. (N. S.) 146; State v. Byrd, 72 S. C. 104, 51 S. E. 542, 33 L. R. A. (N. S.) 144, 38 L. R. A. (N. S.) 1099, 1 A. L. R. 587.

§ 910. Police of any city or town may arrest within one mile of corporate limits.—The police authorities of all towns and cities of this State are hereby authorized and empowered to make arrests of all offenders against the municipal ordinances and statutes of this State committed within the corporate limits at any place within a radius of one mile of the corporate limits, with or without a warrant, when such police authorities are in pursuit of such offender.

1932 Code, § 910; Cr. P. '22, § 4; Cr. C. '12, § 4; 1908 (25) 1089.

This section does not give an officer power to search a person, where there has been no flight by the person nor pursuit by the officer. *Blacksburg v. Beam*, 104 S. C. 146, 88 S. E. 441, L. R. A. 1916E, 714, 3 A. L. R. 1517, 24 A. L. R. 1416.

§ 912. No civil process to be executed on any person attending musters.—No civil officer shall execute any process arresting and confining the person or requiring bail or surety (unless for treason, felony, or breach of the peace), on any person engaged in the military service required by the laws of this State, going to or returning from the same, under the penalty of twenty-five dollars, and the service of any such process shall be void.

1932 Code, § 912; Cr. P. '22, § 6; Cr. C. '12, § 6; Cr. C. '02, § 4; G. S. 2618; R. S. 3; 1794 (8) 489; 1839 (11) 41; 1841 (11) 210.

§ 913. Fugitive in this State charged with crime out of this State.

(1) **Officers may issue warrants for.**—Any officer in the State authorized by law to issue warrants for the arrest of any person charged with crime shall, on satisfactory information laid before him under the oath of any credible person, that any fugitive in the State has committed, out of the State, and within any other State, any offense which by the law of the State in which the offense was committed is punishable either capitally or by imprisonment for one year or upwards in any state prison, shall have full power and authority, and is hereby required, to issue a warrant for said fugitive, and commit him to any jail within the State for the space of twenty days, unless sooner demanded by the public authorities of the State wherein the offense may have been committed, agreeable to the act of Congress in that case made and provided; if no demand be made within the time, the said fugitive shall be liberated, unless sufficient cause be shown to the contrary: *provided*, that nothing herein contained shall be construed to deprive any person so arrested of the right to release on bail as in cases of similar character of offenses against the laws of this State.

(2) **Keep record and transmit copy to Governor.**—Every officer committing any person under this section shall keep a record of the whole proceedings before him, and immediately transmit a copy thereof to the Governor of this State for such action as he may deem fit therein under the law.

(3) **Governor to inform Governor of foreign State.**—The Governor of this State shall immediately inform the Governor of the State in which the crime is alleged to have been committed of the proceedings had in such case.

(4) **Sheriff and jailer surrender fugitive under order of Governor.**—Every sheriff or jailer, in whose custody any person committed under this section shall be, upon the order of the Governor of this State, shall surrender him to the person named in said order for that purpose.

1932 Code, § 913; Cr. P. '22, § 7; Cr. C. '12, § 7; Cr. C. '02, § 5; G. S. 2620; R. S. 4; 1882 (17) 784.

Such warrant may be issued before demand has been made upon the Governor for such fugitive. State v. Anderson, 1 Hill 327, 61 Am. Dec. 163, 46 Am. St. Rep. 415, 84 Am. St. Rep. 698, 26 L. R. A. 34, 42 L. R. A. 674, 66 L. R. A. 335, 67 L. R. A. 300, 2 L. R. A. (N. S.) 731, L. R.

A. 1918D, 979.

As to order of the Governor to surrender prisoner on requisition from another state, see Ex parte Swearingen, 13 S. C. 74, 57 Am. Dec. 395, 68 Am. St. Rep. 130, 112 Am. St. Rep. 122, 23 L. R. A. 290, 805, 13 A. L. R. 416.

§ 914. Agents appointed by governor to bring fugitive in this State.

(1) **Receive three dollars a day and expenses.**—In all cases of requisition for the delivery of fugitives from justice the agents appointed by the Governor to bring such fugitives into this State shall receive as compensation for their services the sum of three dollars per day for the time actually employed, and shall be reimbursed their expenses actually and necessarily incurred in the performance of their duties.

(2) **Governor approve accounts—payment.**—Upon presentation to the Governor of the accounts of such agents, itemized and duly verified by their affidavits thereto annexed, the Governor, if he approved the same as correct, shall endorse his approval thereon, and upon presentation of the said accounts so endorsed to the comptroller general, he shall draw his warrants on the state treasurer for the amount thereof, payable out of the regular contingent fund of the Governor.

1932 Code, § 914, Cr. P. '22, § 8; Cr. C. '12, § 8; Cr. C. '02, § 6; R. S. 5; 1887 (19) 850.

§ 914-1. Attorney general take testimony in hearings on extradition.—The Governor of the State of South Carolina is hereby authorized and empowered, when a hearing is demanded upon any extradition for a fugitive in in this State for an offense committed within any other state, to appoint the attorney general of the State of South Carolina, who shall take, or cause to be taken, by any person in his office the testimony offered at such hearing and report the same to the Governor with his recommendations thereon. *Provided*, that such recommendations shall not be binding upon the Governor. *Provided, further*, that it shall not be necessary for the party so designated to hold this hearing to be commissioned or give bond, but the only requirement necessary is that he shall take an oath that he will fairly and impartially conduct the hearing and report the testimony and his recommendations: *provided*, that, when the attorney general acts personally in such capacity, no oath shall be required.

1939 (41) 112, 423.

§ 915. Clerks of court grant bail to certain witnesses and prisoners.—The clerks of court of this State are hereby authorized and empowered to grant bail to all witnesses in any and all cases and to discharge them from custody during the pendency of any criminal case except in cases where the witness or witnesses have been adjudged in contempt of court and imprisoned by the court. The clerks of court in this State are hereby authorized and empowered to admit to bail and to discharge from custody any person or persons who may be charged with any offense less than a felony or who shall have been committed to jail under final orders of the court: *provided*, this section shall not apply to defendants who have been com-

mitted to jail by the court for a failure to comply with the terms of their recognizance. *Provided, further*, that in Charleston County the amount of bail received by the clerk of court in such cases shall be the amount fixed by the magistrate, coroner or judge committing such person, or persons, to jail, and in each case in which bail shall be allowed or received by the clerk of court of Charleston County under this section and under sections 916, 917 and 918, he shall, before discharging the person so admitted to bail, require each surety on any bond or recognizance to file with him certificates from the county auditor, and register of mesne conveyance, showing his legal qualification to act as surety on such bond or recognizance, and the clerk of court shall record in the same book and dispose of each such recognizance and certificate in the same manner as provided for magistrates' recognizance, bonds, certificates and warrants in sections 943 and 944, as amended.

1932 Code, § 915; 1923 (33) 72; 1940 (41) 1648.

§ 916. Proceedings for discharge of prosecutor on own recognizance in cases not capital.—Hereafter, when any prosecutor, resident in the judicial district where the prosecution is instituted, in criminal cases less than capital, shall have been committed to jail by reason of his or her inability to give surety, on his or her recognizance to prosecute, the clerk of the court of common pleas and general sessions of such district shall have power to discharge such prosecutor on his or her own recognizance, upon being satisfied of his or her inability to give such surety.

1932 Code, § 916; Cr. P. '22, § 9; Cr. C. '12, § 9; Cr. C. '02, § 7; G. S. 2625; R. S. 6; 1857 (12) 636.

§ 917. Discharge of witness on own recognizance in cases not capital.—Whenever any witness in a criminal case less than capital shall have been committed to jail by reason of the like inability to give surety on a recognizance to testify, the clerk of the court shall have the like power to discharge such witness on his or her own recognizance.

1932 Code, § 917; Cr. P. '22, § 10; Cr. C. '12, § 10; Cr. C. '02, § 8; G. S. 2626; R. S. 7; 1857 (12) 636.

§ 918. Penalty for failure of prosecutor or witness to appear.—Prosecutors or witnesses failing to appear under such recognizance shall be deemed guilty of a misdemeanor, and the attorney general and solicitor are authorized to order warrants to issue against such offenders without affidavit or bond to prosecute.

1932 Code, § 918; Cr. P. '22, § 11; Cr. C. '12, § 11; Cr. C. '02, § 9; G. S. 2627; R. S. 8; 1857 (12) 636.

§ 919. Clerk's costs.—The clerks of the courts shall be entitled to one dollar costs for each recognizance taken under the provisions of sections 916 and 917.

1932 Code, § 919; Cr. P. '22, § 12; Cr. C. '12, § 12; Cr. C. '02, § 10; G. S. 2628; R. S. 9; 1857 (12) 636.

§ 920. What persons may be confined.—The police officer or deputy sheriff in industrial communities shall have the power to confine in such prison or building, as the president or treasurer or other executive officer having the management of any industrial corporation may provide in industrial communities, any person or persons who may be arrested charged

with violation of law until such arrested person or persons can be conveniently carried before a magistrate: *provided, however*, that such police officer or deputy sheriff shall not detain any arrested person in said prison longer than eighteen hours, except persons arrested on Saturdays, and then not over forty-two hours: *provided, further*, that such police officer or deputy sheriff shall provide water and food, and shall also furnish such arrested person or persons with sufficient bedding or clothing to make them comfortable in cold weather.

1932 Code, § 920; Cr. P. '22, § 13; Cr. C. '12, § 14; 1910 (26) 765.

§ 921. Surety on bond and recognizance give other such obligations is surety, Charleston County—computation of surety's assets.—Any person signing as surety a bond or recognizance in any case, whether civil or criminal, in any of the courts in Charleston County, or before any officer of said county, shall, in addition to all other requirements of law, file with the said bond or recognizance an affidavit showing in itemized form the amounts of any other bonds or recognizances in civil or criminal cases, or both, on which said person is surety, which affidavit shall be attached to said bond or recognizance and kept therewith. In computing and passing on the legal qualification of such person as surety on the bond or recognizance in question, the actual value of such person's real property shall be calculated at five (5) times the assessed value thereof, as shown by certificate of the county auditor of said county, and from such actual value, so computed shall be deducted the total amount of all outstanding bonds or recognizances on which such person is surety, as shown by said affidavit, as well as such person's outstanding incumbrances and homestead and other exemptions allowed by law.

1940 (41) 1660.

CHAPTER 58

Jurisdiction of Magistrates and Their Courts

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| 922 and 923. Powers and jurisdiction. | 938. Breach of peace in magistrate's view. |
| 924 and 925. Breach of peace. | 939. Bail in non-capital cases. |
| 926. Larceny. | 940. Deposit in lieu of recognizances. |
| 927. Receiving stolen goods. | 941. Scale of recognizances. |
| 928. Obtaining property under false pretenses. | 942. Refusal to enter into recognizances. |
| 929. Arrest of persons charged with offense. | 943, 944. Return of papers and report to clerk. |
| 930. Proceedings by information. | 945. Information of impending duel. |
| 931. Trial by jury. | 946. Change of venue. |
| 932. Take testimony in writing. | 947. Warrant to break open doors of gambling places. |
| 933. Failure of jurors to attend. | 948. Prosecutor not to serve warrant. |
| 934. Appointing special officers to arrest persons charged with felony. | 949. Search warrants. |
| 935 and 936. Preliminary examination. | 950. Endorsement of warrant. |
| 937. Binding over witnesses. | 951. Fines at state fair. |

§ 922. Generally.—Magistrates shall have and exercise, within their respective counties, all the powers, authority and jurisdiction in criminal cases hereinafter set forth.

1932 Code, § 922; Cr. P. '22, § 18; Cr. C. '12, § 19; Cr. C. '02, § 11; G. S. 822; R. S. 10; 1870 (14) 402.

§ 923. Jurisdiction over offenses where fine is under \$100 and imprisonment less than thirty days.—They shall have jurisdiction of all offenses which may be subject to the penalties of either fine or forfeiture not exceeding one hundred dollars, or imprisonment in the jail or workhouse not exceeding thirty days; and may impose any sentence within those limits, singly or in the alternative.

1932 Code, § 923; Cr. P. '22, § 19; Cr. C. '12, § 20; Cr. C. '02, § 12; G. S. 823; R. S. 11; 1870 (14) 402.

The jurisdiction of a trial justice, under this section, extends only to offenses punishable by fine not exceeding one hundred dollars and imprisonment not exceeding thirty days. *State v. Madden*, 28 S. C. 50, 4 S. E. 810.

For example, trial justices have no jurisdiction of the offense of violating a written contract for farm labor, where the statute fixes no limit to the punishment. *State v. Madden*, 28 S. C. 50, 4 S. E. 810. And they have no jurisdiction of the offense of taking a boat under the Act of 1695, because the penalty is indefinite. *State v. Weeks*, 14 S. C. 400, 402.

And when the punishment of petit larceny was not so limited, magistrates had no jurisdiction of it. *State v. Williams*, 13 S. C. 546, 73 Am. St. Rep. 101, Ann. Cas. 14A, 1081; *State v. Jenkins*, 26 S. C. 121, 1 S. E. 437.

But since Act 1887 (19 Stat. 819), so limiting the punishment, they have jurisdiction of that offense. *State v. Cooler*, 30 S. C. 105, 8 S. E. 692, 37 Am. St. Rep.

595, 3 L. R. A. 181, 18 L. R. A. 474, 50 L. R. A. (N. S.) 970, Ann. Cas. 12A, 889, Ann. Cas. 17D, 457.

Likewise they have jurisdiction of the offense of carrying concealed weapons, because the penalty is definite. *State v. McClenton*, 59 S. C. 226, 37 S. E. 819.

This section, construed with § 1035, gives power to sentence to imprisonment, at hard labor on chaingang, not exceeding thirty days. The case of *State v. Williams*, 40 S. C. 373, 19 S. E. 5, 27 L. R. A. 595, 35 L. R. A. 566, 43 L. R. A. 47, 58, 77, 45 L. R. A. 155, decided under the Constitution of 1868, does not apply since the Constitution of 1895.

Under art. V, sec. 18, Constitution of 1895, the circuit court has concurrent jurisdiction in all cases where "exclusive" jurisdiction is not given the magistrate's court. *State v. Wolfe*, 61 S. C. 25, 39 S. E. 179.

See generally, *State v. Pope*, 79 S. C. 87, 60 S. E. 234, Ann. Cas. 17A, 631; *Union v. Hampton*, 83 S. C. 46, 64 S. E. 1017, 38 L. R. A. (N. S.) 197.

§ 924. Extent punish for breach of peace.—They may punish by fine not exceeding one hundred dollars, or imprisonment in the jail or house of correction not exceeding thirty days, all assaults and batteries, and other breach of the peace, when the offense is not of a high and aggravated nature, requiring, in their judgment, greater punishment.

1932 Code, § 924; Cr. P. '22, § 20; Cr. C. '12, § 21; Cr. C. '02, § 13; G. S. 824; R. S. 12; Const., Art. V, § 21; 1870 (14) 402.

A magistrate's judgment is not final.—This section leaves it to the discretion of the trial justice in the first instance, when a party is brought before him, to determine whether he will take jurisdiction or bind the accused over; but it certainly never intended that his judgment in this matter should be final, and that he should have the power to fix indisputably the character of the offense when it came before the higher court. *State v. Burch*, 43 S. C. 3, 20 S. E. 758; *State v. Glover*, 90 S. C. 166, 72 S. E. 1087.

Since the Constitution of 1895 the circuit court has had concurrent jurisdiction. But prior to 1895 it was held that if the indictment in the court of general sessions did not show on its face that the assault and battery was of a high and aggravated nature, it was without jurisdiction and was exclusively within the

jurisdiction of the magistrate's court. *State v. McKettrick*, 14 S. C. 346, 353; *State v. Grant*, 34 S. C. 109, 12 S. E. 1070.

Where an indictment charged an assault and battery with intent to kill in the first count and carrying concealed weapons in the second, and a true bill was returned only as to the second, the case was properly remanded to the magistrate for trial. *State v. McClenton*, 59 S. C. 226, 37 S. E. 819.

In assaults and batteries all participants are principals. *State v. Hunter*, 79 S. C. 73, 60 S. E. 240.

See generally, *State v. Garlington*, 56 S. C. 413, 34 S. E. 689. As to law governing assault and battery, see *State v. Dawson*, 85 S. C. 234, 235, 67 S. E. 313; *State v. McKellar*, 85 S. C. 236, 67 S. E. 314, 14 A. L. R. 996; *Davis v. Collins*, 69 S. C. 460, 48 S. E. 469, 11 L. R. A.

(N. S.) 674, 16 A. L. R. 777, 814, 847; Edwards v. Wessinger, 65 S. C. 161, 43 S. E. 518, 95 Am. St. Rep. 789, 16 A. L. R. 777, 779, 20 A. L. R. 530; State v. Williamson, 65 S. C. 242, 43 S. E. 671, 6 A. L. R. 1609; State v. Jones, 74 S. C. 456, 54 S. E. 1017, 17 A. L. R. 1157; State v. Dalby, 36 S. C. 367, 68 S. E. 633.

§ 925. Arrest persons threatening breach of peace—try—bind over certain to general sessions.—They may cause to be arrested all affrayers, rioters, disturbers, and breakers of the peace, and all who go armed offensively, to the terror of the people, and such as utter menaces or threatening speeches, or otherwise dangerous and disorderly persons. Persons arrested for any of said offenses shall be examined by the magistrate before whom they are brought, and may be tried before him, and if found guilty may be required to find sureties of the peace, and be punished within the limits prescribed in section 924, or when the offense is of a high and aggravated nature, they may be committed or bound over for trial before the court of general sessions.

1932 Code, § 925; Cr. P. '22, § 21; Cr. C. '12, § 22; Cr. C. '02, § 14; R. S. 13; 1870 (14) 402.

See generally, State v. Sumner, 5 Strob. 53.

§ 926. Larceny.—Magistrates shall have jurisdiction of larcenies, by stealing of the property of another, of money, goods or chattels, or any bank note, bond, promissory note, bill of exchange, or other bill, order, or certificate, or any book of accounts for or concerning money or goods due, or to become due, or to be delivered, or any deed or writing containing a conveyance of land, or any other valuable contract in force, or any receipt, release, or defeasance, or any writ, process, or public record, if the property stolen does not exceed twenty dollars in value.

1932 Code, § 926; Cr. P. '22, § 22; Cr. C. '12, § 24; Cr. C. '02, § 16; G. S. 826; R. S. 15, 1870 (14) 403.

Magistrates have jurisdiction of petit larceny.—When there was no law limiting punishment of petit larceny to one hundred dollars' fine or thirty days imprisonment, this section was unconstitutional, and magistrates had no jurisdiction of the crime, and the jurisdiction was exclusively in the court of general sessions. State v. Williams, 13 S. C. 546, 73 Am. St. Rep. 101, Ann. Cas. 14A, 1081; State v. Jenkins, 26 S. C. 121, 1 S. E. 437.

And where the court had no jurisdiction of the case, perjury could not be committed therein. State v. Jenkins, 26 S. C. 121, 1 S. E. 437.

But since Act of 1887 (19 Stat. 819), so limiting the punishment, magistrates have jurisdiction of petit larceny. State v. Cooler, 30 S. C. 105, 8 S. E. 692, 37 Am. St. Rep. 595, 3 L. R. A. 181, 18 L. R. A. 474, 50 L. R. A. (N. S.) 970, Ann. Cas. 12A, 889, Ann. Cas. 17D, 457.

§ 927. Stolen goods.—They shall have jurisdiction of the offenses of buying, receiving or aiding in the concealment of stolen goods and other property, where they would have jurisdiction of the larceny of the same goods or property.

1932 Code, § 927; Cr. P. '22, § 23; Cr. C. '12, § 25; Cr. C. '02, § 17; G. S. 827; R. S. 16; 1870 (14) 403.

§ 928. Obtaining property under false pretenses.—They shall have jurisdiction of the offenses of obtaining property by any false pretense, or any privy or false token, or by any game, device, sleight of hand, pretensions to fortune-telling, trick or other means, by the use of cards or other implements or instruments, where they would have jurisdiction of a larceny of

the same property, and may punish said offenses the same as larceny.

1932 Code, § 928; Cr. P. '22, § 24; Cr. C. '12, § 26; Cr. C. '02, § 18; G. S. 828; R. S. 17; 1870 (14) 403.

§ 929. Arrest persons charged with offense and escaped — crimes — examine into—bind over certain and punish others.—They shall cause to be arrested all persons found within their counties charged with any offense and persons who after committing any offense within the county escape out of the same; examine into treasons, felonies, grand larcenies, high crimes and misdemeanors; and commit or bind over for trial those who appear to be guilty of crimes or offenses not within their jurisdiction, and punish those guilty of such offenses within their jurisdiction.

1932 Code, § 929; Cr. P. '22, § 25; Cr. C. '12, § 27; Cr. C. '02, § 19; G. S. 829; R. S. 18; 1870 (14) 403.

§ 930. Proceedings to be by information—summary.—All proceedings before magistrate in criminal cases shall be commenced on information under oath, plainly and substantially setting forth the offense charged, upon which, and only which, shall a warrant of arrest issue.

The information may be amended at any time before trial.

All proceedings before magistrates shall be summary, or with only such delay as a fair and just examination of the case requires.

1932 Code, § 930; Cr. P. '22, § 26; Cr. C. '12, § 28; Cr. C. '02, § 20; G. S. 830; R. S. 19; 1870 (14) 403.

This section requires that the offense with which a party is charged should be set forth "plainly and substantially," so as to enable the party accused to understand the nature of the offense with which he is charged, in order that he may be prepared to meet the charge at the proper time. It certainly never was designed to require any more formality or technical accuracy in stating the offense. *McConnell v. Kennedy*, 29 S. C. 180, 7 S. E. 76, 80, 28 Am. St. Rep. 142, 57 L. R. A. 688, 19 A. L. R. 673; *McCall v. Alexander*, 81 S. C. 131, 61 S. E. 1106; *State v. Hallback*, 40 S. C. 298, 18 S. E. 919, L. R. A. 1916A, 816.

So in a prosecution for driving an automobile in excess of the speed limit, arrest warrant issued on information and belief need not set forth source of information and grounds of belief. *Mayesville v. Clamp*, 149 S. C. 346, 147 S. E. 455.

And there was no error, in a prosecution for selling whiskey, in amending the information and warrant so as to allege the name of the person to whom the whiskey was sold, and the price paid therefor, and ordering the case to trial, especially as defendant did not show that he was surprised by the amendment, or would be prejudiced by an immediate trial. *Ridgeland v. Gens*, 83 S. C. 562, 65 S. E. 828.

Likewise an information charging that the accused did "feloniously, and with the intention of fraud, make false entries on his cash-book, he being employed (by

deponent) as clerk, to the great injury and injustice of deponent," sufficiently charges accused with forgery, to authorize his arrest. *McConnell v. Kennedy*, 29 S. C. 180, 7 S. E. 76, 28 Am. St. Rep. 142, 57 L. R. A. 688, 19 A. L. R. 673.

The warrant is not invalidated by the fact that the affidavit on which it was issued charged that defendant "did neglect to pay poll-tax," instead of charging, in the language of the act, that defendant "did fail and refuse to pay," or that neither the warrant nor affidavit states that defendant was a resident of the county, and as such liable for the tax. *Rogers v. Marlboro County*, 32 S. C. 555, 11 S. E. 383.

But where the facts stated in the affidavit constituted no offense, both the persons instituting the prosecution and the officer serving the warrant are liable to an action for false imprisonment. *Whaley v. Lawton*, 62 S. C. 91, 40 S. E. 128, 56 L. R. A. 649, Ann. Cas. 12B, 1373.

Warrant charging that plaintiff violated law by disposing of described property under lien, which property plaintiff "did mortgage to said deponent, and did receive said money, mortgage is past due, and deponent taken claim and delivery for said property, and the sheriff cannot find same," sufficiently charge a crime to support action for malicious prosecution. *Duffie v. Edwards*, 185 S. C. 91; 193 S. E. 211.

Proceedings in recorder's court must commence with a statement under oath.—*State v. Praeser*, 173 S. C. 284, 175 S.

E. 551. Also see sections 959, 960, and 968, this code.

The statutory requirement that all prosecutions in magistrate's court shall be commenced by issuance of a warrant cannot be waived by accused. Town of Honea Path v. Wright, 194 S. C. 462, 9 S. E. (2d) 924.

A magistrate has jurisdiction to issue a warrant for one charged with bastardy. State v. Edens, 88 S. C. 302, 306, 70 S. E. 609.

And a magistrate has power to grant a continuance in a criminal prosecution both as a necessary incident of the power to hear and determine causes, and un-

der this section. State v. Pope, 79 S. C. 87, 60 S. E. 234, Ann. Cas. 17A, 631.

But a warrant issued upon a statement of facts not sworn to is unconstitutional. State v. Wimbush, 9 S. C. 309, 84 Am. St. Rep. 697, 28 L. R. A. (N. S.) 548, Ann. Cas. 13D, 215.

A conviction in a mayor's court of offense of driving while intoxicated was a nullity, where court lacked jurisdiction of defendant because prosecution was commenced without issuance of a warrant. Town of Honea Path v. Wright, 194 S. C. 462, 9 S. E. (2d) 924.

See generally, State v. Spray, 74 S. C. 443, 444, 54 S. E. 600, L. R. A. 1917B, 350.

§ 931. Arrested persons entitled to trial by jury.—Every person arrested and brought before a magistrate, charged with an offense within his jurisdiction, shall be entitled, on demand, to a trial by jury, which shall be selected as provided in section 3711.

1932 Code, § 931; Cr. P. '22, § 27; Cr. C. '12, § 29; Cr. C. '02, § 21; G. S. 831; R. S. 20; 1870 (14) 403.

A prosecutor may demand a jury trial. State v. Nash, 51 S. C. 319, 321, 28 S. E. 946, 17 L. R. A. (N. S.) 612, L. R. A. 1915B, 660, 22 A. L. R. 263.

And the magistrate may instruct constable as to preparation of the jury list.

State v. Pinckney, 74 S. C. 445, 54 S. E. 606.

But a demand for a jury after the state has closed its case comes too late. State v. Mays, 24 S. C. 190, 194.

§ 932. Take testimony of witnesses in magistrates' and recorders' courts in writing.—In the trial of any case before any magistrate or recorder in this State, the testimony of all witnesses shall be taken down in writing and signed by the witness, with the exception of such cases as the defendant shall waive the taking and signing of such testimony.

In any case before any magistrate or recorder, where a stenographer shall take down such testimony, the same need not be read over and signed by the witnesses.

1936 (39) 1435.

§ 933. Penalty for failure of jurors to attend when summoned by magistrate or police court.—If any juror duly summoned shall neglect or refuse to appear in obedience to any venire issued by any police or municipal or magistrate's court, and shall not within forty-eight hours render to the recorder or magistrate holding such police or magistrate court, and issuing the venire, a sufficient reason for his delinquency, he shall forfeit and pay a fine of ten (\$10.00) dollars to the treasury of the municipality or county where the cause is tried, to be assessed by such recorder or such magistrate so holding the police or magistrate court and collected on his warrant without other process; and a failure to pay forthwith such fine so assessed shall constitute a contempt of court and be punished accordingly: *provided*, no person shall be required to serve on a jury in said courts oftener than once in each month of the year.

1932 Code, § 933; Cr. P. '22, § 29; Cr. C. '12, § 30; 1907 (25) 609; 1908 (25) 1087.

§ 934. Appoint special officers arrest persons charged with crime above

misdemeanor.—Whenever a magistrate shall have issued a warrant for the arrest of any person charged with an offense above the grade of a misdemeanor, such magistrate shall be authorized to select any citizen or citizens of the county to execute the same, upon his endorsement upon the said warrant that, in his judgment, the selection of such person or persons will be conducive to the certain and speedy execution of the said warrant; and the person or persons so selected shall have all the powers now or hereafter conferred by law upon any constable within this State; and any person or persons selected in the manner provided for in this section shall be required forthwith to proceed to execute the said warrant; and upon his wilfully, negligently or carelessly failing to make the arrest, or permitting the party to escape after arrest, he or they shall be punished, upon conviction, or indictment, by fine and imprisonment, in the county jail, in the discretion of the judge before whom the indictment may be tried; said imprisonment not to be less than six months.

1932 Code, § 935; Cr. P. '22, § 31; Cr. C. '12, § 32; Cr. C. '02, § 23; G. S. 838; R. S. 22; 1871 (14) 666.

A magistrate cannot verbally authorize a person not a constable by legal appointment to convey a prisoner to jail. State v. Clark, 51 S. C. 265, 28 S. E. 906.

§ 935. Hold preliminary examinations upon demand of defendant—when—rules regulating, etc.—It shall be the duty of any magistrate who issues a warrant charging a crime beyond his jurisdiction to grant and to hold a preliminary investigation of the same upon demand of the defendant at any time before trial, at which investigation the defendant shall have the right to cross examine the State's witnesses in person or by counsel, and to have the reply in argument if there be counsel for the State, and to be heard in argument in person or by counsel as to whether a probable case has been made out and as to whether the case ought to be dismissed by the magistrate and the defendant discharged without delay. And the defendant when first brought before the magistrate shall have the right to demand a removal of the hearing to the next magistrate on the same ground as in cases within the jurisdiction of the magistrate, and shall be granted two days, if requested, within which to prepare a showing for removal: *provided*, the defendant be held by recognizance in bailable cases or committed for custody in the meantime: *provided, further*, that whenever any defendant or defendants shall demand, in writing, a preliminary hearing it shall be mandatory upon such magistrate to grant said hearing, and the said case shall not be transmitted to the court of general sessions or submitted to the grand jury until a preliminary hearing shall have been had, the magistrate to retain jurisdiction and the court of general sessions not to acquire jurisdiction until after such preliminary hearing: *provided, further*, that the demand for such preliminary hearing shall be made at least ten (10) days before the convening of the next general sessions court thereafter.

1932 Code, § 936; Cr. P. '22, § 32; Cr. C. '12, § 33; Cr. C. '02, § 24; 1898 (22) 698; 1930 (36) 1322.

Constitutionality. — This section does not contravene art. V, §§ 18, 21, state constitution. State v. Flintroy, 178 S. C., 89; 182 S. E., 311.

This section does not infringe upon the jurisdiction of the court of general sessions. The discharge of a defendant by

a magistrate in a felony case will not be a bar to his further prosecution. Such defendant so discharged cannot plead former jeopardy. State v. Flintroy, 178 S. C., 89; 182 S. E. 311.

No formal indictment is required in a

magistrate's court. *State v. Brown*, 14 S. C. 380.

And the holding of a preliminary examination is not a necessary prerequisite to indictment. *State v. Bowman*, 43 S. C. 108, 20 S. E. 1010, 28 L. R. A. 327, Ann. Cas. 12D, 146; *State v. Bullock*, 54 S. C. 300, 313, 32 S. E. 424; *State v. Brown*, 62 S. C. 374, 40 S. E. 776, Ann. Cas. 12D, 145; *State v. Rabens*, 79 S. C. 542, 60 S. E. 442, L. R. A. 1917B, 350, Ann. Cas. 17E, 183; *State v. Irby*, 166 S. C. 430, 164 S. E. 912.

But it was error for magistrate to transmit warrants to higher court before preliminary hearings demanded by defendant had been held, although indictments had been given out and true bills found on them. *State v. Adcock*, 194 S. C. 235, 9 S. E. (2d) 730.

Magistrates have no authority in cases of felony, except to so examine the prisoner and commit or bind him over for trial in the general sessions. *Cherry v. McCants*, 7 S. C. 224.

Accused not taking legal steps to secure a preliminary, and not informing court that one was wished, waived all rights to such examination. *State v. Jones*, 172 S. C. 129; 173 S. E. 77.

If accused fails to appear in person at the time and place set for the preliminary examination, he waives his right to the hearing. *State v. Rabens*, 79 S. C. 542, 60 S. E. 442, L. R. A. 1917B, 350, Ann. Cas. 17E, 183.

A magistrate cannot supplement the testimony of a witness as taken, after it is signed by the witness, by appending a statement as to the testimony. *State v. Freeman*, 43 S. C. 105, 20 S. E. 974.

The written statements taken by magistrates at the preliminary hearing are the best evidence of what the accused there said. *State v. Winter*, 83 S. C. 153, 65 S. E. 209.

It is not the duty of the magistrate, under this section, to examine accused persons or take their statements in writing unless they are sworn as witnesses on behalf of the state by their own consent; and if he does so, it is not an official act; but he is not prohibited from doing so. *State v. Branham*, 13 S. C. 389, 41 Am. St. Rep. 522, 18 L. R. A. (N. S.) 777, Ann. Cas. 13D, 488; *State v. Howard*, 32 S. C. 91, 10 S. E. 831.

The magistrate may discharge absolutely on the preliminary examination. *State v. Jones*, 32 S. C. 583, 10 S. E. 577.

§ 936. Magistrate must hold preliminary examinations.—If any magistrate fails to hold preliminary or have same waived by setting date for preliminary and to return such papers and report thereon to the clerk, as directed in the Code of Procedure, he shall be subject to the payment of a fine of five (\$5.00) dollars for every such default, within the discretion of the court, to which a rule thereof shall be made returnable.

1932 Code, § 1545; Cr. C. '22, § 492; Cr. C. '12, § 565; Cr. C. '02, § 408; G. S. 855, 856; R. S. 323; 1836 (6) 552; 1839 (11) 23; 1918 (30) 769.

§ 937. Can bind over witnesses.—Upon information made of the materiality of any witness within the State, to support any accusation made, or where the materiality of such witness shall be within the knowledge of any magistrate, he shall issue his warrant, requiring such witness to appear before him or the next magistrate, to enter into recognizance, with good security, if deemed proper, which warrant shall authorize the arrest and detention or any such witness in any county in the State, and on being brought before such magistrate, and refusing to enter into recognizance, such witness may be committed by the said magistrate; and the accused shall, in felonies, and no other case, have the like process to compel the attendance of any witness in his behalf as is granted or permitted on the part of the State: *provided*, that no magistrate shall receive any fees for issuing more than one warrant for witnesses on the part of the State, or upon the part of the accused, in the same case, unless on the second or other application, oath shall be made that the prosecutor or accused was not aware, at the issuing of the previous warrant, of the materiality of such witness.

1932 Code, § 937; Cr. P. '22, 33; Cr. C. '12, § 34; Cr. C. '02, § 25; G. S. 835; R. S. 24; 1830 (11) 22.

This section is not restricted to capital felonies. *Eustace v. Greenville County*, 42 S. C. 190, 20 S. E. 88, 39 L. R. A. 118.

§ 938. May command the peace.—Any magistrate shall be authorized and required to command all persons who, in his view, may be engaged in riotous or disorderly conduct, to the disturbance of the peace, to desist therefrom and to arrest any such person who shall refuse obedience to his command, and to commit to jail any such person who shall fail to enter into sufficient recognizance either to keep the peace or to answer to an indictment, as the magistrate may determine. In like manner he shall arrest and commit, if necessary, any person who, in his view, shall perpetrate any crime or misdemeanor whatsoever. In making any such arrest, the magistrate shall have power to command any constable, bystander, or the posse comitatus, as the emergency may require, and any person who shall refuse to aid in such arrest, when required by the magistrate, shall be liable to indictment as for a misdemeanor. Whenever there shall be an indictment for any offense committed in his view, the magistrate shall be the prosecutor, and he shall bind in recognizance all necessary witnesses.

1932 Code, § 938; Cr. P. '22, § 34; Cr. C. '12, § 35; Cr. C. '02, § 26; G. S. 836; R. S. 25; 1830 (11) 21.

A magistrate may arrest for offenses committed in his hearing.—This section does not limit the magistrate to cases in which he acquires his knowledge of the disorder by seeing it, to the exclusion of cases where he hears it. State v. Williams, 36 S. C. 493, 15 S. E.

554, 55 Am. St. Rep. 499.

And may arrest for misdemeanors as well as for felonies. State v. Byrd, 72 S. C. 104, 109, 51 S. E. 542, 33 L. R. A. (N. S.) 144, 38 L. R. A. (N. S.) 1099, 1 A. L. R. 587.

§ 939. Bailing persons charged with crime not punishable by death or by life imprisonment.—Magistrates may admit to bail any person charged with any offense the punishment of which is other than death or imprisonment for life; and if any person under lawful arrest on a charge regularly made and not bailable be brought before a magistrate he shall commit the the prisoner to jail; but if the offense charged be bailable, the magistrate shall take recognizance, with sufficient surety, if the same be offered; in default whereof, such party shall be committed to prison, unless it shall clearly appear, upon examination, that the charge is not founded in probability; in which case the party may be discharged.

1932 Code, § 939; Cr. P. '22, § 35; Cr. C. '12, § 36; Cr. C. '02, § 28; G. S. 2621; R. S. 34; 1839 (11) 22.

As to the provisions for the holding of a preliminary investigation by a magistrate who issues a warrant charging a crime without his jurisdiction upon demand of defendant, see § 33, and note thereto.

A recognizance is valid without the signature of the principal. State v. Quattlebaum, 67 S. C. 203, 45 S. E. 162; State v. Cornell, 70 S. C. 409, 50 S. E. 22, 5 L. R. A. (N. S.) 404.

And a recognizance is valid without a seal. State v. Foot, 2 Mill 123.

But it must appear on its face to have been issued by competent authority; otherwise it will be held invalid on objection, ore tenus. State v. Ahrens, 12 Rich. 493, 122 Am. St. Rep. 103.

The legal obligation of the surety is that the principal shall appear and abide by the judgment of the court. Reynolds

v. Harral, 2 Strob. 87, 99 Am. St. Rep. 498, 14 L. R. A. 78.

A surety is not estopped from denying validity of recognizance because another has made payments thereon. State v. Bright, 14 S. C. 7, L. R. A. 1917B, 1007.

And the sureties are liable notwithstanding discharge of prisoner by a United States judge. State v. Davis, 12 S. C. 528, 42 Am. Dec. 57.

In felony, the personal appearance of the principal is required. State v. Rowe, 8 Rich. 17, 27 L. R. A. (N. S.) 946, 38 L. R. A. (N. S.) 325.

And failure to appear and plead will estreat the recognizance. State v. Minton, 19 S. C. 280, 282, 27 L. R. A. (N. S.) 946.

And this is true of a failure to appear at the preliminary examination. State v. Rabens, 79 S. C. 542, 60 S. E. 442, 1110,

L. R. A. 1917B, 350, Ann. Cas. 17E, 183.

The court of general sessions may estreat recognizance by scire facias. State v. Wilder, 13 S. C. 344, 122 Am. St. Rep. 74.

Objection to the recognizance comes too late after estreat. Barton v. Keith, 2 Hill 537, 20 L. R. A. 426.

It is no objection, that there is a variance between the recognizance and the warrant. State v. Rowe, 8 Rich. 17, 27

L. R. A. (N. S.) 946, 38 L. R. A. (N. S.) 325.

Magistrate has jurisdiction to bind over to circuit court one charged with and shown to be probably guilty of bastardy where he denies the paternity of the child and refuses to enter into recognizance to maintain the child. State v. Edens, 88 S. C. 302, 70 S. E. 609.

Applied, in State v. McNinch, 13 S. C. 452.

§ 940. Persons charged and to be tried make deposit money in lieu of entering into recognizance.—All persons charged (and to be tried) before any magistrate for any violation of law shall be entitled to deposit with said magistrate, in lieu of entering into recognizance, a sum of money not to exceed the maximum fine in the case for which said person or persons are to be tried. *Provided*, that in Charleston County every magistrate who shall receive such a deposit in lieu of bail in any case in which the offense charged is beyond the trial jurisdiction of such magistrate, shall, within two days thereafter, pay over said deposit to, and file the warrant in such case with, the clerk of court, who shall hold the deposit subject to the further order of the court of general sessions of said county and shall record and dispose of the warrant in accordance with the provisions of sections 943 and 944.

1932 Code, § 940; Cr. P. '22, § 36; Cr. C. '12, § 37; 1904 (24) 388; 1940 (41) 1648.

§ 941. Scale of recognizances—witness and prosecutors.—Recognizances entered into before a magistrate shall be according to the following scale:

(1) If the offense charged be punishable with fine and imprisonment, or either, the recognizance of the accused shall not be for less than two hundred dollars. In all cases the magistrate taking the recognizance shall cause the same to be in such large amount as the circumstances may seem to require.

(2) The recognizance of any prosecutor or witness, in case of misdemeanor, shall not be for less than one hundred dollars; and in case of capital felony, for not less than five hundred dollars; though in all cases the magistrate shall cause the same to be in such large amount as the circumstances may seem to require.

1932 Code, § 941; Cr. P. '22, § 37; Cr. C. '12, § 38; Cr. C. '02, § 29; G. S. 2622; R. S. 35; 1839 (11) 22; 1885 (19) 349.

§ 942. Arrest and committal of witnesses on refusal to enter into recognizances.—Upon information made of the materiality of any witness within the State to support any accusation made, or where the materiality of such witness shall be within the knowledge of any magistrate, he shall issue his warrant requiring such witness to appear before him or the next magistrate to enter into recognizance, with good security, if deemed proper; which warrant shall authorize the arrest and detention of any such witness in any county in the State; and on being brought before such magistrate, and refusing to enter into recognizance, such witness may be committed by the said magistrate to the jail of the county, there to remain until he shall be regularly discharged, or shall enter into recognizance as required by this chapter.

1932 Code, § 942; Cr. P. '22, § 38; Cr. C. '12, § 39; Cr. C. '02, § 30; G. S. 2623; R. S. 36; 1839 (11) 22.

§ 943. Return recognizances, informations and other papers to clerks of court—time.—All magistrates before whom recognizances of witnesses, defendants, or prosecutor, for their respective appearances at any of the courts of sessions for this State shall be taken, or before whom any information or other paper returnable to the same shall be made, shall lodge the said recognizances, information, or other papers, in the respective clerks' offices of the courts to which they are returnable, at least ten days before the meeting of the said courts, respectively: *provided*, that in Charleston County every magistrate who shall admit to bail, under the provisions of sections 935, 937, 938, 939, 941 and 942, any person charged with an offense beyond the trial jurisdiction of such magistrate, or shall take any peace bond or witness recognizances, before discharging such person shall require each surety to file with the magistrate certificates from the county auditor, the register of mesne conveyance and the clerk of court, showing his legal qualification to act as surety on the recognizances or bond in question, and shall, within two days thereafter, file in the office of the clerk of court of Charleston County the warrant in the case, together with the appearance recognizance or peace bond so taken by said magistrate, and the certificates showing the legal qualification of the sureties thereon; and the clerk shall keep a record, in a book to be provided by the county supervisor of said county for said purpose, of each warrant, recognizance and bond so received, showing the date of filing, the charge in said warrant, the amount of the recognizance or bond, and the names of the sureties thereon, and said clerk shall, within two days after the receipt of each warrant, recognizance and bond, deliver the same to the solicitor of the circuit.

1932 Code, § 943; Cr. P. '22, § 39; Cr. C. '12, § 40; Cr. C. '02, § 31; G. S. 2624; R. S. 37; 323; 1836 (6) 552; 1940 (41) 1648.

§ 944. Return papers pertaining to general sessions and report to clerk of court on cases—time.—All papers pertaining to the court of general sessions shall be returned, and a report of the case with the names and addresses of all material witnesses, together with a synopsis of all testimony by each magistrate to the clerk of court within fifteen days after the arrest in each case has been made, and preliminary hearing had or waived, except such as may have been issued or received by him within fifteen days preceding the convening of any court, and except in cases where preliminary hearings have been demanded and no opportunity had for said hearing; in which case magistrates shall return such papers and report thereon to the clerk of court, as directed in this section, not later than the first day of said term. *Provided*, that in Charleston County every magistrate who shall admit to bail, under the provisions of sections 935, 937, 938, 939, 941 and 942, any person charged with an offense beyond the trial jurisdiction of such magistrate, or shall take any peace bond or witness recognizance, before discharging such person shall require each surety to file with the magistrate certificates from the county auditor, the register of mesne conveyance and the clerk of court, showing his legal qualification to act as surety on the recognizance or bond in question, and shall, within two days thereafter, file in the office of the clerk of court of Charleston County the warrant in the case, together with the appearance

recognizance or peace bond so taken by said magistrate, and the certificates showing the legal qualification of the sureties thereon; and the clerk shall keep a record, in a book to be provided by the county supervisor of said county for said purpose, of each warrant, recognizance and bond so received, showing the date of filing, the charge in said warrant, the amount of the recognizance or bond, and the names of the sureties thereon, and said clerk shall, within two days after the receipt of each warrant, recognizance and bond, deliver the same to the solicitor of the circuit.

1932 Code, § 944; Cr. P. '22, § 40; Cr. C. '12, § 565; Cr. C. '02, § 408; G. S. 855, 856; R. S. 323; 1836 (6) 552; 1839 (11) 23; 1918 (30) 769; 1940 (41) 1648.

§ 945. Duty of magistrate on information of impending duel.—Whenever any magistrate shall receive information in writing, and under oath, that any person or persons are about to leave this State, for the purpose of sending or receiving a challenge to fight a duel, or for the purpose of fighting a duel after such challenge shall have been sent or received, it shall be the duty of such magistrate forthwith to issue his warrant for the arrest of such person or persons, to be carried before some magistrate who shall require such persons to enter into recognizance in such sum as to such magistrate may seem meet, conditioned that such person or persons shall keep the peace within this State, and shall not leave the State for the purpose of sending or receiving a challenge to fight a duel, or for the purpose of fighting a duel after such challenge has been sent or received.

1932 Code, § 945; Cr. P. '22, § 41; Cr. C. '12, § 41; Cr. C. '02, § 32; G. S. 838; R. S. 28; 1857 (12) 606.

§ 946. Change of venue. — Magistrates shall have the power to change the venue in all cases, civil and criminal, pending before them: *provided*, that in counties where they have separate and exclusive territorial jurisdiction the change of venue shall be to another magistrate's district in the same county. Whenever either party in a civil case, or the prosecutor or accused in a criminal case, which is to be tried before a magistrate, shall file with the magistrate issuing the paper an affidavit to the effect that he does not believe he can obtain a fair trial before the magistrate, the papers shall be turned over to the nearest magistrate not disqualified from hearing said cause in the county, who shall proceed to try the case as if he had issued the papers: *provided*, such affidavit shall set forth the grounds of such belief, and in civil cases two days' notice of the application for change of venue shall be given to the adverse party. One such transfer only shall be allowed each party in any case.

1932 Code, § 946; Cr. P. '22, § 42; Cr. C. '12, § 42; Cr. C. '02, § 33; R. S. 29; 1887 (19) 787; 1896 (22) 12.

See notes under section 274, subsection 19 thereof.

This section is mandatory only where the affidavit as to facts is filed by the defendant. *State v. Conkle*, 64 S. C. 371, 42 S. E. 173.

And a magistrate who issued warrant for arrest abused discretion in transferring warrant to another magistrate for preliminary hearing in absence of an affidavit for removal being filed by accused. *Clemmons v. Nicholson*, 188 S. C. 124, 198 S. E. 180.

Prejudice.—Statement of recorder that he was willing for city and accused to voluntarily compromise case in which accused was charged with petit larceny, if accused would pay city fine of \$15.00 did not show prejudice or unfairness on part of recorder sufficient to require change of venue. *City of Sumter v. Owens*, 181 S. C. 540, 188 S. E. 192.

See generally, *McNair v. Tucker*, 24 S. C. 105, 107, *Clemmons v. Nicholson*, 188 S. C. 124, 198 S. E. 180, see also, section 935.

§ 947. May break open gambling doors.—Any judge or magistrate residing in any incorporated city or town of this State, on information, by oath of any credible witness, that any of the criminal laws against gambling is being violated, is authorized to grant his warrant, under his hand and seal, to break open and enter any closed door or room within such city, wherever such offense or offenses are alleged to prevail.

1932 Code, § 947; Cr. P. '22, § 43; Cr. C. '12, § 60, 708; Cr. C. '02, § 510; G. S. 1719; R. S. 395; 1816 (6) 28; 1904 (24) 500.

See § 957 also.

§ 948. Prosecutor not to serve warrant.—No magistrate shall deputize the person swearing out a warrant in any case to serve the same.

1932 Code, § 948; Cr. P. '22, § 45; Cr. C. '12, § 45; Cr. C. '02, § 35; R. S. 31; 1886 (19) 531.

§ 949. Magistrates may issue search warrants.—(1) Magistrates shall have authority to issue warrants to make search or seizure in suspected places, and to arrest suspected persons and to seize their property.

(2) Such warrants shall issue only in cases of stolen goods, and must be supported by the oath or affirmation of the party applying for the same, which shall set forth fully and particularly all the facts upon which such application is based, and shall specially designate the suspected place or places, the object or objects of search or seizure, the name or names of the person or persons suspected and who are to be arrested: *provided*, that in the investigation of supposed incendiary fires the insurance commissioner, or his deputy, shall have the right to search for property or goods supposed to have been moved from the building burned.

(3) No such warrant shall issue except in the cases and with the formalities herein prescribed.

1932 Code, § 949; Cr. P. '22, § 46; Cr. C. '12, § 46; Cr. C. '02, § 36; R. S. 32; 1885 (19) 251; 1912 (27) 534.

A search warrant issued upon a statement of facts not sworn to is unconstitutional, and null and void. *State v. Wimbush*, 9 S. C. 309, 84 Am. St. Rep. 697, 28 L. R. A. (N. S.) 548, Ann. Cas. 13D, 215.

§ 950. Warrants to be endorsed in county where served—execution.—Magistrates are authorized and empowered to endorse the warrant or warrants issued by magistrates of other counties when the person or persons charged with a crime in said warrant or warrants resides, or is, in the county of said magistrate. When a warrant or warrants is presented to a magistrate for endorsement, as herein provided, the said magistrate shall authorize the person presenting the same, or any special constable, to execute the same within his county.

1932 Code, § 950; Cr. P. '22, § 47; Cr. C. '12, § 47; Cr. C. '02, § 37; R. S. 33; 1891 (20) 1052.

Cross reference.—As to changing place of trial, see § 426.

Magistrate may take recognizance to appear in another county.—Where a warrant, issued in one county, is indorsed by a magistrate in another, in which the accused resides, and the ac-

cused is arrested thereunder, such magistrate may legally take a recognizance binding accused to appear before the magistrate issuing the warrant. *State v. Rabens*, 79 S. C. 542, 60 S. E. 442, L. R. A. 1917B, 350, Ann. Cas. 17E, 183.

§ 951. Fines at fairs of State Agricultural and Mechanical Society to treasurer thereof.—For the purpose of better providing for the preservation of the public peace during the annual fairs of the State Agricultural and Mechanical Society of South Carolina, all fines imposed for offenses committed on the fair grounds during the sessions of the annual fairs shall be turned over to the treasurer of the said society by the magistrate before whom such cases are tried: *provided*, that arrests of the offenders be made by persons appointed or employed by the authorities of the said agricultural and mechanical society of South Carolina.

1932 Code, § 951; Cr. P. '22, § 48; Cr. C. '12, § 48; 1910 (26) 772.

952. Municipal courts.

CHAPTER 59

Criminal Proceedings in Municipalities

- ARTICLE 1. General Provisions, § 952.
- ARTICLE 2. Cities between 20,000 and Not over 50,000, § 959.
- ARTICLE 3. Cities of 1,500 and Not over 20,000, § 968.
- ARTICLE 4. Towns under 1,000, § 969.
- ARTICLE 5. Recorder, Bennettsville, § 970.
- ARTICLE 6. Recorder's Court for Columbia, § 971.
- ARTICLE 7. Municipal Court in Spartanburg, § 972.
- ARTICLE 8. Recorder, Pageland, § 972-6.

ARTICLE 1

General Provisions

- | | |
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| 952. Municipal courts. | 956. Municipal convicts. |
| 953. Penalty refusing to obey jury summons. | 957. Municipal officers may break open gambling rooms. |
| 954. Appoint acting recorder. | 958. Powers of municipal officers. |

§ 952. Jurisdiction of municipal courts.

(1) **Authority of mayor and mayor pro tempore—trials**—The intendants or mayors of the cities and towns of this State that have been heretofore chartered or that may be hereafter chartered by special act of the General Assembly, or under general laws, shall have all the powers and authority of magistrates in criminal cases within the corporate limits and police jurisdiction of their respective cities and towns, and shall especially have the power and authority to speedily try all offenders against the ordinances or laws of said town in a summary manner and without a jury, unless demanded by the accused; and the mayor or intendent pro tempore shall have the same powers. When the accused shall demand a jury, the same shall be drawn from the qualified electors of the town or city in the same manner as is provided for drawing of juries in the courts of magistrates. The chief of police or marshal of the town, or such officer as the mayor, intendant or mayor pro tempore may appoint, shall act as constable to prepare the jury list; and the complainant, or some officer to be designated

by the mayor, intendant or mayor pro tempore, is authorized to make the challenges allowed on the part of the prosecution.

(2) **Compel attendance of witnesses.**—Such intendants or mayors or city or town councils have the same power which a magistrate now has to compel the attendance of witnesses and require them to give evidence upon the trial before them of any person for the violation of the laws or the ordinances of the town.

(3) **Penalties.**—Whenever said mayor, intendant, or mayor pro tempore shall find the party tried before him guilty of violating an ordinance of said town, he shall have power to impose, in his discretion, a fine or imprisonment in the alternative, not to exceed the limits prescribed for such violation by the ordinances of said city or town, not to exceed a fine in the sum of one hundred dollars, or imprisonment for not more than thirty days, and shall appropriate all revenues arising therefrom to the use of the said corporation: *provided*, such ordinances, rules and by-laws or regulations be not contrary to the laws of the State. Every person sentenced to imprisonment, either directly or in consequence of a failure to pay a fine imposed, shall be subject to work upon the public roads or streets of said city or town, or of the county in which such city or town is situate, during the term of such imprisonment.

(4) **Issue execution to sheriff collect fines.**—The said mayors, intendants or city or town councils shall have power to issue execution to the sheriff of the county for the collection of all fines imposed by it.

(5) **Appeal to full council—powers of council.**—From all decisions of such mayor, intendant, or mayor pro tempore, any defendant, feeling himself or herself aggrieved, shall have the right to appeal to the city or town council, provided he give notice of such appeal within twenty-four hours after sentence has been passed, and to enter into bond to appear and defend before said council at a time to be specified in such undertaking, and to abide the sentences of the city or town council: *provided*, that in those cities of over five thousand inhabitants, incorporated under article 5 of chapter 150, the appellant may pay the fine imposed under protest and appeal to the city council without giving bond. At the trial of such appeal the mayor, intendant, or mayor pro tempore, shall preside and the aldermen shall sit as a court, and a concurrence of a majority of the aldermen present shall be necessary for the reversal of the judgment of the mayor, intendant, or mayor pro tempore; but if the aldermen present shall divide equally in opinion, the judgment of the mayor, intendant, or mayor pro tempore, shall be affirmed. They may reverse, modify or confirm any or all rulings or conclusions of the mayor, intendant, or mayor pro tempore, made or reached in the first trial of the case.

(6) **Appeal to court of general sessions.**—From all the decisions of said mayor, intendant, or mayor pro tempore, or city or town council, any party in interest, feeling himself or herself aggrieved, shall have the right of appeal to the court of general sessions for the county in which the trial is had: *provided*, however, that he must give notice of such appeal in writing within twenty-four hours after the sentence has been passed and enter into bond to appear and defend before said court at its next ensuing session thereafter: *provided*, that in those cities of over five thousand inhabitants, incorporated under article 5 of chapter 150, in all cases the person

convicted shall have the right of appeal to the court of general sessions within five days from time of sentence. Such appeal may be taken either from the sentence of the mayor or from the sentence of the city council; but the appeal shall not operate to stay the execution of the sentence unless the appellant give bond, to be approved by the mayor, conditioned to abide the judgment of the court of general sessions. Said appeal in said court of general sessions shall be heard upon the report of the presiding officer of the trial below, and upon the testimony reported by him. The provisions of this section shall not apply to the city of Charleston.

1932 Code, §§ 952, 7244, 7257, 7258; Civ. '12, §§ 3000, 3009, 3010; Cr. P. '22, § 60; Civ. C. '22, §§ 4399, 4412, 4413; Cr. C. '12, § 59; Civ. C. '02; §§ 2003, 2004, 2005, 2924-2939; 1896 (20) 77, 1897 (22) 498; 1901 (23) 651; 1908 (25) 1029.

See § 794 for appeals from inferior courts. See § 932 for taking testimony in

writing.

I. Subdivision (1).

II. Subdivision (3).

III. Subdivision (5).

IV. Subdivision (6).

Cross Reference.

See § 7453 for reference "Act 5, chap. 150." Also see notes to section 956.

I. SUBDIVISION (1).

The prohibition of the union of judicial and executive functions does not apply to municipalities. *Spartanburg v. Parris*, 85 S. C. 227, 228, 67 S. E. 246, Ann. Cas. 12D, 677, Ann. Cas. 14B, 902; *Greenville v. Pridmore*, 86 S. C. 442, 68 S. E. 636, 138 Am. St. Rep. 1058.

And intendants or mayors have the jurisdiction of magistrates. *Greenville v. Latimer*, 80 S. C. 92, 93, 61 S. E. 224.

And arrest warrants may be issued as in proceedings before magistrates.—Under this section, an arrest warrant issued on information and belief in a prosecution for speeding need not set forth source of information and grounds of belief. *Mayesville v. Clamp*, 149 S. C. 346, 147 S. E. 455, 456.

As to specific section covering proceedings before magistrates, see § 930 and notes thereto.

But warrant should be issued on demand before trial. *Branchville v. Felder*, 86 S. C. 280, 68 S. E. 575.

Proceedings on information. — *Ridgeland v. Gens*, 83 S. C. 562, 65 S. E. 828; *Spartanburg v. Parris*, 85 S. C. 227, 67 S. E. 246, Ann. Cas. 12D, 677, Ann. Cas. 14B, 902.

Demand for jury trial. — *Clinton v. Leake*, 71 S. C. 22, 28, 50 S. E. 541.

Chief of police not disqualified from making jury list where he did not witness conduct of defendant constituting charge.—A town's chief of police is not to be held to have such bias against defendant, charged with disorderly conduct, as to disqualify him from making up the jury list; he not having witnessed his disorderly conduct, but merely having started him to the guardhouse for refusal to give bond. *State v. Byrnes*, 100 S. C. 230, 84 S. E. 822, 824, Ann. Cas.

17C, 896.

Jurisdictional limits.—*Central v. Madden*, 81 S. C. 7, 61 S. E. 1028; *Anderson v. Seligman*, 85 S. C. 16, 67, S. E. 13.

Similar provisions as to mode of trial, (1) by the mayor and (2) on appeal, de novo, by the council, are considered in *City Council v. O'Donnell*, 29 S. C. 355, 365, 7 S. E. 523, 13 Am. St. Rep. 728, 31 Am. St. Rep. 104, 37 Am. St. Rep. 595, 92 Am. St. Rep. 100, 1 L. R. A. 632, Ann. Cas. 12C, 37.

In general.—Similar provisions as to mode of trial, first by the mayor and second on appeal, de novo, by the council, considered in *Anderson v. O'Donnell*, 29 S. C. 355, 364, 7 S. E. 523, 13 Am. St. Rep. 728, 31 Am. St. Rep. 104, 37 Am. St. Rep. 595, 92 Am. St. Rep. 100, 1 L. R. A. 632, Ann. Cas. 12C, 37.

Power to try for violation of ordinances.—Under this section it was merely intended to give mayors the same power to try persons charged with the violation of an ordinance that a magistrate had to try a person charged with the violation of a statute or other law of the State in cases where the punishment did not exceed a fine of \$100 or imprisonment for 30 days, and the recorder of the city of Sumter was without power to try offenses other than violations of city ordinances, and hence without jurisdiction to try and convict for petit larceny in violation of the criminal laws of the State. *Sumter v. Keels*, 95 S. C. 203, 78 S. E. 893.

Practice in criminal cases.—In criminal cases the municipal court must follow the practice prescribed for magistrates' courts. *Greenville v. Latimer*, 80 S. C. 92, 61 S. E. 224.

Amendment of information and immediate trial.—Town council may amend information and try case at once, where defendant makes no showing of surprise by amendment or prejudice by immediate trial. *Ridgeland v. Gens*, 83 S. C. 562, 65 S. E. 828.

Arrest warrant for speeding. — In a prosecution for speeding, arrest warrant

issued on information and belief need not set forth source of information and grounds of belief. *Mayesville v. Clamp*, 149 S. C. 346, 147 S. E. 455.

Trial for gambling.—The mayor of a city may try one charged with gambling under a valid ordinance although the crime of gambling under statute was then triable in court of general sessions. *Anderson v. Seligman*, 85 S. C. 16, 18, 67 S. E. 13.

Jury trial.—As to demand for jury trial, see *Clinton v. Leake*, 71 S. C. 22, 28, 50 S. E. 541.

Punishment.—As to punishment by labor on the streets, see *Union v. Hampton*, 83 S. C. 46, 48, 64 S. E. 1017, 38 L. R. A. (N. S.) 197.

II. SUBDIVISION (3).

Alternative sentence is valid.—*Union v. Hampton*, 83 S. C. 46, 64 S. E. 1017, 38 L. R. A. (N. S.) 197.

But ordinance authorizing sentence to both fine and imprisonment is void.—*Greenville v. Pridmore*, 86 S. C. 442, 68 S. E. 636, 138 Am. St. Rep. 1058.

Municipal authorities may, for any proper cause, sentence offenders against the laws of municipalities to the county jail, and the county jailor is required to receive them, but the municipal authorities must pay the legal expenses for their care and confinement. *Greenville v. Pridmore*, 162 S. C. 52, 160 S. E. 144.

Municipal authorities may also sentence able-bodied male convicts to hard labor upon the county chaingang of the county in which they shall have been convicted, and it is the duty of the county authorities in charge of the respective chaingangs to accept the prisoners so sentenced. *Id.*

III. SUBDIVISION (5).

In general.—This section is not limited by the statute limiting the jurisdiction of magistrates. *Union v. Hampton*, 83 S. C. 46, 48, 64 S. E. 1017, 38 L. R. A. (N. S.) 197.

Constitutionality.—This section is constitutional. *Union v. Hampton*, 83 S. C. 46, 48, 64 S. E. 1017, 38 L. R. A. (N. S.)

197.

An ordinance authorizing the mayor to impose both fine and imprisonment is not void as a whole where a complete ordinance is left after striking out the void part. *Greenville v. Pridmore*, 86 S. C. 442, 444, 68 S. E. 636, 138 Am. St. Rep. 1058.

Punishment.—As to punishment by labor on streets, alternative sentence, see *Union v. Hampton*, 83 S. C. 46, 48, 64 S. E. 1017, 38 L. R. A. (N. S.) 197.

An officer is not disqualified from acting as judge or a jurymen on the trial of a person for the violation of an ordinance, on the ground that he is a party to the prosecution. *City Council v. Fowler*, 48 S. C. 8, 25 S. E. 900, L. R. A. 1918D, 245.

But the mayor pro tem, before whom a trial has been had, cannot vote as a juror on the appeal to the council from his decision. *City Council v. Fowler*, 48 S. C. 8, 25 S. E. 900, L. R. A. 1918D, 245.

IV. SUBDIVISION (6).

Requirement that appeal be taken in twenty-four hours is constitutional. *Due West v. Fuller*, 72 S. C. 150, 51 S. E. 546.

A notice of appeal from conviction in mayor's court, deposited in post office within 24 hours after imposition of sentence, was properly served, although notice did not reach mayor until after expiration of 24 hour period. *Town of Honea Path v. Wright*, 194 S. C. 462, 9 S. E. (2d) 924.

Proceedings on appeal from sentence by mayor, intendant, etc., are similar to those from magistrates' courts. *Greenville v. Latimer*, 80 S. C. 92, 93, 61 S. E. 224, 226.

Statute requiring appeals to circuit court from inferior court to be docketed at least eight days before court convenes are inapplicable to appeal from inferior court in a criminal case. *City of Sumter v. Owens*, 181 S. C. 540, 188 S. E. 192.

As to specific section providing for appeals from magistrates' courts, see § 1024 and note thereto.

§ 953. Penalty refuse obey jury summons.—If any juror, duly summoned, shall neglect or refuse to appear in obedience to any venire issued by any police or municipal court, and shall not within forty-eight hours render to the recorder or magistrate holding such police court and issuing the venire, a sufficient reason for his delinquency, he shall forfeit and pay a fine of ten (\$10.00) dollars to the treasury of the municipality where the cause is tried, to be assessed by such recorder or such magistrate so holding the police court and collected on his warrant without other process, and a failure to pay forthwith such fine so assessed shall constitute a contempt of court and be punished accordingly.

1932 Code, § 953; Cr. P. '22, § 56; Cr. C. '12, § 55; 1907 (25) 609.

§ 954. Appoint acting recorder in absence or disqualification of recorder

of municipal court.—The mayor of any municipality in South Carolina may, in the absence, sickness, incapacity or disqualification, for any reason whatsoever, of the recorder of any city recorder's court, appoint a disinterested practicing attorney, or other competent person resident of such city, as acting recorder during the absence, sickness, incapacity or other disqualification of such regular recorder. *Provided*, such appointee shall take the prescribed oath of office before entering upon his duties. *Provided*, the provisions hereof shall not apply in Laurens County. *Provided, further*, that the county of Chesterfield is exempted from the provisions of this section.

1938 (40) 1784.

§ 956. Municipal convicts—proviso as to time—exchange of convict labor.—Whenever any town or municipal authority in this State have not a sufficient number of convicts sentenced to work on the public works of the town to warrant the expense of maintaining a town chaingang, the town authorities of said town shall be authorized to place said convicts on the county chaingang for the time so sentenced, and the county authorities of the county in which said town is situated shall be authorized and empowered to exchange labor with said town authorities and place county convicts on the public works of the town for the same number of days that town convicts work on the public works of the county.

1932 Code, § 956; Cr. P. '22, § 63; Cr. C. '12, § 944; Cr. C. '02, § 658; 1898 (22) 821.

Exchange of labor is discretionary.—The provisions of this section as to the exchange of labor with town authorities and the placing of county convicts on works of the town for the same number of days that town convicts work on the public works of the county is discretionary and not mandatory. *Greenville v. Pridmore*, 162 S. C. 52, 160 S. E. 144.

When a municipality does not desire to form and maintain its own chaingang,

the authorities of the municipality and the county authorities may, if they desire, arrange for municipal convicts to be sentenced to the county chaingang upon an agreement that the county authorities will make an exchange, in the matter of the labor of such convicts, looking to the supplementing of labor on the public works of the municipality. *Greenville v. Pridmore*, 162 S. E. 52, 160 S. E. 144.

§ 957. Municipal officers may break open gambling rooms.—The mayor or any of the aldermen or the sheriff of the city of Charleston, or the mayor or intendant or any alderman, warden or recorder, of any incorporated city or town of this State, on information, by oath of any credible witness, that any of the criminal laws against gambling is being violated, is authorized to grant his warrant, under his hand and seal, to break open and enter any closed door or room within such city or town, wherever such offense or offenses are alleged to prevail.

1932 Code, § 957; Cr. P. '22, § 61; Cr. C. '12, §§ 60, 708; Cr. C. '02, 510; G. S. 1719; R. S. 395; 1816 (6) 28; 1904 (24) 500.

See § 947 also.

§ 958. Municipal officers' power to arrest, and on conviction to commit to guardhouse.—(1) The said mayors or intendants or city or town councils shall have power to arrest and, upon conviction, to commit to the town guardhouse, for a space of time not exceeding thirty days, and to fine not exceeding one hundred dollars, any person or persons who may be guilty of disorderly conduct in said town to the annoyance of the citizens thereof; and it shall be the duty of the marshal or police officer of the town to make such arrest, and to call to his assistance the posse comitatus, if necessary,

and upon failure to perform the said duty he shall be fined in a sum not exceeding one hundred dollars for each and every offense.

(2) **Powers of marshals or constables.**—The said mayors or intendants and aldermen, councilmen or wardens, in persons, or any of them, may authorize and require any marshal or constable especially appointed for that purpose to arrest, and upon conviction before the mayors, or intendants or city or town or town council to commit to the guardhouse which said mayors or intendants or city or town council is authorized to establish or to the county jail or to the county chaingang, for a term not exceeding thirty days. any person or persons who, within the corporate limits of said town, may be engaged in a breach of the peace, any riotous or disorderly conduct, open obscenity, public drunkenness, or any conduct grossly indecent or dangerous to the citizens of said city or town, or any of them: *provided*, that if the offender be committed to jail it shall be done at the expense of the said city or town: *provided*, this section shall not be construed to prevent trial by jury.

1932 Code, § 958; Cr. P. '22, § 62; Cr. C. '12, § 61; Civ. C. '02, §§ 2908 and 2909; 1897 (22) 501.

See Greenville et al. v. Pridmore, 162 S. C. 53, 160 S. E. 144.

ARTICLE 2

Cities of 20,000 and Not Over 50,000

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|---|--------------------------------|
| 959. Established. | 963. Vacancy—absence. |
| 960. Jurisdiction. | 964. Police. |
| 961. Jurisdiction over incorrigible and destitute children. | 965. Jury trials—stenographer. |
| 962. Recorder. | 966. Appeal—recognizance. |
| | 967. Return on appeal. |

§ 959. Established.—A municipal court is hereby established for every city in this State whose population by the last census was not less than twenty thousand and not more than fifty thousand, or which may now or hereafter by actual enumeration have a population within said limits.

1932 Code, §§ 959, 7246; Cr. P. '22, § 49; Civ. C. '22, § 4401; Cr. C. '12, § 49; Civ. C. '12, § 3001; 1902 (23) 1048; 1923 (33) 164.

See note to section 968.

§ 960 Jurisdiction.—The said municipal court shall have jurisdiction to try and determine all cases arising under the ordinances of the city in which said court is established, and generally shall have all such judicial powers and duties as are now conferred upon the mayor of such city, either by its charter or by the laws of the State of South Carolina. The said municipal court shall also have all such powers, duties and jurisdiction in criminal cases as are now conferred by law upon the magistrates appointed and commissioned for the county in which said court is established, except that said court shall not have the authority of a magistrate to appoint a constable.

1932 Code, §§ 960, 7247; Cr. P. '22, § 50; Civ. C. '22, § 4402; Cr. C. '12, § 50; Civ. C. '12, § 3002; 1902 (23) 1048.

Appeals from inferior courts in criminal cases—see § 794.

Commence proceedings in recorder's court with information under oath.— See §§ 959 and 968 hereof.

Statutes requiring appeals to circuit court from inferior court to be docketed

at least eight days before court convenes are inapplicable to appeal from inferior court in a criminal case. *City of Sumter v. Owens*, 181 S. C. 540, 188 S. E. 192.

§ 961. Jurisdiction over incorrigible and destitute children under the age of seventeen years.—The said municipal court shall also have jurisdiction over and power to investigate the condition, circumstances and surroundings of a child under seventeen years of age, within the jurisdiction of the court, whenever it may be brought to the attention of such courts upon an information, supported by affidavit that such child is homeless, destitute, neglected, incorrigible, constantly exposed to evil or corrupting influences, or that such child is a constant violator of State or municipal laws, or wherever it shall be made to appear by information as aforesaid that the home of such child, by reason of the gross immorality, depravity or criminality of the inmates of such home (whether such inmates be the parents, grandparents or guardians of such child), is not a proper place for the rearing of such child. In making said investigation, the person holding such court shall summon as witnesses the parents, grandparents, guardians or persons with whom said child resides, as well as all others who, in the opinion of the person holding such court, may have knowledge of the conditions and circumstances of such child, and also such persons as the said child or its parents, guardians or persons with whom it may reside may desire to have summoned: *provided*, such person or persons reside within the jurisdiction of the court; and shall examine all such persons, under oath, as to the condition and circumstances surrounding such child, the testimony of the witnesses to be reduced to writing, either stenographically or otherwise, and signed by the witnesses: *provided*, that the decision of the court be sent to the clerk of the court of common pleas of the county wherein said municipal court is situated, to be filed by him among the records of the court of general sessions: *provided*, that in all cases where the salary of the person holding such municipal court shall have been fixed by the mayor and aldermen or city council of said city, before the enactment of this amendment, the same may be so increased. by the mayor and councilmen of said city as to compensate him for the additional services herein imposed upon him; during the making of such investigation the person holding such court shall, upon the request of such child, or his or her parents, guardian or person with whom said child resides, submit the question of the advisability of committing said child to said reformatories to a jury of six, to be selected and empaneled as juries are now selected and empaneled in magistrates' courts: *provided*, also, that said child shall have the right to appeal from the ruling or decision of such courts to the judge of the circuit in which such municipal court is established, or to the city council of said municipality; which appeal shall be heard upon the original papers, and if made to the circuit judge he may hear said appeal at chambers or in open court, but no appeal shall act as a supersedeas unless the mayor or circuit judge shall so order. After hearing and determining the matter, the person holding such court shall forthwith transmit the record of such case, the same to include the information, evidence and ruling, or when the evidence is taken by a sworn

stenographer, the same need not be signed by the witnesses. If, after making such investigation, it shall appear to the person holding such court that it would be conducive to the moral, physical and mental development of such child, the person holding such court shall commit such child to the reformatory, now located in Lexington County, or if white, to the South Carolina Industrial School, now located in Florence County, S. C., said child to be there detained during his minority, unless sooner released therefrom in the manner now provided by law: *provided*, that if such child be a girl, the person holding such court may commit her to such orphan asylum or other institution for the care of children in this State as in the opinion of the person holding such court shall be a fit place for said child, or to such reformatory for girls as may hereafter be established by the State of South Carolina: *provided*, that in continuance of such person in office, as to compensate him for the increased labor hereby imposed upon him, the act entitled "An Act to Enlarge and Define the Duties and Powers of the Probate Court in Relation to Minors," approved February 26, 1912, in so far as it applies to municipalities having a population of over twenty thousand and less than fifty thousand, is hereby repealed.

1932 Code, § 961; Cr. P. '22, § 51; 1913 (28) 62.

§ 962. Recorder, election, term, salary.—The municipal court hereby established shall be held by a recorder, who shall be elected by the mayor and aldermen of the city in which said court is established. The recorder shall hold his office for a term of four years and until his successor is elected and qualified. The salary of the recorder shall be fixed by the mayor and aldermen of such city, and shall not be increased or diminished during his continuance in office. Before entering upon the discharge of the duties of his office he shall take and subscribe the usual oath of office: *provided*, the mayor and aldermen may, by ordinance, fix the term of office of the recorder at less than four years: *provided*, that in the city of Florence, the recorder shall hold his office at the pleasure of the city council and shall receive such salary as the said city council may from time to time fix.

1932 Code, §§ 962, 7248; Civ. C. '22, § 4403; Cr. P. '22, § 52; Civ. C. '12, § 3003; Cr. C. '12, § 51; 1902 (22) 1048; 1928 (35) 1146; 1933 (38) 284.

§ 963. Recorder—vacancy—absence.—In case of a vacancy in the office of recorder, in any city, the mayor and aldermen of such city may elect a successor to fill the unexpired term. In case of the temporary absence, sickness or disability of the recorder, the municipal court shall be held by the mayor, the mayor pro tempore, or by an alderman selected by the city council.

1932 Code, §§ 963, 7249; Civ. C. '22, § 4004; Cr. P. '22, § 53; Civ. C. '12, § 3004; Cr. C. '12, § 52; 1902 (22) 1048.

§ 964. Duties and powers of police.—It shall be the duty of the chief of police of the city in which said municipal court is established, to attend upon the sessions of said court, and the said chief of police and the policemen of such city shall be subject to the orders of said court, and shall execute the orders, writs and mandates thereof, and shall perform such other duties in connection with said court as may be prescribed by the ordinances of such city or town. The said chief of police and policemen

shall also be invested with the same powers and duties as are now or which may hereafter be devolved upon magistrates' constables.

1932 Code, §§ 964, 7250; Civ. C. '22, § 4005; Cr. P. '22, § 54; Civ. C. '12, § 3005; Cr. C. '12, § 53; 1902 (22) 1048.

This section only confers on police officers additional powers and duties and does not prevent a chief of police from

swearing out a warrant in a recorder's court. *Rock Hill v. Worthy*, 104 S. C. 450, 89 S. E. 393.

§ 965. Jury trials—stenographer.—In the trial of any case in the said municipal court, upon the demand for a jury, the same shall be summoned and empaneled in accordance with the law for summoning and empanelling juries in magistrates' courts. The jury shall consist of six. Any party shall have the right to have the testimony given at such trial taken stenographically by a stenographer to be appointed by the recorder: *provided*, such party shall first tender or pay the charges of such stenographer for taking and transcribing the same.

1932 Code, §§ 965, 7251; Civ. C. '22, § 4406; Cr. P. '22, § 55; Civ. C. '12, § 3006; Cr. C. '12, § 54; 1902 (22) 1048.

See section 931-1 which provides the testimony of witnesses in magistrate and recorder court to be taken in writing.

§ 966. Appeal—recognizance.—Any party shall have the right to appeal from the sentence or judgment of the recorder to the city council of the city, or the court of general sessions of the county in which the trial is held: *provided, however*, notice of intention so to appeal be given in writing and served on the recorder within twenty-four hours after sentence is passed or judgment rendered, and the party appealing do enter into bond, payable to such city, to appear and defend such appeal at the next meeting of the city council of such city or the next term of said court of general sessions as the appeal may be taken in such amount and with such sureties as the recorder may determine.

1932 Code, §§ 954, 7255; Civ. C. '22, § 4410; Civ. C. '12, § 3007; Cr. P. '22, § 57; Cr. C. '12, § 56; 1902 (23) 1048.

Appeals from inferior court in criminal cases.—See notes section 794.

Section 794 inapplicable in criminal cases.—Statutes requiring appeals to circuit court from inferior court to be docketed at yeast eight days before court convenes are inapplicable to appeal from inferior court in a criminal case. *City of Sumter v. Owens* 181 S. C. 540, 188 S. E. 192.

Notice of appeal.—Notice of appeal from conviction in mayor's court, deposited in post office within 24 hours after imposition of sentence was prop-

erly served, although notice did not reach mayor until after 24 hour period. *Town of Honea Path v. Wright*, 194 S. C. 462, 9 S. E. (2d) 924.

Served on the recorder.—Where notice of appeal from a recorder's court was served upon the chief of police but not upon the recorder, the circuit judge to whom the appeal was made had no other course open to him then to affirm the judgment of the recorder's court. *City of Anderson v. Ashley*, 197 S. C. 152, 14 S. E. (2d) 897.

§ 967. Return on appeal—contents—hearing in general sessions.—In the event of an appeal the recorder shall make a return to the tribunal to which the appeal is taken, and the appeal shall be heard by the city council, or presiding judge, as the case may be, upon such return. The return of the recorder shall consist of a written report of the charges preferred, the testimony, the proceedings and the sentence or judgment, and where the testimony has been taken by a stenographer as herein provided, shall

embrace the stenographer's report of the testimony. If the appeal is taken to the court of general sessions said return shall be filed with the clerk of the court of general sessions of the county in which the trial is had, and the cause shall be docketed for trial in the same manner as is now provided in case of appeals from magistrates' courts.

1932 Code, §§ 955, 7256; Civ. C. '22, § 4411; Civ. C. '12, § 3008; Cr. P. '22, § 58; Cr. C. '12, § 57; 1902 (23) 1048.

Appeals from inferior courts in criminal cases—see § 794.

ARTICLE 3

Cities of 1,500 and Not over 20,000

§ 968. Establish — jurisdiction — powers. — It shall be lawful for the city council of any city in this State whose population by the last census was not less than fifteen hundred and not more than twenty thousand, or which may now or hereafter by actual enumeration have such population within said limits, by ordinance duly enacted, to establish in said city a municipal court for the trial and determination of all cases arising under the ordinances of such city.

Every municipal court established under the authority of this section shall be vested with all the powers and jurisdiction, and be held and conducted in the same manner, and be subject to all the terms and provisions which are created, expressed and declared in and by sections 959 thru 967.

1932 Code, §§ 972, 7246; Cr. P. '22, § 59; Civ. C. '22, § 4401; Cr. C. '12, § 58; Civ. C. '12, § 3001; 1904 (23) 397; 1905 (24) 911; 1915 (29) 197; 1923 (33) 164.

This section is not void as an illegal delegation of legislative powers. *Green-ville v. Foster*, 101 S. C. 318, 85 S. E. 769.

Defendant in recorder's court under warrant charging him with breach of

peace and not vagrancy could not, while in said court, be orally charged with vagrancy and tried without warrant for same. *State v. Praser*, 173 S. C. 284; 175 S. E. 551.

ARTICLE 4

Towns under 1,000

§ 969. Draw jurors from territory adjacent.—Whenever it shall appear that a sufficient number of competent jurors cannot be had for the trial of cases arising under the ordinances within the corporate limits of a town of less than one thousand inhabitants, it shall be lawful for a jury or any deficiency of jurors to be drawn, as now provided by law, from the territory adjacent to such towns: *provided*, that no person shall be compelled to serve as juror who resides more than five miles from such town.

1932 Code, § 7245; Civ. C. '22, § 4400; 1912 (27) 773.

ARTICLE 5.**Recorder, Bennettsville**

§ 970. City council employ — duties — compensation — appeal. — The city council of Bennettsville, South Carolina, is hereby authorized and empowered to employ a recorder whose duty it shall be to try all offenses against the city ordinance and said city council is hereby authorized and empowered to fix the amount of compensation of said recorder and the times of payment thereof. The jurisdiction of the city recorder shall be the same as that heretofore exercised by the mayor of the town of Bennettsville, and there shall be the same right of appeal and trial in the court of said city recorder as has heretofore existed under the law in all trials before the mayor in the town of Bennettsville.

1932 Code, § 7400; 1927 (35) 977.

ARTICLE 6**Recorder's Court for Columbia.**

971. Jury commissioners.
971-1. Jury.

971-2. Challenges—extra names.

§ 971. Jury commissioners, Columbia—duties—jury box.—The mayor and councilmen of the city of Columbia are hereby declared to be the jury commissioners for the recorder's court for the city of Columbia, and shall, within the first ten days of each year, prepare and place in a box, to be known as the jury box, the names of each and every citizen within the corporate limits of said city eligible to do jury duty, and shall lock and keep said jury box convenient for the drawing of a jury, as hereinafter specified.

1932 Code, § 7252; Civ. C. '22, § 4407; 1916 (29) 821.

§ 971-1. Jury may be had in criminal cases—how drawn.—In all criminal cases in said recorder's court in which a jury may be demanded by either the city or the defendant, a jury shall be selected in the following manner: The city clerk, or if said clerk cannot be had, any other person appointed by the recorder of said city, shall draw out of the jury box referred to in section 7252, eighteen ballots, each containing the names of an eligible juror, and list the said eighteen names in duplicate, delivering one copy of same to the attorney for the said chief, and one copy to the defendant or his attorney.

1932 Code, § 7253; Civ. C. '22, § 4408; 1916 (29) 821.

§ 971-2. Challenges—additional names.—The city clerk shall place the eighteen ballots so drawn out in some box or hat and shall draw out one, and the person so drawn out shall be one of the jury, unless challenged by either party; and the city clerk shall then proceed until he shall have drawn six, who shall not have been challenged. Neither party being allowed more than six challenges, but if the first twelve drawn shall be

challenged and the parties do not agree to a choice, the last six shall be the jury, and when any of the six jurors so drawn cannot be had or are disqualified by law to act in such case, and the parties do not supply the vacancy by agreement, the city clerk shall proceed to draw out of said jury box ballots for three times the number thus deficient, which shall be disposed of and be drawn as above provided.

1932 Code, § 7254; Civ. C. '22, § 4409; 1916 (29) 821.

ARTICLE 7.

Municipal Court in Spartanburg

972. Established—hours.

972-4. Duties of police.

972-1. Jurisdiction.

972-5. Procedure—appeals.

972-2 and 972-3. Judge.

§ 972. Established hours.—There is hereby established a municipal court in the city of Spartanburg, South Carolina, which shall meet at the hour of 10 a. m. every day except Sundays and legal holidays.

1932 Code, § 966; Cr. P. '22, § 49a; 1920 (31) 827; 1934 (38) 1273.

§ 972-1. Jurisdiction—sentence—court room.—The municipal court of the city of Spartanburg shall have jurisdiction to try and determine all cases arising under the ordinances of the city of Spartanburg, and shall have all judicial powers and duties as are now conferred upon the mayor of said city, either by its charter or by the laws of the State of South Carolina.

Whenever a person tried in said municipal court of the city of Spartanburg shall have been declared guilty of violating an ordinance of said city of Spartanburg, the municipal judge shall have power to impose a fine or imprisonment, in the alternative, not to exceed the limits prescribed for such violation by the ordinances of said city of Spartanburg, not to exceed a fine of one hundred (\$100.00) dollars, or imprisonment for not more than thirty days: *provided*, that the said municipal judge shall have the power and right to remit or suspend, at any time after conviction, and for reason appearing to the satisfaction of said municipal judge, any part of said fine or sentence.

The said municipal court shall have the use of the city hall of the city of Spartanburg for holding the sessions of said municipal court.

1932 Code, 967; Cr. P. '22, § 50a; 1920 (31) 827.

§ 972-2. Judge—appointment—term—salary—oath.—The municipal court hereby established shall be held by a judge, who shall be appointed by the Governor, upon recommendation of a majority of the members of the city council of the city of Spartanburg, and the judge shall hold his office for a term of two years, and until his successor is duly appointed and qualified. The salary of the said municipal judge is fixed at the sum of twelve hundred (1,200.00) dollars per annum, payable in equal monthly installments, out of the funds of said city of Spartanburg. Before entering upon

the duties of his office, the municipal judge shall take and subscribe the usual oath of office.

1932 Code, § 968; Cr. P. '22, § 52a; 1920 (31) 827; 1923 (33) 850; 1939 (41) 139.

§ 972-3. Judge—vacancy—special judge.—In case of a vacancy in the office of municipal judge of the city of Spartanburg, it shall be the duty of the Governor, upon the recommendation of a majority of the members of the city council of the city of Spartanburg, to appoint a successor to fill the unexpired term: *provided*, that in case of the absence from the State or temporary disability of said municipal judge, a special judge to fill said office temporarily may be appointed by the Governor, upon the recommendation of a majority of the members of the city council of the city of Spartanburg.

1932 Code, § 969; Cr. P. '22, § 53a; 1920 (31) 827; 1923 (33) 850.

§ 972-4. Duties of police.—It shall be the duty of the chief of police of the city of Spartanburg to attend upon the sessions of said court, and the said chief of police and the policemen of said city of Spartanburg shall be subject to the orders of said court, and shall execute the orders, writs and mandates thereof, and shall perform such other duties in connection with said court as may be prescribed by the ordinances of said city of Spartanburg.

1932 Code, § 970; Cr. P. '22, § 54a; 1920 (31) 827.

§ 972-5. Practice—procedure—appeals.—The general and statutory law applicable to the mayor's court shall apply in said municipal court of the city of Spartanburg, and the same rules of practice as obtained in relation to the mayor's court shall likewise obtain in said municipal court; the laws, rules and practice regulating appeals from the proceedings, judgment and sentence of the mayor's court to the court of general sessions and to the Supreme Court shall apply in the municipal court.

1932 Code, § 971; Cr. P. '22, § 54b; 1920 (31) 827.

ARTICLE 8

Recorder, Pageland

§ 972-6. Election—term—jurisdiction.—The office of recorder for the town of Pageland is hereby created and established. The said recorder shall be elected by the town council of the town of Pageland and his term of office shall be coterminous with that of the mayor. The said recorder shall be paid such salary or compensation as the town council of the town of Pageland shall ordain. The jurisdiction and powers of said recorder in criminal matters shall be the same as that of the mayor of said town of Pageland. He shall have all the power and authority of magistrates in criminal cases and all power and authority in criminal matters vested in mayors of the class of the town of Pageland by all general and special law. The said recorder may establish and prescribe all necessary and proper rules of procedure in said recorder's court.

1939 (41) 198.

CHAPTER 60

Proceedings in Courts of General Sessions

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| 973 thru 977. Grand juries. | 982. Empaneling of jurors. |
| 978. Person indicted entitled to copy. | 983. Defendant's witnesses. |
| 979 and 980. Right of counsel. | 984. Opening and publication of sealed sentence. |
| 981. No continuance on traverse of indictment. | 985. Indictment of public officer. |
| 988. Jurisdiction of circuit courts. | |

§ 973. Grand jury—drawing.—The clerk of the court of general sessions in each county, not less than fifteen days before the commencement of the first term of the court in each year, shall issue writs *venire facias* in each county for twelve grand jurors to be returned to the court, who, together with the six grand jurors for whose selection provision has hereinbefore been made, shall be held to serve at each term thereof throughout said year, and until another grand jury is selected and empaneled. During the last term of the court of general sessions held in each county for such year, six of the grand jurors then in service shall be drawn as hereinafter provided, who, together with twelve grand jurors selected in the manner herein prescribed, shall constitute the grand jury for such year: *provided*, that no person shall serve as a grand juror for more than two consecutive years: *provided*, that in each county in this State containing a city having more than seventy thousand (70,000) population, according to the official United States census, the grand jury shall consist of six of the grand jurors then in service to be drawn by the jury commissioners for said county prescribed in the proviso to section 607, who, together with the twelve grand jurors selected in the manner herein prescribed, shall constitute the grand jury for such year; *provided*, that no person shall serve as a grand juror for more than two consecutive years.

1932 Code, § 973; Cr. P. '22, § 64; Cr. C. '12 § 62; Cr. C. '02, § 38, Subdivisions b, c; 1901 (23) C34; 1903 (24) 108; 1939 (41) 27; 1941 (42) 70.

The act of 1897, XXII, 419, was directory only, and not mandatory. *State v. Powers*, 59 S. C. 200, 201, 37 S. E. 690.

This is so as to time in which *venire* must issue. *State v. Smith*, 38 S. C. 270, 16 S. E. 997, 27 L. R. A. 786, Ann. Cas. 13D, 96.

And *venire* issued in less than 15 days does not affect validity of indictment.—It is a mere irregularity to issue the *venire* 13 instead of 15 days before the convening of the court, and an indictment found by them is valid. *State v. Smith*, 38 S. C. 270, 16 S. E. 997, 27 L. R. A. 786, Ann. Cas. 13D, 96.

But the writ of *venire* must have the seal of the court, or it is invalid. *State v. Dozier*, 2 Speer 211, 216, 27 L. R. A. 779, Ann. Cas. 14C, 759; *State v. Williams*, 1 Rich. 188, 189, 27 L. R. A. 779, Ann. Cas. 14C, 759.

But it is not necessary that the impression of the device should be manifest on the seal. *State v. McElmurray*, 3 Strob. 33, 39, 43 Am. Dec. 83, 95 Am. St. Rep. 767, 24 L. R. A. (N. S.) 779; *State v. Thayer*, 4 Strob. 286, 287.

And it is not necessary that the names of the jurors should be embodied in the writ; it is sufficient if they be arranged in lists below the signature of the clerk. *State v. McElmurray*, 3 Strob. 33, 39, 43 Am. Dec. 83, 95 Am. St. Rep. 767, 2 L. R. A. (N. S.) 779.

Grand jurors are not officers. *State v. Graham*, 79 S. C. 116, 60 S. E. 431, L. R. A. 1917A, 240.

If grand jury drawn to serve during the year be discharged before the impaneling, the grand jury of the preceding year may act. *State v. McEvoy*, 9 S. C. 280, 12 Am. St. Rep. 904, 86 Am. St. Rep. 647, 27 L. R. A. 787, 56 L. R. A. 388, 27 L. R. A. (N. S.) 705.

Grand jury need not consist of more than twelve members. *State v. Clayton*, 11 Rich. 581, 27 L. R. A. 779, 846, 28 L. R. A. 35, Ann. Cas. 12C, 30.

But writ may be issued for return of eighteen jurors where previous writ quashed.—Under this section, writ of *venire facias* may be issued for eighteen grand jurors to be returned, instead of twelve, where a previous *venire* has

been quashed, under which grand jurors for the county had been drawn. *State v. Powers*, 59 S. C. 200, 37 S. E. 690, 692.

Magistrates are disqualified from acting as jurors. *State v. Graham*, 79 S. C. 116, 60 S. E. 431, L. R. A. 1917A, 240.

But mail carriers are not disqualified. *State v. Graham*, 79 S. C. 116, 60 S. E. 431, L. R. A. 1917A, 240.

As to who may be grand jurors, see § 976 and note thereto.

Presentment of grand jury as to management of county affairs is advisory.—The presentment of a grand jury as to the management of county affairs is only

advisory to the county commissioners; and if, on being served with the presentment, they make return that they disapprove of the recommendations of the grand jury, and decline to comply, the court will not order an indictment against them. *State v. Commissioners*, 12 Rich. 300.

Disqualification of the jury commissioner to act must be determined by the trial court. *State v. Perry*, 73 S. C. 199, 53 S. E. 169.

Duties and powers of grand jury.—See generally *State v. Bramlett*, 166 S. C., 323, 164 S. E., 873.

§ 974. Drawing of grand jurors under extraordinary circumstances.—

Whenever for any cause, such as the quashing of the array or there being no court at the fall term, there has heretofore been or shall hereafter be a failure to draw the names of six members of the grand jury for any county to serve on the grand jury for the county for the ensuing year as required by law, there shall be drawn, at the proper time for drawing the grand jury, eighteen names from the jury box, instead of twelve, and the said eighteen persons, whose names are so drawn, shall be summoned and shall serve as the grand jury for the year in question, and shall be the lawful grand jury for such county for that year, and until their successors be drawn, summoned and qualified according to law.

1932 Code, § 974; Cr. P. '22, § 65; Cr. C. '12, § 63; Cr. C. '02, § 38, Subdivision d; 1903 (24) 108.

§ 975. Drawing grand jurors by clerk to hold over.—

When the judge entitled to preside fails to attend and to hold the fall or last term of the court of common pleas and general sessions for any county, the clerk of the court shall have the right, and is required hereby, to make the drawing from the outgoing grand jury, that is to say, from the grand jury for the then current year, of the names of the six members who shall serve as a part of the grand jury for the then ensuing year, with the same force and effect as if the names of the said six grand jurors had been drawn in the presence of the presiding judge.

1932 Code, § 975; Cr. P. '22, § 66; Cr. C. '12, § 64; Cr. C. '02, § 38, Subdivision e; 1903 (24) 108.

§ 976. Who to be grand jurors and who jurors for trials.—

Grand jurors shall be drawn, summoned, and returned in the same manner as jurors for trials, and when drawn at the same time as jurors for trials, the persons whose names are first drawn, to the number required, shall be returned as grand jurors, and those afterwards drawn, to the number required, shall be jurors for trials.

1932 Code, § 976; Cr. P. '22, § 67; Cr. C. '12, § 65; Cr. C. '02, § 39; G. S. 2630; R. S. 39; 1871 (14) 694.

Section 639 does not apply to grand jurors. *State v. Boyd*, 56 S. C. 283, 34 S. E. 661; *State v. Rafe*, 56 S. C. 379, 34 S. E. 660.

Assigning those commissioner deemed best suited for grand jury duty instead of drawing jurors strictly according to

section not fatal defect in drawing of jurors.—Although it was an irregularity under this section, the jury commissioner's assigning of those he supposed best suited for grand jury duty, in the drawing of names for the grand and petit jury, was not such a defect as to affect

the verdict. *State v. Smalls*, 73 S. C. 516, 53 S. E. 976, 977. See, *State v. Wood*, 130 S. C. 88, 125 S. E. 566, 567.

And objection as to qualification of grand juror comes too late after pleading to the indictment. *State v. Boyd*, 56 S. C. 382, 34 S. E. 661.

As to specific section governing defects in drawing of jurors, see § 640 and note thereto.

And the fact that the grand jury which found the indictment contained no member of the race to which the defendant belongs is not, of itself, a ground for quashing indictment. *State v. Brown-*

field, 60 S. C. 509, 39 S. E. 2, 66 L. R. A. 369.

Waiver of irregularities in drawing.—*State v. Berkeley*, 64 S. C. 194, 41 S. E. 961.

Deficiency in the number of grand jurors is to be supplied as in § 618. The accused is not entitled to demand a copy of the jury list. *State v. Merriman*, 34 S. C. 16, 12 S. E. 619, 82 Am. St. Rep. 28, 95 Am. St. Rep. 771, 15 L. R. A. 672, 20 L. R. A. 615, 45 L. R. A. 689, 700, 14 L. R. A. (N. S.) 740, 30 L. R. A. (N. S.) 848, L. R. A. 1918A, 667, 694.

§ 977. Foreman of grand jury swear witnesses.—The foreman of the grand jury or acting foreman in the circuit courts of any county of the state shall have the authority and power to swear witnesses, whose names shall appear on the bill of indictment, in the grand jury room: *provided*, that the provisions of this section shall not apply to Berkeley, Sumter, Newberry, Pickens, Colleton, Lee, Hampton, Lexington, Richland, Greenwood, Kershaw, Saluda and Abbeville Counties: *provided, however*, that no witnesses shall be sworn except those who have been bound over or subpoenaed in the manner now provided by law, this last proviso, however, shall not apply to Anderson County.

1932 Code, § 977; Cr. P. '22, § 68; 1913 (28) 139; 1914 (28) 577; 1916 (29) 819; 1917 (30) 147; 1930 (36) 1183; 1933 (38) 565; 1935 (39) 193; 1936 (39) 1749; 1937 (40) 60.

Witnesses examined before grand jury must be sworn in open court. *State v. Kilcrease*, 6 S. C. 444, 28 L. R. A. 321.

Court will not inquire into testimony that influenced the jury. *State v. Boyd*, 2

Hill 288, 27 Am. Dec. 376, 16 Am. Dec. 283, 28 L. R. A. 320, 52 L. R. A. 174, 2 L. R. A. (N. S.) 863, 47 L. R. A. (N. S.) 1208.

§ 978. Persons indicted for capital offenses to have copy of their indictment.—Whoever shall be accused and indicted for any capital offense whatsoever shall have a true copy of the whole indictment, but not the names of the witnesses, delivered to him, three days, at least before he shall be tried for the same, whereby to enable him to advise with counsel thereupon, his attorney or attorneys, agent or agents, or any of them requiring the same, and paying the officer his usual fees for the copy of every such indictment.

1932 Code, § 978; Cr. P. '22, § 69; Cr. C. '12, § 66; Cr. C. '02, § 40; G. S. 2632; R. S. 40; 1731 (3) 286.

Failure to allow defendant three days' inspection of indictment before arraignment is not error under this section. *State v. Poston*, 118 S. C. 232, 110 S. E. 399.

But the demand for the copy of the indictment should be made, at the latest, at the arraignment. *State v. Winningham*, 10 Rich. 257, Ann. Cas. 13D, 1099.

And motion for continuance at arraignment may be demand for copy.—To move for a continuance at arraignment, on the ground that the prisoner was entitled to a copy of the indictment three days before trial, was considered a demand for the copy. *State v. Winning-*

ham, 10 Rich. 257, Ann. Cas. 13D, 1099.

But arraignment without demand for the copy amounts to a waiver. *State v. Winningham*, 10 Rich. 257, Ann. Cas. 13D, 1099.

And when made after trial had commenced and more than three days after arraignment, it was properly refused. *State v. Briggs*, 27 S. C. 80, 2 S. E. 854, Ann. Cas. 13D, 1100.

The three days are inclusive of day on which motion is made for copy. *State v. Briggs*, 1 Brev. 8.

As to computation of time in general, see § 821 and note thereto.

Where defendant, charged with mur-

der, when arraigned on Monday, demanded three days' sight of indictment, trial was properly held on Thursday. *State v. Platt*, 154 S. C. 1, 151 S. E. 206, 209.

And refusal to move for continuance on day set for trial is waiver of right to copy in time allowed.—On Monday the prisoner was arraigned and his counsel demanded a copy of the indictment, which was furnished the same day. The counsel then said they thought they would be ready for trial on Wednesday, but on that day they were not ready, and declined to move for delay. It was held that they waived right to have copy of indictment three days before trial. *State v. Colclough*, 31 S. C. 156, 9 S. E. 811, Ann. Cas. 13D, 1099 Ann. Cas. 16B,

144.

The deprivation of the right allowed by this section is a defect entitling the defendant to a new trial. *State v. Weldon*, 91 S. C. 29, 74 S. E. 43, 45, 39 L. R. A. (N. S.) 667, Ann. Cas. 13E, 801.

But provisions of section as to payment of fees for copy of indictment are positive.—Under this section, the defendant in order to be entitled to a copy of the indictment, must tender the usual fees for such copy. *State v. Wright*, 140 S. C. 363, 138 S. E. 828, 830.

Names of witnesses for prosecution need not be furnished to defendant. *State v. Robison*, 61 S. C. 106, 39 S. E. 247; *Spartanburg v. Parris*, 85 S. C. 227, 228, 67 S. E. 246, Ann. Cas. 12D, 677, Ann. Cas. 14B, 902.

§ 979. May have counsel.—Every such person so accused and indicted, arraigned or tried, for any capital offense, shall be received and admitted to make his full defense by counsel learned in the law and to make any proof that he can by lawful witness or witnesses, who shall then be upon oath, for his just defense in that behalf.

1932 Code, § 979; Cr. P. '22, § 70; Cr. C. '12, § 67; Cr. C. '02, § 41; G. S. 2633; R. S. 41; 1731 (3) 286.

§ 980. Court may assign counsel.—In case any person so accused or indicted shall desire counsel, the court before whom such person shall be tried is authorized and required, immediately upon his request, to assign to such person such and so many counsel, not exceeding two, as the presiding judge shall designate, to whom such counsel shall have free access, at all seasonable times, either before, at, or after the said trial, any law or usage to the contrary notwithstanding.

1932 Code, § 980; Cr. P. '22, § 71; Cr. C. '12, § 68; Cr. C. '02, § 42; G. S. 2634; R. S. 42; 1731 (3) 286; 1939 (41) 126.

But in *State v. Jones*, 172 S. C. 130, 173 S. E. 77, where defendants were convicted of highway robbery and lar-

ceny, the court held that the trial court was not required to assign counsel for defendants not represented by attorneys.

§ 981. Traverse of indictment not a continuance.—A traverse of any indictment shall not, in any court of criminal jurisdiction in this State, of itself, operate to continue the case.

1932 Code, § 981; Cr. P. '22, § 72; Cr. C. '12, § 69; Cr. C. '02, § 43; G. S. 2635; R. S. 43; 1871 (14) 534.

§ 982. Juries to be impaneled, etc., in each case.—In impaneling juries in criminal cases, the jurors shall be called, sworn, and impaneled anew for the trial of each case, according to the established practice, and their foreman shall be appointed by the court or by the jury when they retire to consider their verdict.

1932 Code, § 982; Cr. P. '22, § 73; Cr. C. '12, § 70; Cr. C. '02, § 44; G. S. 2636; R. S. 44; 1871 (14) 692.

See generally, as to practice of impaneling juries, *State v. Slack*, 1 Bail. 330, 78 Am. Dec. 258; *State v. Sims*, 2 Bail. 29, 1 Am. Dec. 574, 23 Am. Dec. 128, 103 Am. St. Rep. 28, 50 L. R. A. (N. S.) 951; *State*

v. Crank, 2 Bail. 66, 1 Am. Dec. 574, 23 Am. Dec. 117, 35 Am. Dec. 756, 36 Am. Dec. 533, 39 Am. Dec. 452, 45 Am. Dec. 473, 47 Am. Dec. 238, 51 Am. Dec. 375, 58 Am. Dec. 248, 80 Am. Dec. 97, 3 Am.

St. Rep. 280, 6 Am. St. Rep. 248, 18 L. R. A. (N. S.) 790, 50 L. R. A. (N. S.) 951, Ann. Cas. 14C, 326; State v. Kleinback, 2 Spears 418, 421; State v. Brown,

3 Strob. 508, 514, 71 Am. Dec. 671, 51 Am. Rep. 315, 12 A. L. R. 805; State v. Harding, 70 S. C. 395, 50 S. E. 11.

§ 983. Pay of defendant's witnesses in criminal cases—process to compel attendance.—In all criminal prosecutions the accused shall have compulsory process for obtaining witnesses in his favor; and in felonies, and no other cases, such witnesses shall receive the same pay as the State's witnesses upon the certificate of the trial judge that the testimony of such witness was material to the defense: *provided*, that the compulsory process hereinabove mentioned shall be in misdemeanors a subpoena under the official signature of the clerk of the court, or other judicial officer, which subpoena or copy shall be served upon the witness a reasonable time before such witness is required to attend court, and for any disobedience to such subpoena the court may punish for contempt.

1932 Code, § 983; Cr. P. '22, § 74; Cr. C. '12, § 71; Cr. C. '02, § 45; G. S. 2638; R. S. 45; 1731 (3) 286; 1839 (11) 23; 1896 (22) 102.

See § 4964

Cross reference.—As to provision for obtaining witnesses by compulsory process, see const. art. 1, § 18, and note thereto.

It must be shown that witness wanted is one "in Favor" of defendant.—Under this section, there must be a showing that the person wanted is really a witness "in favor" of the defendant, and that his testimony would be material to the defendant's cause. State v. Pope, 78 S. C. 264, 58 S. E. 815, 816.

And it is not error to refuse to process a witness that is a resident of another state.—State v. Murphy, 48 S. C. 1, 25 S. E. 43, 44, 82 Am. St. Rep. 28, L. R. A. 1918E, 527, Ann. Cas. 13C, 433, Ann. Cas.

16A, 1067.

Payment of witnesses limited to felonies.—It is manifest from this section that the liability of a county to pay fees of defendant's witnesses is limited to felonies. Henderson v. Evans, 51 S. C. 331, 29 S. E. 5, 40 L. R. A. 26; Whittle v. Saluda County, 59 S. C. 554, 38 S. E. 168, 8 L. R. A. (N. S.) 509.

As to specific section providing for payment of witnesses in state cases by county, see § 3859 and note thereto.

And in cases of misdemeanor defendant cannot have his witnesses bound over. State v. Thomas, 8 Rich. 295, Ann. Cas. 12A, 976.

§ 984. Clerk of court required to open and publish sealed sentences.—Upon the arrest of a party for whom there is a sealed sentence, the sheriff shall forthwith carry the prisoner before the clerk of the court, who shall, in the presence of the prisoner and the attorney of record, if there be one, open and publish said sentence, and it shall at once be enforced unless stayed by appeal.

1932 Code, § 984; Cr. P. '22, § 75; Cr. C. '12, § 72; 1910 (26) 587, 762; 1911 (27) 135.

§ 985. Duty of presiding judge when officer is indicted, etc.—It shall be the duty of the presiding judge before whom any public officer as described in section 1525, shall be tried, to cause a certified copy of the indictment to be immediately transmitted to the Governor, who shall upon receipt thereof declare by proclamation his office vacant, and the same shall be filled as in the case of death or resignation of the incumbent. And whenever it shall be brought to the notice of the Governor by affidavit that any officer who has the custody of public or trust funds is probably guilty of embezzlement, or the appropriation of public or trust funds to private use, then the Governor shall direct his immediate prosecution by the proper officer, and, upon true bill found, the Governor shall suspend such officer and appoint one in his stead until he shall have been acquitted

by the verdict of a jury. In case of conviction the office shall be declared vacant and the vacancy filled as may be provided by law.

1932 Code, § 985; Cr. P. '22, § 76; Cr. C. '12, § 546; Cr. C. '02, § 389; G. S. 2556; R. S. 306; 1896 (22) 312.

§ 988. Jurisdiction of circuit courts.—The circuit courts of this State, within their respective circuits, in the counties of which the circuits are respectively composed, shall have cognizance of all offenses committed against the provisions of sections 1385 to 1388.

1932 Code, § 988; Cr. P. '22, § 79; Cr. C. '12, § 330; Cr. C. '02, § 243; G. S. 2577; R. S. 208; 1871 (14) 566.

CHAPTER 61

Procedure against Corporations

989. Procedure in general.

990. Magistrates' courts.

991. Court of general sessions.

992. Appeal.

§ 989. Procedure against corporations for violating criminal laws.—Whenever any corporation doing business in this State, whether incorporated under the laws of this State or not, shall be charged in any court of competent jurisdiction with the violation of any of the criminal laws of the State appertaining to corporations, the court in which such prosecution originates shall obtain and have jurisdiction of such offending corporation in the following manner, to-wit: If the offense charged be within the jurisdiction of the magistrates' courts in this State, it shall be that whenever any person shall make an affidavit before any magistrate that such corporation has violated any of the criminal laws of this State in any matter now provided for by law, or that hereafter be provided for by law, it shall be the duty of such magistrate to issue a warrant against such offending corporation in which shall be stated the substance of the offense charged against such corporation, together with a notice to such corporation stating the time and place and when and where such corporation must or shall appear for trial; and in such case, a copy of the warrant shall be served upon such corporation in the manner now provided by law for the service of process in civil actions. And when there is no agent or officer of the company, the service shall be made upon such person as is in charge of the property of the said corporation, and if no such person can be found, it shall be served upon the secretary of state, who shall transmit a copy of the same by mail to the last known residence of the managing officer of said corporation, directed to said officer: *provided*, that no criminal proceeding shall be instituted against any corporation unless the offense charged, or some part thereof, shall have been committed in the county where the prosecution shall be instituted: *and provided, further*, that in the case of a foreign corporation, it shall be necessary that such corporation have an agent or other officer within the county upon whom such process may be served in accordance with the provisions in civil actions; but if such foreign corporation have no agent or other officer within the county where the offense, or some part thereof, has been committed, then process shall be served on the person appointed by such corporation to

receive service of process as now required by law regulating foreign corporations, or upon the insurance commissioner in cases when by law service of process in civil actions may be made upon the insurance commissioner, and such service shall be made in the same manner provided by law for service of summons in civil actions against such corporations.

1932 Code, § 989; Civ. C. '22, § 4297; Civ. C. '12, § 2830; 1911 (27) 39.

§ 990. In magistrate's court.—If such corporation shall appear, or shall fail to appear, after such service, the magistrate shall proceed with the trial as in criminal cases, and if such defendant corporation shall be found guilty of the offense charged whether by a verdict of a jury or by the findings of the magistrate in case a trial by jury be waived by the party or parties appearing, the magistrate shall pronounce sentence in conformity with the law in such case, and such sentence may be enforced by an execution against the property of such defendant corporation in the same manner as now provided by law for enforcing the judgments of magistrates' courts: *provided*, that nothing herein shall be construed to prevent the right of appeal by either party to the court of general sessions, as is now provided by law in criminal cases within the jurisdiction of magistrates.

1932 Code, § 990; Civ. C. '22, § 4298; Civ. C. '12, § 2831; 1911 (27) 41.

§ 991. In court of general sessions.—If the offense charged against such corporation be cognizable by the courts of general sessions, the solicitor shall hand out a bill of indictment to the grand jury of the county in which such offense, or some part thereof, has been committed, and if the grand jury shall return a true bill, the solicitor shall cause a copy of such indictment to be served on such corporation offending or upon such of its officers or agents as is now provided by law for the service of process in civil actions, and in the manner indicated in the preceding section, together with a notice to such corporation of the term of the court of general sessions in which such case will be tried; and the sentence and judgment of the court of general sessions shall be enforced in the same manner by execution against the property of the defendant as is now provided by law for enforcing the judgments of the courts of common pleas in civil actions.

1932 Code, § 991; Civ. C. '22 § 4299; Civ. C. '12, § 2832; 1911 (27) 41.

§ 992. Appeal.—In all cases the right of appeal shall be preserved, and the procedure therein shall be the same as is now provided by law in appeals in criminal cases, whether in the magistrates' courts or in the courts of general sessions.

1932 Code, § 992; Civ. C. '22, § 4300; Civ. C. '12, § 2833; 1911 (27) 41.

CHAPTER 62

Rights of Persons Accused

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| 993. Information as to grounds of arrest. | 997. Methods of conviction. |
| 994. Double jeopardy and multiplication of charges. | 998. Arraignment on new indictment. |
| 995. Offenses prosecuted by indictment. | 999. No punishment until legally convicted. |
| 996. Counsel and witnesses. | |

§ 993. Right to be informed of ground of arrest, etc. — penalty. — Every person arrested by virtue of process, or taken into custody by an officer in this State, has a right to know, from the officer who arrests or claims to detain him, the true ground on which the arrest is made; and an officer who refuses to answer a question relative to the reason for such arrest, or answers such question untruly, or assigns to the person arrested an untrue reason for the arrest, or neglects on request to exhibit to the person arrested, or any other person acting in his behalf, the precepts by virtue of which such arrest is made, shall be punished as for a misdemeanor.

1932 Code, § 993; Cr. P. '22, § 80; Cr. C. '12, § 74; Cr. C., '02, § 47; G. S. 2447; R. S. 46.

§ 994. Double jeopardy and multiplication of charges.—Whenever a municipal court or a magistrate's court shall have acquired jurisdiction by reason of a person or persons committing an act which is alleged to be in violation of a municipal ordinance and which is in violation of the criminal law of South Carolina, that a conviction or an acquittal by the first court acquiring jurisdiction shall be a complete bar to a trial by another court for the same alleged unlawful act or acts: *provided, however*, that this shall have no application to violations of the prohibition law.

Whenever a person or persons be accused of committing an act which is susceptible of being designated as several different offenses, the magistrate of the municipal court upon the trial of the said person or persons shall be required to elect which charge to prefer, and a conviction or an acquittal upon such elected charge shall be a complete bar to further prosecution for said alleged offense.

Whenever a person or persons shall have been convicted in a municipal court or a magistrate's court, such person or persons shall have the right, upon petition, to obtain from any circuit judge or justice of the Supreme Court at chambers or in open court, a writ of certiorari requiring such municipal court or magistrate to certify the entire records of the case together with a copy of the municipal ordinance, or a reference to the Criminal code as to the statute involved, as the case may be, and including the rulings, findings, and sentences, returnable at such time as such circuit judge or justice of the Supreme Court may direct, and upon the hearing of the writ such circuit judge or justice of the Supreme Court shall have same jurisdiction of the entire matter as circuit judges now have in cases appealed from municipal courts or magistrate's courts.

1932 Code, § 994; 1928 (35) 1317.

§ 995. Offenses to be prosecuted by indictment, except when information is authorized.—No person shall be held to answer in any court for an alleged crime or offense, unless upon indictment by a grand jury, except in the following cases:

(1) When a prosecution by information is expressly authorized by statute.

(2) In proceedings before a police court or magistrate; and,

(3) In proceedings before courts martial.

1932 Code, § 995; Cr. P. '22, § 81; Cr. C. '12, § 75; Cr. C. '02, § 48; G. S. 2448; R. S. 47.

This section is meant to carry into effect art. 1 § 17, of the State Constitution.

360, 13 L. R. A. (N. S.) 813, Ann. Cas. 18D, 830, 16 A. L. R. 1484.

State v. Brock, 61 S. C. 141, 39 S. E. 359,

§ 996. Accused may have counsel, witnesses, etc.—The accused shall, at his trial, be allowed to be heard by counsel, may defend himself, and shall have a right to produce witnesses and proofs in his favor, and to meet the witnesses produced against him face to face.

1932 Code, § 996; Cr. P. '22, § 82; Cr. C. '12, § 76; Cr. C. '02, § 49; G. S. 2449; R. S. 48.

Conduct interfering with rights of defendant under section.—The intrusion into the prisoner's dock, the counsel's place, the witness' chair, the jury's seats, of a large number of persons, part of a vast assemblage hostile to the prisoners, was calculated to terrify the prisoners,

intimidate the witnesses, and overawe the jury, and was an interference with the rights of the accused under this section. State v. Weldon, 91 S. C. 29, 74 S. E. 43, 45, 39 L. R. A. (N. S.) 667, Ann. Cas. 13E, 801.

§ 997. Persons indicted—how convicted.—No person indicted for an offense shall be convicted thereof, unless by confession of his guilt in open court, or by admitting the truth of the charge against him by his plea or demurrer, or by the verdict of a jury accepted and recorded by the court.

1932 Code, § 997; Cr. P. '22, § 83; Cr. C. '12, § 77; Cr. C. '02, § 50; G. S. 2450; R. S. 49.

The defendant is entitled to trial by jury after demurrer to indictment is over-

ruled. State v. Barden, 64 S. C. 206, 41 S. E. 959, L. R. A. 1915B, 649.

§ 998. Arraignment on new indictment.—If a person, on his trial, be acquitted upon the ground of a variance between the indictment and the proof, or upon an exception to the form or substance of the indictment, he may be arraigned again on a new indictment, and tried and convicted for the same offense, notwithstanding such former acquittal.

1932 Code, § 998; Cr. P. '22, § 84; Cr. C. '12, § 78; Cr. C. '02, § 51; G. S. 2451; R. S. 50.

Defendant not entitled to discharge where indictment held improper on appeal.—Under this section, the holding on appeal from conviction of murder, that the indictment without amendment was at fatal variance with proof on essential allegations as to place of death of deceased, and that amendment of indictment was improper, does not entitle defendant to be discharged from custody;

but he may be held subject to order of Court of General Sessions. State v. Platt, 154 S. C. 1, 151 S. E. 206, 213.

See generally, State v. Jenkins, 20 S. C. 351, 77 Am. Dec. 697, 92 Am. St. Rep. 115, 148; State v. Brown, 33 S. C. 151, 11 S. E. 641, 92 Am. St. Rep. 115, 23 L. R. A. 347, 40 L. R. A. (N. S.) 38, State v. Gowan, 178 S. C. 78, 182 S. E. 159.

§ 999. No person to be punished until legally convicted.—No person shall be punished for an offense unless duly and legally convicted thereof in a court having competent jurisdiction of the cause and of the person.

1932 Code, § 999; Cr. P. '22, § 85; Cr. C. '12, § 79; Cr. C. '02, § 52; G. S. 2452; R. S. 51.

CHAPTER 63

Indictments and Trials

- 1000. Grand juror not to be on trial jury.
- 1001. Liability for taxes not a cause for challenge.
- 1002. Number of challenges.
- 1003. Sufficiency of indictment.
- 1004. Defects in indictments.
- 1005. Amendments.
- 1006. Autre fois acquit or convict.
- 1007. Indictments for murder.
- 1008. Count for carrying weapons.
- 1009. Averment as to written instruments.
- 1010. Prisoner's witnesses.
- 1011. Testimony of defendant.
- 1012 and 1013. Incriminating evidence and privileged communication.
- 1012-1. Convicted persons testify.
- 1014 and 1015. Persons duelling or aiding in a duel.
- 1016. Depositions in rape trials.
- 1017. Injury within and death beyond State limits.
- 1018. Injury beyond and death within State limits.
- 1019. Parties in different counties.
- 1020. Injury in one county and death in another.
- 1021. Accessories before the fact.
- 1022. Accessories after the fact.
- 1022-1. Defendants waive indictment plead guilty.
- 1023. Costs where venue changed.

§ 1000. Jurors on grand jury which found indictment not serve on jury for trial thereof.—No member of the grand jury which has found an indictment shall be put upon the jury for trial thereof.

1932 Code, § 1000; Cr. P. '22, § 86; Cr. C. '12, § 80; Cr. C. '02, § 53; G. S. 2639; R. S. 52; 1731 (3) 279.

General note on jury trial.—The hours for holding court are to be determined by the judge. *State v. Walker*, 79 S. C. 107, 60 S. E. 309; *State v. Bethune*, 86 S. C. 143, 67 S. E. 466, 134 Am. St. Rep. 731, Ann. Cas. 12B, 971, 10 A. L. R. 862, 17 A. L. R. 1120, 1136.

And the same is true as to when the progress of the trial shall be suspended or resumed. *State v. Harding*, 70 S. C. 382, 50 S. E. 10; also as to when the jury shall be charged with the consideration of the case. *State v. Rowell*, 75 S. C. 494, 56 S. E. 23, 134 Am. St. Rep. 1047, 17 L. R. A. (N. S.) 611, 51 L. R. A. (N. S.) 840, Ann. Cas. 12D, 442, 22 A. L. R. 263.

So also is the granting or refusal of a continuance within the discretion of the judge. *State v. Lewis*, 1 Bay 1, 85 Am. St. Rep. 89; *State v. Sanders*, 68 S. C. 138, 46 S. E. 769, 68 S. C. 192, 47 S. E. 55, 31 L. R. A. (N. S.) 708; *State v. Box*, 66 S. C. 402, 44 S. E. 969; *State v. Hutto*, 66 S. C. 449, 45 S. E. 13, 19 L. R. A. (N. S.) 493, Ann. Cas. 12C, 50, Ann. Cas. 13C, 488; *State v. Boyleston*, 84 S. C. 574, 66 S. E. 1047, Ann. Cas. 12D, 1232, Ann. Cas. 13C, 440; *State v. Williams*, 76 S. C. 135, 141, 56 S. E. 783, 122 Am. St. Rep. 759, 24 L. R. A. (N. S.) 785, Ann. Cas. 13C, 488; *State v. Pope*, 78 S. C. 264, 265, 58 S. E. 815; *State v. Hunter*, 79 S. C. 84, 60 S. E. 241, Ann. Cas. 13C, 446; *State v. Rabens*, 79 S. C. 542; 60 S. E. 442, L. R. A. 1917B, 350, Ann. Cas. 17E, 183; *State v. Franklin*, 80 S. C. 332, 60 S. E. 953, 19 L. R. A. (N. S.) 493, 33 L. R. A. (N. S.) 146; *State v. Mills*, 79 S. C. 187, 60 S. E. 664, 37 L. R. A. (N. S.) 254, 16 A.

L. R. 417; *State v. Walker*, 79 S. C. 107, 60 S. E. 309; *State v. Hunt*, 83 S. C. 193, 65 S. E. 176; *State v. Kenny*, 77 S. C. 236, 57 S. E. 859; *State v. Edwards*, 86 S. C. 215, 68 S. E. 524, Ann. Cas. 13C, 440.

Likewise polling the jury is discretionary with the court. *State v. Daniel*, 77 S. C. 53, 57 S. E. 639, Ann. Cas. 12B, 1237. As well as a motion for severance of trial. *State v. Mitchell*, 49 S. C. 410, 27 S. E. 424; *State v. Kenny*, 77 S. C. 236, 57 S. E. 859.

After the court has acquired jurisdiction of the defendant, he may be tried for a misdemeanor in his absence. *State v. Rabens*, 79 S. C. 542, 60 S. E. 442, L. R. A. 1917B, 350, Ann. Cas. 17E, 183.

It is irregular to postpone trial to another week before another jury, when first jury was exhausted by challenges. *State v. Briggs*, 27 S. C. 80, 2 S. E. 854, Ann. Cas. 13D, 1100.

Arraignment is not necessary a second time because of mistrial. *State v. Stewart*, 26 S. C. 125, 1 S. E. 468, 103 Am. St. Rep. 160, 3 L. R. A. (N. S.) 1021, 13 L. R. A. (N. S.) 814, 24 L. R. A. (N. S.) 779.

Election is not required where indictment charges same offense, growing out of the same transaction in two counts. *State v. Jones*, 86 S. C. 17, 67 S. E. 160, Ann. Cas. 12D, 446, 13 A. L. R. 1263.

Objection to grand juror, who finds a bill of indictment at one court and serves as petit juror at next court comes too late after trial and conviction. *State v. O'Driscoll*, 2 Bay 153, 18 L. R. A. 474, 50 L. R. A. (N. S.) 970, Ann. Cas. 17D, 457.

As to failure to make objection to trial

on holiday, see *State v. Cook*, 78 S. C. 253, 59 S. E. 862, 125 Am. St. Rep. 788, 15 L. R. A. (N. S.) 1013, 45 L. R. A. (N. S.) 145, 13 Ann. Cas. 1051. As to permitting jury to disperse during trial, see *State v. Belcher*, 13 S. C. 459, 43 Am. Dec. 83, 86 Am. St. Rep. 641, 662, 103 Am. St. Rep. 160, 17 L. R. A. 484, 56 L. R. A. 360, 396, 24 L. R. A. (N. S.) 779. As to exercise of right to nolle pros., see *State v. Thomas*, 75 S. C. 477, 55 S. E. 893; *State v. Edwards*, 68 S. C. 318, 47 S. E. 305. As to argument of counsel, limits, see *State v. Duncan*, 86 S. C. 370, 68 S. E. 684, Ann. Cas. 12A. 1016. As to nolle pros., where both civil and criminal actions are being prosecuted for same assault, see *State v. Blyth*, 1 Bay, 166, 167,

35 L. R. A. 704, Ann. Cas. 15D, 1004; overruled in *State v. Frost*, 1 Brev. 385. As to entry of a nolle pros., at any time before the jury is charged, see *State v. McKee*, 1 Bail. 651, 21 Am. Dec. 499, 49 Am. Dec. 705, 1 Am. St. Rep. 525, 48 Am. St. Rep. 214, 103 Am. St. Rep. 160, 35 L. R. A. 704, 44 L. R. A. 697, 14 L. R. A. (N. S.) 553, 40 L. R. A. (N. S.) 1214, Ann. Cas. 1005, 12 A. L. R. 1007. As to inconsistent offenses alleged to have arisen out of same transaction, see *State v. Hendrix*, 86 S. C. 64, 68 S. E. 129.

Section applied in *State v. Goodwin*, 131 S. C. 67, 126 S. E. 519, in which error was found where two members of the grand jury served as members of the trial jury.

§ 1031. Liability for taxes not cause challenge—juror in actions recover forfeitures.—In indictments and penal actions for the recovery of a sum of money, or other thing forfeited, it shall not be a cause of challenge to a juror that he is liable to pay taxes in any county, city or town, which may be benefited by such recovery.

1932 Code, § 1001; Cr. P. '22, § 87; Cr. C. '12, § 81; Cr. C. '02, § 54; G. S. 2640; R. S. 53; 1871 (14) 693.

§ 1002. Right to challenge.—Any person or persons who shall be arraigned for the crime of murder, manslaughter, burglary, arson, rape, grand larceny, breach of trust when the same shall be punishable as for grand larceny, perjury, or forgery, shall be entitled to peremptory challenges not exceeding ten; and the State in such cases shall be entitled to peremptory challenges not exceeding five; and any person or persons who shall be indicted for any crime or offense other than those enumerated above shall have the right to peremptory challenges not exceeding five, and the State in such cases shall be entitled to peremptory challenges not exceeding five. But no right to stand aside jurors shall be allowed to the State in any case whatsoever: *provided*, that in no case where there shall be more than one defendant jointly tried shall more than twenty peremptory challenges be allowed in all to the defendants: *provided, further*, that in misdemeanors where there is more than one defendant jointly tried shall more than ten peremptory challenges be allowed in all to the defendants: *provided*, that in felonies where there is more than one defendant jointly tried, the State shall have ten (10) challenges, and the defendants not more than twenty (20) challenges.

1922 Code, § 1002; Cr. P. '22, § 88; Cr. C. '12, § 82; Cr. C. '02, § 55; R. S. 54; 33 Ed. 1; 1712 (2) 549; 1841 (11) 154; 1887 (19) 830; 1892 (21) 94; 1927 (35) 180; 1928 (35) 1161; 1930 (36) 1268; 1932 (27) 1145.

Statute in force at time of trial governed peremptory challenges available to state though act became effective after commission of offense. *State v. Rector et al.*, 166 S. C. 335, 164 S. E. 865.

Arraignment is only required in the cases here enumerated, and has never been necessary in cases of misdemeanors, where defendant may be tried in their absence. *State v. Meyers*, 40 S. C. 555, 18 S. E. 892; *State v. Brock*, 61 S. C.

141, 39 S. E. 359, 360, 13 L. R. A. (N. S.) 813, Ann. Cas. 17D, 830, 16 A. L. R. 1484.

The right to arraignment in larceny is determined by the value of the property stated in the indictment, whether below the value of twenty dollars. *State v. Moore*, 30 S. C. 69, 8 S. E. 437.

Defendant being once arraigned, and a mistrial had, need not be again arraigned on second trial. *State v. Stewart*, 26 S.

C. 125, 1 S. E. 468, 103 Am. St. Rep. 160, 3 L. R. A. (N. S.) 1021, 13 L. R. A. (N. S.) 814, 24 L. R. A. (N. S.) 779.

Constitutionality of Acts reducing number of challenges.—The Acts reducing the number of challenges to what is here allowed are not unconstitutional, as they do not prevent the right of trial by jury. *State v. Wyse*, 32 S. C. 45, 10 S. E. 612, 56 L. R. A. 390, 10 L. R. A. (N. S.) 808, Ann. Cas. 12B, 1237.

Peremptory challenge may be interposed at any time by the State before prisoner has spoken. *State v. Corley*, 43 S. C. 127, 20 S. E. 989, 2 L. R. A. (N. S.) 51; *State v. Haines*, 36 S. C. 504, 15 S. E. 555, 129 Am. St. Rep. 44; *State v. Harding*, 70 S. C. 395, 50 S. E. 11.

The right to stand aside a juror was considered a right that might be abused, and the proviso of this section was passed to destroy the right to "stand aside." *State v. Goodwin*, 131 S. C. 67, 126 S. E. 519, wherein the practice was described as follows: "The prosecuting attorney, under the old practice, exercised the right to stand a juror. After the panel was exhausted, without filling the juror, and the defense had exhausted its peremptory challenge, then the juror who had been 'stood aside' was presented and the defense was at the mercy of the prosecution."

When defendant entitled to five challenges.—Defendant on trial for burning stacks of hay and ricks of corn fodder was only entitled to five peremptory challenges. *State v. Pope*, 9 S. C. 273, 81 Am. Dec. 68. And the same is true where the charge is burning a frame building. *State v. Workman*, 15 S. C. 540, 544, 18 L. R. A. (N. S.) 777. Also in a trial for receiving stolen goods above \$20. *State v. Jacob*, 30 S. C. 131, 8 S. E. 698, 14 Am. St. Rep. 48, 897, 19 Am. St. Rep. 825, 31 L. R. A. 490.

Jurors drawn from supernumeraries.—Formerly, before the amendatory Act of December 23, 1882, no peremptory challenge, in trials for offenses not described in this section, could be made to jurors drawn from supernumeraries to fill places of those challenged. *State v. Cardozo*, 11 S. C. 195, 197, 51 Am. Dec. 94, 27 L. R. A. 787, 52 L. R. A. 839, 53 L. R. A. 538, L. R. A. 1916A, 835; *State v. Smalls*, 11 S. C. 262, 52 Am. Dec. 244, 97 Am. Dec. 715, 53 L. R. A. 573, L. R. A. 1916A, 835.

Where the panel is exhausted by challenges of four prisoners, it was irregular to postpone trial to another week before original jury; and it was error to allow the prisoner then only twelve challenges because he had exhausted eight the week before. *State v. Briggs*, 27 S. C. 80, 2 S. E. 854, Ann. Cas. 13D, 1100.

Forgery.—The first part of this section applies to uttering or publishing as true any false, forged, or counterfeited writ-

ing. It is a kindred form of forgery. *State v. Murray*, 72 S. C. 508, 52 S. E. 189, 119 Am. St. Rep. 318, 8 L. R. A. (N. S.) 1176.

General note on challenges.—The right to challenge is a sacred right. *State v. Briggs*, 27 S. C. 80, 2 S. E. 854, Ann. Cas. 13D, 1100. But the right to challenge is not a right to select a jury but a right to reject certain numbers of jurors. *State v. Wise*, 7 Rich. 412, 30 Am. Rep. 499, Ann. Cas. 12B, 1239; *State v. Coleman*, 8 S. C. 237, 18 L. R. A. 475; *State v. Gill*, 14 S. C. 411, 56 L. R. A. 393, 424, 17 A. L. R. 1123, 1157; *State v. Prater*, 26 S. C. 198, 2 S. E. 108, 95 Am. St. Rep. 773; *State v. Jacob*, 30 S. C. 131, 8 S. E. 698, 14 Am. St. Rep. 48, 897, 19 Am. St. Rep. 825, 31 L. R. A. 490; *State v. Jackson*, 32 S. C. 27, 10 S. E. 769, 45 L. R. A. 689, 3 L. R. A. (N. S.) 543, 4 L. R. A. (N. S.) 158, L. R. A. 1916A, 816; *State v. Campbell*, 35 S. C. 28, 14 S. E. 292, 89 Am. St. Rep. 696, 17 L. R. A. 663, L. R. A. 1916A, 824, 836.

Prisoner cannot withdraw a peremptory challenge in order to challenge for cause. *State v. Price*, 10 Rich. 351.

Overruling challenges for cause not to be considered as error when jury was completed without exhausting peremptory challenges. *State v. McQuaige*, 5 S. C. 429, 27 L. R. A. 784; *State v. Dodson*, 16 S. C. 453, 59 Am. Dec. 579, 132 Am. St. Rep. 570, 35 L. R. A. (N. S.) 988, 47 L. R. A. (N. S.) 206, 17 L. R. A. 1123.

Where juror's father and grandfather of accused were brothers, the judge properly excluded the juror on account of consanguinity. *State v. Merriman*, 34 S. C. 16, 12 S. E. 619, 82 Am. St. Rep. 28, 95 Am. St. Rep. 771, 15 L. R. A. 672, 20 L. R. A. (N. S.) 615, 45 L. R. A. (N. S.) 689, 700, 14 L. R. A. (N. S.) 740, 30 L. R. A. (N. S.) 848, L. R. A. 1918A, 667, 694.

Judge may refuse to have list entirely called over in hearing of the prisoner before the jurors are presented. *State v. Hallback*, 40 S. C. 298, 18 S. E. 919, L. R. A. 1916A, 816.

As to effect of exhausting jury by challenge, see *State v. Burket*, 2 Mill 155, 12 Am. Dec. 662. As to arraignment by de-facto deputy clerk, see *State v. Hopkins*, 15 S. C. 153. As to challenge to array, see *State v. Merriman*, 34 S. C. 16, 12 S. E. 619, 82 Am. St. Rep. 28, 95 Am. St. Rep. 771, 15 L. R. A. 672, 20 L. R. A. (N. S.) 615, 45 L. R. A. (N. S.) 689, 700, 14 L. R. A. (N. S.) 740, 30 L. R. A. (N. S.) 848, L. R. A. 1916A, 667, 694; *State v. Toland*, 36 S. C. 515, 15 S. E. 599, L. R. A. 1916A, 820, Ann. Cas. 12C, 283.

Applied in *State v. Anderson*, 59 S. C. 229, 37 S. E. 820, 29 A. L. R. 1131, 1180, at the time of which decision only two challenges were permitted the state in other cases.

§ 1003. What indictment shall be sufficient.—Every indictment shall be deemed and judged sufficient and good in law which, in addition to allegations as to time and place, as now required by law, charges the crime substantially in the language of the common law or of the statute prohibiting the same, or so plainly that the nature of the offense charged may be easily understood; and if the offense be a statutory offense, that the same be alleged to the contrary to the statute in such case made and provided.

1932 Code, § 1003; Cr. P. '22, § 89; Cr. C. '12, § 83; Cr. C. '02, § 56; R. S. 55; 1887 (19) 829.

I. General Consideration.

II. Charging Particular Offenses.

A. Charging So Plainly That Offense May Be Determined.

B. Charging in Language of Statute.

I. GENERAL CONSIDERATION

Editor's note.—Many of the cases citing this section cite it in conjunction with § 1007 which relates to the indictment for murder. The two sections should be considered together.

Mere clerical errors or matters of form in an indictment may be amended, with the consent of the grand jury, at any time before accused pleads thereto. State v. Means, 80 S. C. 401, 61 S. E. 898.

Time.—An indictment must not allege the date of the commission of the crime posterior to the finding of the indictment. State v. Ray, Rice 1, 3, 33 Am. Dec. 90, 39 Am. Dec. 409, 49 Am. Dec. 705, 61 Am. Dec. 95, 69 Am. Dec. 355, 77 Am. Dec. 696, 2 L. R. A. (N. S.) 252.

Place.—It is correct to charge in the indictment that the offense was committed at the courthouse. State v. Colclough, 31 S. C. 156, 9 S. C. 811, Ann. Cas. 13D, 1099, Ann. Cas. 16B, 144.

Charging several distinct offenses.—

The rule in this state, as deduced from the cases of State v. Nelson, 14 Rich. 169, 58 Am. Dec. 248, 92 Am. Dec. 663, 94 Am. Dec. 130, and State v. Scott, 15 S. C. 434, 58 Am. Dec. 248, 92 Am. Dec. 663, 98 Am. St. Rep. 171, seems to be that, while distinct offenses may be charged in separate counts of the same indictment, the proper practice is, where the several offenses grow out of the same transaction, to instruct the jury to pass upon the several counts separately; but, if the several offenses charged do not grow out of the same transaction, then the proper practice is to require the prosecuting officer to elect upon which count he will proceed. State v. Sheppard, 54 S. C. 178, 181, 32 S. E. 146, L. R. A. 1915C, 562. In the case at bar the offenses charged grew out of the same transactions; in fact, the same offense was charged in each of the counts of the indictment. State v. Jones, 86 S. C. 17, 67 S. E. 160, 164, Ann. Cas. 12D, 446, 13 A. L. R. 1263.

Each count must be complete in its allegations without aid from any other. State v. Johnson, 45 S. C. 483, 23 S. E. 619; State v. Langford, 55 S. C. 322, 33

S. E. 370, 74 Am. St. Rep. 746, 88 Am. St. Rep. 589; State v. Banks, 84 S. C. 543, 66 S. E. 999.

If the counts do not grow out of the same transaction the solicitor may be required to elect upon which count he will proceed. State v. Sheppard, 54 S. C. 178, 32 S. E. 146, L. R. A. 1915C, 562; State v. Bouknight, 55 S. C. 353, 354, 33 S. E. 451, Ann. Cas. 13D, 867; State v. Woodward, 38 S. C. 353, 17 S. E. 135.

Joinder of counts.—For robbery and assault with intent to kill, see State v. Smith, 56 S. C. 378, 34 S. E. 657, 57 S. C. 489, 35 S. E. 727. For grand larceny and receiving stolen goods joined, see State v. Posey, 7 Rich. 484; State v. Thomas, 75 S. C. 477, 55 S. E. 893. For murder and accessory after the fact, see State v. Burbage, 51 S. C. 284, 28 S. E. 937, 21 L. R. A. (N. S.) 15, 13 A. L. R. 1264.

It is not necessary to state name of presiding judge or grand jurors. State v. Bethune, 86 S. C. 143, 67 S. E. 466, 134 Am. St. Rep. 731, Ann. Cas. 12B, 971, 10 A. L. R. 862, 17 A. L. R. 1120, 1136.

Defendant's name once set out in full need not be constantly repeated. State v. Anderson, 3 Rich. 172, 176, 58 Am. Dec. 240, Ann. Cas. 14A, 1115.

Even when the name of the owner of the stolen goods as laid in the indictment for larceny is idem sonans with the name proved, and the defendant was not misled, the variance is not fatal. State v. White, 34 S. C. 59, 12 S. E. 661, 27 Am. St. Rep. 783, 100 Am. St. Rep. 337.

As to how third persons should be described, see State v. Anderson, 3 Rich. 172, 174, 58 Am. Dec. 240, Ann. Cas. 14A, 1115; State v. Scurry, 3 Rich. 68, 70, 100 Am. St. Rep. 344.

Applied in State v. Jaques, 65 S. C. 178, 185, 43 S. E. 515.

II. CHARGING PARTICULAR OFFENSES.

A. Charging So Plainly That Offense May Be Determined.

Accused must be informed of cause and nature of accusation.—In speaking of this section, Blease, J., in State v. Johnston, 149 S. C. 195, 146 S. E. 657, 660, (see also State v. Rector, 158 S. C. 212, 155 S. E. 385, 386) says: "In considering that section of the code, we must not forget the guarantee given to an ac-

cused in a criminal prosecution that he is 'to be fully informed of the nature and cause of the accusation.' Constitution Art. 1, sec. 18." In this case it was held that an indictment for false statements as to the financial condition of a corporation was sufficient.

And indictment and verdict must enable court to impose sentence.—The offense should be so plainly stated in the indictment as to enable the court looking alone to the indictment and the verdict to impose the sentence prescribed by law. *State v. Perry*, 87 S. C. 535, 70 S. E. 304, 305.

An indictment must set forth the necessary ingredients of the offense charged. *State v. Henderson*, 1 Rich. 179, 184, 53 Am. St. Rep. 698, 19 A. L. R. 1476.

Fraudulent conversion.—Under the part of this section providing that an indictment shall be sufficient which charges the crime so plainly that the nature of the offense charged may be easily understood, an indictment charging breach of trust in fraudulently converting money alleged to have been held in trust by accused, describing the money as "the proper goods and chattels" of the owner, was sufficient, though, strictly speaking, money is not goods and chattels. *State v. Pentacost*, 87 S. C. 405, 69 S. E. 880. See also *State v. Shirer*, 20 S. C. 392, 98 Am. Dec. 126, 87 Am. St. Rep. 22, 33, 17 L. R. A. 484.

Slander.—Under this section an indictment for slander, which did not state the exact words or to whom spoken, was sufficient. *State v. Hughey*, 120 S. C. 156, 112 S. E. 823.

Larceny from partnership.—Under this section an indictment charging grand larceny of goods from named partnership was sufficient without specifying the names of the individual members of the partnership. *State v. Franklin*, 115 S. C. 342, 105 S. E. 740.

A defect in an indictment charging an entry of a house without breaking with intent to steal, arising from the failure to allege that the entry was without breaking, is not fatal, and is apparent on the face thereof, and is not available, unless raised by demurrer or motion to quash, as required by the next section. *State v. Ross*, 83 S. C. 434, 65 S. E. 443, 23, A. L. R. 292.

B. Charging in Language of Statute.

The rule for pleading statutes which contain exceptions or provisos is: "If there is an exception in the enacting clause (which means here that part of the statute which creates the offense), the party pleading must show that his adversary is not within the exception; but, if there be an exception in a subsequent clause, or subsequent statute, that is matter of defense, and is to be shown by the other party." 1 Bish. Crim. Prac., sec. 375 et seq. The case of *State*

v. Reynolds, 2 N. & McC. 365, is directly in point. There the indictment was under the statute which provides that, if any person shall play at any game with cards, etc., except whist, when there is no betting, etc., such person shall be guilty, etc., and the court held that the indictment was insufficient, because it failed to negative the exception. In discussing the rule above stated, the court said:

"But if they (exceptions) are contained in the enacting clause, it will be necessary to negative them, in order that the description of the crime may, in all respects, correspond with the act."

In such cases, if the exception is not negatived, the crime is not charged substantially in the language of the act, so as to meet the requirement of this section. *State v. Freeland*, 106 S. C. 220, 91 S. E. 3, 4.

It is not necessary to mention and negative in the indictment things not only not forbidden but expressly allowed by the statute, for the defendant could not fail to know these things were not meant. *State v. Yoe*, 76 S. C. 46, 56 S. E. 542.

An indictment under Cr. Code 1912, § 405, providing that anyone in possession of cocaine or a mixture thereof, with certain exceptions, shall be guilty of a misdemeanor, need not allege that defendant wilfully and knowingly had possession of the cocaine; those words not being used in the statute. *State v. Freeland*, 106 S. C. 220, 91 S. E. 3.

Injury to automobile.—An indictment alleging that accused wilfully, unlawfully, and maliciously injured the automobile of another of a specified value, the injury amounting to a specified sum, is substantially in the language of the statute, and sufficiently indicates the cause and nature of the accusation within this section. *State v. Davis*, 88 S. C. 229, 70 S. E. 811, 34 L. R. A. (N. S.) 295, Ann. Cas. 16A, 431, 557.

Forgery.—Under this section an indictment for forgery, which follows the language of the statute defining forgery, and concludes against "the statute in such case made and provided," is sufficient, though the word "feloniously" does not appear therein. *State v. Allen*, 56 S. C. 495, 35 S. E. 204, 62 L. R. A. 257, 28 L. R. A. (N. S.) 242, 24 A. L. R. 1209, 1211.

On an indictment for fraud the facts constituting the fraud must be alleged in the pleadings, and a mere statement of the illegality of the act charged is insufficient. *State v. Jaques*, 65 S. C. 178, 43 S. E. 515.

An indictment for embezzling the proceeds of notes intrusted to accused for collection was not insufficient for failing to describe the notes. *State v. Ashe*, 89 S. C. 160, 71 S. E. 827.

In *State v. Alexander*, 140 S. C. 325, 138 S. E. 835, 839, it was held that deleted

of surplusage the indictment conformed to the statute relating to embezzlement and met the requirements of this section.

An indictment for larceny is not substantially in the language of the statute, if it contains no allegation of the material matter of value prescribed in the statute, and the nature of the offense, which is dependent upon the value of the property alleged to have been disposed of, is not made so plain as to be easily understood. A different construction of the statute would require the court to dispense with allegations of value in an indictment for larceny. *State v. Perry*, 87 S. C. 535, 70 S. E. 304, 305.

But an indictment alleging that accused, being in possession of \$50 of prosecutor, the \$50 being the proceeds of the sale of an animal of prosecutor of the value of \$50, unlawfully appropriated to his own use the \$50 with intent to de-

fraud, whereby accused committed a breach of trust with fraudulent intent, and by force of the statute committed larceny, against the form of the statute, charges a violation of the section, declaring that any person committing a breach of trust with a fraudulent intention shall be guilty of larceny. *State v. Beasley*, 91 S. C. 159, 74 S. E. 371.

Other Illustrations.—As to indictment for disposing of property under lien, see *McCall v. Alexander*, 81 S. C. 131, 133, 61 S. E. 1106; for keeping a gambling house, see *State v. Yoe*, 76 S. C. 46, 56 S. E. 542; for conspiracy, see *State v. Ameker*, 73 S. C. 330, 53 S. E. 484.

"Contrary to the Statute."—If the offense be statutory, it must be alleged to be contrary to the statute in such case made and provided. *State v. Strickland*, 10 S. C. 191, 192, 58 Am. Dec. 248.

§ 1004. How defects in indictments may be objected to.—Every objection to any indictment for any defect apparent on the face thereof shall be taken by demurrer, or on motion to quash such indictment before the jury shall be sworn, and not afterwards.

1932 Code, § 1004; Cr. P. '22, § 90; Cr. C. '12, § 84; Cr. C. '02, § 57; R. S. 56; 1887 (19) 829.

The purpose and effect of this legislation is to prevent motions to arrest judgment on grounds based upon an indictment apparent on the face thereof. *State v. Lark*, 64 S. C. 350, 42 S. E. 175, 176, 67 L. R. A. 183.

It applies only where the defect appeared on the face of the indictment. *State v. Richardson*, 149 S. C. 121, 146 S. E. 676, holding that it did not apply to objections that jury commissioners were disqualified when drawing grand jury.

The section does not apply to magistrate's courts. *State v. Williams*, 97 S. C. 449, 81 S. E. 154.

Nor does it apply when statement as to one of two offenses is sufficient.—This section has no application when there are allegations appropriate to two offenses one of which is defectively set out while the statement as to the other is sufficient in form. *State v. Banks*, 84 S. C. 543, 66 S. E. 999, 1000.

Separation of offenses.—Defendant not raising objection to indictment as containing two separate and distinct offenses by appropriate motion to have them separately stated must be held to have waived objection, under this section. *State v. Redmond*, 150 S. C. 452, 148 S. E. 474.

Unnecessary allegations regarded as surplusage.—If an indictment contains unnecessary allegations and no objection is raised pursuant to this section, they will be regarded as merely surplusage. *State v. Gilchrist*, 54 S. C. 159, 31 S. E. 866.

Whether the language in an indictment was mere surplusage should be raised by demurrer or motion to quash under this section and not by motion for new trial. *State v. Philips*, 73 S. C. 236, 53 S. E. 370, 21 L. R. A. (N. S.) 312.

An objection properly made after arraignment and before the jury is sworn, would be in time under this section. *State v. Poston*, 118 S. C. 232, 110 S. E. 399.

Effect of overruling demurrer.—Where a defendant demurs to an indictment charging misdemeanor, and it is overruled, he is entitled to plead thereto, and be tried by a jury. *State v. Barden*, 64 S. C. 206, 41 S. E. 959, L. R. A. 1915B, 649.

Necessity of excepting when motion overruled.—If grounds are taken by the defendant's counsel by demurrer or motion to quash before the jury were sworn, and the same are overruled, and no exception is taken to the ruling of the court on the demurrer or motion to quash, the action of the court in that regard is not properly under review. This is sufficient to require a dismissal of the appeal. *State v. Lark*, 64 S. C. 350, 42 S. E. 175, 176, 67 L. R. A. 183.

The Supreme Court will not consider error imputed to trial judge for refusing to quash indictment, when the "Case" does not show that motion therefor was made. *State v. Atkinson*, 33 S. C. 100, 11 S. E. 693, 57 L. R. A. 882, Ann. Cas. 18E, 916.

Defects as to grand jury.—Defendant does not waive his right to raise the

question on motion in arrest, that the indictment was found by a grand jury illegally drawn, by pleading to the indictment and going to trial. *State v. Edwards*, 68 S. C. 318, 47 S. E. 395.

Since the disqualification of a grand juror does not appeal on the face of an indictment a motion to quash comes too late after pleading thereto. *State v. Boyd*, 56 S. C. 382, 34 S. E. 661.

Failing to state the time of the finding by the grand jury and the day of the designated month at which the offense was committed relate merely to the form, and an objection must, as required by this section, be taken by demurrer or motion to quash before the jury is sworn. *State v. Davis*, 86 S. C. 208, 68 S. E. 532.

Failure to allege that entry was without breaking apparent on face of indictment.—See note to preceding section, analysis line, II, B.

Signature of Foreman.—Finding of grand jury in writing, if publicly announced by the clerk in their presence is good, though not signed by the foreman. *State v. Creighton*, 1 N. & McC. 256.

Objection that there are a number of blank counts numbered, only several of which are filled out, must be taken by demurrer or motion to quash. *State v. Norris*, 65 S. C. 287, 43 S. E. 791.

Applied in *State v. Morrow*, 40 S. C. 221, 18 S. E. 853, 856, 44 Am. St. Rep. 83, 33 L. R. A. (N. S.) 333; *State v. Means*, 80 S. C. 401, 61 S. E. 898; *State v. Rodman*, 86 S. C. 154, 68 S. E. 343, 7 A. L. R. 1536.

Applied as to objection to the act of a solicitor in nol. prossing a count in an indictment for murder, charging defendant with carrying concealed weapons in *State v. Edwards*, 68 S. C. 318, 47 S. E. 395.

Objections held too late in *State v. Maddox*, 80 S. C. 452, 61 S. E. 964; *State v. Norris*, 65 S. C. 287, 291, 43 S. E. 791; *State v. Weaver*, 74 S. C. 417, 418, 54 S. E. 615; *State v. Bethune*, 86 S. C. 143, 67 S. E. 466, 134 Am. St. Rep. 731, Ann. Cas. 12B, 971, 10 A. L. R. 862, 17 A. L. R. 1120, 1136; *State v. Blakeney*, 33 S. C. 111, 11 S. E. 637, 3 L. R. A. (N. S.) 1028, 7 A. L. R. 1551, 26 A. L. R. 1343.

§ 1005. Amendments of indictments—variance—continuance.—If there be any defect in form in any indictment it shall be competent for the court before which the case is tried to amend the said indictment: *provided*, such amendment does not change the nature of the offense charged; that if on the trial of any case there shall appear to be any variance between the allegations of the indictment and the evidence offered in proof thereof, it shall be competent for the court before which the trial shall be had to amend the said indictment according to the proof: *provided*, such amendment does not change the nature of the offense charged; and after such amendment the trial shall proceed in all respects and with the same consequences as if no variance had occurred, unless such amendment shall operate as a surprise to the defendant, in which case the defendant shall be entitled, upon demand, to a continuance of the cause.

1932 Code, § 1005; Cr. P. '22, § 91; Cr. C. '12, § 85; Cr. C. '02, § 58; R. S. 57; 1887 (19) 829.

Amendment must be asked for.—In *State v. Hamilton*, 77 S. C. 383, 57 S. E. 1098, the court said: "No doubt under § 1159 (this section) the court could have allowed the indictment to be amended to conform to the proof, as the amendment would not have changed the nature of the offense charged. But no such amendment was asked for, and the cause cannot be considered as if the indictment had been amended."

Detailed description.—An amendment is properly allowed where it is merely a detailed description of the offense. *State v. Rodman*, 86 S. C. 154, 68 S. E. 343, 7 A. L. R. 1536.

The court may amend the caption of an indictment at any time. *State v. Williams*, 2 McC. 301, 3 Am. St. Rep. 279, 27 L. R. A. 182, 7 A. L. R. 1517; *Van-*

dyke v. Dare, 1 Bail, 65, 3 Am. St. Rep. 279, 7 A. L. R. 1517.

Filling proper date.—Under this section an indictment stating the year of the offense as "one thousand eight hundred and ninety—" may be amended by filling in the proper year. *State v. May*, 45 S. C. 509, 23 S. E. 513, 7 A. L. R. 1532.

An indictment in a prosecution for statutory rape, which alleged that the offense was committed on "— day of December, 1907," could be amended by inserting the 1st day of the month, without resubmitting it to the grand jury. *State v. Richey*, 88 S. C. 239, 70 S. E. 729, 48 L. R. A. (N. S.) 236, Ann. Cas. 15D, 166, 7 A. L. R. 1532.

After all the evidence was in, the court, under this section could allow *State* to strike out the words "divers other days"

from an indictment charging defendant with manufacturing whisky on August 23, 1923, and "divers other days," and insert in lieu thereof "between the 20 day of August and 23d day of August, 1923, inclusive," and such amendment was not prejudicial error. *State v. Rush*, 129 S. C. 43, 123 S. E. 765.

Substitution of names.—Accused's real name may be substituted in an indictment charging violation of the prohibition law, without resubmitting the indictment to the grand jury, in view of this section. *State v. Blackstone*, 113 S. C. 528, 101 S. E. 845; *State v. McGill* 191 S. C. 1, 3 S. E. (2d) 257.

Failure to allege the place of death of deceased in an indictment for murder is a fatal defect, which cannot be cured by amendment, under this section and is ground for quashing the indictment or arresting judgment on motion. *State v.*

Blakeney, 33 S. C. 111, 11 S. E. 637, 3 L. R. A. (N. S.) 1028, 7 A. L. R. 1551, 26 A. L. R. 1343.

Breaking and entering in the day and in the night time are distinct offenses, so that where accused was charged with breaking and entering in the daytime, and the evidence showed that the breaking and entering was in the night time, the indictment could not be amended to conform to the proof, but the variance was fatal. *State v. Sowell*, 85 S. C. 278, 67 S. E. 316, 317, 7 A. L. R. 1543.

Consent to Material change.—While a material change in the body of the indictment cannot be made by amendment by order of Court, such amendment may be made with the defendant's consent in open court. *State v. Faile*, 43 S. C. 52, 20 S. E. 798, 89 Am. St. Rep. 709, 56 L. R. A. 365, 381, 397, Ann. Cas. 12C, 482.

§ 1006. Plea of autre fois acquit or convict.—In any plea of autre fois acquit or autre fois convict it shall be sufficient for any defendant to state that he has been lawfully acquitted or convicted, as the case may be of the offense charged in the indictment.

1932 Code, § 1006; Cr. P. '22, § 92; Cr. C. '12, § 86; Cr. C. '02, § 59; R. S. 58; 1887 (19) 829.

General note.—Where defendant was convicted on second count, and a new trial granted, the whole case stood as though it had never been tried. *State v. Commissioners*, *Riley* 273; *State v. McGee*, 55 S. C. 247, 254, 33 S. E. 353, 24 L. R. A. (N. S.) 175, L. R. A. 1916D, 198, 2 A. L. R. 1094; *State v. Stephens*, 13 S. C. 285, 135 Am. St. Rep. 74, 44 L. R. A. (N. S.) 346, L. R. A. 1916A, 816; *State v. Hamilton*, 80 S. C. 435, 61 S. E. 965, 121 Am. St. Rep. 881; *State v. Gillis*, 73 S. C. 318, 53 S. E. 487, 114 Am. St. Rep. 95, 5 L. R. A. (N. S.) 571, 6 Ann. Cas. 993.

Such defense, under the Constitution of 1868, art 1, § 18, could not avail except where the defendant has been acquitted or convicted by a jury. *State v. Shirer*, 20 S. C. 392, 98 Am. Dec. 126, 87 Am. St. Rep. 22, 33, 17 L. R. A. 484; *State v. Wise*, 33 S. C. 582, 12 S. E. 556, 28 Am. St. Rep. 954, 82 Am. St. Rep. 37, 52, 135 Am. St. Rep. 76, 45 L. R. A. 689, 3 L. R. A. (N. S.) 543, 14 L. R. A. (N. S.) 708, Ann. Cas. 16A, 277.

Issue of facts arising on plea to be tried by jury. *State v. Dewees*, 76 S. C. 72, 56 S. E. 674, 11 Ann. Cas. 991.

Demurrer by State to plea. *State v. Dewees*, 76 S. C. 72, 56 S. E. 674, 11 Ann. Cas. 991; *State v. Van Buren*, 86 S. C. 297, 298, 68 S. E. 568, 42 L. R. A. (N. S.) 769.

But as an indictment for larceny must allege the true name of the owner, an acquittal for stealing the fowls of A cannot be set up as former jeopardy for

stealing the fowls of A's wife. *State v. Council*, 58 S. C. 368, 36 S. E. 663, 92 Am. St. Rep. 115.

The provisions of the Constitution of 1895, Art. 1, § 17, differ from the Constitution of 1868; and as to what is "jeopardy" under it, see *State v. Stephenson*, 54 S. C. 234, 237, 32 S. E. 305, 11 L. R. A. (N. S.) 178; *State v. Richardson*, 47 S. C. 166, 25 S. E. 220, 135 Am. St. Rep. 72, 35 L. R. A. 238, L. R. A. 1917D, 1148; *State v. McKee*, 1 Bail. 651, 21 Am. Dec. 499, 49 Am. Dec. 705, 1 Am. St. Rep. 525, 48 Am. St. Rep. 214, 103 Am. St. Rep. 160, 35 L. R. A. 704, 44 L. R. A. 697, 14 L. R. A. (N. S.) 553, 40 L. R. A. (N. S.) 1214, Ann. Cas. 1005, 12 A. L. R. 1007; *State v. McLemore*, 2 Hill 680, 21 Am. Dec. 508; *State v. Briggs*, 27 S. C. 80, 85, 2 S. E. 854, Ann. Cas. 13D, 1100; *State v. Syphrett*, 27 S. C. 29, 34, 2 S. E. 624, 13 Am. St. Rep. 616, 42 Am. St. Rep. 290, 104 Am. St. Rep. 117, 33 L. R. A. (N. S.) 208, Ann. Cas. 15D, 1263, 19 A. L. R. 1534.

In arson, the crime being against possession rather than against the ownership, the subject might be alleged as the property of either the owner or the possessor, and an acquittal would bar new indictment in the name of the other. *State v. Copeland*, 46 S. C. 13, 23 S. E. 980, 92 Am. St. Rep. 116.

An acquittal upon an insufficient indictment is no bar to a second indictment for same offense. *State v. Ray*, *Rice*, 43, 33 Am. Dec. 90, 39 Am. Dec. 409, 49 Am. Dec. 705, 61 Am. Dec. 95, 69 Am.

Dec. 355, 77 Am. Dec. 696, 2 L. R. A. (N. S.) 252; State v. Jenkins, 20 S. C. 351, 77 Am. Dec. 697, 92 Am. St. Rep. 115, 148; State v. Brown, 33 S. C. 151, 11 S. E. 641, 92 Am. St. Rep. 115, 23 L. R. A. 347, 40 L. R. A. (N. S.) 38.

The acquittal or conviction must be upon charge of same offense to sustain such plea. State v. Thurston, 2 McM. 382, 396, 58 Am. Dec. 539, 41 Am. Rep. 476, 92 Am. St. Rep. 118, 121, 31 L. R.

A. (N. S.) 723, 26 A. L. R. 384; State v. Cassety, 1 Rich. 90, 92, 92 Am. St. Rep. 155, 32 L. R. A. (N. S.) 623, 45 L. R. A. (N. S.) 979; State v. Risher, 1 Rich. 219, 58 Am. Dec. 539, 92 Am. St. Rep. 106, 115; State v. Nathan, 5 Rich. 219, 231, 92 Am. St. Rep. 108, 141, 57 L. R. A. 446, 62 L. R. A. 325, 1 L. R. A. (N. S.) 736; State v. Parish, 8 Rich. 322, 58 Am. Dec. 540, 92 Am. St. Rep. 121, 31 L. R. A. (N. S.) 733, Ann. Cas. 12C, 670.

§ 1007.—Indictments for murder.—Every indictment for murder shall be deemed and adjudged sufficient and good in law which, in addition to setting forth the time and place, together with a plain statement, divested of all useless phraseology, of the manner in which the death of the deceased was caused, charges that the defendant did feloniously, willfully, and of his malice aforethought kill and murder the deceased.

1932 Code, § 1007; Cr. P. '22, § 93; Cr. C. '12, § 87; Cr. C. '02, § 60; R. S. 59; 1887 (19) 829.

I. General Consideration of Indictment for Murder.

II. Constructions of This Section.

I. GENERAL CONSIDERATION OF INDICTMENT FOR MURDER.

And indictment is good, if sufficiently certain in all respects. State v. Turnage, 2 N. & McC. 158; State v. Freeman, 1 Speer, 57, 65, 56 L. R. A. 379; State v. Green, 4 Strob. 129, 133.

There can be no trial without a sufficient and valid indictment; acquittal upon an invalid one no bar to second. State v. Ray, Rice, 1, 33 Am. Dec. 90, 39 Am. Dec. 409, 49 Am. Dec. 705, 61 Am. Dec. 95, 69 Am. Dec. 355, 77 Am. Dec. 696, 2 L. R. A. (N. S.) 252.

Surplus words may be rejected. State v. Fley, 2 Brev. 338, 4 Am. Dec. 583, 51 Am. Dec. 376, 3 Am. St. Rep. 280; State v. Huggins, 12 Rich. 402, 3 L. R. A. (N. S.) 1020; State v. Coleman, 8 S. C. 237, 241, 18 L. R. A. 475.

Demand for copy.—Party entitled to demand and to have copy of, three days before trial. State v. Winningham, 10 Rich. 257, Ann. Cas. 13D, 1099.

Too late to demand copy three days after arraignment and trial had commenced. State v. Briggs, 27 S. C. 80, 2 S. E. 854, Ann. Cas. 13D, 1100.

Principal and accessory may be charged jointly in same count. State v. Atkinson, 40 S. C. 363, 18 S. E. 1021, 42 Am. St. Rep. 877, 94 Am. St. Rep. 346, 97 Am. St. Rep. 799, 101 Am. St. Rep. 329, 136 Am. St. Rep. 141, 56 L. R. A. 470, 19 A. L. R. 645, 24 A. L. R. 1413.

It need not charge those present aiding and abetting as being there with malice. State v. Rabon, 4 Rich. 260. As to indictment against principal and accomplice, see State v. Norton, 28 S. C. 572, 6 S. E. 820, against accessory alone, see State v. Kennedy, 85 S. C. 146, 67 S. E. 152, 18 A. L. R. 919.

Counts for murder charging A as principal with pistol and B as accessory, and charging B as principal with a knife and A as accessory, properly joined. State v. Norton, 28 S. C. 572, 6 S. E. 820.

Conclusion.—Not vitiated by concluding "against the peace and dignity of the same State aforesaid," instead of "against the peace and dignity of the State," as prescribed by the Constitution. State v. Robinson, 27 S. C. 615, 4 S. E. 570, 38 L. R. A. 587; State v. Mason, 54 S. C. 240, 32 S. E. 357, 38 L. R. A. (N. S.) 1078.

Murder from riot.—As to what is necessary to state in indictment for murder committed by a number of persons engaged in a riot, see State v. Jenkins, 14 Rich. 215, 94 Am. Dec. 132, 68 L. R. A. 214.

II. CONSTRUCTIONS OF THIS SECTION.

Time and place.—The provisions of this section recognize that indictments for murder shall comply with the constitutional requirements, for in that section it is stated that an indictment for that crime shall set forth "the time and place" of the murder alleged to have been committed. See State v. Platt, 154 S. C. 1, 151 S. E. 206, where the necessity of alleging and proving the place of death of the person alleged to have been murdered, is fully discussed. State v. Rector, 158 S. C. 212, 155 S. E. 385, 386.

It is sufficient if the offense was committed in county where indictment is found. State v. Fant, 2 Brev. 487; State v. Blakeney, 33 S. C. 111, 11 S. E. 637, 3 L. R. A. (N. S.) 1028, 7 A. L. R. 1551, 26 A. L. R. 1343.

It is not necessary that it should state the precise day of year of the alleged crime. State v. Branham, 13 S. C. 389, 41 Am. St. Rep. 522, 18 L. R. A. (N. S.) 777, Am. Cas. 13D, 488.

An indictment stating county where shooting occurred, and alleging that defendants "then and there * * * did kill and murder," sufficiently showed place of deceased's death under this section. *State v. Rector*, 158 S. C. 212, 155 S. E. 385.

As to stating when deceased died with certainty, see *State v. Coleman*, 8 S. C. 237, 18 L. R. A. 475; *State v. Reeder*, 72 S. C. 223, 51 S. E. 702, 3 L. R. A. (N. S.) 1023, 19 L. R. A. (N. S.) 493.

It is alleged with sufficient certainty, if it appear by reference back to prior allegations. *State v. Stewart*, 26 S. C. 125, 1 S. E. 468, 103 Am. St. Rep. 160, 3 L. R. A. (N. S.) 1021, 13 L. R. A. (N. S.) 814, 24 L. R. A. (N. S.) 779.

Manner of death. — An indictment charging defendant with committing a homicide by striking in the head "with a stone or iron hammer" is not defective because charging the crime disjunctively. *State v. Lark*, 64 S. C. 350, 42 S. E. 175, 67 L. R. A. 183.

An indictment for murder by striking deceased with plaintiff's automobile, although reciting that accused "did make an assault" with his automobile and did "run against, strike, throw to the ground, run over, crush, bruise and wound" deceased, held not objectionable as charging three or more distinct offenses, under this section. *State v. Portee*, 122 S. C. 298, 115 S. E. 238.

That death ensued in consequence of the act of prisoner, see *State v. Wimberly*, 3 McC. 190.

Sufficiently stated when, after stating time and place of wounding, it charges that defendant did then and there feloniously, etc., kill and murder deceased.

State v. Huggins, 12 Rich. 402, 3 L. R. A. (N. S.) 1020.

As to what is sufficient description of wound, see *State v. Crank*, 2 Bail. 66, 1 Am. Dec. 574, 23 Am. Dec. 117, 35 Am. Dec. 756, 36 Am. Dec. 533, 39 Am. Dec. 452, 45 Am. Dec. 473, 47 Am. Dec. 238, 51 Am. Dec. 375, 58 Am. Dec. 248, 80 Am. Dec. 97, 3 Am. St. Rep. 280, 6 Am. St. Rep. 248, 18 L. R. A. (N. S.) 790, 50 L. R. A. (N. S.) 951, Ann. Cas. 14C, 326.

Indictment charging that defendant "feloniously, willfully and of his malice aforethought" choked, suffocated, and strangled deceased "with his hands and arms, and with cords, wires, ropes and belts" placed around the neck, of which strangling deceased died, is sufficient under this section. *State v. King*, 158 S. C. 251, 155 S. E. 409.

An indictment charging that defendant "feloniously," etc., "with switches and sticks, did strike and beat and wound, giving to the said M. * * * one mortal wound, of which mortal wound the said M. * * * died," etc., is sufficient, though the evidence showed that defendant, in beating the deceased, inflicted many wounds. *State v. Chiles*, 44 S. C. 338, 22 S. E. 339, 51 L. R. A. (N. S.) 880, L. R. A. 1915A, 1063.

Nol. pros. of count under following section.—Where an indictment charges in one count murder and in another count carrying concealed weapons, the solicitor may nol. pros. the latter without affecting the count as to murder. *State v. Norton*, 69 S. C. 454, 48 S. E. 464, 68 L. R. A. 218.

§ 1008. Special count for carrying weapons in case of murder, manslaughter, assaults, etc.—In every indictment for murder, manslaughter, assault and assault and battery of a high and aggravated nature, assault and assault and battery with intent to kill, and in every case where the crime is charged to have been committed with a deadly weapon of the character specified in section 1256, there shall be a special count in said indictment for carrying concealed weapons and the jury shall be required to find a verdict on such special count; and all cases embraced in this section, including the carrying of the weapons, shall be in the exclusive jurisdiction of the court of general sessions: *provided*, that one-half of the fine shall go to the free school fund of the county and the other half to the pension fund of said county.

1932 Code, § 1008; Cr. P. '22, § 94; Cr. C. '12, § 159; Cr. C. '02, § 131; 1897 (22) 427.

In general.—It is not ground for quashing an indictment charging murder with a pistol that the solicitor omitted a count charging carrying concealed weapons, as provided by this section. *State v. Hasty*, 76 S. C. 105, 56 S. E. 669.

An indictment for an assault with intent to kill and for carrying such weapon must charge in a special count the carrying of the weapon concealed about the person, and the jury must find a special verdict on this count before defendant can be sentenced therefor. *State v. Johnson*, 70 S. C. 384, 50 S. E. 8.

Motion to quash indictment for alleged inconsistency. See *State v. Griggs* 184 S. C. 304; 192 S. E. 360.

Objection to nol. prosse. of count as to

carrying concealed weapons. See note to § 1004.

Nol prosse. of count does not affect count for murder. See note to § 1007.

§ 1009. Averments of instrument of writing in indictment — perjury. — In all cases whatsoever in which it shall be necessary to make any averment in any indictment as to any instrument, whether the same consists wholly or in part of writing, print or figures, it shall be sufficient to describe such instrument by any name or designations by which the same may be usually known, or by the purport thereof, and in such manner as to sufficiently identify such instrument without setting out any copy or fac simile of the whole or any part thereof.

Indictments for perjury.—In any indictment for perjury it shall not be necessary to set forth more than the substance of the oath and the fact concerning which the perjury is alleged to have been committed.

1932 Code, § 1009; Cr. P. '22, § 95; Cr. C. '12, § 88; Cr. C. '02, §§ 61, 62; R. S. 60, 61; 1887 (19) 829.

§ 1010. Prisoner's witnesses to be sworn, etc.—Every person who shall be produced or appear as a witness on the behalf of the prisoner, upon any trial for treason or felony, before he be admitted to depose, or give any manner of evidence, shall first take an oath to depose the truth, the whole truth, and nothing but the truth in such manner as the witnesses for the State are by law obliged to do; and if convicted of any willful perjury in such evidence, shall suffer all the punishments, penalties, forfeitures, and disabilities which, by law, may be inflicted upon persons convicted of willful perjury.

1932 Code, § 1010; Cr. P. '22, § 96; Cr. C. '12, § 89; Cr. C. '02, § 63; G. S. 2642; R. S. 62; 1 Ann. St. 2, c. 9; 1712 (2) 543.

§ 1011. Defendant may testify in criminal cases.—In the trial of all criminal cases, the defendant shall be allowed to testify (if he desires to do so, and not otherwise) as to the facts and circumstances of the case.

1932 Code, § 1011; Cr. P. '22, § 97; Cr. C. '12, § 90; Cr. C. '02, § 64; G. S. 2642; R. S. 63; 1866 (13) 378.

A defendant cannot be made to testify against himself and be convicted on his own testimony. *Town Council v. Owens*, 61 S. C. 22, 39 S. E. 184.

Every witness, of course, is privileged from answering any question tending to criminate himself; but no question of privilege is involved here, as no objection on the ground of privilege was interposed to the question of the solicitor, and the defendant in fact refused to answer the question, and no effort to compel him to answer was made. *State v. Williamson*, 65 S. C. 242, 43 S. E. 671, 672, 6 A. L. R. 1609.

Not competent against co-defendant.—Even if this section providing that in criminal cases the defendant may, if he chooses, testify as to the facts of the case, makes a defendant who is infamous competent in his own behalf, it does not make him competent as against a co-defendant. *State v. Peterson*, 35 S. C. 279, 14 S. E. 617, L. R. A. 1917F, 900.

This section did not make defendant a competent witness for a co-defendant with whom he was jointly indicted. This was a common-law disability from which this section was not intended to relieve. *State v. Franks*, 51 S. C. 259, 28 S. E. 908.

When two defendants are jointly tried for larceny, the testimony of one already convicted for an infamous crime should go to the jury under instructions that it is incompetent as to the other. *State v. Peterson*, 35 S. C. 279, 14 S. E. 617, L. R. A. 1917F, 900.

One defendant may introduce testimony to contradict a codefendant who testifies against him. *State v. Adams*, 49 S. C. 414, 27 S. E. 451.

The conduct of the prosecuting attorney in commenting unfavorably in his argument upon the fact that the defendant had not gone upon the stand, as permitted by this section, although improper, will not cause a reversal, where the court checks any evil consequences

by charging that no inference can be drawn therefrom. *State v. Howard*, 35 S. C. 197, 14 S. E. 481.

When the accused voluntarily elects to be a witness in his own behalf he thereby assumes the position of any ordinary witness. And he may be cross-examined as any other witness. *State v. Robertson*, 26 S. C. 117, 1 S. E. 443, 9 Am. St. Rep. 569, 20 L. R. A. 616; *State v. Wise*, 33 S. C. 582, 12 S. E. 556, 28 Am. St. Rep. 954, 82 Am. St. Rep. 37, 52, 135 Am. St. Rep. 76, 45 L. R. A. 689, 3 L. R. A. (N. S.) 543, 14 L. R. A. (N. S.) 708, Ann. Cas. 16A, 277; *State v. Merriman*, 34 S. C. 16, 12 S. E. 619, 82 Am. St. Rep. 28, 95 Am. St. Rep. 771, 15 L. R. A. 672, 20 L. R. A. 615, 45 L. R. A. 689, 700, 14 L. R. A. (N. S.) 740, 30 L. R. A. (N. S.) 848, L. R. A. 1918A, 667, 694; *State v. Kennedy*, 85 S. C. 146, 155, 67 S. E. 152, 18 A. L. R. 919; *State v. Boyleston*, 84 S. C. 574, 66 S. E. 1047, Ann. Cas. 12D, 1233, Ann. Cas. 13C, 440; *State v. Rowell*, 75 S. C. 494, 56 S. E. 23, 134 Am. St. Rep. 1047, 17 L. R. A. (N. S.) 611, 51 L. R. A. (N. S.) 840, Ann. Cas. 12D, 442, 22 A. L. R. 263; *State v. Kenny*, 77 S. C. 236, 57 S. E. 859; *State v. Mills*, 79 S. C. 187, 60 S. E. 664, 37 L. R. A. (N. S.) 254, 16 A. L. R. 417; *State v. Barwick*, 89 S. C. 153, 71 S. E. 838, L. R. A. 1918A, 731, *State v. Holmes*, 171 S. C. 8, 171 S. E. 444.

He may be examined as to his religious belief. *State v. Turner*, 36 S. C. 534, 15 S. E. 602, 82 Am. St. Rep. 27, 46 L. R. A. 641, 41 L. R. A. (N. S.) 874, 920, 10 A. L. R. 1123.

And in murder prosecution, instruction that there was prima facie presumption of fact that defendant who testified in his own behalf had told jury the truth concerning the killing was erroneous as giving undue prominence to testimony of defendant. *State v. Gowan*, 178 S. C. 78, 182 S. E. 159.

Impeachment of moral character. — While it may be true that a defendant, by taking the stand as a witness, does not thereby permit his general moral character to be impeached, he does thereby put in issue his character for truth and veracity, and is subject to the rules which govern the cross-examination of ordinary witnesses in testing credibility. *State v. Mitchell*, 56 S. C. 532, 35 S. E. 210; *State v. Williamson*, 65 S. C. 242, 43 S. E. 671, 672, 6 A. L. R. 1609.

Where accused is a witness for himself, he may be examined as to whether he had not been indicted for perjury, without production of the record. *State v. Williamson*, 65 S. C. 242, 43 S. E. 671, 6 A. L. R. 1609.

See generally *State v. Edgins*, 171 S. C. 81, 171 S. E. 444.

§ 1012. Persons not required to criminate themselves, etc.—privilege of husband and wife.—No person shall be required to answer any question tending to criminate himself, nor shall husband or wife be required to disclose any communication made to each other during their coverture; nor shall testimony given under section 1011 be afterwards used against him in any other criminal case, except upon an indictment for perjury, founded on that testimony.

1932 Code, §1012; Cr. P. '22, § 98; Cr. C. '12, § 91; Cr. C. '02, § 65; G. S. 2644; R.'S. 65; 1866 (13) 378.

Husband and wife. — Construed as "simply intended to preserve the then existing rules of law by which persons could not be required to criminate themselves, and by which confidential communications" between husband and wife were protected; it does not change the rule that a wife is an incompetent witness for or against her husband. *State v. Workman*, 15 S. C. 540, 18 L. R. A. (N. S.) 777; *State v. Dodson*, 16 S. C. 453, 59 Am. Dec. 579, 132 Am. St. Rep. 570, 35 L. R. A. (N. S.) 988, 47 L. R. A. (N. S.) 206, 17 A. L. R. 1123.

So wife of one not on trial is a com-

petent witness against his accomplices. *State v. Drawdy*, 14 Rich. 87, 27 Am. Dec. 379, 14 A. L. R. 1434.

Wife or father is competent to testify on separate trial against the son indicted with him. *State v. Anthony*, 1 McC. 285, 27 Am. Dec. 379, 3 Am. St. Rep. 283, 26 L. R. A. (N. S.) 1036.

Accomplice by becoming witness does not waive protection accorded to his communication to his attorney. *State v. James*, 34 S. C. 49, 12 S. E. 657, Ann. Cas. 12A, 787, Ann. Cas. 13A, 32, 19A, L. R. 1068.

§ 1012-1. Person convicted and sentenced for crime may testify. — No person shall be disqualified to testify in the trial of any cause in the courts of this State by reason of conviction and sentence for any crime. The fact of such conviction and sentence may be established and the credibility of

the testimony of any such witness shall be entirely for the jury or the court determining the facts at issue, as the case may be.

1934 (38) 1193.

§ 1013. Persons testify in offenses under §§ 1112, 1113 and 1114, administering substances cause abortions, etc.—In any preliminary examination, and on any inquiry before a grand jury, and on the trial of any indictment for any alleged offense under sections 1112, 1113, and 1114, no person shall be protected from testifying as a witness for the reason that the testimony of such witness would tend to criminate or disgrace such witness: *provided, however*, that no testimony so given of a character tending to criminate or disgrace such witness shall ever be used in evidence in any action, prosecution or proceeding, civil or criminal, against such witness, or against his or her representatives.

1932 Code, § 1013; Cr. P. '22, § 99; Cr. C. '12, § 172; Cr. C. '02, § 141; 1882 (18) 547.

See § 1114-1 for second paragraph of this section in 1932 Code.

§ 1014. Principal or second compellable to give testimony.—Upon the trial of all indictments for duelling, any person concerned therein, either as principal or second, or as counselling, aiding, and abetting in such duel, shall and may be compelled to give evidence against the person or persons actually indicted, without criminating himself or subjecting or making himself liable to any prosecution, penalty, forfeiture, or punishment, on account of his agency in such duel.

1932 Code, § 1014; Cr. P. '22, § 100; Cr. C. '12, § 155; Cr. C. '02, § 127; G. S. 2470; R. S. 127; 1823 (6) 208.

§ 1015. Persons engaged in duel may be used as witnesses.—In every case where two or more persons shall be charged in any indictment for fighting a duel, or being concerned therein, either of such persons may be used as a witness or witnesses in behalf of the State, by having his or their names stricken out of the indictment, or otherwise, at the discretion of the attorney general or solicitor, or other attorney acting for the State, conducting such prosecution, of which an entry shall immediately be made on the minutes of the court; and in case of any such person or persons so used as a witness or witnesses in behalf of the State, in any prosecution for fighting a duel, or for being concerned therein, shall afterwards be indicted for the same offense, the fact of his or their being used as a witness or witnesses in the former prosecution for the same offense, shall and may be pleaded in bar to such subsequent indictment, and, on proof thereof, by competent evidence, such person or persons shall be thereof acquitted and discharged.

1932 Code, § 1015; Cr. P. '22, § 101; Cr. C. '12, § 156; Cr. C. '02, § 128; G. S. 2471; R. S. 128; 1823 (6) 208.

§ 1016. Testimony by deposition in trials for rape or assault with intent to ravish.

(1) **Testimony of prosecutrix may be by deposition.**—Before or during the trial of a person charged with rape or assault with intent to ravish, when the female who is alleged to have been assaulted is a witness,

the judge of the court in which the case is to be tried may, in his discretion, by an order direct that the deposition of such witness be taken at a time and place designated in said order within the county in which the trial is to be had upon such notice to the accused as the judge may direct.

(2) **How deposition to be taken.**—Such deposition shall be taken by the clerk of the court of general sessions for the county in which the case is to be tried, or by such other officer as the presiding judge may name in his order, at the taking of which the accused shall be present, who shall have the same rights in regard to the examination of the witness as if she were testifying in open court, and no other persons other than the attorneys for the State and accused shall be present unless expressly admitted by said judge, and the accused shall have the right to object to the admissibility of the testimony of such witness, either at the time of the taking of the deposition or when the same is offered in evidence on the trial in open court.

(3) **Deposition to be read to jury.**—Such deposition shall be read to the jury upon the trial, and shall be considered by them as though such testimony had been given orally in court.

(4) **Judge may direct depositions in rebuttal.**—Said judge may, in like manner, direct other depositions of such witness, in rebuttal or otherwise, which shall be taken and read in the manner and under the conditions herein prescribed as to the first deposition.

(5) **Custody of deposition.**—Said depositions, when taken, shall be signed by the witness in the presence of said clerk or other officer taking the same, placed in a sealed envelope, the title of the case endorsed thereon, and be retained by the said clerk of court till the same is opened in court, and if taken by another officer he shall deliver the same to said clerk, to be retained by him as herein provided.

(6) **Deposition to be withdrawn.**—The clerk of the court in which said case is tried, in the event no appeal is taken, shall, as soon as the time for appealing has elapsed, withdrawn the deposition from the record of the case and destroy the same; and in case there is an appeal, as soon as the case is finally disposed of the said clerk shall destroy the depositions herein provided for.

(7) **Sheriff to procure attendance of accused.**—It shall be the duty of the sheriff of the county to secure the personal attendance of the accused at the time and place of taking such depositions; and the absence of either the attorney for the State or for the accused, after notice prescribed in the order, shall not prevent or delay the taking of such depositions.

1932 Code, § 1016; Cr. P. '22, § 107; Cr. C. '12, § 92; 1909 (26) 206.

This section is constitutional. *State v. Butler*, 85 S. C. 45, 66 S. E. 1041. As to speculative questions see *State v. Dalby*, 86 S. C. 367, 68 S. E. 633.

§ 1017. Injury within limits and death beyond limits of this State.—When any person shall be struck, wounded, poisoned, or otherwise injured or illtreated, within the limits of this State, and shall die thereof beyond the limits of this State, whether on the high seas or elsewhere, the person so striking, wounding, poisoning, or otherwise causing death as aforesaid, shall be subject to indictment, trial, and punishment in the county in which said stroke, wound, poisoning, or other injury or illtreatment was

committed, in all respects the same as if the death had occurred in the said county.

1932 Code, § 1017; Cr. P. '22, § 108; Cr. C. '12, § 144; Cr. C. '02, § 116; G. S. 2461; R. S. 116; 1859 (22) 822.

It will be observed that this and the three following sections do not purport to make any change in the rules of criminal pleading, but are simply designed to prescribe a place of trial in certain cases, where, as the law then stood, it was at least doubtful as to where would be the proper place of trial. They do not declare in general terms that, no matter where the death ensues, the accused may be indicted and tried where the injury causing the death was inflicted, but they specify particularly that where death en-

sues in a particular place, from an injury inflicted in another place, then the accused may be indicted and tried in a certain place, and so on. We do not see, therefore, how these statutory provisions can be regarded as having the effect of altering the established rules of criminal pleading, especially in cases not falling within any of the classes provided for by these statutes. *State v. Coleman*, 17 S. C. 473, 3 L. R. A. (N. S.) 1028, 26 A. L. R. 1343; *State v. Platt*, 154 S. C. 1, 151 S. E. 203, 211.

§ 1018. Injury beyond limits and death within limits of State.—Where any person within the limits of this State shall inflict an injury on any person, who at the time said injury is inflicted, is beyond the limits of this State, or where any person beyond the limits of this State shall inflict an injury on any person at the time within the limits of this State, and such injury shall cause the death of the person injured, in either case, the person causing such death shall be subject to be indicted, tried and punished; in the first case, in the county of this State where the person inflicting the injury was at the time when the same was inflicted; and, in the second case, in the county in which it was received; and the procedure and punishment shall be in all respects the same as if both parties were within the said county at the time said injury was inflicted, and the homicide had been in all respects completed in said county.

1932 Code, § 1018; Cr. P. '22, § 109; Cr. C. '12, § 145; Cr. C. '02, § 117; G. S. 2462; R. S. 117; 1859 (12) 822.

§ 1019. When parties in different counties.—Where an injury is inflicted by any person within the bounds of one county of this State on a person within the bounds of another county, and death shall ensue therefrom, and the party dies within this State, indictment, trial and punishment shall be the same as if the homicide had been committed altogether within the county where the party dies; and where the party dies without the jurisdiction of this State, indictment, trial and punishment shall be the same as if the homicide had been completed in the county where the injury causing death was received.

1922 Code, § 1019; Cr. P. '22, § 110; Cr. C. '12, § 146; Cr. C. '02, § 118; G. S. 2463; R. S. 118; 1859 (12) 823.

§ 1020. Where injury in one county and death in another.—When any person shall be struck, wounded, poisoned, or otherwise injured in one county, and dies thereof in another, any inquisition or indictment thereon found by jurors of either county shall be as good and effectual in law as if the stroke, wound, poisoning, or other injury had been committed and done in the county where the party shall die. And the person guilty of such striking, wounding, poisoning, or other injury, and every accessory thereto, either before or after the fact, shall be tried in the county where such indictment shall be found, and, if convicted, punished in the same

mode, manner, and form, as if the deceased had suffered such striking, wounding, poisoning, or other injury and death, in the county where such indictment shall be found.

1932 Code, § 1020; Cr. P. '22, § 111; Cr. C. '12, § 147; Cr. C. '02, § 119; G. S. 2464; R. S. 119; 1880 (17) 336.

Section constitutional.—It was held in the case of the State v. McCoomer, 79 S. C. 63, 65, 60 S. E. 237, 30 L. R. A. (N. S.) 394, L. R. A. 1918F, 966, that the act of the General Assembly, from whence this section comes, was constitutional; and that the offense is to be considered committed in both counties and triable in either. See, also, *Ex parte Swygert*, 117 S. C. 94, 108 S. E. 261. *State v. Platt*, 154 S. C. 1, 151 S. E. 206, 210.

Where court has assumed jurisdiction.—The court of the county where the

wound was inflicted having first assumed exclusive jurisdiction of the case, accused cannot be proceeded against in the county where the person died. *Ex parte Swygert*, 117 S. C. 94, 108 S. E. 261.

Not retroactive.—This section did not apply to trial for murder from blows inflicted before its enactment. *State v. Sweat*, 16 S. C. 624; *State v. McCoomer*, 79 S. C. 63, 69 S. E. 237, 30 L. R. A. (N. S.) 394, L. R. A. 1918F, 966.

Applied in *State v. Messervey*, 105 S. C. 254, 89 S. E. 662.

§ 1021. Accessories before the fact in cases of felony—where to be tried.

—A person charged with the offense mentioned in section 1937, may be indicted, tried, and punished in the same court and county where the principal felon might be indicted and tried, although the offense of counselling, hiring, or procuring the commission of such felony is committed on the high seas, or on land either within or without the limits of this State.

1932 Code, § 1021; Cr. P. '22, § 112; Cr. C. '12, § 921; Cr. C. '02, § 636; G. S. 2612; R. S. 523. See 4 and 5 P. and M., c. 4; 1712 (2) 484.

The distinction between this and the following section in regard to commission of the offense on the high seas or without the state, is noted in *State v. Burbage*, 51 S. C. 284, 28 S. E. 937, 939, 21 L. R. A. (N. S.) 15, 13 A. L. R. 1264.

The venue of prosecution for being ac-

cessory before fact to uttering forged check by inciting, procuring, counseling, and commanding another in a certain county and at points outside state to commit such offense in that county was properly laid therein. *State v. Farne, et al.*, 190 S. C. 75, 1 S. E. (2d) 912.

§ 1022. Accessories after the fact—how, when and where tried.—Whoever becomes an accessory to a felony after the fact may be indicted, convicted and punished (whether the principal felony has or has not been previously convicted, or is not amenable to justice) by any court having jurisdiction to try the principal felon, and either in the county where such person became an accessory, or in the county where the principal felony was committed.

1932 Code, § 1022; Cr. P. '22, § 113; Cr. C. '12, § 922; Cr. C. '02, § 637; G. S. 2613; R. S. 524. See I Ann. St. 2, c. 9; 1714 (2) 543.

This section simply prescribes a place of trial, and does not dispense with the necessity of alleging in the indictment the time and place when and where de-

fendant became an accessory after the fact. *State v. Burbage*, 51 S. C. 284, 28 S. E. 937, 21 L. R. A. (N. S.) 15, 13 A. L. R. 1264.

§ 1022-1. Defendant arrested may on warrant charging misdemeanor not in jurisdiction of magistrate's court waive presentment by grand jury and plead guilty and be sentenced by circuit court judge.

(1) Apply for immediate disposition.—When any defendant is arrested upon a warrant charging a misdemeanor which is not within the jurisdiction of the magistrate's court, such defendant may apply to the clerk of court of the county having jurisdiction of such case for an immediate

disposition of the case, and thereupon it shall be the duty of the clerk of court to forward the arrest warrant to the solicitor of the judicial circuit.

(2) Waive presentment by grand jury and plead guilty.—Upon receipt by the solicitor of the warrant, he may forthwith prepare a formal indictment as now provided by law in such cases and shall return it to the clerk of court. The clerk of court shall then notify the sheriff or one of his duly authorized deputies to bring the defendant before the clerk of court at a time and place to be stated in the notice at which time the clerk of court shall have the defendant sign a waiver of the presentment by the grand jury and his plea of guilty.

(3) Appear before circuit judge and receive sentence.—That upon the said defendant's signing the waiver of presentment and the plea of guilty, the clerk of court shall deliver the indictment to the sheriff or one of his duly authorized deputies whose duty it shall be to appear before the resident judge of the circuit or presiding judge therein at some convenient time and place, having with him the defendant. And upon the defendant's acknowledging his plea before the judge, the judge shall sentence said general sessions of the county in which the case arose: *provided*, that no plea or pleas shall be entered or made under this section except by and with the consent of the solicitor of the respective circuit after investigation of such solicitor.

(4) Powers of circuit judges.—As to such cases as are herein referred to, the circuit judge shall have the same powers at chambers as they now have in open court.

(5) Repeal—cumulative.—All acts or parts of acts inconsistent herewith are hereby repealed: *provided, however*, nothing herein shall be construed to repeal, change or alter any of the provisions of § 3752 and any acts amendatory thereto relating to criminal procedure before special magistrates in Anderson County etc.; *provided, further*, that nothing herein shall be construed to repeal, change or alter any of the provisions of law now in force in any county of the State enacted for the same or a similar purpose as this section, but shall be deemed cumulative and supplementary thereto.

1939 (41) 215.

§ 1023. Costs in criminal cases where venue is changed.—Whenever a criminal case is transferred from one county to another for trial, all the costs and expenses of such trial shall be paid by the county in which the bill of indictment was found. It is made the duty of the clerk of court of the county in which the bill of indictment was found, his deputy or some other person designated for the purpose, by such clerk of court, to attend upon such trial, to issue vouchers or warrants for such costs and expenses in like manner as if the case were tried in the county in which the bill of indictment was found, and the same shall be paid by the treasurer of such county as other court expenses of such county are paid: *provided*, in the event a verdict of guilt is returned against the defendant or defendants named in the bill of indictment, and a fine is imposed as well as any other penalty and such fine be paid by the party or parties named the proceeds of such fine shall be delivered to the clerk of court of the county having

original jurisdiction by the clerk of court of the county in which the verdict was obtained.

1932 Code, § 1023; Civ. C. '22, § 5722; Civ. C. '12, § 4205; 1902 (22) 1087; 1930 (36) 1097; 1933 (38) 441.

See *Kershaw County v. Richland County*, 61 S. C. 75, 39 S. E. 263, Ann. Cas. 13B, 187, decided prior to the enactment of this section, deciding exact-

ly opposite to the provisions of this section, and probably instigating its passage by the Legislature.

CHAPTER 64

Appeals and New Trials

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| 1024. Appeals from magistrates' courts. | 1029. Hearing case on appeal. |
| 1025 and 1026. Notice of appeal. | 1030. New trials. |
| 1027. Bail. | 1031. Stay of execution. |
| 1028. Docketing case in general sessions. | 1032. No bail in certain cases. |
| 1033. Appellate procedure. | |

§ 1024. Appeals from magistrates' courts.—Every person convicted before a magistrate of any offense whatever, and sentenced, may appeal from the sentence to the next term of the court of general sessions for the county: *provided*, that in those counties where county courts are now established or which may hereafter be established, appeals in such cases shall be to the county court for the county. All appeals from magistrates' courts in criminal causes shall be taken and prosecuted as hereinafter prescribed.

1932 Code, § 1024; Cr. P. '22, § 114; Cr. C. '12, § 93; Cr. C. '02, § 66; G. S. 2646; R. S. 66; 1870 (14) 403; 1937 (40) 80.

Appeals in criminal cases—See notes under § 794.

Appeals in criminal cases—See notes under § 794.

The state cannot appeal from a judgment of acquittal. *State v. Ivey*, 73 S. C. 282, 288, 53 S. E. 428, L. R. A. 1916 B, 1299, Ann. Cas. 12D, 1290, Ann. Cas. 17D, 687; *State v. Gathers*, 15 S. C. 370, 19 L. R. A. 344.

Nor can the state appeal from an order granting a new trial.—The state has no right of appeal from an order of the magistrate granting a new trial in a criminal prosecution where the jurisdiction of the magistrate as to ordering the new trial was not in question, and where the order was predicated upon the magistrate's judgment as to the weight and sufficiency of the evidence. *State v. Lynn*, 120 S. C. 258, 113 S. E. 74; *State v. Benton*, 85 S. C. 107, 67 S. E. 143.

And a defendant cannot appeal after paying his fine.—Under this section a defendant who has paid the fine imposed, though under protest, cannot appeal, as the payment of the fine must be regarded as putting an end to the case. *Batesburg v. Mitchell*, 58 S. C. 564, 37 S. E. 36, Ann. Cas. 13E, 300, 18 A. L. R. 868.

But the state may appeal from an order granting the quashing of an indictment. *State v. Young*, 30 S. C. 399, 9 S. E. 355, 19 L. R. A. 348, 70 L. R. A. 196; *State v. Bouknight*, 55 S. C. 353, 357, 33 S. E. 451, 74 Am. St. Rep. 751, Ann. Cas. 13D, 867.

And from a judgment reversing a conviction on the ground that the statute or ordinance was invalid. *State v. Long*, 66 S. C. 398, 44 S. E. 960; *State v. Johnson*, 76 S. C. 39, 56 S. E. 544, 20 L. R. A. (N. S.) 1005, 11 Ann. Cas. 721, Ann. Cas. 16D, 12.

However an appeal lies only after a final judgment or sentence.—An appeal from an interlocutory order in a criminal case is premature, as an appeal lies only from the final judgment or sentence. *State v. Hughes*, 56 S. C. 540, 35 S. E. 214; *State v. Hill*, 74 S. C. 415, 416, 54 S. E. 614; *State v. Timmons*, 68 S. C. 258, 47 S. E. 140; *State v. Mason*, 54 S. C. 240, 32 S. E. 357, 38 L. R. A. (N. S.) 1078; *State v. Burbage*, 51 S. C. 284, 288, 28 S. E. 937, 21 L. R. A. (N. S.) 15, 13 A. L. R. 1264; *State v. Byars*, 79 S. C. 174, 60 S. E. 448.

§ 1025. Time of appeal.—The appellant shall, within five days after sentence, serve notice of appeal upon the magistrate who tries the case, stating the grounds upon which the appeal is founded.

1932 Code, § 1025; Cr. P. '22, § 115; Cr. C. '12, § 94; Cr. C. '02, § 67; 1880 (17) 493.

No relief can be granted upon a failure to serve notice on the magistrate.—The circuit judge cannot relieve one convicted before a magistrate, who has failed to serve on the magistrate the notice and grounds of appeal within the five days prescribed by this section. *Gibbes v. Beckett*, 84 S. C. 534, 66 S. E. 1000.

Sunday is not included if the five days expire at that time.—Where the five days expire on Sunday, that day will not be counted under the rule that,

where an act is required to be done within a certain number of days exceeding a week, Sunday is included, but, if the number of days is less than seven, Sunday is not counted. *State v. Gandy*, 87 S. C. 523, 70 S. E. 163, Ann. Cas. 17E, 934. As to computation of time, see § 821 and note thereto.

See generally, *State v. Spray*, 74 S. C. 443, 444, 54 S. E. 600, L. R. A. 1917B, 350; *City of Sumter v. Owens*, 181 S. C. 540, 188 S. E. 192.

§ 1026. Notice to be filed with clerk of court.—Within ten days after said service the said magistrate shall file in the office of the clerk of court the said notice, together with the record and statement of all the proceedings in the case, and the testimony in writing taken at the trial and signed by the witnesses.

1932 Code, § 1026; Cr. P. '22, § 116; Cr. C. '12, § 95; Cr. C. '02, § 68; G. S. 2648; R. S. 68; 1880 (17) 493.

Only the testimony taken in writing and signed by witnesses can be used on appeal.—This section plainly implies that the only testimony upon which an appeal from a trial justice can be heard is that which was taken in writing at the trial, and signed by the witnesses. *State v. Freeman*, 43 S. C. 105, 20 S. E. 974.

And a trial justice cannot supplement the testimony of a witness as taken down, after it is signed by the witness, by appending a statement as to the testimony. *State v. Freeman*, 43 S. C. 105, 20

S. E. 974.

But failure to have testimony signed by witnesses is not grounds to set aside judgment.—The proper practice, under this section, is to take the testimony in writing, and have it signed by the witnesses, but failure so to do may not cause the judgment to be set aside. *State v. Conkle*, 64 S. C. 371, 42 S. E. 173.

See generally, *State v. Spray*, 74 S. C. 443, 444, 54 S. E. 600, L. R. A. 1917B, 350; *City of Sumter v. Owens*, 181 S. C. 540, 188 S. E. 192.

§ 1027. Defendant entitled to bail.—Upon service of the said notice the said magistrate shall, on demand of the defendant, admit him to bail in such reasonable sum, and with good sureties, as said magistrate may require, with conditions to appear at the court appealed to, and at any subsequent term to which the case may be continued, if not previously surrendered, and so from term to term until the final decree, sentence, or order of the court thereon, and to abide such final sentence, order or decree, and not depart without leave, and in the meantime to keep the peace and be of good behavior.

1932 Code, § 1027; Cr. P. '22, § 117; Cr. C. '12, § 96; Cr. C. '02, § 69; G. S. 2649; R. S. 69; 1880 (17) 493.

§ 1028. Clerk to enter case on proper docket.—The clerk of court, upon receipt of said case, shall place the same upon the proper docket of the court of general sessions for trial or other disposition at the next ensuing term of said court.

1932 Code, § 1028; Cr. P. '22, § 118; Cr. C. '12, § 97; Cr. C. '02, § 70; G. S. 2650; R. S. 70; 1880 (17) 493.

§ 1029. Appeal heard without examination of witnesses.—The said appeal shall be heard by the court of general sessions upon the grounds of exceptions made, and upon the papers hereinbefore required, and without the examination of witnesses in said court. And the said court may either confirm the sentence appealed from, reverse or modify the same, or grant a new trial, as to the said court may seem meet and conformable to law.

1932 Code, § 1029; Cr. P. '22, § 119; Cr. C. '12, § 98; Cr. C. '02, § 71; G. S. 2651; R. S. 71; 1880 (17) 493.

The appeal should be heard on the papers, and not de novo. State v. Brown, 14 S. C. 380; State v. Spray, 74 S. C. 443, 444, 54 S. E. 600, L. R. A. 1917B, 350; Greenville v. Latimer, 80 S. C. 92, 93, 61 S. E. 224.

For example, affidavits submitted by accused when his appeal was heard in the circuit court, contradicting the magistrate's report of the testimony, constituted no part of the proceedings upon which the appeal was to be heard, and the court properly refused to consider them. State v. Richardson, 98 S. C. 147, 82 S. E. 353.

The circuit judge may amend his order and remand the case for a new trial, after making order sustaining the appeal

and dismissing the case. State v. Fullmore, 47 S. C. 34, 24 S. E. 1026.

And the circuit court may reduce the fine imposed by a judgment of the mayor's court of a city for violation of a city city ordinance, when there is nothing in the case showing that the modification, did not seem "meet and conformable to law." City Council v. Eichelberger, 44 S. C. 351, 22 S. E. 345.

On appeal from judgment of magistrate imposing sentence of imprisonment for 30-day period, the circuit court could impose a fine of \$100 or imprisonment for 30-day period under this section empowering the court to "modify" the sentence appealed from. State v. Funderburk, 130 S. C. 352, 126 S. E. 140.

§ 1030. Circuit courts may grant new trials.—All the circuit courts of this State shall have power to grant new trials in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law of the United States.

1932 Code, § 1030; Cr. P. '22, § 120; Cr. C. '12, § 99; Cr. C. '02, § 72; G. S. 2652; R. S. 72.

For treatment of the subject of granting new trials, see § 34 and note thereto.

In general.—As to presence of prisoner at hearing of motion for a new trial, see State v. Jefcoat, 20 S. C. 383, 386, Ann. Cas. 16C, 96. As to handing a letter to a juror without examining it or asking consent of counsel, see State v. Wine, 58 S. C. 94, 36 S. E. 439, 22 A. L. R. 273.

This section authorizes a judge to grant new trials.—This section does not make it the duty of the judge to grant a new trial, it only authorizes him to do so. State v. Hayes, 69 S. C. 295, 48 S. E. 251.

The circuit courts are not only vested with the power to grant new trials, under and by virtue of the provisions of this section, but, likewise, as an incident to their original jurisdiction. State v. Williams, 108 S. C. 295, 93 S. E. 1006, 1007.

And for that reason it should be literally construed. Elmore v. Scurry, 1 S. C. 139.

For example, a judge has discretionary power to grant new trials on after-discovered evidence. State v. David, 14 S. C. 428; Tarrant v. Gilletson, 14 S. C. 620; State v. Workman, 15 S. C. 540, 18 L. R.

A. (N. S.) 777; Durant v. Philpot, 16 S. C. 116, L. R. A. 1916C, 1193; Waring v. Cheraw, etc., R. Co., 16 S. C. 416, 2 A. L. R. 42, 55; Sams v. Hoover, 33 S. C. 401, 12 S. E. 8; State v. Anderson, 85 S. C. 229, 67 S. E. 237, 137 Am. St. Rep. 887, 46 L. R. A. (N. S.) 907, L. R. A. 1916A, 1195; State v. Nance, 25 S. C. 168, 86 Am. St. Rep. 656, 103 Am. St. Rep. 160, 41 L. R. A. 538, 56 L. R. A. 382, 24 L. R. A. (N. S.) 784, 29 A. L. R. 1141, 1180.

Evidence that witness on former trial swears her testimony was not true, is not newly discovered evidence. State v. Adams, 78 S. C. 523, 60 S. E. 658; State v. Marks, 70 S. C. 448, 50 S. E. 14; State v. Workman, 38 S. C. 550, 16 S. E. 770.

The right to a new trial on newly discovered testimony, when sufficient, is as fully settled and guaranteed by the law as any other, and this right cannot be lost because a new trial had once been refused upon facts wholly different from and not involving this newly discovered testimony. State v. Williams, 108 S. C. 295, 93 S. E. 1006, 1007.

This section does not limit the time within which the motion must be made. Id.

Even after judgment has been affirmed

on appeal, it is within the discretionary power of the circuit court to grant a new trial on the ground of newly discovered evidence. *State v. Williams*, 108 S. C. 295, 93 S. E. 1006, 1007.

And after remittitur on appeal has been filed.—The circuit court has jurisdiction to hear motion for new trial on ground of after-discovered testimony after remittitur on appeal has been filed, without first obtaining leave of the Supreme Court. *State v. Lee*, 80 S. C. 367, 61 S. E. 657, 27 A. L. R. 1091. See, however, *State v. Adams*, 73 S. C. 435, 53 S. E. 538, 27 A. L. R. 1091; where case has been remanded to have new days assigned for execution of sentence.

But not while the case is pending on appeal from the justice court.—Circuit courts having only appellate jurisdiction in actions originating in trial justice's courts, a motion for a new trial in the justice court on the ground of after-discovered evidence cannot be entertained by a circuit court on appeal from the justice court. *Sams v. Hoover*, 33 S. C. 401, 12 S. E. 8.

A new trial should be granted in a case where the jury disregarded the judge's charge. *Dent v. Bryce*, 16 S. C. 1, 14, 21 L. R. A. (N. S.) 852; *Thompson v. Lee*, 19 S. C. 489.

Or where there was no evidence on which to base a verdict. *State v. Clardy*, 73 S. C. 340, 354, 53 S. E. 493, 7 Ann. Cas. 12D, 1228; *State v. Howard*, 64 S. C. 344, 42 S. E. 173, 92 Am. St. Rep. 804, 58 L. R. A. 685, 68 L. R. A. 859, L. R. A. 1915D, 1015, Ann. Cas. 16E, 534.

Or where defendant's counsel did not have time in which to prepare a defense. *State v. Thompson*, 122 S. C. 407, 115 S. E. 326.

Or where defendant was prevented from having a fair and impartial trial.—Where defendant's material witnesses were reluctant to testify through timidity or fear, and because of the tense feeling against defendant in the community, the court was warranted in granting a new trial on the ground that defendant was prevented from having a fair and impartial trial. *State v. Thompson*, 122 S. C. 407, 115 S. E. 326.

Or where there was error in amount of verdict. *Wilson & Co. v. Atlanta, etc.*, R. Co., 16 S. C. 587, 592, Ann. Cas. 14C, 118; *Levi v. Legg*, 23 S. C. 232, 109 Am. St. Rep. 451.

Or where there is variance between the testimony and material allegations of the indictment. *State v. Hamilton*, 17 S. C. 462.

Or where the judge charged the jury upon the facts. *State v. Norton*, 28 S. C. 572, 6 S. E. 820.

Or where a sufficient demand of a copy of the indictment was not complied with. *State v. Winningham*, 10 Rich. 257,

Ann. Cas. 13D, 1099.

Or where the prisoner was not allowed to cross-examine a witness before he left the stand. *State v. McNinch*, 12 S. C. 89, 27 L. R. A. 784, 28 L. R. A. 369.

Or on account of misconduct of a juror. *State v. Foster*, 80 S. C. 347, 61 S. E. 564.

But the circuit court has no power to grant new trials, except in cases tried by a jury. *Meetze v. Charlotte, etc.*, R. Co., 23 S. C. 1, 49 L. R. A. 511, 522.

And the judge cannot grant a new trial at chambers. *State v. Chavis*, 34 S. C. 132, 13 S. E. 317.

The foregoing decision was decided prior to the enactment of § 37, which as amended, unquestionably changes the rule announced in the above case.—Ed. note.

And a new trial should not be granted where the judge's charge was humane, and there was no error in the verdict. *State v. Hammond*, 5 Strob. 91.

Or where the jury might well have convicted upon the evidence. *State v. McLendon*, 5 Strob. 85; *State v. Prater*, 26 S. C. 198, 2 S. E. 108, 95 Am. St. Rep. 773.

Or where the guilt is clear, though no motive for the murder appears. *State v. Whitman*, 14 Rich. 113, 1 Am. St. Rep. 522, Ann. Cas. 12B, 1237.

Or where there appears no reason to question sanity after trial. *State v. Stark*, 1 Strob. 479, 97 Am. Dec. 177, 76 Am. St. Rep. 92, 36 L. R. A. 465, 39 L. R. A. 738.

Likewise the Supreme Court will not grant a new trial where no errors are alleged. *State v. Clark*, 15 S. C. 403, 407, 66 Am. Dec. 235. See *State v. Riely*, 2 Brev. 444; *State v. Wright*, 3 Brev. 421, where it was not granted on the part of the State.

The power to grant a new trial on questions of fact is lodged conclusively with the circuit judge. *State v. Nance*, 25 S. C. 168, 86 Am. St. Rep. 656, 103 Am. St. Rep. 160, 41 L. R. A. 538, 56 L. R. A. 382, 24 L. R. A. (N. S.) 784, 29 A. L. R. 1141, 1180; *State v. Haines*, 36 S. C. 504, 15 S. E. 555, 129 Am. St. Rep. 44.

And the judge's conclusion as to a new trial, when founded on the facts at trial, is final. *Brickman v. South Carolina R. Co.*, 8 S. C. 173, 77 Am. Dec. 219, 26 L. R. A. 385, 67 L. R. A. 179, 49 L. R. A. (N. S.) 200, L. R. A. 1916E, 161; *Steele v. Charlotte, etc.*, R. Co., 11 S. C. 589, 26 L. R. A. 385; *Warren v. Lagrone*, 12 S. C. 45; *Steele v. Charlotte, etc.*, R. Co., 14, S. C. 324; *Wood v. Atlanta, etc.*, R. Co., 19 S. C. 579; *Lanier & Co. v. Tolleson*, 20 S. C. 57, 135 Am. St. Rep. 380; *Blakely v. Frazier*, 20 S. C. 144, Ann. Cas. 13B, 1163; *Finch v. Finch*, 21 S. C. 342, 91 Am. St. Rep. 302, 39 L. R. A. (N. S.) 1068, Ann. Cas. 14D, 1065, 2 A. L. R. 368; *Hyrne v. Erwin*, 23 S. C. 226, 55 Am.

Rep. 15, 67 Am. St. Rep. 38, 93 Am. St. Rep. 666, 14 L. R. A. 429, 37 L. R. A. 834, 51 L. R. A. 478, 42 L. R. A. (N. S.) 786, Ann. Cas. 12D, 869, Ann. Cas. 14A, 802; State v. Tarrant, 24 S. C. 593, 103 Am. St. Rep. 906, Ann. Cas. 13E, 23, 10 A. L. R. 92, 118; State v. Hayes, 69 S. C. 295, 48 S. E. 251; State v. Burris, 85 S. C. 327, 67 S.

E. 306; State v. Porter, 80 S. C. 450, 61 S. E. 1087; State v. Knotts, 70 S. C. 400, 50 S. E. 9.

But not when founded on error of law. State v. David, 14 S. C. 428; Wood v. Atlanta, etc., R. Co., 19 S. C. 579.

See generally, Dubois v. Carter, 132 S. C. 176, 129 S. E. 137.

§ 1031. Appeal to stay execution of sentence.—In criminal cases, service of notice of appeal in accordance with law, shall operate as a stay of the execution of the sentence, until the appeal is finally disposed of.

Defendant may be bailed except in capital cases.—Pending such appeal the defendant shall still remain in confinement, until he give bail in such sum and with such sureties as to the court shall seem proper: *provided, however,* bail shall not be allowed in case the defendant has been convicted of a capital crime.

1932 Code, § 1031; Cr. P. '22, § 121; Cr. C. '12, § 100; Cr. C. '02, § 73; R. S. 73; 1884 (18) 737.

A tender of sufficient bond stays execution, on an appeal from a magistrate's order, holding one in contempt. State v. Barnett, 98 S. C. 422, 82 S. E. 795, 8 A. L. R. 1564, 13 A. L. R. 146, 29 A. L. R. 1279.

The circuit court reacquires jurisdiction to enforce sentence when the remit-

titur from the Supreme Court is filed. State v. Lee, 80 S. C. 367, 61 S. E. 657, 27 A. L. R. 1091; State v. Prater, 27 S. C. 599, 4 S. E. 562.

An appeal is finally disposed of when it is declared abandoned by competent authority. State v. Johnson, 52 S. C. 505, 30 S. E. 592.

§ 1032. Judges shall not grant bail in certain cases.—It shall not be lawful for any justice of the Supreme Court, or any circuit judge of this State, pending an appeal to the Supreme Court, to grant bail to any person who shall have been convicted of any offense the punishment whereof is death, or imprisonment for life, or imprisonment for any term exceeding ten years.

1932 Code, § 1032; Cr. P. '22, § 122; Cr. C. '12, § 101; Cr. C. '02, § 74; R. S. 75; 1887 (19) 786.

This section does not apply to the Supreme Court.—It is very manifest from the language used in this section that it has no application to the Supreme Court, for its provisions are, in express terms,

confined to a single justice of the Supreme Court and to the circuit judges. State v. Farris, 51 S. C. 176, 28 S. E. 308, Ann. Cas. 13A, 157.

§ 1033. Practice and proceedings on appeal.—The practice and proceedings in cases of appeal from the courts of general sessions shall conform to the practice and proceedings in cases of appeal from the courts of common pleas.

1932 Code, § 1033; Cr. P. '22, § 123; Cr. C. '12, § 102; Cr. C. '02, § 75; R. S. 74; 1884 (18) 737.

An appeal from an interlocutory order, in a criminal case, before final judgment, is premature. State v. Hughes, 56 S. C. 540, 35 S. E. 214.

See generally, State v. Sheldon, 77 S. C. 74, 57 S. E. 1111, as to reinstating appeal.

CHAPTER 65

Judgment and Execution

1034. Punishment for felony.
 1035 and 1036. Male convicts to work on chaingangs.
 1037. Serving of sentences for less than six months.
 1038, 1038-1 thru 1038-16. Sentence where no punishment provided.
 1039. Suspension of sentence.
 1039-1 thru 1039-3. Recorders of certain municipalities suspend sentence.
 1039-4. Suspended sentence run for time prescribed in order.
 1040. Recognizances.
 1041. Forfeiture of recognizances.
 1042 and 1043. Execution on estate of offender.
 1044. Remitting forfeiture.
 1045. Apportioning fines.
 1045-1. Governor may remand convicts.
 1046. Execution of death sentences.

§ 1034. Punishment for felony when not specially provided for.—Where no special punishment is provided for a felony, it shall, at the discretion of the court, be by one or more of the following modes, to-wit: confinement in the penitentiary, or in a workhouse or penal farm (when such institutions shall exist), for a period not less than three months nor more than ten years, with such imposition of hard labor and solitary confinement as may be directed.

1932 Code, 1034; Cr. P. '22, § 124; Cr. C. '12, § 103; Cr. C. '02, § 76; G. S. 2614; R. S. 76; 1865 (13) 406; 1869 (14) 175.

Cross reference.—As to sentence where no punishment is provided, see § 1038 and note thereto.

Editor's note.—The indeterminate sentence act which was passed in 1925 was repealed in 1928. Sections 2 and 3 of the said repealing act provided respectively as follows:

"Sec. 2. **In force as to sentence imposed.**—The Act herein repealed shall continue in force and effect in so far as it may affect sentences imposed under that Act or prior to the passage."

"Sec. 3. **Powers of courts and judges restored.**—The duties and powers of courts and trial judges shall remain in all respects as they existed prior to the passage of the Act herein repealed."

This section and § 1038 must be construed together. State v. Edwards, 127 S. C. 116, 120 S. E. 490, 491.

When an act violated has been repealed before sentence, none can be imposed on a convict. State v. Mansel, 52 S. C. 468, 30 S. E. 481.

A succeeding judge may pass sentence on defendant convicted at a previous term. State v. Knotts, 70 S. C. 400, 50 S. E. 9.

And whether such sentence should be in alternative or merely fine or imprisonment alone is within discretion of judge. State v. Davis, 86 S. C. 208, 68 S. E. 532.

And prisoner may waive his right to be present at its rendition. State v. Haines, 36 S. C. 504, 15 S. E. 555, 129 Am. St. Rep. 44.

Appeal stays sentence. State v. Prater, 27 S. C. 599, 4 S. E. 562.

Sentence may be arrested when conviction of murder is by a jury illegally drawn. State v. Pratt, 15 Rich. 47; State v. Jennings, 15 Rich. 42.

But a second trial is on the same indictment.—Where Supreme Court on motion in arrest of judgment orders a new trial, the second trial is on the same indictment. State v. Stephens, 13 S. C. 285, 287, 135 Am. St. Rep. 74, 44 L. R. A. (N. S.) 346, L. R. A. 1916A, 816.

Some irregularities are not sufficient to annul a sentence. State v. Coleman, 8 S. C. 237, 18 L. R. A. 475.

Verdict against one, under indictment against him and another jointly, is good. State v. Bradley, 9 Rich. 168, 169.

It is not inconsistent when it finds murder both by drowning and by beating, charged in separate counts. State v. Posey, 4 Strob. 103.

Where an indictment contains several counts, a general verdict of guilty may be referred to such of them as are supported by the evidence. State v. Crank, 2 Bail. 66, 1 Am. Dec. 574, 23 Am. Dec. 117, 35 Am. Dec. 756, 36 Am. Dec. 533, 39 Am. Dec. 452, 45 Am. Dec. 473, 47 Am. Dec. 238, 51 Am. Dec. 375, 58 Am. Dec. 248, 80 Am. Dec. 97, 3 Am. St. Rep. 280, 6 Am. St. Rep. 248, 18 L. R. A. (N. S.) 790, 50 L. R. A. (N. S.) 951, Ann. Cas. 14C, 326.

Failure to ask prisoner if he has anything to say why judgment should not be pronounced on him is error, and he must be re-sentenced. State v. Trezevant, 20 S. C. 363, 47 Am. Rep. 840, Ann. Cas. 16C, 96; State v. Jefcoat, 20 S. C. 383, Ann. Cas. 16C, 96.

Illegality of sentence is not fatal to

conviction.—Where the sentence is illegal, but the conviction is legal, the conviction may be sustained and the case remanded for a legal sentence. *State v. Collins*, 125 S. C. 267, 118 S. E. 423; *State v. Baker*, 58 S. C. 111, 36 S. E. 501, 18 L. R. A. (N. S.) 791, 51 L. R. A. (N. S.) 387.

And the foreman may correct in open court a mere informality in verdict just rendered. *State v. Anderson*, 24 S. C. 109, 114, 23 L. R. A. 723.

Particular sentences considered.—It was said in the case of *State v. Edwards*, 127 S. C. 116, 120 S. E. 490, that a sentence of fifteen years for highway robbery was excessive in view of this section and § 1038. See also, *State v. Collins*, 125 S. C. 267, 118 S. E. 423, where a sentence of fifteen years for arson was held illegal in view of this section and a section of the Code then in effect which provided for formalities for arson on a ver-

dict of guilty of arson with recommendation for mercy, five year sentence for conspiracy to commit robbery within judge's discretion. *State v. McAdams*, 167 S. C. 405; 166 S. E. 405.

See generally. *State v. Cole*, 2 McC. 1, 94 Am. Dec. 219, 9 L. R. A. (N. S.) 166. As to cumulative sentences, see *State v. McKellar*, 85 S. C. 236, 67 S. E. 314, 14 A. L. R. 996. As to sentence within limits of discretion, see *State v. Sanders*, 68 S. C. 192, 47 S. E. 55, 31 L. R. A. (N. S.) 708. As to certainty in verdicts, see *State v. Williamson*, 65 S. C. 242, 43 S. E. 671, 6 A. L. R. 1609; *State v. Reeder*, 72 S. C. 223, 51 S. E. 702, 3 L. R. A. (N. S.) 1023, 19 L. R. A. (N. S.) 493; *State v. Norris*, 65 S. C. 287, 43 S. E. 791; *State v. Gadsden*, 70 S. C. 430, 50 S. E. 16, 29 A. L. R. 1149, 1180; *State v. Williams*, 76 S. C. 135, 141, 56 S. E. 783, 122 Am. St. Rep. 759, 24 L. R. A. (N. S.) 785, Ann. Cas. 13C, 488.

§ 1035. Able-bodied male convicts work on county chaingangs.—In every case in which imprisonment is provided as the punishment, in whole or in part, for any crime, all able-bodied male convicts shall hereafter be sentenced to hard labor on the public works of the county in which convicted, if such county maintains a chaingang, without regard to the length of the sentence, and in the alternative to imprisonment in the county jail or state penitentiary at hard labor: *provided*, that in any case the presiding judge shall have the power, by special order, to direct that any person convicted before him be confined in the state penitentiary if it is considered unsafe or unwise for such convict to be committed to county chaingang: *provided*, that the provisions of this section shall not apply to the counties of Greenville and Clarendon: *provided*, that a separation of the sexes and races be at all times observed, except in the penitentiary and on the state farms, and Kershaw County: *provided*, *further*, should the supervisor or commissioner of any county find that it is inconvenient or impracticable to work any convict committed to the county chaingang, he may turn said convict over to the penitentiary authorities: *provided*, *further*, that the highway commissioners of Berkeley County may, at their discretion, hire or farm out the convicts of Berkeley County by, through and with the consent of the authorities of the state penitentiary.

1932 Code, § 1035; Cr. P. '22, § 125; Cr. C. '12, § 104; 1911 (27) 169; 1912 (27) 553; 1914 (28) 515; 1917 (30) 265.

Cross reference.—As to whether convicts may be sentenced to county chain gangs, see the following section and note thereunder. See § 1036. For service of sentence under six months, see § 1037.

Editor's note.—Under the former standing of this section, it was provided that "all able-bodied male convicts whose sentences shall not be for a longer period than ten years * * * shall be sentenced to hard labor upon the public works of the county in which the convict shall have been convicted, and in the alternative to imprisonment in the county jail or state penitentiary at hard labor."

In construing the above section, the court said, in the case of *State v. Green*, 89 S. C. 132, 71 S. E. 847, that the failure to impose the alternative sentence as required was such an error as related only to the sentence and the verdict will not be disturbed because of such errors, but the sentence imposed will be set aside and the case remanded to the circuit court for the purpose of imposing the sentence in the alternative.

Under the former standing of this section it was also provided that "in every case in which imprisonment is provided as the punishment, in whole or in part,

for any crime, such imprisonment shall be, either in the penitentiary, with or without hard labor, or in the county jail, with or without hard labor, at the discretion of the circuit judge pronouncing the sentence." State v. Williams, 40 S. C. 373, 19 S. E. 5, 8, 27 L. R. A. 595, 35 L. R. A. 566, 43 L. R. A. 47, 58, 77, 45 L. R. A. 155.

The court, in construing the section as it then stood, said that it applied only to the court of sessions—a court of general jurisdiction—and could not apply to a court of inferior and limited jurisdiction, such as a justice's court, and in so far as it purports to confer on justices the power to add to a sentence of imprisonment the requirement of hard labor, it is unconstitutional.

Applicability to Greenville and Clarendon Counties.—In *Greenville v. Pridmore*, 162 S. C. 52, 160 S. E. 144, the court said: "We may say that it appears from the language used, that Greenville and Clarendon are exempted from the provisions of this section, although the General Assembly by the Act of February 13th, 1912 (27 Stats. 553), made the law applicable to Clarendon County, and by the Act of February 6th, 1914 (28 Stats. 515), made it applicable to Greenville County, which amendatory Acts were evidently overlooked in the prepa-

ration of the 1922 Code."

This section cannot be construed as applying only to felonies. State v. Welch, 29 S. C. 4, 6 S. E. 894, 896, 19 L. R. A. (N. S.) 493, Ann. Cas. 12C, 48.

This section as originally passed had no connection with any particular grade of offenses but was an isolated independent act, "to amend the law respecting the punishment of crime." State v. Welch, 29 S. C. 4, 6 S. E. 894, 896, 19 L. R. A. (N. S.) 493, Ann. Cas. 12C, 48. As to punishment for felony when not specially provided for, see the next forgoing section.

But may be construed as applying to offenses other than felonies.—Violations of law in selling liquor without license being then punishable by fine or imprisonment, a sentence to imprisonment in the penitentiary with hard labor was proper. State v. Boyd, 35 S. C. 269, 14 S. E. 620, 27 L. R. A. 597.

It is within the discretion of the judge whether the imprisonment shall be in the penitentiary or county jail.—It was said in the case of State v. Boyd, 35 S. C. 269, 14 S. E. 620, 27 L. R. A. 597, that it is in the discretion of the circuit judge pronouncing sentence whether an imprisonment shall be in the penitentiary or county jail.

§ 1036. Convicts, sentencing of—county and municipal.—All the courts of this State and municipal authorities which, under existing laws, have power to sentence convicts to confinement in prison with hard labor, shall sentence all able-bodied male convicts to hard labor upon the public works of the county in which said person shall have been convicted, and in the alternative to imprisonment in the county jail or state penitentiary at hard labor: *provided*, that municipal authorities may sentence municipal convicts to work upon the streets and other public works of the municipality in which they have been convicted, and such convicts when so sentenced shall work under the exclusive direction and control of the municipal authority imposing sentence: *provided*, that no convict whose sentence shall be for a period longer than five years shall be so sentenced.

All persons charged with a crime by any municipal authorities of any incorporated town or city in the county of Marion shall have the right to incarcerate such persons in the county jail of Marion County without any expense to the town authorities of said town; and the officers in charge of the jail shall receive such person and hold same subject to the orders of the mayor or intendant of said town: *provided, further*, that all persons sentenced by any mayor or intendant of any incorporated town in the county of Marion to labor on the public works of said county shall be required to serve on the county chaingang of Marion county without compensation, to any of the said incorporated towns from whence they are sentenced.

1922 Code, §§ 1036, 3831; Civ. C. '22, § 723; Cr. P. '22, § 126; Civ. C. '12, § 639; Cr. C. '12, § 943; Cr. C. '02, § 657; R. S. 544; 1892 (21) 22; 1899 (23) 13; 1905 (24) 915, § 4; 1922 (32) 947.

See also section 956.

Editor's note.—Due to the relationship and similarity which this section bears to the foregoing section, the annotations, all of which are taken from early cases which do not clearly draw the line between this and the foregoing section, have been placed under that section.

In general.—For a discussion of the historical growth of the law pertaining to the working of a municipal convict beyond the limits of the municipality in which his offense was committed, the practitioner is referred to *Greenville v.*

Pridmore, 162 S. C. 52, 160 S. E. 144.

The last proviso in this section conflicts with the provisions of the foregoing section which is to the effect that the sentence of able-bodied male convicts to hard labor on the public works of the county shall be "without regard to the length of sentence." *Greenville v. Pridmore*, 162 S. C. 52, 160 S. E. 144.

Municipal authorities may sentence persons convicted of offenses against their laws, if they desire to do so, to the municipal chain gang. *Greenville v. Pridmore*, 162 S. C., 52, 160 S. E., 144.

§ 1037. Serving of sentences for less than six months.—All persons convicted of any criminal offense whatsoever, where the sentence imposed by the presiding judge is less than six months, the person so convicted and sentenced shall serve said sentence either in the county jail or on the chain-gang of the county in which said person was tried, convicted and sentenced: *provided*, that should it appear to the presiding judge that the person sentenced is a dangerous character or cannot be safely kept in said county, then the presiding judge shall order said person to be taken to the state penitentiary. *Provided*, that in Chester County prisoners sentenced under the hereinabove provisions shall be sentenced to jail or the public works of the county, and that the board of county directors is authorized to work the prisoners so sentenced either on the county farm or on the public roads of the county under a foreman or road supervisor, or some person designated by the county board without re-establishing the chaingang in the said county, and at night the prisoners may be kept in some building provided by the board of county directors either on the county farm or some convenient place elsewhere in the county and that the honor or trusty system may be used by the board of county directors. *Provided, further*, that the board of county directors may in their discretion let said prisoners to other counties upon such terms as may be agreed upon by the county authorities of such counties.

1932 Code, § 1037; 1931 (37) 272, 1091; 1932 (37) 1133.

§ 1038. Sentence where no punishment is provided.—In cases of legal conviction, where no punishment is provided by statute, the court shall award such sentence as is conformable to the common usage and practice in this State, according to the nature of the offense, and not repugnant to the Constitution.

1932 Code, § 1038; Cr. P. '22, § 127; Cr. C. '12, § 105; Cr. C. '02, § 78; G. S. 2653; R. S. 78. (See, 1866 (13) 406, §§ 9, 10.)

Constitutionality of section.—In a case where accused is indicted under the common law, and is sentenced under this section, he cannot question the constitutionality of another act relating to the offense for which he was indicted and sentenced, and his exceptions to the refusal of the court to quash the indictment, on the ground that the act is unconstitutional, present only speculative questions, which the court on appeal will not consider. *State v. Dalby*, 86 S. C.

367, 68 S. E. 633.

This section and section 1034 must be construed together. *State v. Edwards*, 127 S. C. 116, 120 S. E. 490, 491.

This section and section 1034 have been cited as authority for holding a sentence of fifteen years for highway robbery invalid, see the catchline, "Particular Sentences Considered," under sec. 1034.

A sentence imposed under the authority of this section is wholly within the discretion of the court. *State v. Dalby*,

86 S. C. 367, 68 S. E. 633, 634.

The court did not err in sentencing the defendant, under the authority of this section, on conviction for an aggravated assault and battery, to imprisonment without the option of paying a fine. *State v. Charles*, 107 S. C. 418, 93 S. E. 136.

And the Supreme Court will not interfere with sentence given unless it is clearly an abuse of discretion.—The Supreme Court will not interfere, where there was no abuse of discretion, with the circuit court sentence, made under the authority of this section, unless it is made to appear that the fine imposed is such as to shock the conscience of the court or virtually amount to confiscation of the defendant's property. *State v. Charleston Bridge Co.*, 115 S. C. 233, 105 S. E. 349.

This section should be applied in a prosecution of a bridge company for fail-

ure to keep its bridge in proper condition. *State v. Charleston Bridge Co.*, 113 S. C. 116, 101 S. E. 657, 661.

But section should not be applied in case of misdemeanor where the penalty is already fixed.—It was said in the dissenting opinion in the case of *McCullough v. Brown*, 41 S. C. 220, 19 S. E. 453, 475, 23 L. R. A. 410, 53 L. R. A. 764, 61 L. R. A. 125, 150, 67 L. R. A. 70, 8 L. R. A. (N. S.) 126, 14 L. R. A. (N. S.) 1157, 15 L. R. A. (N. S.) 922, 933, 948, L. R. A. 1915D, 186, 3 A. L. R. 1485, 14 A. L. R. 1153, that a sentence, given under the authority of this section, is erroneous, when the offense for which the sentence was given is a misdemeanor, and the penalty for such misdemeanors is fixed.

Illegality of sentence is not fatal to conviction.—See the above catchline under § 1034.

§ 1038-1. After conviction or plea except where punishment is death or life imprisonment judges of courts of record with criminal jurisdiction may suspend sentence and place defendant on probation or may impose fine and place defendant on probation.—After conviction or plea for any offense, except a crime punishable by death or life imprisonment, the judge of any court of record with criminal jurisdiction at the time of sentence may suspend the imposition or the execution of a sentence and place the defendant on probation or may impose a fine and also place the defendant in probation.

1942 (42) 1456.

§ 1038-2. Probation officer report on offenses and defendants.—When directed by the court, the probation officer shall fully investigate and report to the court in writing the circumstances of the offense and the criminal record, social history, and present condition of the defendant, including, whenever practicable, the findings of a physical and mental examination of the defendant. When the services of a probation officer are available to the court, no defendant charged with a felony, and, unless the court shall direct otherwise in individual cases, no other defendant shall be placed on probation or released under suspension of sentence until the report of such investigation shall have been presented to and considered by the court.

1942 (42) 1456.

§ 1038-3. Conditions of probation.—The court shall determine and may impose, by order duly entered, and may at any time modify the conditions of probation and may include among them the following or any other: The probationer shall:

- (a) Refrain from the violation of any state or federal penal laws;
- (b) Avoid injurious or vicious habits;
- (c) Avoid persons or places of disreputable or harmful character;
- (d) Permit the probation officer to visit at his home or elsewhere;
- (f) Work faithfully at suitable employment as far as possible;
- (h) Pay a fine in one or several sums as directed by the court;
- (j) Support his dependents;

(k) Follow the probation officer's instructions and advise regarding recreational and social activities.

1942 (42) 1456.

§ 1038-4. Period of probation or suspension of sentence—discharge—arrest probationers—revoke dispose of case.—The period of probation or suspension of sentence shall not exceed a period of five years and shall be determined by the judge of the court and may be continued or extended within the above limit. Upon the satisfactory fulfillment of the conditions of probation or suspension of sentence the court shall by order duly entered discharge the defendant. At any time during the period of probation or suspension of sentence, the court may issue or cause the issuing of a warrant and cause the defendant to be arrested for violating any of the conditions of probation or suspension of sentence. Any police officer, or other officer with power of arrest, upon the request of the probation officer, may arrest a probationer. In case of an arrest the arresting officer shall have a written warrant by said probation officer setting forth that the probationer has, in his judgment, violated the conditions of probation and said statement shall be warrant for the detention of said probationer in the county jail, or other appropriate place of detention, until said probationer can be brought before the judge of the court. Such probation officer shall forthwith report such arrest and detention to the judge of the court and submit in writing a report showing in what manner the probationer has violated his probation. Upon such arrest, the court shall cause the defendant to be brought before it and may revoke the probation or suspension of sentence and shall proceed to deal with the case as if there had been no probation or suspension of sentence.

1942 (42) 1456.

§ 1038-5. The South Carolina probation and parole board—pay—term—appointment—vacancy—duties and powers of pardoning board devolved on.—The South Carolina probation and parole board shall consist of one member from each congressional district of the State, and they shall serve without salary but shall receive actual traveling expenses and ten (\$10.00) dollars per day while in the performance of their official duties. The terms of office of the members of said board shall be for a period of four (4) years and until their respective successors are appointed and qualified. The members of said board shall be appointed by the governor with the advice and consent of the Senate. All vacancies occurring among the members of said board shall be filled as soon as practicable by the Governor by appointment with the advice and consent of the Senate for the unexpired term. All vacancies occurring among the members of said board shall be filled as soon as practicable by the Governor by appointment with the advice and consent of the Senate for the unexpired term. The said board shall elect annually between January 15th and January 30th a chairman from its members. All powers, duties, and authorities of the pardoning board of this State are hereby devolved upon the said South Carolina probation and parole board. *Provided*, that the Governor is authorized to appoint the initial members of the board and such appointees shall hold and perform the duties of the office and exercise the powers thereof until the Senate shall have convened and acted upon such appointment, and

the regular term of office of such initial appointees shall begin to run from the date of their confirmation by the Senate. In the event of a vacancy occurring during a recess of the Senate, the Governor is authorized to fill such vacancy by appointment for the unexpired term pending the convening of the Senate and action by it upon such appointment.

1942 (42) 1456, 1463.

§ 1038-6. Supervisor of probation and parole—assistants.—The said South Carolina probation and parole board is authorized and empowered to appoint a supervisor of probation and parole, who shall serve as its executive secretary, and shall receive a salary of not less than three thousand six hundred (\$3,600.00) dollars nor more than four thousand (\$4,000.00) dollars per annum, payable semi-annually, and shall also be paid traveling and other necessary expenses in the performance of his official duties, and who shall give his entire time to the work. When the necessity of the service requires, it shall appoint one or more assistants and fix their salaries. The person appointed as supervisor of probation and parole shall be qualified by academic preparation equivalent to that represented by graduation from an institution of recognized standing, or (2) by skill and any equivalent combination of training and experience.

1942 (42) 1456.

§ 1038-7. Supervisor—appoint probation officers and clerical help—duties and powers.—The supervisor of probation and parole shall appoint, subject to the approval of the South Carolina board of probation and parole, such probation officers as are required for service in the State, and such clerical assistance as may be necessary.

The supervisor of probation and parole shall direct the work of the probation officers appointed under §§ 1038-1 thru 1038-16. He shall consult and co-operate with the courts and institutions in the development of methods and procedure in the administration of probation and parole; and shall arrange conference of probation officers and judges. He shall make an annual written report with statistical and other information to the South Carolina probation and parole board and the Governor.

1942 (42) 1456.

§ 1038-8. Probation officers—work under supervisor—salaries—expenses—oath.—Probation officers appointed under §§ 1038-1 thru 1038-16 shall be assigned to serve in such courts or districts or otherwise as the supervisor of probation and parole may determine. They shall be paid salaries, to be fixed by the South Carolina board of probation and parole not to exceed two thousand one hundred (\$2,100.00) dollars per annum, payable semi-monthly, and shall also be paid traveling and other necessary expenses incurred in the performance of their official duties as probation officers when such expense accounts have been authorized and approved by the supervisor of probation and parole. Each person appointed as a probation officer shall take an oath of office as required by State officers, and shall be noted of record by the clerk of court.

1942 (42) 1456.

§ 1038-9. Probation officers—duties and powers.—A probation officer shall investigate all cases referred to him for investigation by the judges of the

courts or by the supervisor of probation and parole, and shall report in writing thereon. He shall furnish to each person released on probation under his supervision a written statement of the conditions of probation and shall instruct him regarding the same. Such officer shall keep informed concerning the conduct and condition of each person on probation or parole under his supervision by visiting, requiring reports, and in other ways, and shall report thereon in writing as often as the court or supervisor of probation and parole may require. Such officer shall use all practicable and suitable methods, not inconsistent with the conditions imposed by the court or the supervisor of probation and parole, to aid and encourage persons on probation or parole to bring about improvement in their conduct and condition. Such officer shall keep detailed records of his work; shall make such reports in writing to the supervisor of probation as he may require; and shall perform such other duties as the supervisor of probation and parole may require. A probation officer shall have, in the execution of his duties, the powers of arrest and to the extent necessary for the performance of his duties the same right to execute process as is now given, or that may hereafter be given by law, to the sheriffs of this State. In the performance of his duties of probation and parole investigation and supervision he shall be regarded as the official representative of the court and the South Carolina board of probation and parole.

1942 (42) 1456.

§ 1038-10. Cases board act on.—In all cases cognizable of this act, the South Carolina probation and parole board, with the approval of the Governor, may upon ten days' written notice to the solicitor and judge who participated in the trial of the prisoner, parole any prisoner convicted of a felony and imprisoned in the state penitentiary, in any jail or upon the public works of any county, who if sentenced for less than life, shall have served at least one-third of the term for which he was sentenced, not deducting any allowance of time for good behavior, or who, if sentenced for life, shall have served five years less the diminution which would have been allowed for good conduct, pursuant to law, had his sentence been for thirty years, or who, if he is a first offender and is sentenced for an indeterminate term, shall have served the minimum for which he was sentenced not deducting any allowance for time for good behavior or who, if sentenced for more than one year, shall have served one-third of the term for which he was sentenced, not deducting any allowance of time for good behavior. That, after a prisoner has served one-third of his sentence, if such sentence exceed one year, it is made mandatory that the board review his case, irrespective of whether or not any application has been made therefor, for the purpose of determining whether or not any such prisoner is entitled to any of the benefits provided for in §§ 1038-1 thru 1038-16.

1942 (42) 1456.

§ 1038-11. Prisoners parole — conditions — board determine violations—no arguments or appearances—effect of cancelling parole. — The South Carolina probation and parole board is required to carefully consider the record of the prisoner, before and after imprisonment, and, no such prisoner shall be paroled until it shall appear, to the satisfaction of said board,

that the prisoner has shown a disposition to reform; that, in the future, he will probably obey the law and lead a correct life; that by his conduct he has merited a lessening of the rigors of his imprisonment; that the interests of society will not be impaired thereby; and that suitable employment has been secured for him; and the paroled prisoner, shall as often as may be required, render a written report to said board giving such information as may be required by the board which shall be approved by the person in whose employment the prisoner may be at the time.

The South Carolina probation and parole board shall issue an order in quadruplicate signed by each member of the board which, if countersigned by the Governor (and the acceptance of the prisoner noted thereon by his signature) directing the officer, officers or Board having the supervision and control of the prisoner to forthwith release the prisoner on parole, and the prisoner shall serve the remainder of his term of imprisonment up to the maximum, subject to the conditions and restrictions hereinafter imposed. Every such paroled prisoner shall remain in the legal custody of the board and may at any time, on the order of the board, be reimprisoned in said prison or such other jail or camp as may be designated by the said board.

The South Carolina probation and parole board shall be the sole judge as to whether or not a parole has been violated and no appeal therefrom shall be allowed.

The said board shall not permit arguments or appearances, nor shall it have any other hearing than upon the records prescribed by §§ 1038-1 thru 1038-16.

Upon failure of any prisoner released on parole under the provisions of §§ 1038-1 thru 1038-16, to do, or refrain from doing, any of the things set forth and required to be done by and under the terms of said parole, the said order of parole shall be cancelled, and the prisoner shall thereupon and thereafter have the status of an escaped convict; be arrested without a warrant, and be required to serve the part of the sentence that shall remain unserved, and be ineligible to parole thereafter under §§ 1038-1 thru 1038-16.

1942 (42) 1456.

§ 1038-12. Term of parole—prisoners released on good behavior. — Any prisoner hereafter sentenced, who may be paroled under authority of §§ 1038-1 thru 1038-16, shall continue on parole until the expiration of the maximum term or terms specified in his sentence without deduction of such allowance for good conduct as is or may hereafter be provided for by law.

Any prisoner who shall have served the term or terms for which he shall hereafter be sentenced, less deductions allowed therefrom for good conduct, shall upon release be treated as if released on parole and shall be subject to all provisions of law relating to the parole of prisoners under §§ 1038-1 thru 1038-16 until the expiration of the maximum term or terms specified in his sentence; *provided*, that this section shall not operate to prevent delivery of a prisoner to the authorities of any State otherwise entitled to his custody.

1942 (42) 1456.

§ 1038-13. Public agencies and officials cooperate—supervisor make surveys — records of prisoners.—It is hereby made the duty of every city, county or State official or department to render all assistance and cooperation within his or its fundamental power which may further the objects of §§ 1038-1 thru 1038-16. The South Carolina probation and parole board, the supervisor of probation and parole, and the probation officers are authorized to seek the cooperation of such officials and departments, and especially of the sheriffs, jailers, magistrates, police officials and institutional officers. The supervisor of probation and parole is authorized to conduct surveys of the State Penitentiary, county jails and camps and shall obtain such information as will enable the board to intelligently pass upon all applications for parole. It shall be the duty of the superintendent of the state penitentiary, wardens, jailers, sheriffs, supervisors or such officer in whose control a prisoner may be committed, to aid and assist the supervisor of probation and parole and the probation officers in such surveys.

It shall be the duty of the superintendent of the state penitentiary, where the prisoner is confined in the state penitentiary; or to the sheriff of the county, where the person is confined in county jail; of the county supervisor, or the chairman of the governing board of the county; if there be no county supervisor, where the prisoner is confined upon the chaingang of any county, to keep a record of the industry, habits and deportment of any such prisoner, as well as any other information which may have theretofore been requested of such officer by the South Carolina probation and parole board or the supervisor of probation and parole, and to furnish the same upon request of the board or of the supervisor.

1942 (42) 1456.

§ 1038-14. Information received by probation officers.—All information and data obtained in the discharge of official duty by any probation officer shall be privileged information, shall not be receivable as evidence in any court, and shall not be disclosed directly or indirectly to anyone other than the judge or to others entitled under §§ 1038-1 thru 1038-16 to receive reports, unless and until otherwise ordered by a judge of the court or the supervisor of probation and parole.

1942 (42) 1456.

§ 1038-15. Offices for probation officers.—The governing body of each county in which a probation officer serves, shall provide, in or near the court house, suitable office space for such officer.

1942 (42) 1456.

§ 1038-16. Effect on powers of pardoning board.—Nothing in §§ 1038-1 thru 1038-16 shall be construed as changing or altering any of the present powers of the pardoning board of this State.

1942 (42) 1456.

§ 1039. Circuit judges suspend sentence except in cases of felony.—The circuit judges of this State shall have the power and authority, in their discretion, to suspend sentences imposed by them, upon such terms and upon such conditions as in their judgment may be fit and proper: *provided*, said power and authority shall not extend to cases of felony.

1932 Code, § 1039; Cr. P. '22, § 128; 1912 (27) 773.

See sections 1039-4 for time suspended sentence run.

See sections 1039-1, 1039-2 and 1039-3 for power of record in certain cities suspend sentences.

As to appeal to stay execution of sentence, see § 1031 and note thereto.

There is no statute giving municipal courts authority to suspend sentences, and a town cannot, therefore, confer this authority on its mayor by proper ordinance. *McGaha v. Beacham*, 157 S. C. 288, 154 S. E. 166, 167.

Hence the attempt of the mayor to suspend the sentence of a defendant convicted of vagrancy is beyond the mayor's power and void. *McGaha v. Beacham*, 157 S. C. 288, 154 S. E. 166, 167.

Proper remedy for illegal suspension of sentence is a motion for the execution of the sentence.—The proper remedy upon a circuit judge attempting to suspend a sentence in a case of felony, is to move for the execution of the sentence. *State v. Brewer*, 113 S. C. 177, 102 S. E. 15; cited with approval in *McGaha v. Beacham*, 157 S. C. 288, 154 S. E. 166, 167.

Suspension of a sentence for bigamy is illegal.—Bigamy is a felony, within the meaning of this section, and there-

fore, a sentence given for such offense cannot be suspended under the authority of this section. *State v. Brewer*, 113 S. C. 177, 102 S. E. 15.

Sentence of imprisonment for seduction may be suspended in part on condition that defendant aid in the support of the child.—Under the authority of this section, the court has power to suspend part of a sentence of imprisonment, in a seduction case, on condition that the defendant pay a specified amount towards the support of a child of the seduced girl. *State v. Teal*, 108 S. C. 455, 95 S. E. 69, L. R. A. 1918C, 556, 1 A. L. R. 623, 26 A. L. R. 400.

And such a condition is not a fine or penalty, because the defendant can elect to serve his term. *State v. Teal*, 105 S. C. 455, 95 S. E. 69, L. R. A. 1918C, 556, 1 A. L. R. 623, 26 A. L. R. 400.

But having once accepted conditions imposed in order to secure a lighter sentence, defendant must obey them or suffer the consequences of disobedience. *State v. Gleaton*, 172 S. C. 300, 174 S. E. 12.

And it was not error to refuse accused request for a jury in hearing for revocation of suspension of sentence. *Ibid*.

§ 1039-1. Recorders of municipalities of 5,000 to 5,075 suspend sentences.

—Recorders of the incorporated towns in South Carolina having a population according to the 1930 United States census in excess of five thousand (5,000) and less than five thousand and seventy-five (5,075) shall have the power and authority, in their discretion, to suspend sentences imposed by them in such cases as come within their jurisdiction, upon such terms as in their discretion may seem fit and proper.

1935 (39) 19.

See section 1039-4 for time suspended sentence to run.

§ 1039-2. Recorders of municipalities of 5,550 to 5,600 suspend sentences.

—Recorders of the incorporated, towns in South Carolina having a population according to the 1930 United States census in excess of five thousand five hundred and fifty (5,550) and less than five thousand six hundred (5,600) shall have the power and authority, in their discretion, to suspend sentences imposed by them in such cases as come within their jurisdiction, upon such terms as in their discretion may seem fit and proper.

1935 (39) 20.

See section 1039-4 for time suspended sentence run.

§ 1039-3. Recorders of municipalities over 60,000 may suspend sentences.

—The recorders of the cities in South Carolina having a population in excess of sixty thousand (60,000) shall have the power and authority in their discretion to suspend sentences imposed by them in such cases as come within their jurisdiction, upon such terms as in their discretion may seem fit and proper.

1932 (37) 1353.

§ 1039-4. Sentence suspended run for time prescribed in sentence or order of suspension.—When the sentence of any person, who has been sentenced by a court of competent jurisdiction of this State, shall be suspended by a judge of such court or by the Governor of the State, such suspension shall run for the period of time prescribed by such judge or Governor in the sentence or order of suspension, and no person who has had a sentence so suspended shall be called back and required to do service under such sentence beyond and after the expiration of such period.

1935 (39) 431.

See sections 1039-1, 1039-2 and 1039-3 for power of recorders in certain cities to suspend sentences.

§ 1040. Recognizances to be in name of State.—In all recognizances by any person for keeping the peace, or good behavior, or for appearing as a party, surety of witness at any court of criminal jurisdiction within the State, the sum or sums of money in which any such person shall be bound shall be made payable to the State; and every such recognizance shall be good and effectual in law, provided it be signed by every party thereto in the presence of a judge, clerk of a court of common pleas, magistrate or notary public, who shall sign the same as a witness.

1932 Code, § 1040; Cr. P. '22, § 129; Cr. C. '12, § 111; Cr. C. '02, § 84; G. S. 2659; R. S. 84; 1787 (5) 13; 1882 (18) 450.

Cross references.—As to sureties to justify, see circuit court rule 65. As to where the sureties shall justify, see circuit court rule 66.

Editor's note.—This section is introductory to the following section, and consequently a great many of the cases there annotated also bear on this section. The practitioner is advised to consider the annotations there found in conjunction with those here placed.

The statute in force before 1883 was in substantially the same words, except that it contained the words "otherwise such recognizance shall be void." The omission of these words from the statute would imply that the General Assembly intended the law should be regarded less mandatory and more directory than formerly. An obligation—especially one voluntarily assumed for the protection of the public—will not be regarded void because not taken in precise accordance with the statute, unless the statute expressly so provides. *Treasurers v. Bates*, 2 Bail. 362, 376, 15 Am. Dec. 82, 83 Am. Dec. 383, 37 Am. Rep. 236, 132 Am. St. Rep. 768, 43 L. R. A. 179, 52 L. R. A. 167, 62 L. R. A. 451, 40 L. R. A. (N. S.) 662, 748, L. R. A. 1917B, 995, 1 A. L. R. 1603; *State v. Quattlebaum*, 67 S. C. 203, 45 S.

E. 162.

A recognizance cannot be executed by an attorney. *State v. Ahrens*, 12 Rich. 493, 122 Am. St. Rep. 103.

But a clerk is authorized to take a recognizance under order of the judge. *State v. Sattelwhite*, 20 S. C. 536, 540.

A recognizance is not invalid for mere irregularity. *State v. Rowe*, 8 Rich. 17, 27 L. R. A. (N. S.) 946, 36 L. R. A. (N. S.) 325.

A seal is not necessary to the validity of the bond. *State v. Foote*, 2 Mill 123; *Reynolds v. Harral*, 2 Strob. 87, 99 Am. St. Rep. 498, 14 L. R. A. 78.

A bond, void under the statute, may be enforced as a valid obligation at common law. *State v. Quattlebaum*, 67 S. C. 203, 45 S. E. 162; see, also, the authority therein cited.

An appearance recognizance in the general sessions is binding on a surety without the signature of the principal. *State v. Cornell*, 70 S. C. 409, 50 S. E. 22, 5 L. R. A. (N. S.) 404; citing with approval, *State v. Quattlebaum*, 67 S. C. 203, 45 S. E. 162.

In felonies, personal appearance is necessary. *State v. Rowe*, 8 Rich. 17, 27 L. R. A. (N. S.) 946, 38 L. R. A. (N. S.) 325.

§ 1041. Proceedings in case of forfeiture of recognizances. — Whenever such recognizance shall become forfeited by noncompliance with the condition thereof, the attorney general, or solicitor, or other person acting for him, shall, without delay, issue a notice to summon every party bound in such forfeited recognizance to be and appear at the next ensuing court of

sessions, to show cause, if any he has, why judgment should not be confirmed against him; and if any person so bound fail to appear, or appearing, shall not give such reason for not performing the condition of such recognizance as the court shall deem sufficient, then the judgment on such recognizance shall be confirmed.

1932 Code, § 1041; Cr. P. '22, § 130; Cr. C. '12, § 112; Cr. C. '02, § 85; G. S. 2660; R. S. 85; 1787 (5) 13.

The provision that a forfeited recognizance should be estreated without delay is directory merely. *State v. Cornell*, 70 S. C. 409, 50 S. E. 22, 23, 5 L. R. A. (N. S.) 404.

A proceeding, in 1903, to estreat a recognizance, forfeited in 1897, is not barred by laches. *State v. Cornell*, 70 S. C. 409, 50 S. E. 22, 23, 5 L. R. A. (N. S.) 404.

The recognizance is regarded as a conditional judgment, which on the breach of the condition is to be confirmed or made absolute, unless the parties show sufficient cause to the contrary. *State v. Edens*, 88 S. C. 302, 70 S. E. 609, 610.

And as such, it is an obligation of record. *State v. Johnson*, 77 S. C. 252, 57 S. E. 846, 847.

And the recognizers thereby voluntarily submit themselves to the jurisdiction of the court as parties with respect to proceedings for estreat. *State v. Johnson*, 77 S. C. 252, 57 S. E. 846, 847.

The court of general sessions has exclusive jurisdiction of proceedings to forfeit recognizances. *State v. Cornell*, 70 S. C. 409, 50 S. E. 22, 23, 5 L. R. A. (N. S.) 404, citing with approval *State v. Quattlebaum*, 67 S. C. 203, 45 S. E. 162; See, also, *State v. Johnson*, 77 S. C. 252, 57 S. E. 846 and the authority therein cited.

And this applies to recognizance for appearance in a magistrate's court.—The court of general session can estreat a recognizance for appearance in a magistrate's court. *State v. Williams*, 84 S. C. 21, 65 S. E. 982, 983, L. R. A. 1916F, 373.

And this may be done by scire facias.—Court of general sessions may estreat by scire facias. *State v. Wilder*, 13 S. C. 344, 122 Am. St. Rep. 74.

Its action in declaring the recognizance forfeited will be presumed regular.—The court of general sessions, being one of general jurisdiction, its action in declaring the forfeiture of a recognizance will be presumed on appeal to have been regular, and, a recognizance being a matter of record, every reasonable presumption will be indulged in to support it, and the burden of proving defects is on the recognizers. *State v. Edens*, 88 S. C. 302, 70 S. E. 609.

Therefore, a recital of an order of court showing that defendant was under recognizance to appear and plead to an indictment, and that he was called, but failed to appear, is conclusive; there being no proof of the contrary. *State v.*

Edens, 88 S. C. 302, 70 S. E. 609.

Sufficiency of Allegations.—In a proceeding to estreat a recognizance it should be alleged that the defendant was called at the door of the court house and failed to answer. *State v. Cornell*, 70 S. C. 409, 50 S. E. 22, 23, 5 L. R. A. (N. S.) 404.

The fact that the defendant was called at the court house door and failed to answer should be shown by record, but may be shown by evidence by the solicitor. *State v. Cornell*, 70 S. C. 409, 50 S. E. 22, 23, 5 L. R. A. (N. S.) 404.

In a proceeding to estreat a recognizance, an allegation that the defendant, pursuant to a preliminary examination before a magistrate, was bound over to appear on a bond signed by two sureties, sufficiently alleges that the signing was in the presence of the magistrate. *State v. Cornell*, 70 S. C. 409, 50 S. E. 22, 23, 5 L. R. A. (N. S.) 404.

Delivery of the copy of the notice to the party in a civil action is sufficient.—While the statute requires the issuance of notice, it does not prescribe the place, manner, or proof of service as is provided when the procedure is in the civil court. If, therefore, the notice is issued as required, and it appears to the satisfaction of the court that a copy of the same has been delivered to the party, the statute is complied with, and all the ends to be subserved by a notice are achieved. *State v. Johnson*, 77 S. C. 252, 57 S. E. 846, 847.

Such notice required, is not original process to obtain jurisdiction, but is a continuation of proceedings in which the court has already acquired jurisdiction. *State v. Johnson*, 77 S. C. 252, 57 S. E. 846, 847.

In this view, it is of no consequence that the notice was delivered to appellant in another state. *State v. Johnson*, 77 S. C. 252, 57 S. E. 846, 847.

An order on the hearing of a return adjudging the return on the rule to show cause insufficient is not final.—An order on the hearing of a return, in proceedings under this section, in a case of forfeiture of a recognizance, adjudging the return on the rule to show cause insufficient, declaring the recognizance to be forfeited and estreated, and providing that, in order that judgment may be confirmed, notice shall be issued summoning the surety to appear at the next term, to show cause why judgment shall be con-

firmed, is not final; but leaves the question of rendering final judgment open to be determined on another return. *State v. Dingle*, 87 S. C. 518, 70 S. E. 163, See, also, § 1044.

The issuance of a second rule to show cause why judgment should not be confirmed after adjudication of insufficiency of first return is unnecessary. *State v. Edens* 88 S. C. 302, 70 S. E. 609.

And a rule to show cause is not appealable. *State v. McNinch*, 13 S. C. 452.

Character of prosecution cannot be considered.—The character of the prosecution, and whether it was instituted in good faith, and is meritorious and well founded, cannot be considered on a motion to estreat the recognizance of the defendant. *State v. Williams*, 84 S. C. 21, 65 S. E. 982, 984, L. R. A. 1916F, 373.

And a variance between the warrant and recognizance is not fatal to validity of recognizance.—In the case of *State v. Rowe*, 8 Rich. 17, 27 L. R. A. (N. S.) 946, 38 L. R. A. (N. S.) 325, it was held that a variance between the warrant and the recognizance was not fatal to the validity of the recognizance. In that case the warrant charged the defendant with forgery. The recognizance stated the charge to be fraud or forgery. The recognizance was held good. *State v. Williams*, 84 S. C. 21, 65 S. E. 982, 985, L. R. A. 1916F, 373.

The dismissal of a prosecution by a prosecuting officer, or finding of no bill by a grand jury is not the legal termination of the prosecution; it must be terminated by the order of court discharging the defendant. *Whaley v. Lawton*, 57 S. C. 256, 35 S. E. 558, 2 L. R. A. (N. S.) 933, 1105, L. R. A. 1916F, 371, Ann. Cas. 13A, 927; *Smith v. Shackelford*, 1 N. & McC. 36, 2 L. R. A. (N. S.) 939, Ann. Cas. 15D, 1166; *O'Driscoll v. McBurney*, 2 N. & McC. 54, 26 Am. St. Rep. 136, 2 L. R. A. (N. S.) 941; *Teague v. Wilks*, 3 McC. 461, 465, 2 L. R. A. (N. S.) 937; *Heyward v. Cuthbert*, 4 McC. 354, 2 L.

R. A. (N. S.) 943, 9 L. R. A. (N. S.) 171, Ann. Cas. 15D, 1166; *Tisdale v. Kingman*, 34 S. C. 326, 13 S. E. 547, 93 Am. St. Rep. 474, 2 L. R. A. (N. S.) 929, 950.

Failure to comply with the order of the court granting the recognizance is a breach thereof.—"A recognizance binds the principal, not only to appear, but to abide the judgment of the court, and not to depart thence without its leave; and, if the principal be ordered to execute a new bond, either to keep the peace for a specified period, or for his appearance at a subsequent term, or before another court, and he depart without complying with the order, it is a breach of the recognizance." 3 A. & E. Enc. 715, cited approvingly in *State v. Williams*, 84 S. C. 21, 65 S. E. 982, 984, L. R. A. 1916F, 373.

And a recognizance may be estreated for failure to personally appear even before trial or conviction. *State v. Minton*, 19 S. C. 280, 27 L. R. A. (N. S.) 946, cited with approval in *State v. Williams*, 84 S. C. 21, 65 S. E. 982, 985, L. R. A. 1916F, 373.

Or before trial, where defendant fails to appear and plead. *State v. Minton*, 19 S. C. 280, 282, 27 L. R. A. (N. S.) 946.

But there is no lien on land until recognizance is estreated. *State v. Morgan*, 2 Bail. 601.

Objections to its validity are too late after estreat. *Barton v. Keith*, 2 Hill 537, 20 L. R. A. 426.

But objection that paper, on its face, is not a recognizance, can be made ore tenus. *State v. Ahrens*, 12 S. C. 493, 523, 122 Am. St. Rep. 103.

Surety is not estopped from disputing validity because another party has made payment thereon. *State v. Bright*, 14 S. C. 7, L. R. A. 1917B, 1007.

Sureties are liable notwithstanding discharge of prisoner by United States judge. *State v. Davis*, 12 S. C. 528, 42 Am. Rep. 57.

§ 1042. Execution to issue for sale of estate of offender, etc.—In every case where any such recognizance shall be adjudged so forfeited, or where any fine shall be imposed by or recovered for the use of the State, in any court or before a magistrate, if the party incurring such fine or forfeiture shall fail to pay down the same, with the costs of prosecution, then a writ, in the nature of an execution, shall issue, by virtue of which the sheriff, or his deputy, shall sell (in the same manner as property is sold under execution in civil cases) so much of such offender's estate, real or personal, as may be necessary to satisfy the fine or forfeiture, and also the cost of prosecution, and also the reasonable charges of taking, keeping, and selling such property, returning the overplus, if any, to the offender, together with a bill of the fine or forfeiture, with costs and charges, if he requires it.

1932 Code, § 1042; Cr. P. '22, § 131; Cr. C. '12, § 113; Cr. C. '02, § 86; G. S. 2661; R. S. 86; 1787 (5) 13.

§ 1043. If amount not made, offender may be committed to jail, etc.—If the sheriff, or his deputy, return on oath that such offender refused to pay, or has not any property, or not sufficient whereon to levy, then a writ of *capias ad satisfaciendum* shall issue, whereby he shall be committed to the common jail, until the forfeiture, costs, and charges shall be satisfied—entitled, however, to the privilege of insolvent debtors.

1932 Code, § 1043; Cr. P. '22, § 132; Cr. C. '12, § 114; Cr. C. '02, § 87; G. S. 2662; R. S. '27; 1787 (5) 13.

A person convicted of bastardy who does not give a recognizance can after an execution is returned unsatisfied be arrested on a ca sa. under this section. State v. Brewer, 38 S. C. 263, 16 S. E. 1001, 37 Am. St. Rep. 752, 19 L. R. A.

362, 34 L. R. A. 669, citing and distinguishing State v. Glenn, 14 S. C. 118; State v. Quick, 25 S. C. 110.

See generally, Hurst v. Samuels, 29 S. C. 476, 7 S. E. 822.

§ 1044. Court may remit forfeiture in certain cases.—If any person shall forfeit a recognizance from ignorance or unavoidable impediment, and not from willful default, the court of sessions may, on affidavit stating the excuse or cause thereof, remit the whole or any part of the forfeiture, as may be deemed reasonable.

1932 Code, § 1044; Cr. P. '22, § 133; Cr. C. '12, § 115; Cr. C. '02, § 88; G. S. 2663; R. S. '89; 1787 (5) 13.

§ 1045. Fines in alternative apportioned when part of sentence served.—In all cases in this State where a sentence has been imposed by any judge, magistrate, mayor or intendant of any city or town in the alternative (by fine or imprisonment), and the person upon whom said sentence has been imposed shall enter upon the service of said sentence, and thereafter the said person, or any one in his or her behalf, shall desire or offer to pay the fine imposed by said sentence, the clerk of the court in the county in which the said sentence was imposed, or the judge, magistrate, mayor or intendant who imposed the said sentence, shall apportion the fine imposed therein, so that the said person, or any one in his or her behalf, shall be allowed to pay such part of said fine as shall be in proportion to the balance of the time to be served under the said sentence. That, upon the payment of said proportionate part of said fine, the said clerk, judge, magistrate, mayor or intendant shall release and discharge the person in behalf of whom the said fine is so paid, from further custody.

1932 Code, § 1045: 1922 (32) 767.

§ 1045-1. Governor may remand convicts from penitentiary—lease to other counties.—The Governor of this State shall have the authority, on proper cause shown, to remand any convict committed to the state penitentiary back to the county chaingang of the county from which he was committed, to serve the balance of the sentence imposed by law, upon the request of the county commissioners.

1932 Code, § 3834; 1923 (33) 233.

§ 1046. Execution of death sentence upon dismissal of appeal—notices to superintendent of penitentiary.

(1) **Clerk of Supreme Court notify superintendent of state penitentiary disposition of appeal from sentence of death—time for execution.—**In all criminal cases where the sentence of death is imposed, and which

are appealed to the Supreme Court or in which notice of intention to appeal is given, when the judgment below has been affirmed, or the appeal dismissed or abandoned, it shall be the duty of the clerk of the Supreme Court, when the remittitur is sent down, or the appeal is dismissed, or abandoned, to notify the superintendent of the state penitentiary or his duly appointed officer in charge thereof, of the final disposition of such appeal, and, on the fourth Friday after the receipt of the said notice, the sentence appealed from shall be duly carried out as provided by law in such cases, unless stayed by order of the Supreme Court or respite or commutation of the Governor.

(2) Form of notice.—Two copies of the said notice shall be served or sent by registered mail to the superintendent of the state penitentiary or his duly appointed officer in charge thereof, which notice shall read substantially as follows: "This is to notify you that the sentence of death imposed in the case of State vs., from which an appeal has been taken, has been affirmed and finally disposed of by the Supreme Court, and the remittitur has been sent down to the clerk of the court of general sessions of County," or "This is to notify you that the appeal from the sentence of death imposed in the case of State vs., has been dismissed (or abandoned), and the notice has been sent down to the clerk of the court of general sessions of County."

"It is, therefore, required of you by an act of the legislature, entitled 'An Act to Regulate the Execution of the Judgment and Sentence of the Court in Capital Cases,' approved the 16th day of March, 1923, as amended by act approved the 19th day of February, 1929, to execute the judgment and sentence of death imposed on the said defendant or defendants (if more than one), on the fourth Friday after the service upon you or receipt of this notice." The receipt of the notice shall be acknowledged in writing by the recipient, which acknowledgment shall be filed by the clerk of the Supreme Court, and in case of service, the return of service shall be filed.

(3) Service on prisoner.—It shall be the duty of the superintendent of the state penitentiary or his duly appointed officer to immediately serve one of the said copies upon the defendant personally.

1932 Code, § 1046; 1923 (33) 113; 1929 (36) 66; 1936 (39) 1306.

This section was held applicable to dismissal of appeal from order denying defendant a new trial on after-discovered

evidence. *Ex parte Howell*, 168 S. C. 197, 167 S. E. 230.

Section is constitutional. *Ibid*.

CHAPTER 66

The Writ of Habeas Corpus

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| 1047. Persons entitled to writ. | 1057. Writ during court session. |
| 1048. Bail in case of treason or felony. | 1058. Writ after adjournment. |
| 1049. Willful neglect to seek writ. | 1059. No re-arrest of person discharged. |
| 1050. Power of judge in vacation. | 1060. Power of magistrates. |
| 1051. To whom writ directed. | 1061. Officers neglecting duty. |
| 1052. Service of writ. | 1062. Penalties. |
| 1053. Duty of officer having custody of prisoner. | 1063, 1064. Removal from one prison to another. |
| 1054. Time within which to bring prisoner before court. | 1065. Appeals. |
| 1055. Discharge of prisoner. | 1066. Suspension of writ by Governor. |
| 1056. Notice to state's attorney. | 1066-1. Execute. |

§ 1047. Persons entitled to benefit of provisions.—If any person or persons shall be or stand committed or detained for any crime, unless for felony (the punishment of which is death), or treason, plainly expressed in the warrant of commitment, or unless charged as accessory before the fact to treason or felony (the punishment of which felony is death), or with suspicion thereof, or unless charged with suspicion of treason or felony (which felony is punishable with death), which shall be plainly expressed in the warrant of commitment, they shall be entitled to the writ of habeas corpus.

1932 Code, § 1047; Cr. P. '22, § 134; Cr. C. '12, § 116; Cr. C. '02, § 89; G. S. 2322; R. S. 89; 31 ch. 2, c. 2; (1) 118, 123, §§ 3 and 21; 1839, 22 § 6.

Cross reference.—As to persons committed for treason or felony indicted at next term or let to bail, etc., see sec. 1048 and note thereto.

It is usual for the court to try all issues of law and facts upon the petition, return and supporting affidavits in as summary a manner as the circumstances permit. A reference may, at the discretion of the court, be ordered. *Ex parte Cannon*, 75 S. C. 214, 217, 55 S. E. 325, Ann. Cas. 14A, 743.

But findings of fact cannot be reviewed on appeal.—The proceedings are on the law side of the court, and the findings of fact by the trial judge, or justice, cannot be reviewed on appeal. *Ex parte Reed*, 19 S. C. 604, 41 L. R. A. (N. S.) 1577, Ann. Cas. 14A, 743, 761; *Ex parte Cannon*, 75 S. C. 214, 219, 55 S. E. 325, Ann. Cas. 14A, 743.

The writ of habeas corpus cannot be used as a substitute for a writ of error. *State v. Garlington*, 56 S. C. 413, 414, 34 S. E. 689; *Ex parte Bond*, 9 S. C. 80, 30 Am. Rep. 20, 23 Am. St. Rep. 110, 55 Am. St. Rep. 274, 87 Am. St. Rep. 192, 45 L. R. A. 138; *State v. Lundy*, 19 S. C. 601; *State v. Williams*, 32 S. C. 583, 10 S. E. 551, 21 L. R. A. (N. S.) 242.

The prisoner himself can waive his presence at the return of the writ. *State v. Jones*, 32 S. C. 583, 10 S. E. 577.

See generally, *Ex parte Avant*, 84 S. C. 519, 66 S. E. 976. As to proceedings re-

lating to the custody of infants, see *Ex parte Rembert*, 82 S. C. 336, 64 S. E. 150, 41 L. R. A. (N. S.) 585, Ann. Cas. 14A, 744; *Ex parte Canova*, 84 S. C. 473, 65 S. E. 625, 67 S. E. 476, 42 L. R. A. (N. S.) 1016, Ann. Cas. 12D, 362, Ann. Cas. 14A, 744, 759; *Tillman v. Tillman*, 84 S. C. 552, 66 S. E. 1049, 26 L. R. A. (N. S.) 781, 41 L. R. A. (N. S.) 586, 42 L. R. A. (N. S.) 1018, Ann. Cas. 13B, 887, Ann. Cas. 14A, 744, 755; *Ex parte Reynolds*, 73 S. C. 296, 298, 53 S. E. 490, 114 Am. St. Rep. 86, 16 L. R. A. (N. S.) 1004, 41 L. R. A. (N. S.) 582, 42 L. R. A. (N. S.) 1016, 6 Ann. Cas. 936, Ann. Cas. 14A, 743, 759; *Ex parte Cannon*, 75 S. C. 214, 55 S. E. 325, Ann. Cas. 14A, 743; *Ex parte Davidge*, 72 S. C. 16, 51 S. E. 269, 41 L. R. A. (N. S.) 592, 608, Ann. Cas. 14A, 743, 759, 20 A. L. R. 839; *Brown v. Robertson*, 76 S. C. 151, 56 S. E. 786, 9 L. R. A. (N. S.) 1173, 41 L. R. A. (N. S.) 591, Ann. Cas. 14A, 744; *Workman v. Watts*, 74 S. C. 546, 54 S. E. 775, Ann. Cas. 14A, 744, 756. As to relief against writ of ne exeat, see *Ex parte Messervy*, 80 S. C. 285, 61 S. E. 445. As to cases of arrest for contempt, see *Ex parte Parker*, 74 S. C. 466, 55 S. E. 122, 114 Am. St. Rep. 1011, 35 L. R. A. (N. S.) 584, L. R. A. 1917F, 294, 7 Ann. Cas. 874, Ann. Cas. 16B, 1056, Ann. Cas. 16C, 699; *State v. Everett*, Dud. 295, 10 A. L. R. 388.

§ 1048. Persons committed for treason or felony indicted at next term or let to bail, etc.—If any person committed for treason or felony, plainly and specially expressed in the warrant of commitment, upon his prayer or petition in open court, the first week of the term, to be brought to his trial, shall not be indicted some time in the next term after such commitment, it shall and may be lawful to and for the judge of the circuit court, and he is hereby required, upon motion made in open court the last day of the term, either by the prisoner or any one in his behalf, to set at liberty the prisoner upon bail, unless it appear to him, upon oath made, that the witnesses for the State could not be produced at the same term; and if any person committed as aforesaid upon his prayer or petition in open court, the first week of the term, to be brought to his trial, shall not be indicted and tried the second term after his commitment, or upon his trial shall be acquitted, he shall be discharged from his imprisonment.

1932 Code, § 1048; Cr. P. '22, § 135; Cr. C. '12, § 117; Cr. C. '02, § 90; G. S. 2323; R. S. 90; (1) 119, § 7.

Cross reference.—As to person entitled to the benefit of this chapter, see the next foregoing section and note there placed. As to appeals from all final decisions rendered on application for writs of habeas corpus, see sec. 1065 and note there-to.

Scope and purpose of the section.—It will be observed that the section makes two distinct and different provisions for the relief of persons committed to jail under a charge of treason or felony: First, That, where a person so charged is not indicted during the term of the court next succeeding his commitment, he may apply, either in person "or by any one in his behalf," to the judge of the circuit court for bail, which the judge is required to grant "unless it appears to him, upon oath made, that the witnesses for the state could not be produced the same term." The plain purpose of this provision was to give a person committed to jail for treason or felony the right to bail where he is not indicted—that is, where an indictment is not presented to the grand jury—at the first term after his commitment, unless it shall be made to appear to the satisfaction of the judge that the witnesses relied upon by the state to warrant the finding of the indictment cannot be procured at that term. The second provision of the section does, however, give the defendant the right to a discharge "from his imprisonment" where, upon his petition to be brought to trial, he "shall not be indicted and tried the second term after his commitment." State v. Williams, 35 S. C. 160, 14 S. E. 309, 85 Am. St. Rep. 190, 56 L. R. A. 534, Ann. Cas. 12D, 1274.

This section applies only to those persons who are in actual custody. State v. Williams, 35 S. C. 160, 14 S. E. 309, 310, 85 Am. St. Rep. 190, 56 L. R. A. 534, Ann. Cas. 12D, 1274; see also, State v.

Buyck, 2 Bay 563, 56 L. R. A. 518, 534, 35 L. R. A. (N. S.) 883, Ann. Cas. 12D, 1274, 14 A. L. R. 345; State v. Logan, 3 Brev. 415, 416, 56 L. R. A. 534, 35 L. R. A. (N. S.) 883, Ann. Cas. 12D, 1274, 14 A. L. R. 345; State v. Holmes, 3 Strob. 272, 278, 56 L. R. A. 514.

And this means actual confinement at the time of the application for discharge. —To entitle one to the benefit of the provisions of this section, it must appear that he is in actual confinement at the time he applies for his discharge. State v. Williams, 35 S. C. 160, 14 S. E. 309, 310, 85 Am. St. Rep. 190, 56 L. R. A. 534, Ann. Cas. 12D, 1274.

The jurisdiction of the court over a person charged with violation of the law of this State is not affected by his being wrongfully brought into the State. State v. Smith, 1 Bail. 283, 19 Am. Dec. 679, 47 Am. Dec. 559, 57 Am. Dec. 400, 58 Am. Dec. 693, 59 Am. Dec. 576, 10 Am. St. Rep. 209, 111 Am. St. Rep. 111, 14 L. R. A. 287, 15 L. R. A. 177, 16 L. R. A. (N. S.) 306, L. R. A. 1915F, 544, Ann. Cas. 13B, 878, 18 A. L. R. 510, 26 A. L. R. 403.

A prisoner is not entitled to be set at liberty on bail when true bill is found against him for murder at the term during which he surrenders and demands trial. State v. Holmes, 3 Strob. 272, 56 L. R. A. 514.

Where day for execution of sentence has elapsed, prisoner is not entitled to discharge. Ex parte Nixon, 2 S. C. 4.

A prisoner, tried at the first term for horse stealing, and mistrial had, is not entitled to discharge upon continuance by State at second term. State v. Spergen, 1 McC. 563, 85 Am. St. Rep. 203, 56 L. R. A. 520, 543, Ann. Cas. 12D, 1274.

And a person accused of forgery, and admitted to bail, is not entitled to his discharge from the prosecution at the second term. State v. Buyck, 2 Bay 563,

56 L. R. A. 518, 534, 35 L. R. A. (N. S.) 883, Ann. Cas. 12D, 1274, 14 A. L. R. 345.

A prisoner must be discharged hereunder, if not indicted and tried within two terms after his confinement. State v. Fasket, 5 Rich. 255, 256, 56 L. R. A. 514, 543, Ann. Cas. 12D, 1274.

One discharged under habeas corpus act is not thereby protected from further prosecution on same charge. State v. Fley, 2 Brev. 338, 4 Am. Dec. 583, 51 Am. Dec. 376, 3 Am. St. Rep. 280.

See generally, State v. Logan, 3 Brev.

415, 2 Tread. 493, 56 L. R. A. 534, 35 L. R. A. (N. S.) 883, Ann. Cas. 12D, 1274, 14 A. L. R. 345.

As to transfer of cases to United States court, see State v. Smalls, 11 S. C. 262, 58 Am. Dec. 244, 97 Am. Dec. 715, 53 L. R. A. 573, L. R. A. 1916A, 835; State v. Davis, 12 S. C. 528, 42 Am. Dec. 57. As to form of order for bail under writ of habeas corpus, see In re Draher, 38 S. C. 551, 16 S. E. 840. As to bail refused while defendant is confined under sentence on plea of assault and battery, see Ex parte Jones, 36 S. C. 607, 15 S. E. 544.

§ 1049. If not asked for two terms, etc.—If any person shall have willfully neglected, by the space of two whole terms after his imprisonment, to pray a habeas corpus for his enlargement, such person, so willfully neglecting, shall not have any habeas corpus to be granted in vacation time, in pursuance of this chapter.

1932 Code, § 1049; Cr. P. '22, § 136; Cr. C. '12, § 118; Cr. C. '02, § 91; G. S. 2324; R. S. 91; (1) 119, § 4.

Circuit judge cannot hear application for writ outside of circuit. Ex parte Parker, 6 S. C. 472.

§ 1050. Judges to grant writs, etc.—Any of the judges of this State, in vacation time and out of term, upon view of the copy or copies of the warrant or warrants of commitment and detainer, or otherwise, upon oath made that such copy or copies were denied to be given by the person or persons in whose custody the prisoner or prisoners is or are detained, are hereby authorized and required, upon request, made in writing, by such person or persons as are committed as aforesaid, or any on his, her or their behalf, attested and subscribed by two witnesses who were present at the delivery of the same to award and grant a writ of habeas corpus, under the seal of such court, whereof he shall be one of the judges.

1932 Code, § 1050; Cr. P. '22, § 137; Cr. C. '12, § 119; Cr. C. '02, § 92; G. S. 2325; R. S. 92; (1) 118, § 3.

§ 1051. Writ to be directed to whom.—Such writ shall be directed to the officer or officers in whose custody the party so committed or detained shall be, and shall be returned immediately, before the judge issuing the same.

1932 Code, § 1051; Cr. P. '22, § 138; Cr. C. '12, § 120; Cr. C. '02, § 93; G. S. 2326; R. S. 93; (1) 118, § 3.

§ 1052. Service of writ.—The said writ shall be served upon the said officer, or left at the jail or prison with any of the under-officers, under-keepers, or deputy of the said officers or keepers.

1932 Code, § 1052; Cr. P. '22, § 139; Cr. C. '12, § 121; Cr. C. '02, § 94; G. S. 2327; R. S. 94; (1) 117, § 2.

§ 1053. Prisoners to be brought upon payment of charges, etc.—proviso.—The said officer or officers, his or their under-officers, under-keepers, or deputies, shall, within three days after the service thereof, upon payment or tender of charges of bringing the said prisoner (to be ascertained by the judge or court that awarded the same, and endorsed upon the said writ), not exceeding ten cents per mile, and upon security given by his own

bond to pay the charges of carrying back the prisoner, if he shall be remanded by the court or judge to which he shall be brought, and that he will not make any escape by the way, make return of such writ, and bring, or cause to be brought, the body of the party so committed or restrained, unto or before the judge or court from whence the said writ shall issue, or unto and before such other person or persons before whom the said writ is made returnable, according to the command thereof, and shall then certify the true cause of his detainer or imprisonment: *provided, however*, that if any prisoner be not able to pay the said charges, the same shall be paid by the county wherein he is confined: *provided, further*, that if such prisoner shall be acquitted of the charge against him, or finally discharged on habeas corpus by the judge or court hearing the same, the expenses of the proceeding in habeas corpus shall be paid by the county in which the case is situated.

1932 Code, § 1052; Cr. P. '22, § 140; Cr. C. '12, § 122; Cr. C. '02, § 95; G. S. 2328; R. S. 95; 1870 (14) 400.

§ 1054. Time within which prisoners must be brought before court.—If the place of imprisonment of the said party be beyond the distance of twenty miles from the place where such court is held, and not above one hundred miles, he shall be brought before the court, or the person or persons before whom the writ is returnable, within the space of ten days, and if beyond the distance of one hundred miles, then within the space of twenty days after the delivery of such writ and not longer.

1932 Code, § 1054; Cr. P. '22, § 141; Cr. C. '12, § 123; Cr. C. '02, § 96; G. S. 2329. R. S. 96; (1) 117, § 2.

§ 1055. Proceedings upon hearing of return.—If, upon a hearing, the party shall be entitled to his discharge, then the judge before whom he is brought shall within two days after the party shall be brought before him, discharge the said prisoner from his imprisonment, taking his recognizance, with one or more surety or sureties, in any sum according to his discretion, having regard to the nature of the offense, for his appearance in the court of general sessions, the term following, for such county where the offense was committed, or in the court of such other county where the said offense is properly cognizable, as the case shall require, and then shall certify the said writ, with the return thereof, and the said recognizance or recognizances, into the said court where such appearance is to be made; but if no legal cause be shown for the imprisonment or restraint, the prisoner shall be discharged therefrom.

1932 Code, § 1055; Cr. P. '22, § 142; Cr. C. '12, § 124; Cr. C. '02, § 97; G. S. 2330; R. S. 97; (1) 118, § 3.

Under this chapter, the judge can neither let to bail nor discharge a prisoner committed for an offense not bailable. State v. Everett, Dud. 295, 10 A. L. R. 388.

Such as a party convicted of an infamous crime. State v. Connor, 2 Bay 34, 81 Am. Dec. 89.

But independently of this chapter, the judge may, at chambers, let to bail for any offense whatever, and in making up his judgment may look beyond the com-

mitment. State v. Hill, 3 Brev. 89, 81 Am. Dec. 88, 39 L. R. A. (N. S.) 758; State v. Everett, Dud. 295, 10 A. L. R. 388; State v. Arthur, 1 McM. 456, Ann. Cas. 13C, 695.

The judge can only conditionally discharge on bail, not absolutely. State v. Jones, 32 S. C. 583, 10 S. E. 577.

See generally, as to discretionary power to bail. State v. Hill, 1 Tread. 242, 37 Am. Dec. 364; State v. Gulden, 2 McC. 524.

§ 1056. Notice to be given to attorney general, etc.—When it appears, from the return of the writ or otherwise, that the party is imprisoned on a criminal accusation, he shall not be discharged until sufficient notice has been given to the attorney general, or circuit solicitor, or other attorney acting for the State, that he may appear and object to such discharge, if he thinks fit.

1932 Code, § 1056; Cr. P. '22, § 143; Cr. C. '12, § 125; Cr. C. '02, § 98; G. S. 2331; R. S. 98.

§ 1057. Granting of writ during session of court.—During the term of the circuit court for that county where any prisoner is detained, no person shall be removed from the common jail upon any writ of habeas corpus granted in pursuance of this chapter, but, upon any such writ, shall be brought before the circuit judge, in open court, who is thereupon to do what to justice shall appertain.

1932 Code, § 1057; Cr. P. '22, § 144; Cr. C. '12, § 126; Cr. C. '02, § 99; G. S. 2332; R. S. 99; (1) 122, § 18.

§ 1058. Writ after adjournment.—After the circuit court adjourns, any person or persons detained may have a writ of habeas corpus, according to the direction and intention of this chapter.

1932 Code, § 1058; Cr. P. '22, § 145; Cr. C. '12, § 127; Cr. C. '02, § 100; G. S. 2333; R. S. 100; (1) 122, § 19.

§ 1059. Person discharged not to be re-arrested, etc.—No person who shall be delivered or set at large upon any writ of habeas corpus shall, at any time, be again imprisoned or committed for the same offense by any person or persons whatsoever, other than by the legal order and process of such court wherein he shall be bound by recognizance to appear, or other court having jurisdiction of the cause; and if any other person or persons shall knowingly, contrary to this chapter, recommit or imprison, or knowingly procure or cause to be recommitted or imprisoned for the same offense, or pretended offense, any person delivered or set at large, as aforesaid, or be knowingly aiding or assisting therein, then he or they shall forfeit to the prisoner or party grieved the sum of two thousand five hundred dollars, any colorable pretense or variation in the warrant or warrants of commitment notwithstanding, to be recovered as aforesaid.

1932 Code, § 1059; Cr. P. '22, § 146; Cr. C. '12, § 128; Cr. C. '02, § 101; G. S. 2334; R. S. 101; (1) 119, § 6.

§ 1060. Two magistrates to grant writs of habeas corpus.—Any two magistrates are authorized and required to grant the writ of habeas corpus as fully, effectually and lawfully as may any judge of the court of common pleas and general sessions or justice of the Supreme Court of this State, except in cases of felony, the punishment for which is death, or imprisonment for life, and except in changing the custody of any child or children, in which cases magistrates shall have no jurisdiction in application of habeas corpus.

1932 Code, § 1060; Cr. P. '22, § 147; Cr. C. '12, § 129; Cr. C. '02, § 102; G. S. 2335; R. S. 102; 1712 (2) 460; 1839 (11) 23; 1918 (30) 765.

Two magistrates may discharge absolutely hereunder. *State v. Jones*, 32 S. C. 583, 10 S. E. 577.

But if one of the two magistrates refuse to sign the writ, he is liable. *Ashe v. O'Driscoll*, 2 Tread. 698.

Two magistrates cannot admit a person to bail who is charged with murder in the warrant. *State v. Arthur*, 1 McM. 456, Ann. Cas. 13C, 695.

But they may do so on charge of passing counterfeit money. *Barton v. Keith*,

2 Hill 537, 20 L. R. A. 426.

An appeal from an order made by two magistrates in habeas corpus proceedings must be to the circuit court and not directly to the Supreme Court. *State v. Duncan*, 22 S. C. 87, 89, 10 A. L. R. 396.

§ 1061. Penalty to officers neglecting their duty.—Every person whatsoever to whom any power is given, either judicial or ministerial, by this chapter, and which, by virtue hereof, he is required and commanded to do, who shall wilfully neglect, refuse, or omit to do the same, when the same shall be legally requested and demanded, according to the directions herein, and when the person or persons so requesting and demanding the same are legally entitled to request or demand by the provisions of this chapter, then and in such case such person, whether magistrate or officer, willfully so refusing, neglecting, or omitting what this chapter requires and commands, for each such willful neglect, refusal, or omission, shall forfeit the sum of five hundred (\$500) dollars, and shall be thereafter incapable of holding or executing his office.

1932 Code, § 1061; Cr. P. '22, § 148; Cr. C. '12, § 130; Cr. C. '02, § 103; G. S. 2336; R. S. 103; (1) 119, § 5; 1712 (2) 400.

§ 1062. Penalties—how recovered.—The said penalties may be recovered by the prisoner or party grieved, his executors and administrators, against such offender, his executors or administrators, by action in any court of competent jurisdiction, wherein no protection, privilege, injunction, or stay of prosecution, shall be admitted or allowed.

1932 Code, § 1062; Cr. P. '22, § 149; Cr. C. '12, § 131; Cr. C. '02, § 104; G. S. 2337; R. S. 104; (1) 119, § 5.

§ 1063. Persons not to be removed from one prison to another without cause.—If any person or persons, citizens of this State, shall be committed to any prison, or in custody of any officer or officers whatsoever, for any criminal or supposed criminal matter, the said person shall not be removed from the said prison and custody, into the custody of any other officer or officers, unless it be by habeas corpus or some other legal writ, or where the prisoner is delivered to the constable or other inferior officer, to carry such prisoner to some common jail, or where any person is sent, according to law, to any common workhouse of correction, or where the prisoner is removed from one place or prison to another within the said county, in order to his or her trial or discharge in due course of law, or in case of sudden fire or infection, or other necessity, or when brought into court as a witness in some matter or cause as provided by law.

1932 Code, § 1063; Cr. P. '22, § 150; Cr. C. '12, § 132; Cr. C. '02, § 105; G. S. 2338; R. S. 105; (1) 120, § 9.

§ 1064. Penalty for signing warrants, etc.—If any person or persons shall, after such commitment aforesaid, make out and sign or countersign any warrant or warrants for such removal aforesaid, contrary to this chapter, as well he that makes or signs or countersigns such warrant or warrants, as the officer or officers that obey or execute the same, shall suffer and incur the pains and forfeitures mentioned in section 1059 to 1061.

1932 Code, § 1064; Cr. C. '22, 151; Cr. C. '12, § 133; Cr. C. '02, § 106; (1) 120, § 9.

§ 1065. Appeals allowed.—An appeal from all final decisions rendered on applications for writs of habeas corpus shall be allowed as is provided by law in civil actions.

1932 Code, § 1065; Cr. P. '22, § 152; Cr. C. '12, § 134; Cr. C. '02, § 107.

Cross references.—As to when appeals to the Supreme Court may be had, see sec. 26 and note there placed. As to notice of intention to appeal serving case with exception, objection and alterations, see sec. 781 and note thereunder. As to when notice of appeal may stay execution—undertaking and appeal, see sec. 782 and note thereto.

The State has an appealable interest in a habeas corpus order releasing persons sought to be extradited pursuant to the Governor's warrant. *Ex parte Murray*, 112 S. C. 342, 99 S. E. 798, 799, 5 A. L. R. 1152, 10 A. L. R. 396.

The appeal is at end if the day of trial arrives before the hearing of the appeal.—The sole object of an application for bail under a writ of habeas cor-

pus is to release the accused from prison until the day of trial. Whether bail be granted or improperly denied, the function of the writ is at an end when the day of trial arrives. So, also, the only effect of a reversal on appeal of the order denying bail would be to give the accused bail until the day of trial arrives when it would end. Hence, if the day of trial arrives before the appeal is heard and decided, necessary result is to end the appeal. *Ex parte Jones*, 82 S. C. 164, 63 S. E. 743.

Habeas corpus order made in chambers but not served upon the adverse party may be appealed from more than ten days after date of order. *Ex parte Murray*, 112 S. C. 342, 99 S. E. 789, 5 A. L. R. 1152, 10 A. L. R. 396.

§ 1066. Governor may suspend habeas corpus—when.—If, during any insurrection, rebellion, or any unlawful obstruction of the laws, as set forth in section 1390, the Governor of the State, in his judgment shall deem the public safety requires it, he is authorized to suspend the privilege of the writ of habeas corpus in any case throughout the State or any part thereof; and whenever the said privilege shall be suspended, as aforesaid, no military or other officer shall be compelled, in answer to any writ of habeas corpus, to return the body of any person or persons detained by him by authority of the Governor; but upon certificate under oath, of the officer having charge of any one so detained, that such person is detained by him as a prisoner under the authority of the Governor, further proceedings under the writ of habeas corpus shall be suspended by the judge or court having issued the said writ, so long as said suspension by the Governor shall remain in force and said rebellion continue.

1932 Code, § 1066; Cr. P. '22, § 153; Cr. C. '12, § 337; Cr. C. '02, § 250; G. S. 2584; R. S. 215; 1868 (14) 86.

§ 1066-1. Execute writs of habeas corpus.—Every sheriff, deputy sheriff, or jailer shall have power, and he is authorized, required, and commanded to give due obedience to the execution of every writ of habeas corpus made or signed by any person or persons by law empowered to grant the same, and shall do and perform any matter or thing which by the same he may be required to do; and if he shall wilfully neglect, refuse, or omit to obey or perform the same when legally requested and demanded in such case, for each such neglect, refusal, or omission, he shall forfeit the sum of five hundred dollars, to be recovered by indictment.

1932 Code, § 1532; Cr. C. '22, § 479; Cr. C. '12, § 553; Cr. C. '02, § 396; G. S. 680; R. S. 313; 1839 (11) 48.

CHAPTER 67

Inquests on the Dead

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| 1067. Summoning a jury. | 1085. Form of conclusion of inquisition. |
| 1068. Executing a warrant. | 1086. Warrant in murder case. |
| 1069. Persons subject to jury duty. | 1087. Commitment. |
| 1070. The jury. | 1088. Custody of persons committed. |
| 1071. Charge to jury. | 1089. Report to Governor. |
| 1072. Inquiry in case of suicide. | 1090. Binding over person killing by
mischance. |
| 1073. Proclamation. | 1091. Burying body without inquiry. |
| 1075 and 1076. Power of coroner. | 1092 and 1093. Dead bodies. |
| 1077. Absent jurors. | 1094. Burial without inquest. |
| 1078. Oath of witnesses. | 1095. Punishment for contempt. |
| 1079. Taking testimony and binding
over witnesses. | 1096. Inquest regulated. |
| 1080. Form of verdict. | 1097. Preliminary examinations. |
| 1081. Death by means unknown. | 1098, 1099. Examination of bodies by
chemist. |
| 1082. Death by self-murder. | 1100. Duty of chemist to attend trial. |
| 1083. Death by mischance. | |
| 1084. Death by the hands of another. | |

§ 1067. Mode of summoning a jury—form of warrant.—When the coroner shall be informed of or shall see the dead body of any person supposed to have come to a violent and untimely death, found lying within his county, he shall make out his warrant, directed to all or any of the constables of his county, or to the sheriff of his county, requiring them, or any of them, forthwith to summon a jury of fourteen men of the county within a radius of ten miles, to appear before him at the time and place specified in the warrant, which warrant shall be in this form:

“The State of South Carolina,

“To the sheriff (or to any constable or constables, as the case may be), of _____ County, greeting:

“These are to require you, immediately on receipt and sight hereof, to summon and warn, verbally or otherwise, fourteen men of the said county, to be and appear before me, the coroner of said county, at _____ within the said county, between the hours of _____ o’clock on the _____ day of _____, then and there to inquire, upon the view of a body of a certain person there lying dead, how he came to his death. Fail not herein, as you will answer the contrary at your peril.

“Given under my hand and seal, at _____, this _____ day of _____, A. D. _____, by me.

“A. B. [L. S.]

“Coroner for _____ County.”

1932 Code, § 1067; Cr. P. '22, § 154; Cr. C. '12, § 999; Cr. C. '02, § 701; G. S. 2664; R. S. 580; 1839 (11) 72; 1875, XV, 8.

An inquest over a dead body is a proceeding essentially criminal in its nature, and it falls within the term “criminal proceedings” for which salaries are provided instead of fees. *Acker v. Anderson County*, 77 S. C. 478, 58 S. E. 337.

§ 1068. Any constable or sheriff to execute warrant.—Any constable or sheriff to whom such warrant shall come, shall forthwith execute the same, and repair unto the place at the time therein mentioned, and make return of the warrant, with his proceedings thereon, to the coroner that granted it; and every constable or sheriff failing to perform the duty by such war-

rant required of him, or failing to return the same as aforesaid, shall forfeit and pay the sum of twenty dollars, if without reasonable excuse, to be recovered by action; and each and every person summoned and warned as aforesaid to be a juror, and failing to appear and act as such juror, shall also forfeit and pay the sum of twenty dollars, if without reasonable excuse, to be recovered by action.

1932 Code, § 1068; Cr. P. '22, § 155; Cr. C. '12, § 1000; Cr. C. '02, § 702; G. S. 2665; R. S. 581; 1839 (11) 72.

§ 1069. Persons subject to jury duty.—All persons subject to jury duty in the circuit courts shall be liable to serve as jurors on an inquest on a dead body found within their county.

1932 Code, § 1069; Cr. P. '22, § 156; Cr. C. '12, § 1001; Cr. C. '02, § 703; G. S. 2666; R. S. 582; 1839 (11) 72.

§ 1070. Jurors—number—oath—compensation.—Of the jurors summoned and appearing, the coroner shall swear six and administer to the foreman, appointed by him, an oath in the form following: "You shall inquire, and true presentment make on behalf of the state of South Carolina, in what manner A B, here lying dead, came to his death, and you shall deliver a true verdict thereon, according to such evidence as shall be given, and according to your knowledge. So help you, God;" and to the others he shall administer an oath in this form: "The oath which your foreman has taken on his part, you shall well and truly observe and keep on your part. So help you, God." For such services each juror sworn shall be allowed mileage, as all jurors in the circuit courts, and a per diem of fifty cents, to be paid on certificate of the coroner or magistrate holding the inquest, to be paid as are jurors in the circuit courts: *provided*, the hereinabove provisions as to per diem and mileage shall not apply to the counties of Abbeville, Anderson, Bamberg, Berkeley, Clarendon, Dorchester, Darlington, Greenwood, Hampton, Jasper, Kershaw, Lancaster, Oconee, Orangeburg, Pickens, Saluda, Spartanburg, Union, Horry and York. *Provided, further*, that coroner juries in Sumter County shall receive fifty (\$.50) cents per diem, but shall not receive pay for mileage when serving on the coroner's jury in Sumter County. *Provided, further*, that jurors serving in inquests in York County and Jasper County shall be entitled to receive a per diem of fifty cents for each day of attendance, to be certified by the coroner.

1932 Code, §§ 1070, 1074; Cr. P. '22, §§ 157, 161; Cr. C. '12, § 1002; Cr. C. '02, § 704; G. S. 2667; R. S. 583; 1839 (11) 73; 1914 (28) 517; 1917 (30) 161; 1933 (38) 23; 1936 (39) 1297.

§ 1071. Coroner to charge jury.—The jury so sworn shall be charged by the coroner to declare, upon oath, whether the deceased came to his death by mischance and accident, or by felony; and if by felony, whether by his own or another's; and if by mischance, whether by the act of God or of man; and if he died of another's felony, who were principals and who accessories who threatened him of life, or murder, and with what instrument he was struck or wounded; and if by mischance or accident, by the act of God or man, whether by hurt, fall, stroke, drowning or otherwise. And he shall also charge them to inquire of the persons that were present at the finding of the body whether he were killed in the same place or else-

where, and if elsewhere, by whom or how he was there brought, and of all other circumstances.

1932 Code, § 1071; Cr. P. '22, § 158; Cr. C. '12, § 1003; Cr. C. '02, § 705; G. S. 2668; R. S. 584; 1839 (11) 73.

§ 1072. Inquiry in case of suicide.—If the jury so charged find that the deceased came to his death by his own felony, they shall further inquire into the manner, names, and instrument, and into all the circumstances of the death.

1932 Code, § 1072; Cr. P. '22, § 159; Cr. C. '12, § 1004; Cr. C. '02, § 706; G. S. 2669; R. S. 585; 1839 (11) 73.

§ 1073. Proclamation.—The jury being charged, they must stand together until proclamation be made for any that can give evidence to draw near, and they shall be heard.

1932 Code, § 1073; Cr. P. '22, § 160; Cr. C. '12, § 1005; Cr. C. '02, § 707; G. S. 2670; R. S. 586; 1839 (11) 73.

§ 1075. Coroner has power to issue warrants, examine, bind over, commit, etc.—The coroner shall have the power to issue a warrant or warrants, to summon witnesses, and examine before the jury any person present, whether summoned or not, concerning the death; and every person summoned or required to give evidence, and disregarding such summons, or refusing to testify, without such excuse as shall be lawful and sufficient, shall forfeit and pay the sum of twenty dollars, and shall be committed to jail by the coroner until the next court of general sessions, or until he testifies and is discharged by the coroner (the said forfeiture to be recovered by indictment); and in addition shall be liable to be indicted at the next court of general sessions for the county, and upon conviction shall be fined and imprisoned, at the discretion of the court. And the coroner shall bind such witness or witnesses so appearing, by recognizance, with good and sufficient surety, to appear at the next court of general sessions to stand his trial; and the witnesses refusing to enter into such recognizance shall be forthwith committed to the jail of the county by commitment, under the hand and seal of the coroner, there to be kept until they enter into such recognizance as before required.

1932 Code, § 1075; Cr. P. '22, § 162; Cr. C. '12, § 1006; Cr. C. '02, § 708; G. S. 2671; R. S. 587; 1839 (11) 73.

§ 1076. Power to adjourn the jury, bind jurors, etc.—A coroner shall have power, if he deem it necessary, to adjourn the jury, either from day to day or any other day and place, to receive evidence, binding the jurors severally by one recognizance, in such amount as he shall think fit, for their appearance; which recognizance may be estreated, as to any of consors for default by the court of general sessions.

1932 Code, § 1076; Cr. P. '22, § 163; Cr. C. '12, § 1007; Cr. C. '02, § 709; G. S. 2672; R. S. 588; 1839 (11) 74.

§ 1077. Absent jurors, how supplied, etc.—If all or any part of the jurors shall fail to reappear at the day and place to which they were adjourned, the coroner shall issue his warrant to supply the places of the absent jury, or of so many of the jurors absent as may be necessary; and the jurors last

summoned shall be sworn and charged as those first summoned were, and shall have the same power and be liable to the same penalties.

1932 Code, § 1077; Cr. P. '22, § 164; Cr. C. '12, § 1008; Cr. C. '02, § 710; G. S. 2673; R. S. 589; 1839 (11) 74.

§ 1078. Oath of witnesses.—The witnesses examined upon the inquest shall be sworn as follows, by the coroner, who is empowered to administer the oath, that is to say: "The evidence you shall give to this inquest concerning the death of A B, here lying dead, shall be the truth, the whole truth, and nothing but the truth: So help you God."

1932 Code, § 1078; Cr. P. '22, § 165; Cr. C. '12, § 1009; Cr. C. '02, § 711; G. S. 2674; R. S. 590.

§ 1079. Coroner to take testimony in writing, and bind over or commit witnesses.—The testimony of all witnesses examined upon an inquest shall be taken down in writing by the coroner, and signed by the witnesses, and if the testimony given tends to criminate any person as concerned in the death of the deceased, the coroner shall bind over the witness who gave it, in recognizance, with sufficient surety, to appear at the next court of general sessions to be holden for the county, to give evidence concerning the death; and such witness, for refusing to enter into such recognizance, shall be committed by the coroner to the jail of the county, by warrant under his hand and seal, there to be kept until the session of the court, or until he shall enter into recognizance as required.

1932 Code, § 1079; Cr. P. '22, § 166; Cr. C. '12, § 1010; Cr. C. '02, § 712; G. S. 2675; R. S. 591; 1839 (11) 74.

Report taken is the best evidence of what a witness may have testified to before the coroner. State v. Prater, 26 S. C. 198, 2 S. E. 108, 110, 95 Am. St. Rep. 773.

The report being already before the court, it is not error, upon appeal by one of the defendants, for the court to refuse to admit testimony tending to show that a false statement was made by a witness at the trial, to the effect that he did not, when first interrogated by the coroner, deny seeing another of the defendants, charged with the murder, on the night the homicide was committed. State v. Prater, 26 S. C. 198, 2 S. E. 108, 110, 95

Am. St. Rep. 773.

Failure to make witnesses sign such report not necessarily fatal.—When coroner fails to have witness sign the testimony taken down in writing, such testimony is nevertheless competent. State v. Jones, 29 S. C. 201, 7 S. E. 296, 31 L. R. A. 490, 25 L. R. A. (N. S.) 1030, 37 L. R. A. (N. S.) 794, 806, Ann. Cas. 12C, 818, 20 A. L. R. 1195.

But the testimony of a witness examined on inquest in absence of prisoner is not competent against him, on trial for murder, after death of witness. State v. Campbell, 1 Rich. 124, 61 Am. St. Rep. 889, 95 Am. St. Rep. 771, 15 A. L. R. 513.

§ 1080. Form of verdict.—The jury having viewed the body, heard the evidence, and made inquiry into the cause and manner of the death, shall render their verdict thereon, in writing, to the coroner under their hands and seals, in the manner following (which shall pass by indenture interchangeably between the coroner and jury), that is to say:

"South Carolina,

"County _____

"An inquisition intended, taken at _____, in _____ County, the _____ day of _____, A. D. _____, before A B, coroner (or C D, magistrate, acting as coroner), for said county, upon view of the body of E F, of _____, then and there being dead, by the oaths of (inserting the names of the jurors), being a lawful jury of inquest, who, being charged and sworn to inquire for the state of South Carolina, where and by what means the said E F came to his death, upon their oath do say, etc. (inserting how,

where, at what time, and by what instrument the deceased was killed);” and, if it shall appear that the deceased was willfully killed by another, the inquisition must be concluded in this form: “And so the jurors aforesaid, upon their oaths aforesaid, do say that the aforesaid J K, in manner and form aforesaid, E F then and there feloniously did kill, against the peace and dignity of the same State aforesaid.”

1932 Code, § 1080; Cr. P. '22, § 167; Cr. C. '12, § 1011; Cr. C. '02, § 713; G. S. 2676; R. S. 592; 1839 (11) 74.

§ 1081. Finding in case of death by means unknown.—If it shall appear that the deceased came to his death by means unknown to the jury, the inquisition shall conclude thus: “That the said E F was killed and murdered by some person or persons (or by some means) to the jurors unknown, against the peace and dignity of the same State aforesaid.”

1932 Code, § 1081; Cr. P. '22, § 168; Cr. C. '12, § 1012; Cr. C. '02, § 714; G. S. 2677; R. S. 593; 1839 (11) 75.

§ 1082. Finding in case of death by self-murder.—If it appears that he died by self-murder, the inquisition shall conclude: “That the said E F, in manner and form aforesaid, then and there voluntarily and feloniously himself did kill, against the peace and dignity of the same State aforesaid.”

1932 Code, § 1082; Cr. P. '22, § 169; Cr. C. '12, § 1013; Cr. C. '02, § 715; G. S. 2678; R. S. 594; 1839 (11) 75.

The use of the word “feloniously” expressly recognizes suicide as retaining its common law character of a felony. *State v. Leveille*, 34 S. C. 120, 13 S. E. 319, 321, 27 Am. St. Rep. 799, 28 Am. St. Rep. 898, 63 Am. St. Rep. 100, 90 Am. St. Rep. 581, 18 L. R. A. 225, 63 L. R. A. 365, 663, 4 L. R. A. (N. S.) 156, 38 L. R. A. (N. S.) 1089, 1100, Ann. Cas. 12A, 39, 13 A. L. R. 1264.

§ 1083. Finding in case of death by mischance.—If it appear that the deceased came to his death by mischance, the finding shall conclude: “That E F, in manner and form aforesaid, came to his death by misfortune or accident.”

1932 Code, § 1083; Cr. P. '22, § 170; Cr. C. '12, § 1014; Cr. C. '02, § 716; G. S. 2679; R. S. 595; 1839 (11) 75.

§ 1084. Finding in case of death by the hands of another.—If the proof shall be that the death was occasioned by the hands of another, the conclusion shall be: “That J K, the said E F, by misfortune and contrary to his will, in manner and form aforesaid, did kill and slay.”

1932 Code, § 1084; Cr. P. '22, § 171; Cr. C. '12, § 1015; Cr. C. '02, § 717; G. S. 2680; R. S. 596; 1839 (11) 75.

§ 1085. Form of conclusion of inquisition.—After the conclusion above, according to the facts, the inquisition shall end in this form: “In witness whereof, I, _____, coroner aforesaid, and the jurors aforesaid, to this inquisition, have interchangeably put our hands and seal, the day and year above mentioned.

“A B (L. S.),
“Coroner _____ County.
“C D, etc. (L. S.),
“Foreman of Jury of Inquest.
“E F, etc. (L. S.),
“Jurors.”

1932 Code, § 1085; Cr. P. '22, § 172; Cr. C. '12, § 1016; Cr. C. '02, § 718; G. S. 2681; R. S. 597; 1839 (11) 75.

§ 1086. Warrant in case of murder.—If the finding of the inquest be willful killing by the hands or means of another, the coroner shall forthwith issue his warrant, directed to the sheriff, or to one or more constables for the county, for all the persons implicated by said finding, which warrant shall be in this form:

"The State of South Carolina,

"By A B, coroner (or C D, magistrate, acting as coroner) for _____
County:

"To _____, sheriff of _____ County:

"Whereas, by inquisition by me held on (time and place inserted), it was found that (here insert the finding of the jury): "These are, therefore, to command you forthwith to apprehend (here insert the name or names of the accused) and bring him (or them) before me, to be dealt with according to law.

"Given under my hand and seal, this _____ day of _____, A. D. _____

"A B, coroner, (L. S.),

"(or C D, magistrate, acting as coroner)."

1932 Code, § 1086; Cr. P. '22, § 173; Cr. C. '12, § 1017; Cr. C. '02, § 719; G. S. 2682; R. S. 598; 1839 (11) 75.

§ 1087. Commitment.—Upon the return of the said warrant, and the arrest of the party or parties, the coroner shall proceed to commit him, her or them by warrant, in the following form:

"To the sheriff, or jailer, of _____ County:

"You are hereby commanded and required to receive and keep in close confinement in the jail of your county (here insert the name or names of the party or parties), charged before me by the finding of a jury of inquest held on the _____ day of _____, at _____, with (here insert the finding) until he (she or they) shall be delivered by due course of law. Herein fail not.

"Given under my hand and seal, this _____ day of _____, A. D. _____

"A B, coroner, (L. S.),

"(or C D, magistrate, acting as coroner)."

1932 Code, § 1087; Cr. P. '22, § 174; Cr. C. '12, § 1018; Cr. C. '02, § 720; G. S. 2683; R. S. 599; 1839 (11) 75.

§ 1088. Sheriff, etc., to keep persons committed.—All sheriffs and jailers are required to receive and keep securely all persons so committed by the coroner.

1932 Code, § 1088; Cr. P. '22, § 175; Cr. C. '12, § 1019; Cr. C. '02, § 721; G. S. 2684; R. S. 600; 1839 (11) 75.

§ 1089. Report to Governor in certain capital cases.—It shall be the duty of each county coroner, whenever a homicide has been committed in his county, and the party committing such homicide has not been arrested, or, having been arrested, has escaped custody before bill found, to forward a report to the Governor within three days after the holding and inquest by him, or, in cases of escape, within three days after notice of such escape, which report shall embrace the name of the person killed, and the name of the person, if known, charged with committing such homicide, together with a copy of the evidence taken before the jury of inquest, and the ver-

dict rendered thereupon: *provided*, that in case of escape, it shall be the duty of the sheriff, or other officer having custody of the party, to notify such coroner of the escape promptly.

1932 Code, § 1089; Cr. P. '22, § 176; Cr. C. '12, § 563; Cr. C. '02, § 406; G. S. 721; R. S. 321 (15) 439, 440.

§ 1090. Bind over person killing by mischance and witnesses.—If the finding of the inquest be that the deceased came to his death by mischance, by the hands of another, the coroner shall bind in recognizance, with sufficient surety, the party against whom the verdict has been rendered, to appear at the next court of general sessions for the county, that the matter may be then and there inquired into; and the coroner shall also bind over by recognizance, with good surety, all such material witnesses as were examined before the jury of inquest.

1932 Code, § 1090; Cr. P. '22, § 177; Cr. C. '12, § 1020; Cr. C. '02, § 722; G. S. 2685; R. S. 601; 1839 (11) 77.

§ 1091. Penalty bury body without inquiry.—If any person shall bury, or cause to be buried, the dead body of a person supposed to have come to a violent death, before notice to the coroner to examine the body, and before inquiry is made into the manner and circumstances of the death, such person shall be liable to indictment therefor before the court of general sessions, and, upon conviction, shall be fined and imprisoned at the discretion of the presiding judge. And the coroner shall bind him in recognizance, with sufficient surety, to appear and stand his trial at the ensuing term of such court.

1932 Code, § 1091; Cr. P. '22, § 178; Cr. C. '12, § 1021; Cr. C. '02, § 723; G. S. 2686; R. S. 602; 1839 (11) 77.

§ 1092. Take up body on suspicion of violent death.—If the coroner shall know or be informed of the interment of a body of a person supposed to have come to a violent death, he shall proceed to empanel a jury, as is hereinbefore directed, and order such body to be taken up, and shall conduct his examination into the cause and manner of the death as though such body had not been buried.

1932 Code, § 1092; Cr. P. '22, § 179; Cr. C. '12, § 1022; Cr. C. '02, § 724; G. S. 2687; R. S. 603; 1839 (11) 77.

§ 1093. Record of body long dead, etc.—If the body has been so long dead and buried or so injured by improper keeping as that the causes of the death cannot be ascertained upon the examination, the coroner shall make a record of the fact, stating its condition, by whom, and how long it had been kept or buried, the circumstances of the burial, and the identity (if discovered); which record shall be entered in his book, and returned, as any other inquisition, to the clerk of the court of general sessions for the county.

1932 Code, § 1093; Cr. P. '22, § 180; Cr. C. '12, § 1023; Cr. C. '02, § 725; G. S. 2688; R. S. 604; 1839 (11) 77.

§ 1094. Liability for burial without inquest, etc.—The person burying or directing the burial of the dead body of one supposed to have come to a casual or violent death, without due notice to the coroner, upon conviction thereof by indictment in the court of general sessions, shall be liable to be fined and imprisoned, at the discretion of the court. And the coroner shall

bind him in recognizance, with sufficient surety, to appear and stand his trial at the ensuing term of such court.

1932 Code, § 1094; Cr. P. '22, § 181; Cr. C. '12, § 1024; Cr. C. '02, § 726; G. S. 2689; R. S. 605; 1839 (11) 78.

§ 1095. Coroner may punish for contempt.—Whenever any person or persons shall willfully disturb or impede the proceedings of a jury of inquest while inquiring into the cause of any death, or shall offer any contempt to the person or authority of the coroner while so engaged, the coroner is hereby empowered to commit such person or persons to the common jail of the county for a time not exceeding twenty-four hours.

Any person who shall have been at any time duly summoned to attend and serve upon a coroner's jury who shall neglect or refuse to so attend and serve without proper excuse, shall be liable to be punished for contempt, and the coroner is hereby authorized and empowered to punish such contempt by fine not exceeding twenty dollars, or imprisonment not more than twenty-four hours, or both, at his discretion.

1932 Code, § 1095; Cr. P. '22, § 182; Cr. C. '12, § 1025; Cr. C. '02, § 727; G. S. 711; R. S. 606; 1839 (11) 78; 1874 (15) 529, 2.

§ 1096. Inquests regulated.—It shall be unlawful for any coroner or magistrate to hold an inquest over any dead body, except upon the written request of two reputable citizens residing in the neighborhood where the dead body is found: *Provided*, That the provisions of this section shall not apply to counties where coroners are paid salaries, except in the counties of Bamberg, Florence and Dorchester, where such requests shall be necessary.

1932 Code, § 1096; Cr. P. '22, § 183; Cr. C. '12, § 1026; Cr. C. '02, § 728; 1894 (21) 815; 1900 (23) 456; 1934 (38) 1220.

§ 1097. Preliminary examinations—duty of coroner—inquest—when dispensed with—fees—evidence filed—proviso.—Whereas, great expense to the counties is being incurred by the apparent requirement of law that coroners and magistrates acting for coroners shall summon a jury, and often one or more doctors, in case of every body found dead, even where there is no suspicion of foul play at all, therefore:

In every case where a body is found dead, and an investigation or inquest is deemed advisable, it shall be the duty of the coroner, or of the magistrate acting as coroner, as the case may be, to go to the body and examine the witnesses most likely to be able to explain the cause of death, take their testimony in writing, and decide for himself whether there ought to be a trial or whether blame probably attaches to any living person for the death; and if so, he shall proceed to summon a jury and hold a formal inquest as now required by law; but if there be, in his judgment, no apparent or probable blame against living persons as to the death, he shall issue a burial permit, and all further inquiry or formal inquest shall be dispensed with; and for such preliminary examination such officer shall receive the same fees paid in same way as a magistrate for any ordinary preliminary examination in a criminal case; and the evidence and the finding of the officer on said preliminary shall be filed in the clerk's office of the county, the finding to be that deceased came to death from natural cause, or came to death at his own hand, or from an act of God, or from mischance, without blame on the part of another person.

In counties where the coroner receives a salary no fees shall be allowed

to any officer for services in such preliminary examinations.

1932 Code, § 1097; Cr. P. '22, § 184; Cr. C. '12, § 1027; Cr. C. '02, § 729; 1884 (21) 825.

As to fees of physicians, see § 4958 (3).

The coronor must hold the preliminary investigation before a formal inquest.—If a coroner should hold a formal inquest without the preliminary investigation required, his act would be contrary to the section and he would not be entitled to his fees for such inquest. *Moses v. Sumter County*, 55 S. C. 502, 33 S. E. 581.

And it is not within his discretion to dispense with it. *Moses v. Sumter County*, 55 S. C. 502, 33 S. E. 581.

But in the absence of evidence to the contrary, the circuit court must assume that the coroner did his duty. *Moses v.*

Sumter County, 55 S. C. 502, 33 S. E. 581.

On an appeal from an allowance of inquest fees, where the record does not show that the preliminary inquest had been made, a judgment allowing such fees will not be disturbed as, in the absence of evidence to the contrary, it will be presumed that the officer did his duty. *Moses v. Sumter County*, 55 S. C. 502, 33 S. E. 581.

The record must show as an established fact that no such preliminary investigation was had. *Moses v. Sumter County*, 55 S. C. 502, 33 S. E. 581.

§ 1098. Coroner to provide for examination of bodies by chemists in certain cases.—It shall be the duty of the coroners in this State, and of any other persons acting as coroner, in holding inquests under the laws of this State, whenever, upon the holding of any inquest, they have any reason to cause a majority of said members of coroner's inquest to believe that the deceased came to his death by means of poison, to carefully prepare the body or parts of the body as directed by the authorities of Clemson Agricultural and Mechanical college, and to carefully send the same promptly to the authorities of said college; and to this end the authorities of said college shall prepare and print and mail to the clerks of court, full instructions as to the proper preparation and shipment of such bodies or parts of bodies, as the case may be, for chemical analysis, which instructions shall be delivered by said clerks to the coroner and to each magistrate in each county.

1932 Code, § 1098; Cr. P. '22, § 185; Cr. C. '12, § 1028; 1906 (25) 132.

§ 1099. Duty of college to make chemical analysis.—It shall be the duty of the authorities of said college to have made by the proper department thereof a chemical analysis of all bodies, or parts of bodies, as the case may be, so sent to them by any coroner, or other person acting as coroner in this State, and to report the result fully to the coroner, or acting coroner, with all convenient speed.

1932 Code, § 1099; Cr. P. '22, § 186; Cr. C. '12, § 1029; 1906 (25) 132.

In a prosecution for poisoning and drowning a boy, it was held, in the case of *State v. Thomas*, 159 S. C. 76, 156 S. E. 169, 172, that the court erred in deny-

ing to the defendant the use of part of the chemist's report taken under the authority of this section.

§ 1100. Duty of chemist to attend trial.—It shall be the duty of the chemist who conducted or performed said analysis, or of a competent assistant who was present aiding therein, upon notice from any solicitor, to attend the trial of any case involving the issue as to the cause of the death in question; and for such attendance and testimony in the case he shall be entitled to mileage going and returning, and five dollars per day for the actual number of days of such attendance, to be paid for by witnesses' pay certificate issued in the usual way of such.

1932 Code, § 1100; Cr. P. '22, § 187; Cr. C. '12, § 1030; 1906 (25) 132.

CRIMINAL CODE

TITLE 21

Felonies and Misdemeanors

- CHAPTER 67-A. Offenses against the Government, § 1100-1.
- CHAPTER 68. Offenses against the Person, § 1101.
- CHAPTER 69. Offenses against Property, § 1132.
- CHAPTER 70. Trade Regulations and Offenses against Public Policy, § 1231
- CHAPTER 71. Offenses against the Public Peace, § 1380.
- CHAPTER 72. Offenses against Public Justice, § 1397.
- CHAPTER 73. Offenses against Morality and Decency, § 1432.
- CHAPTER 74. Offenses against Public Health, § 1465.
- CHAPTER 76. Offenses by Certain Officers, § 1508.
- CHAPTER 77. Transportation of, and Cruelty to, Animals, § 1593.
- CHAPTER 78. Bridges, Ferries, Highways and Rules of the Road, § 1604.
- CHAPTER 79. Offenses by and against Railroad Companies, their Agents and Employees, § 1692.
- CHAPTER 80. Offenses Relating to Assessment and Collection of Taxes, § 1718.
- CHAPTER 81. Bastardy and Vagrancy, § 1726.
- CHAPTER 82. Desecration of the Sabbath and of Religious Worship, § 1732
- CHAPTER 83. Gambling, § 1738.
- CHAPTER 84. Fish and Game, § 1750.
- CHAPTER 86. Intoxicating Liquors, § 1829.
- CHAPTER 88. Offenses Relating to Sailors and Immigrants, § 1924.
- CHAPTER 89. Accessories and Aiders to Felonies, § 1936.
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TITLE 22

Prisons and Imprisonment

- CHAPTER 90. Jails and Prisoners, § 1938.
- CHAPTER 91. State Penitentiary, § 1961.
- CHAPTER 92. Correctional Institutions, § 2014.

CHAPTER 67-A

Offenses against the Government

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| 1100-1 and 1100-2. Information respecting national or state defense. | 1100-8. Duties of Governor—persons make arrests — persons arrest — warrants. |
| 1100-3. Acts prohibited when United States at war. | 1100-9. Aliens and foreign born residents report to clerks of court. |
| 1100-4. Conspiracy | 1100-10. Operation of shrimping or fishing boats. |
| 1100-5. Conceal or harbor violator of this statute. | 1100-11. Sabotage. |
| 1100-6. Application. | |
| 1100-7. Foreign government defined. | |

§ 1100-1. Not obtain, or willfully communicate, or willfully retain, or through gross negligence permit use, etc., of information respecting national or state defense to injury of United States or this State or to advantage of foreign country—penalties.—Whoever, for the purpose of obtaining information respecting the national or state defense with intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or the State of South Carolina, or to the advantage of any foreign nation, goes upon, enters, flies over, or otherwise obtains information concerning any vessel, aircraft, work or defense, navy yard, naval base, submarine base, coaling station, fort, battery, torpedo station, dock-yard, canal, railroad, arsenal, camp, factory, mine, telephone, telegraph, wireless or signal station, building, office or other place connected with the national or state defense, owned or constructed or in progress of construction by the United States, or any of its officers or agents within the boundaries of the State of South Carolina, or by the State of South Carolina, or any of its subdivisions or agencies, or any place in the state of South Carolina in which any vessel, aircraft, arms, munitions, or other materials or instruments for use in time of war, are being made, prepared, repaired or stored, under any contract or agreement with the United States, or with any firm on behalf of the United States, or any prohibited place within the meaning of §§ 1100-1 thru 1100-10; or (b) whoever, for the purpose aforesaid, and with like intent or reason to believe, copies, takes, makes or obtains, or attempts or induces or aids another to copy, take, make or obtain, any sketch, photograph, photographic negative, blue print, plan, map, model, instrument, appliance, document, writing or note of anything connected with the national or state defense; or (c) whoever, for the purpose aforesaid, receives or obtains from any person, or from any source whatsoever, any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, instrument, appliance, or note of anything connected with the national or state defense knowing or having reason to believe, at the time he receives or obtains, or agrees or attempts or induces, or aids another to receive or obtain it, that it has been, or will be obtained, taken, made or disposed of by any person contrary to the provisions of §§ 1100-1 thru 1100-10; or (d) whoever, lawfully or unlawfully having possession of, access to, control over, or being intrusted with any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, instrument, appliance, or note relating to the national or state de-

fense, willfully communicates or transmits, or attempts to communicate or transmit, the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it on demand to the officer or employee of the United States, or the State of South Carolina, entitled to receive it; or (e) whoever, being intrusted with or having lawful possession or control of any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, note or information, relating to the national defense or state defense through gross negligence permits the same to be removed from its proper place of custody or delivered to anyone in violation of his trust or to be lost, stolen, obstructed, or destroyed, shall be punished by a fine of not more than ten thousand (\$10,000.00) Dollars or by imprisonment for not more than two years, or both.

1940 (41) 1935.

§ 1100-2. Not communicate, or attempt to do so, or aid another communicate information relating to national or state defense to be used to injury of United States or this State or to advantage of a foreign country to foreign country, faction, party, et al therein—not communicate useful information to enemy during time of war—penalties.—Whoever, with intent or reason to believe that it is to be used to the injury of the United States, or the state of South Carolina, or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to, or aids or induces another to, communicate, deliver, or transmit, to any foreign government, or to any faction or party, or military, or naval force within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employer, subject, or citizen thereof, either directly or indirectly, any documents, writing, code book, signal book, sketch, photograph, photographic negatives, blue print, plan, model, note, instrument, appliance, map, or information relating to the national or the state defense, shall be punished by imprisonment for not more than twenty years; *provided*, that whoever shall violate the provisions of subsection (2) of this §§ 1100-1 thru 1100-10 in time of war shall be punished by death or by imprisonment for not more than thirty years; and (b) whoever, in time of war, with intent that the same shall be communicated to the enemy, shall collect, record, publish, or communicate, or attempt to elicit any information, with respect to the movement, numbers, description, condition, or disposition of any of the armed forces, ships aircraft, or war materials of the United States or of the State of South Carolina, or with respect to the plans or conduct, or supposed plans or conduct of any naval or military operations, or with respect to any works or measures undertaken for or connected with, or intended for the fortification or defense of any place, or any other information relating to the public defense, which might be useful to the enemy, shall be punished by death or by imprisonment for not more than thirty years.

1940 (41) 1935.

§ 1100-3. Acts prohibited when United States at war—penalties.—Whoever, when the United States is at war, shall willfully make or convey

false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service of the United States, shall be punished by a fine of not more than \$10,000.00 or imprisonment for not more than twenty years, or both.

1940 (41) 1935.

§ 1100-4. Conspiracy—penalties.—If two or more persons conspire to violate the provisions of section 1100-2 or 1100-3, and one or more of such persons does any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished as in said sections provided in case of the doing of the act the accomplishment of which is the object of such conspiracy, except as above provided conspiracies to commit offenses under §§ 1100-1 thru 1100-10 shall be punished by a fine of not more than \$10,000.00, or imprisonment for not more than two years, or both.

1940 (41) 1935.

§ 1100-5. Conceal or harbor violator of this statute—penalties.—Whoever harbors or conceals any person who he knows, or has reasonable grounds to believe or suspect has committed, or is about to commit, an offense under §§ 1100-1 thru 1100-10 shall be punished by a fine of not more than \$10,000.00, or by imprisonment for not more than two years, or both.

1940 (41) 1935.

§ 1100-6. Application.—The provisions of §§ 1100-1 thru 1100-10 shall extend to all places within the jurisdiction of the state of South Carolina, and to any and all offenses under §§ 1100-1 thru 1100-10 committed within said State.

1940 (41) 1935.

§ 1100-7. Foreign government defined.—The words “foreign government”, as used in §§ 1100-1 thru 1100-10, shall be deemed to include any government, faction, or body of insurgents within a country with which the United States is at peace, which government, faction, or body of insurgents may or may not have been recognized by the United States as a government.

1940 (41) 1935.

§ 1100-8. Duties of Governor—persons make arrests—persons arrest—warrants.—It shall be the duty of the Governor of the state of South Carolina to call upon all sheriffs, bonded peace officers, constables, detectives, and officers and members of the national guard, especially to report to him any and all violations or suspected violations of the provisions of §§ 1100-1 thru 1100-10, and any of the said sheriffs, bonded peace officers, constables, detectives and officers or members of the national guard of South Carolina are hereby authorized and directed to arrest with or without warrant any

person who may violate §§ 1100-1 thru 1100-10 or may be found in such circumstances as to reasonably indicate his or her violation of any provision or provisions of §§ 1100-1 thru 1100-10. *Provided*, if any person is arrested hereunder without warrant, a warrant shall be obtained by the arresting officer, from a proper officer, within forty-eight hours after the said arrest and commitment.

1940 (41) 1935.

§ 1100-9. Aliens and foreign born residents report to clerks of court—duties of clerks of courts—penalties.—All aliens and foreign born residents of South Carolina shall report to the clerk of the court of the county in which they reside within thirty (30) days after June 10, 1940, and furnish him with their name, place of residence, age, place of birth, height, approximate weight, race, color of hair and eyes, the nature of their business or vocation, if any, and if employed by any person, firm, corporation or society, the name thereof, and the address of the principal office, together with the name and address of the president, or other managing officer thereof. It shall be the duty of the said clerk to record such names in a book kept for that purpose, in alphabetical order, and on the 1st and 15th day of each month forward a list of such persons to the Governor of the State. Likewise, any alien coming into South Carolina is hereby required, within ten (10) days after his arrival, to report and furnish the information above listed to such clerks of court. Any person willfully refusing or failing to comply with the provisions of this section shall be deemed guilty of a misdemeanor and any person failing for ten (10) days to report and give the information herein required, after he has been notified in writing so to do by any judge of the State or county, any magistrate, sheriff, constable or other peace officer so to do, shall be declared to be willfully transgressing the provisions of this section and guilty of a misdemeanor and punishable as provided herein.

1940 (41) 1935.

§ 1100-10. Operation of shrimping or fishing boats.—No shrimping or fishing boats shall be operated from any of the ports or shores of this State or within the territorial jurisdiction of the waters of this State unless there be constantly aboard each boat a natural born citizen and resident of the United States who possesses and at all times has in possession a certificate of the sheriff of a coastal county approving of such operator and certifying his good moral character.

1940 (41) 1935.

§ 1100-11. One who, wilfully and with malicious intent hinder preparation of U. S. for defense or war, physically injures or destroys industrial establishment or public utility producing goods for military use, or any machinery contained in such establishment, or goods or equipment therein for military use guilty of sabotage.—Any employee, employer, or other person who, wilfully and with a malicious intent to hinder the preparation of the United States for defense or war, physically injures or destroys any factory or industrial establishment or public utility in the production of goods, articles, or equipment for military use, any machinery contained

in any such factory or industrial establishment, or any goods, articles, or equipment produced or in the process of being produced in such factory or industrial establishment for military use but not delivered shall be guilty of sabotage. The crime of sabotage as defined in this section shall be a felony, and any person convicted thereof shall be punished by imprisonment in the State's prison for not more than ten years or a fine of not more than ten thousand dollars or both, in the discretion of the court.

1941 (42) 200.

CHAPTER 68

Offenses against the Person

- 1101. Murder defined.
- 1102. Punishment for murder.
- 1103. Killing by stabbing.
- 1104. Killing by obstructing railroad.
- 1105. Killing by poison.
- 1106. Killing in a duel.
- 1107. Manslaughter.
- 1108. Poisoning or attempting to poison.
- 1109. Rape.
- 1110. Punishment for rape or attempting to ravish.
- 1111. Carnal knowledge and age of consent.
- 1112, 1113. Causing or supplying means for miscarriage.
- 1114. Soliciting or taking substance causing miscarriage.
- 1114-1. Time prosecutions commence.
- 1115, 1116. Placing obstruction on railroads.
- 1117. Sending or accepting challenge to fight.
- 1118. Carrying or delivering challenge.
- 1119. Pointing firearm at another.
- 1120. Discharging firearms at dwellings.
- 1121. Spring guns unlawful.
- 1122. Kidnapping minor.
- 1123. Non-support of wife and children.
- 1124. Mistreating children, servants or helpless persons.
- 1125. Punishment for cruelty to children.
- 1126. Negligent mismanagement of steamboats.
- 1126-1. Entrance shafts to elevators to be lighted.
- 1127. Wilful neglect by railroad crew.
- 1128. Penalty upon officer from whom prisoner taken.
- 1129. Disturbing or loitering about girls' schools.
- 1130. Misuse of aircraft.
- 1131. Assault by masked person.

§ 1101. Murder defined.—Murder is the killing of any person with malice aforethought, either express or implied.

1932 Code, § 1101; Cr. C. '22, § 1; Cr. C. '12, § 135; Cr. C. '02, § 108; G. S. 2453; R. S. 108; 1712 (2) 418.

- I. In General.
 - A. What Constitutes Homicide.
 - B. What Constitutes Murder.
 - C. What Constitutes Assault with Intent to Kill.
 - D. When Homicide Excusable or Justifiable.
- II. Pleading and Practice.
 - A. Evidence.
 - 1. Admissibility.
 - a. In General.
 - b. Dying Declarations.
 - c. Proceedings at inquest.
 - B. Trial.
 - 2. Presumption and Burden of Proof.
 - 3. Weight and Sufficiency.
 - 4. Verdict.
 - C. New Trial.
 - D. Appeal.

Cross Reference.

As to indictments and informations for murder, see §§ 1206 et seq.

I. IN GENERAL.**A. What Constitutes Homicide.**

Accidentally killing another in attempting Suicide constitutes criminal homicide.—One who, in attempting to commit suicide, accidentally kills another who is trying to prevent it, is guilty of criminal homicide. *State v. Leveille*, 34 S. C. 120, 13 S. E. 319, 27 Am. St. Rep. 799, 28 Am. St. Rep. 898, 63 Am. St. Rep. 100, 90 Am. St. Rep. 581, 18 L. R. A. 225, 63 L. R. A. 365, 663, 4 L. R. A. (N. S.) 156, 38 L. R. A. (N. S.) 1089, 1100, Ann. Cas. 12A, 39, 13 A. L. R. 1264.

So also does inciting suicide.—Inciter to suicide is murderer if causal connection between incitement and death established. *State v. Jones*, 86 S. C. 17, 67 S. E. 160, Ann. Cas. 12D, 446, 13 A. L. R. 1263.

Or killing another by acts of negligence.—*State v. Badgett*, 87 S. C. 543, 70 S. E. 301, Ann. Cas. 12C, 502, 5 A. L. R. 607.

The distinguishing element between murder and manslaughter is that of malice. Malice must be shown to convict one of murder. It does not have to be shown to convict one of manslaughter. But both murder and manslaughter are felonies. *State v. King*, 158, S. C. 251, 155 S. E. 409, 426. See also, *State v. Ferguson*, 2 Hill 619, 27 Am. Dec. 412, 35 Am. Dec. 756, 86 Am. St. Rep. 644, 56 L. R. A. 388, 5 L. R. A. (N. S.) 814, 27 L. R. A. (N. S.) 704; *State v. Adams*, 68 S. C. 421, 47 S. E. 676, 17 A. L. R. 1123; *State v. Reeder*, 72 S. C. 223, 226, 51 S. E. 702, 3 L. R. A. (N. S.) 1023, 19 L. R. A. (N. S.) 493; *State v. Driggers*, 84 S. C. 526, 532, 66 S. E. 1042, 137 Am. St. Rep. 855, 25 L. R. A. (N. S.) 377, L. R. A. 1916A, 1195, 19 Ann. Cas. 1166, 8 A. L. R. 1220; 12 A. L. R. 879, 900; *State v. Chastain*, 85 S. C. 64, 67 S. E. 6, 31 L. R. A. (N. S.) 1168, Ann. Cas. 12C, 49.

B. What Constitutes Murder.

This section does not make murder a statutory offense; it is still a common law crime. *State v. Coleman*, 8 S. C. 237, 18 L. R. A. 475; *State v. Bowers*, 65 S. C. 207, 213, 43 S. E. 656, 95 Am. St. Rep. 795, 109 Am. St. Rep. 805, 134 Am. St. Rep. 727, 5 L. R. A. (N. S.) 815, 38 L. R. A. (N. S.) 1062, 1105.

On a prosecution for murder, it is not necessary to prove a motive. *State v. Thraillkill*, 73 S. C. 314, 53 S. E. 482, Ann. Cas. 12C, 236, 16 L. R. A. 1471.

Or intent or design to effect death.—A charge that it constitutes murder if the accused conceived a design to assault deceased, and in consequence of such as-

sault he died, whether deceased intended to kill him or not, is proper. *State v. Alexander*, 30 S. C. 74, 8 S. E. 440, 14 Am. St. Rep. 879, 16 Am. St. Rep. 20, 28 Am. St. Rep. 899, 953, 63 Am. St. Rep. 100, 76 Am. St. Rep. 93, 90 Am. St. Rep. 576, 18 L. R. A. 225, 39 L. R. A. 740, 4 L. R. A. (N. S.) 934, 10 L. R. A. (N. S.) 1002, Ann. Cas. 12A, 39. See also, *State v. Emerson*, 78 S. C. 83, 58 S. E. 974, 46 L. R. A. (N. S.) 14.

Where the killing is with malice.—*State v. Gallman*, 79 S. C. 229, 60 S. E. 682, 16 A. L. R. 1307.

Malice is a term of art importing wickedness and excluding a just cause or excuse. *State v. Doig*, 2 Rich. 179, 128 Am. St. Rep. 170, 61 L. R. A. 869, 19 L. R. A. (N. S.) 275.

Express or implied.—*State v. Jones*, 113 S. C. 134, 101 S. E. 647.

Or with deliberation and premeditation.—*State v. Cobb*, 65 S. C. 324, 43 S. E. 654, 95 Am. St. Rep. 801.

Regardless of the nature of act causing death.—*State v. Shaw*, 64 S. C. 566, 43 S. E. 14, 92 Am. St. Rep. 817, 60 L. R. A. 801, 63 L. R. A. 393, 38 L. R. A. (N. S.) 1087.

As killing one with design to effect death of another.—*State v. Kennedy*, 85 S. C. 146, 67 S. E. 152, 18 A. L. R. 919.

Likewise it constitutes murder to kill one in commission of other offense.—*State v. Leveille*, 34 S. C. 120, 13 S. E. 319, 27 Am. St. Rep. 799, 28 Am. St. Rep. 898, 63 Am. St. Rep. 100, 90 Am. St. Rep. 581, 18 L. R. A. 225, 63 L. R. A. 365, 663, 4 L. R. A. (N. S.) 156, 38 L. R. A. (N. S.) 1089, 1100, Ann. Cas. 12A, 39, 13 A. L. R. 1264; *State v. Kennedy*, 109 S. C. 141, 95 S. E. 350.

Provided in all these instances defendant is not insane.—*State v. McIntosh*, 39 S. C. 97, 17 S. E. 446, 76 Am. St. Rep. 88, 36 L. R. A. 727, 39 L. R. A. 744, 4 L. R. A. (N. S.) 156, Ann. Cas. 12A, 787, Ann. Cas. 12C, 236. See also, *State v. Stark*, 1 Strob. 479, 97 Am. Dec. 177, 76 Am. St. Rep. 92, 36 L. R. A. 465, 39 L. R. A. 738; *State v. Paulk*, 18 S. C. 514, 515, 83 Am. Dec. 239, 97 Am. Dec. 174, 177, 44 Am. Rep. 435, 76 Am. St. Rep. 97, 36 L. R. A. 465, 39 L. R. A. 739, 41 L. R. A. 538; *State v. Coleman*, 20 S. C. 441, 66 Am. Dec. 238, 17 L. R. A. 707, 36 L. R. A. 727, 39 L. R. A. 313, 324, 743, 40 L. R. A. 563, 35 L. R. A. (N. S.) 988; *State v. Bundy*, 24 S. C. 439, 58 Am. Rep. 262, 97 Am. Dec. 177, 63 Am. St. Rep. 100, 76 Am. St. Rep. 88, 18 L. R. A. 225, 36 L. R. A. 465, 727, 39 L. R. A. 739, Ann. Cas. 12A, 36, 12 A. L. R. 869.

Though insanity caused by intoxication is of no avail.—*State v. Lloyd*, 85 S. C. 73, 67 S. E. 9, 27 L. R. A. (N. S.) 465, 52 L. R. A. (N. S.) 232.

And all persons present aiding and

abetting a murder are regarded as principals and equally guilty. *State v. Davis*, 88 S. C. 204, 70 S. E. 417; *State v. Cannon*, 49 S. C. 550, 27 S. E. 526, 68 L. R. A. 198; *State v. Gaylord*, 70 S. C. 415, 50 S. E. 20; *State v. Kennedy*, 109 S. C. 141, 95 S. E. 350; *State v. Fley*, 3 Brev. 338, 4 Am. Dec. 513, 51 Am. Dec. 376, 3 Am. St. Rep. 280; *State v. Crank*, 2 Bail. 66, 1 Am. Dec. 574, 23 Am. Dec. 117, 35 Am. Dec. 756, 36 A. M. Dec. 533, 39 Am. Dec. 452, 45 Am. Dec. 473, 47 Am. Dec. 238, 51 Am. Dec. 375, 58 Am. Dec. 248, 80 Am. Dec. 97, 3 Am. St. Rep. 280, 6 Am. St. Rep. 248, 18 L. R. A. (N. S.) 790, 50 L. R. A. (N. S.) 951, Ann. Cas. 14C, 326; *State v. Anthony*, 1 McC. 285, 27 Am. Dec. 379, 3 Am. St. Rep. 283, 26 L. R. A. (N. S.) 1036; *State v. Arden*, 1 Bay 487, 51 Am. Dec. 373; *State v. Carson*, 36 S. C. 524, 15 S. E. 588, 12 A. L. R. 279.

The fact that the killing was by a crowd engaged in a riot does not affect the degree of the homicide. *State v. Jenkins*, 14 Rich. 215, 94 A. M. Dec. 132, 68 L. R. A. 214.

See generally, *State v. White*, 21 S. C. 597; *State v. McGreer*, 13 S. C. 464, 3 L. R. A. (N. S.) 537, *State v. Rector*, 166 S. C. 335, 164 S. E. 865, *State v. Folk*, 167 S. C. 529, 166 S. E. 611.

C. What Constitutes Assault with Intent to Kill.

Malice need not exist for any appreciable period of time.—*State v. Milam*, 88 S. C. 127, 70 S. E. 447, 38 L. R. A. (N. S.) 1072.

And where person does not die from shot wound offense is assault with intent to kill.—*State v. Du Rant*, 87 S. C. 532, 70 S. E. 306.

As murder would have been committed if death ensued.—*State v. Williamson*, 65 S. C. 242, 43 S. E. 671, 6 A. L. R. 1609; *State v. Jones*, 133 S. C. 167, 130 S. E. 747.

And in such cases all participants are regarded as principals.—*State v. Epps*, 122 S. C. 272, 114 S. E. 631; *State v. Smith*, 125 S. C. 307, 118 S. E. 626.

D. When Homicide Excusable or Justifiable.

Contributory negligence of deceased is no defense.—Contributory negligence cannot constitute a defense to an indictment for murder or manslaughter. *State v. Hanahan*, 111 S. C. 58, 96 S. E. 667, 16 A. L. R. 914.

Nor is the fact that deceased was a bad man.—*State v. Morrison*, 121 S. C. 11, 113 S. E. 304.

Or an escaped convict.—*State v. Whittle*, 59 S. C. 297, 37 S. E. 923, 67 L. R. A. 309.

Or a trespasser on defendant's potato

bank.—*State v. Jones*, 104 S. C. 141, 88 S. E. 444.

But killing in self-defense is justifiable.—*State v. Mason*, 115 S. C. 214, 105 S. E. 286.

Provided defendant comes within requirements of self-defense law.—*State v. Gibbs*, 113 S. C. 256, 102 S. E. 333.

Which is to save life or protect from bodily harm.—*State v. Bowers*, 65 S. C. 207, 43 S. E. 656, 95 Am. St. Rep. 795, 109 Am. St. Rep. 805, 134 Am. St. Rep. 727, 5 L. R. A. (N. S.) 815, 38 L. R. A. (N. S.) 1062, 1105; *State v. Littlejohn*, 33 S. C. 599, 11 S. E. 638; *State v. Hardin*, 114 S. C. 280, 103 S. E. 557; *State v. Bodie*, 33 S. C. 117, 11 S. E. 624, 48 Am. St. Rep. 569, 19 L. R. A. (N. S.) 493, Ann. Cas. 12C, 482; *State v. Driggers*, 84 S. C. 526, 66 S. E. 1042, 137 Am. St. Rep. 855, 25 L. R. A. (N. S.) 377, L. R. A. 1916A, 1195, 19 Ann. Cas. 1166, 8 A. L. R. 1220, 12 A. L. R. 879, 900.

In apprehension of danger.—*State v. Wise*, 33 S. C. 582, 12 S. E. 556, 28 Am. St. Rep. 954, 82 Am. St. Rep. 37, 52, 135 Am. St. Rep. 76, 45 L. R. A. 689, 3 L. R. A. (N. S.) 543, 14 L. R. A. (N. S.) 708, Ann. Cas. 16A, 277; *State v. Symmes*, 40 S. C. 383, 19 S. E. 16, 3 L. R. A. (N. S.) 544, Ann. Cas. 12B, 775.

Which must be real or apparent.—*State v. Jones*, 29 S. C. 201, 7 S. E. 296, 31 L. R. A. 490, 25 L. R. A. (N. S.) 1030, 37 L. R. A. (N. S.) 794, 806, Ann. Cas. 12C, 818, 20 A. L. R. 1195; *State v. Watson*, 94 S. C. 458, 78 S. E. 324.

Actually believed in.—*State v. Jackson*, 32 S. C. 27, 10 S. E. 769, 45 L. R. A. 689, 3 L. R. A. (N. S.) 543, 4 L. R. A. (N. S.) 158, L. R. A. 1916A, 816; *State v. Moody*, 94 S. C. 26, 77 S. E. 713; *State v. Bethune*, 112 S. C. 100, 99 S. E. 753; *State v. Herron*, 116 S. C. 282, 108 S. E. 93; *State v. McGreer*, 13 S. C. 464, 3 L. R. A. (N. S.) 537; *State v. Turner*, 29 S. C. 34, 6 S. E. 891, 13 Am. St. Rep. 706, 14 Am. St. Rep. 40, 16 Am. St. Rep. 19, 28 Am. St. Rep. 911, 124 Am. St. Rep. 1021, 3 L. R. A. (N. S.) 353, L. R. A. 1916A, 1250, 1267; *State v. Jones*, 29 S. C. 201, 7 S. E. 296, 31 L. R. A. 490, 25 L. R. A. (N. S.) 1030, 37 L. R. A. (N. S.) 794, 806, Ann. Cas. 12C, 818, 20 A. L. R. 1195; *State v. Wise*, 33 S. C. 582, 12 S. E. 556, 28 Am. St. Rep. 954, 82 Am. St. Rep. 37, 52, 135 Am. St. Rep. 76, 45 L. R. A. 689, 3 L. R. A. (N. S.) 543, 14 L. R. A. (N. S.) 708, Ann. Cas. 16A, 277; *State v. Bodie*, 33 S. C. 117, 11 S. E. 624, 48 Am. St. Rep. 569, 19 L. R. A. (N. S.) 493, Ann. Cas. 12C, 482; *State v. Littlejohn*, 33 S. C. 599, 11 S. E. 638; *State v. Merriman*, 34 S. C. 16, 12 S. E. 619, 82 Am. St. Rep. 28, 95 Am. St. Rep. 771, 15 L. R. A. 672, 20 L. R. A. 615, 45 L. R. A. 689, 700, 14 L. R. A. (N. S.) 740, 30 L. R. A. (N. S.) 848, L. R. A. 1918A, 667, 694; *State v. Symmes*, 40 S. C. 383, 19 S. E. 16, 3 L. R. A. (N. S.) 544,

Ann. Cas. 12B, 775; State v. McIntosh, 40 S. C. 349, 18 S. E. 1033, 19 L. R. A. (N. S.) 493, 19 A. L. R. 1282, 25 A. L. R. 524; State v. Sullivan, 43 S. C. 205, 21 S. E. 4, 89 Am. St. Rep. 703, 3 L. R. A. (N. S.) 543, L. R. A. 1918A, 694, Ann. Cas. 12D, 1019; State v. Ariel, 38 S. C. 221, 16 S. E. 779, 19 L. R. A. (N. S.) 493; State v. Corley, 43 S. C. 127, 128, 20 S. E. 989, 2 L. R. A. (N. S.) 51.

And which must be reasonable.—State v. Jackson, 32 S. C. 27, 10 S. E. 769, 45 L. R. A. 689, 3 L. R. A. (N. S.) 543, 4 L. R. A. (N. S.) 158, L. R. A. 1916A, 816; State v. Thompson, 68 S. C. 133, 46 S. E. 941, 3 L. R. A. (N. S.) 543, Ann. Cas. 14D, 1271; State v. Bethune, 112 S. C. 100, 99 S. E. 753; State v. Stockman, 82 S. C. 388, 64 S. E. 595, 129 Am. St. Rep. 888, 31 L. R. A. (N. S.) 1168, 45 L. R. A. (N. S.) 72, L. R. A. 1915B, 1149, Ann. Cas. 17C, 628, 25 A. L. R. 519; State v. Moody, 94 S. C. 26, 77 S. E. 713; State v. Green, 118 S. C. 279, 110 S. E. 145, 19 A. L. R. 1431.

Based upon sufficient grounds.—State v. Thomas, 103 S. C. 316, 88 S. E. 20.

Such as the use of deadly weapons.—State v. McIntosh, 39 S. C. 97, 17 S. E. 446, 76 Am. St. Rep. 88, 36 L. R. A. 727, 39 L. R. A. 744, 4 L. R. A. (N. S.) 156, Ann. Cas. 12A, 788, Ann. Cas. 12C, 236; State v. Campbell, 111 S. C. 112, 96 S. E. 543.

And in the absence of any other apparently safe means of averting the impending danger. State v. Andrews, 73 S. C. 257, 53 S. E. 423, 124 Am. St. Rep. 1032, 3 L. R. A. (N. S.) 370, 14 L. R. A. (N. S.) 708, L. R. A. 1916A, 1250; State v. McIntosh, 40 S. C. 349, 18 S. E. 1033, 19 L. R. A. (N. S.) 493, 19 A. L. R. 1282, 25 A. L. R. 524; State v. Sullivan, 43 S. C. 205, 21 S. E. 4, 89 Am. St. Rep. 703, 3 L. R. A. (N. S.) 543, L. R. A. 1918A, 694, Ann. Cas. 12D, 1019; State v. Harvey, 110 S. C. 274, 96 S. E. 399; State v. Bethune, 112 S. C. 100, 99 S. E. 754; State v. Abercrombie, 114 S. C. 241, 103 S. E. 524; State v. Hardin, 114 S. C. 280, 103 S. E. 557.

Such as by retreating.—State v. Trammell, 40 S. C. 331, 18 S. E. 940, 42 Am. St. Rep. 874, 74 Am. St. Rep. 731, 109 Am. St. Rep. 812, 45 L. R. A. 699, 2 L. R. A. (N. S.) 51, 51 L. R. A. (N. S.) 840, 18 A. L. R. 1282; State v. George, 119 S. C. 120, 111 S. E. 880; State v. Jones, 90 S. C. 290, 73 S. E. 177, 50 L. R. A. (N. S.) 954, 973, Ann. Cas. 13A, 893, 18 A. L. R. 1289; State v. Rochester, 72 S. C. 194, 51 S. E. 685, 2 L. R. A. (N. S.) 52, 4 L. R. A. (N. S.) 935; State v. Gordon, 128 S. C. 422; 122 S. E. 501; State v. Waldrop, 73 S. C. 60, 52 S. E. 793, 2 L. R. A. (N. S.) 70, Ann. Cas. 14B, 1126, 18 A. L. R. 1282.

Except that one need not retreat when attacked upon his own premises.—State

v. Gibbs, 113 S. C. 256, 102 S. E. 333; State v. Brooks, 79 S. C. 144, 60 S. E. 518, 128 Am. St. Rep. 836, 17 L. R. A. (N. S.) 483, 45 L. R. A. (N. S.) 72, 15 Ann. Cas. 49; State v. Marlowe, 120 S. C. 205, 112 S. E. 921; State v. Bowers, 122 S. C. S. C. 275, 115 S. E. 303; State v. Bradley, 126 S. C. 528, 120 S. E. 240; State v. Gordon, 123 S. C. 422, 122 S. E. 501; State v. Burdette, 118 S. C. 164, 101 S. E. 664, 8 A. L. R. 660.

But one is not justified in taking another's life by mere threats on the other's part to take his. State v. Howard, 35 S. C. 197, 14 S. E. 481. See also State v. Waldrop, 73 S. C. 60, 52 S. E. 793, 2 L. R. A. (N. S.) 70, Ann. Cas. 14B, 1126, 18 A. L. R. 1282.

Nor to protect property.—State v. Green, 118 S. C. 279, 110 S. E. 145, 19 A. L. R. 1431. See also State v. Davis, 50 S. C. 405, 27 S. E. 905, 62 Am. St. Rep. 837, 4 L. R. A. (N. S.) 156, 5 L. R. A. (N. S.) 811; State v. Bethune, 112 S. C. 100, 99 S. E. 753.

Regardless of nature or purpose of attack.—State v. Douglas, 115 S. C. 483, 101 S. E. 648, 8 A. L. R. 656.

One restrained of his liberty under an illegal arrest may use necessary force, even to the taking of life, to make his escape. State v. Davis, 53 S. C. 150, 31 S. E. 62, 69 Am. St. Rep. 845, 74 Am. St. Rep. 726, 84 Am. St. Rep. 702, 61 L. R. A. 299, 66 L. R. A. 355, 365; State v. Bethune, 112 S. C. 100, 99 S. E. 753.

Provided at time of arrest he is not engaged in commission of crime.—State v. Byrd, 72 S. C. 104, 51 S. E. 542, 33 L. R. A. (N. S.) 144, 38 L. R. A. (N. S.) 1099, 1 A. L. R. 587.

But a slayer cannot urge in justification necessity produced by own wrongful acts.—State v. Whittle, 59 S. C. 297, 37 S. E. 923, 67 L. R. A. 309; State v. Jacobs, 28 S. C. 29, 4 S. E. 799, 27 Am. St. Rep. 810, 74 Am. St. Rep. 731, 45 L. R. A. 689, 4 L. R. A. (N. S.) 155, Ann. Cas. 14D, 1271; State v. Murrell, 33 S. C. 83, 11 S. E. 682, 26 L. R. A. (N. S.) 922; State v. Beckham, 24 S. C. 283, 45 L. R. A. 689, 710; State v. Petsch, 43 S. C. 132, 20 S. E. 993, 86 Am. St. Rep. 652, 109 Am. St. Rep. 806, 45 L. R. A. 689, 704, 56 L. R. A. 374, 3 L. R. A. (N. S.) 376, 543, 19 L. R. A. (N. S.) 493, Ann. Cas. 12C, 430, 14 A. L. R. 759; State v. Trammell, 40 S. C. 331, 18 S. E. 940, 42 Am. St. Rep. 874, 74 Am. St. Rep. 731, 109 Am. St. Rep. 812, 45 L. R. A. 699, 2 L. R. A. (N. S.) 51, 51 L. R. A. (N. S.) 840, 18 A. L. R. 1282; State v. Summer, 55 S. C. 32, 32 S. E. 771, 74 Am. St. Rep. 707, 82 Am. St. Rep. 50, 109 Am. St. Rep. 805, 2 L. R. A. (N. S.) 51, 5 L. R. A. (N. S.) 817, Ann. Cas. 14D, 1271, 18 A. L. R. 1282; State v. Lee, 85 S. C. 101, 67 S. E. 141,

147 Am. St. Rep. 869, 51 L. R. A. (N. S.) 840.

As he must be without fault.—State v. Harvey, 110 S. C. 274, 96 S. E. 399; State v. Petsch, 43 S. C. 132, 20 S. E. 993, 86 Am. St. Rep. 652, 109 Am. St. Rep. 806, 45 L. R. A. 689, 704, 56 L. R. A. 374, 3 L. R. A. (N. S.) 376, 543, 19 L. R. A. (N. S.) 493, Ann. Cas. 12C, 430, 14 A. L. R. 759; State v. Brown, 113 S. C. 513, 101 S. E. 847.

And as a man may deprive himself of right of self-defense by words as well as acts. State v. Council, 129 S. C. 116, 123 S. E. 788. See also State v. Morrison, 121 S. C. 11, 113 S. E. 304; State v. Trammell, 40 S. C. 331, 18 S. E. 940, 42 Am. St. Rep. 874, 74 Am. St. Rep. 731, 109 Am. St. Rep. 812, 45 L. R. A. 699, 2 L. R. A. (N. S.) 51, 51 L. R. A. (N. S.) 840, 18 A. L. R. 1282; State v. Hunter, 82 S. C. 153, 63 S. E. 685, 51 L. R. A. (N. S.) 840; State v. Lee, 85 S. C. 101, 67 S. E. 141, 147 Am. St. Rep. 869, 51 L. R. A. (N. S.) 840; State v. English, 115 S. C. 535, 106 S. E. 781; State v. Shuler, 116 S. C. 152, 107 S. E. 147; State v. Summer, 55 S. C. 32, 32 S. E. 771, 74 Am. St. Rep. 707, 82 Am. St. Rep. 50, 109 Am. St. Rep. 805, 2 L. R. A. (N. S.) 51, 5 L. R. A. (N. S.) 817, Ann. Cas. 14D, 1271, 18 A. L. R. 1282; State v. Jones, 113 S. C. 134, 101 S. E. 647; State v. Byrd, 52 S. C. 480, 30 S. E. 482; State v. Emerson, 78 S. C. 83, 58 S. E. 974, 46 L. R. A. (N. S.) 14; State v. Bradley, 126 S. C. 528, 120 S. E. 240; State v. Ferguson, 91 S. C. 235, 74 S. E. 502, 51 L. R. A. (N. S.) 840. But see State v. Leaks, 114 S. C. 257, 103 S. E. 549, 10 A. L. R. 858; State v. Rowell, 75 S. C. 494, 56 S. E. 23, 134 Am. St. Rep. 1047, 17 L. R. A. (N. S.) 611, 51 L. R. A. (N. S.) 840, Ann. Cas. 12D, 442, 22 A. L. R. 263; State v. Burdette, 118 S. C. 164, 101 S. E. 664, 8 A. L. R. 660; State v. Randall, 118 S. C. 158, 110 S. E. 123.

Killing in defense of another is justifiable.—State v. Douglas, 115 S. C. 483, 101 S. E. 648, 8 A. L. R. 656.

The killer having the same rights to self-defense as person protected.—State v. Cook, 78 S. C. 253, 59 S. E. 862, 125 Am. St. Rep. 788, 15 L. R. A. (N. S.) 1013, 45 L. R. A. (N. S.) 145, 13 Ann. Cas. 1051.

For example the killer must be without fault.—State v. Harvey, 110 S. C. 274, 96 S. E. 399.

And the person protected must come within all requirements of self-defense law.—State v. Douglas, 115 S. C. 483, 101 S. E. 648, 8 A. L. R. 656; State v. Hays, 121 S. C. 163, 113 S. E. 362; State v. Burdette, 118 S. C. 164, 101 S. E. 664, 8 A. L. R. 660.

Likewise killing in defense of habitation may be justifiable.—State v. Brad-

ley, 126 S. C. 528, 120 S. E. 240.

Where the danger is imminent and immediate.—State v. Stockman, 82 S. C. 388, 64 S. E. 595, 129 Am. St. Rep. 888.

But such right is limited to place of habitation or curtilage.—State v. Bradley, 126 S. C. 528, 120 S. E. 240.

And can be exercised only after asking the assailant to leave premises.—State v. McIntosh, 40 S. C. 349, 18 S. E. 1033, 19 L. R. A. (N. S.) 493, 19 A. L. R. 1282, 25 A. L. R. 524. See also, State v. Williams, 76 S. C. 135, 56 S. E. 783, 122 Am. St. Rep. 759, 24 L. R. A. (N. S.) 785, Ann. Cas. 13C, 488.

Using such force as is necessary.—State v. Hibler, 79 S. C. 170, 60 S. E. 438, 19 L. R. A. (N. S.) 493, 45 L. R. A. (N. S.) 72, Ann. Cas. 12C, 48, 25 A. L. R. 524.

And of course an accidental killing may be excusable.—State v. Morgan, 40 S. C. 345, 18 S. E. 937, 36 L. R. A. 465, 3 L. R. A. (N. S.) 1153.

According to nature of weapons and manner of its use.—State v. Jones, 101 S. C. 111, 85 S. E. 239.

II. PLEADING AND PRACTICE.

A. Evidence.

1. Admissibility.

a. In General.

Evidence of articles worn and carried by deceased burned to death admissible for identification.—State v. Martin, 47 S. C. 67, 25 S. E. 113, 68 L. R. A. 59, Ann. Cas. 18C, 697.

Evidence of defendant's state of mind immediately before killing admissible.—State v. Miller, 73 S. C. 277, 53 S. E. 426, 114 Am. St. Rep. 82, 38 L. R. A. (N. S.) 1061; State v. Bowers, 122 S. C. 275, 115 S. E. 303; State v. Gregory, 127 S. C. 87, 120 S. E. 499.

So also evidence that he was intoxicated before killing.—State v. Smalls, 73 S. C. 516, 53 S. E. 976; State v. Rowell, 75 S. C. 494, 56 S. E. 23, 134 Am. St. Rep. 1047, 17 L. R. A. (N. S.) 611, 51 L. R. A. (N. S.) 840, Ann. Cas. 12D, 442, 22 A. L. R. 263.

That he was the aggressor in the difficulty.—State v. McKellar, 85 S. C. 236, 67 S. E. 314, 14 A. L. R. 996. See also, State v. Evans, 112 S. C. 43, 99 S. E. 751.

It is also proper to admit statements of deceased after the shooting.—State v. Thomas, 103 S. C. 316, 88 S. E. 20.

Evidence about communications before killing.—State v. Harmon, 79 S. C. 80, 60 S. E. 230, Ann. Cas. 14D, 1271.

Evidence of previous quarrels and ill feeling.—State v. Brooks, 79 S. C. 144, 60 S. E. 518, 128 Am. St. Rep. 836, 17 L. R. A. (N. S.) 483, 45 L. R. A. (N. S.) 72, 15 Ann. Cas. 49.

Evidence of previous difficulties without the details thereof.—State v. Evans,

112 S. C. 43, 99 S. E. 751; State v. Adams, 68 S. C. 421, 47 S. E. 676, 17 A. L. R. 1123; State v. Williams, 125 S. C. 385, 118 S. E. 783.

Evidence of threats between the parties.—State v. McPhail, 115 S. C. 333, 105 S. E. 638; State v. Lee, 58 S. C. 335, 36 S. E. 706, 86 Am. St. Rep. 649, 56 L. R. A. 376, 42 L. R. A. (N. S.) 663, Ann. Cas. 12C, 430, Ann. Cas. 13E, 228, 25 A. L. R. 1373, 1393; State v. Smith, 12 Rich. 430, 11 Am. Rep. 776, 124 Am. St. Rep. 1031, 3 L. R. A. (N. S.) 354, 14 L. R. A. (N. S.) 712, L. R. A. 1916A, 1250; State v. Jackson, 32 S. C. 27, 10 S. E. 769, 45 L. R. A. 639, 3 L. R. A. (N. S.) 543, 4 L. R. A. (N. S.) 158, L. R. A. 1916A, 816; State v. Campbell, 35 S. C. 28, 14 S. E. 292, 89 Am. St. Rep. 696, 17 L. R. A. 663, L. R. A. 1916A, 824, 836.

Evidence of commission of or participation in act by accused.—State v. Kennedy, 109 S. C. 141, 95 S. E. 350.

Evidence of defendant's character and habits.—State v. Herring, 118 S. C. 386, 110 S. E. 668; State v. Barth, 25 S. C. 175, 60 Am. Rep. 496, 20 L. R. A. 618, Ann. Cas. 13E, 20, 10 A. L. R. 92, 112; State v. Brown, 34 S. C. 41, 12 S. E. 662, 20 L. R. A. 613, 19 L. R. A. (N. S.) 493, 806, Ann. Cas. 13E, 25, 10 A. L. R. 92, 118; State v. Edwards, 13 S. C. 30, 32, 20 L. R. A. 618, 25 L. R. A. (N. S.) 550, 562, Ann. Cas. 13E, 23, 10 A. L. R. 92, 112.

Provided defendant puts his character in issue.—State v. Marlowe, 120 S. C. 205, 112 S. E. 921; State v. Graham, 120 S. C. 216, 112 S. E. 923.

And provided such evidence is relevant to issue.—State v. Swygert, 130 S. C. 91, 124 S. E. 636; State v. Smalls, 73 S. C. 516, 53 S. E. 976; State v. Smith, 12 Rich. 430, 11 Am. Rep. 776, 124 Am. St. Rep. 1031, 3 L. R. A. (N. S.) 354, 14 L. R. A. (N. S.) 712, L. R. A. 1916A, 1250.

Evidence of character and habits of deceased is admissible.—State v. Miller, 73 S. C. 277, 53 S. E. 426, 114 Am. St. Rep. 82, 38 L. R. A. (N. S.) 1061; State v. Boyd, 126 S. C. 300, 119 S. E. 839.

Provided such evidence is relevant.—State v. Crosby, 88 S. C. 98, 70 S. E. 440, 38 L. R. A. (N. S.) 1101; State v. McDaniel, 68 S. C. 304, 47 S. E. 384, 102 Am. St. Rep. 661, 124 Am. St. Rep. 1024, 3 L. R. A. (N. S.) 354, 367, 1161, 41 L. R. A. (N. S.) 878, 899, 912, 934, L. R. A. 1916A, 1250.

But specific instances of violence may not always be shown.—State v. Dean, 72 S. C. 74, 51 S. E. 524, 3 L. R. A. (N. S.) 370, 14 L. R. A. (N. S.) 710; State v. Boyd, 126 S. C. 300, 119 S. E. 839.

Evidence of physical condition of parties is admissible.—State v. Herring, 118 S. C. 386, 110 S. E. 386.

So also is evidence of personal rela-

tion of parties.—State v. Senn, 32 S. C. 392, 11 S. E. 292, 48 Am. St. Rep. 572, 95 Am. St. Rep. 771, 17 L. R. A. 707, 70 L. R. A. 40, 25 L. R. A. (N. S.) 543, 562, L. R. A. 1915B, 1148, 17 A. L. R. 1162; State v. Gilliam, 66 S. C. 119, 45 S. E. 6, 124 Am. St. Rep. 324, 63 L. R. A. 389, 41 L. R. A. (N. S.) 934, Ann. Cas. 14B, 1013, Ann. Cas. 15D, 339; State v. McDaniel, 68 S. C. 304, 47 S. E. 384, 102 Am. St. Rep. 661, 124 Am. St. Rep. 1024, 3 L. R. A. (N. S.) 354, 367, 1161, 41 L. R. A. (N. S.) 878, 899, 912, 934, L. R. A. 1916A, 1250.

Evidence of motive for killing where relevant.—State v. Durant, 87 S. C. 532, 70 S. E. 306; State v. McPhail, 115 S. C. 333, 105 S. E. 638; State v. Andrews, 73 S. C. 257, 53 S. E. 423, 124 Am. St. Rep. 1032, 3 L. R. A. (N. S.) 370, 14 L. R. A. (N. S.) 708, L. R. A. 1916A, 1250; State v. Jones, 86 S. C. 17, 67 S. E. 160, Ann. Cas. 12D, 446, 13 A. L. R. 1263; State v. Aughtry, 49 S. C. 285, 26 S. E. 619, 27 S. E. 199, 97 Am. St. Rep. 776, 41 L. R. A. (N. S.) 751, Ann. Cas. 12C, 236, 17 A. L. R. 1128; State v. Stukes, 73 S. C. 386, 53 S. E. 643; State v. Posey, 4 Strob. 142; State v. Kennedy, 85 S. C. 146, 67 S. E. 152, 18 A. L. R. 919.

Evidence of ability and opportunity.—State v. Thrailkill, 71 S. C. 136, 50 S. E. 551, 124 Am. St. Rep. 1021, 3 L. R. A. (N. S.) 370, 14 L. R. A. (N. S.) 710, 19 L. R. A. (N. S.) 494, L. R. A. 1916A, 1250, 10 A. L. R. 1123.

Evidence of circumstances preceding and leading up to fatal encounter.—State v. Thrailkill, 71 S. C. 136, 50 S. E. 551, 124 Am. St. Rep. 1021, 3 L. R. A. (N. S.) 370, 14 L. R. A. (N. S.) 710, 19 L. R. A. (N. S.) 494, L. R. A. 1916A, 1250, 10 A. L. R. 1123; State v. Douglas, 115 S. C. 483, 101 S. E. 648, 8 A. L. R. 656; State v. Messervy, 86 S. C. 503, 68 S. E. 766, 140 Am. St. Rep. 176, 203, L. R. A. 1918B, 1126.

Provided such evidence is connected with the homicide.—State v. Thrailkill, 73 S. C. 314, 53 S. E. 482, Ann. Cas. 12C, 236, 16 A. L. R. 1471; State v. Jackson, 32 S. C. 27, 10 S. E. 769, 45 L. R. A. 689, 3 L. R. A. (N. S.) 543, 4 L. R. A. (N. S.) 158, L. R. A. 1916A, 816; State v. Petsch, 43 S. C. 132, 20 S. E. 993, 86 Am. St. Rep. 652, 109 Am. St. Rep. 806, 45 L. R. A. 689, 704, 56 L. R. A. 374, 3 L. R. A. (N. S.) 376, 543, 19 L. R. A. (N. S.) 493, Ann. Cas. 12C, 430, 14 A. L. R. 579; State v. James, 34 S. C. 49, 12 S. E. 657, Ann. Cas. 12A, 787, Ann. Cas. 13A, 32, 19 A. L. R. 1068, rehearing denied 34 S. C. 579, 13 S. E. 325.

And is competent.—State v. Rochester, 72 S. C. 194, 51 S. E. 685, 2 L. R. A. (N. S.) 52, 4 L. R. A. (N. S.) 935; State v. Williams, 125 S. C. 385, 118 S. E. 783.

And material.—State v. Gregory, 127

S. C. 87, 120 S. E. 499; State v. Gallman, 79 S. C. 229, 60 S. E. 682, 16 A. L. R. 1307; State v. Tidwell, 100 S. C. 248, 84 S. E. 778.

Evidence as to identity and presence of accused is admissible.—State v. Wide-man, 68 S. C. 119, 46 S. E. 769; State v. Stukes, 73 S. C. 386, 53 S. E. 643.

So also is evidence of nature of act and attendant circumstances.—State v. Cannon, 49 S. C. 550, 27 S. E. 526, 68 L. R. A. 198; State v. Davis, 55 S. C. 339, 33 S. E. 449, 68 L. R. A. 1918A, 667; State v. McDaniel, 68 S. C. 304, 47 S. E. 384, 102 Am. St. Rep. 661, 124 Am. St. Rep. 1024, 3 L. R. A. (N. S.) 354, 367, 1161, 41 L. R. A. (N. S.) 878, 899, 912, 934, L. R. A. 1916A, 1250; State v. Cannon, 52 S. C. 452, 30 S. E. 589, 62 L. R. A. 348, 3 L. R. A. (N. S.) 542, 6 L. R. A. (N. S.) 1155, 15 A. L. R. 917; State v. Davis, 88 S. C. 204, 70 S. E. 417.

Evidence of subsequent incriminating or exculpatory circumstances.—State v. Marks, 70 S. C. 448, 50 S. E. 14; State v. Messervey, 105 S. C. 254, 89 S. E. 662.

Where such evidence is relevant.—State v. Taylor, 56 S. C. 360, 34 S. E. 939, 86 Am. St. Rep. 660, 56 L. R. A. 395, 414, 442, 37 L. R. A. (N. S.) 254, 16 A. L. R. 417.

But statements made by accused after homicide inadmissible on own behalf.—State v. Talbert, 41 S. C. 526, 19 S. E. 852, 86 Am. St. Rep. 644, 56 L. R. A. 432, 450.

Nor are declarations of deceased unless admitted as dying declarations.—State v. Wyse, 32 S. C. 45, 10 S. E. 612, 56 L. R. A. 390, 19 L. R. A. (N. S.) 808, Am. Cas. 12B, 1237.

Evidence as to sanity of accused is admissible.—State v. Herring, 118 S. C. 386, 110 S. E. 668.

So also is evidence of circumstances showing self-defense.—State v. Bright, 89 S. C. 228, 71 S. E. 821, 10 A. L. A. 1123; State v. Thrailkill, 71 S. C. 136, 50 S. E. 551, 124 Am. St. Rep. 1021, 3 L. R. A. (N. S.) 370, 14 L. R. A. (N. S.) 710, 19 L. R. A. (N. S.) 494, L. R. A. 1916A, 1250, 10 A. L. R. 1123; State v. Turner, 29 S. C. 34, 6 S. E. 891, 13 Am. St. Rep. 706, 14 Am. St. Rep. 40, 16 Am. St. Rep. 19, 28 Am. St. Rep. 911, 124 Am. St. Rep. 1021, 3 L. R. A. (N. S.) 353, L. R. A. 1916A, 1250, 1267.

Such as character and habits of person killed.—State v. Hiers, 107 S. C. 411, 93 S. E. 124.

Particular acts of violence by deceased connected with the homicide.—State v. Andrews, 73 S. C. 257, 53 S. E. 423, 124 Am. St. Rep. 1032, 3 L. R. A. (N. S.) 370, 14 L. R. A. (N. S.) 708, L. R. A. 1916A, 1250; State v. Hill, 129 S. C. 166, 123 S. E. 817; State v. Brown, 34 S. C. 41, 12 S. E. 662, 20 L. R. A. 613, 19 L. R. A. (N. S.) 49, 806, Ann. Cas. 13E, 25, 10 A.

L. R. 92, 118.

Previous quarrels and ill-feeling bearing on issue of self-defense.—State v. Thrailkill, 71 S. C. 136, 50 S. E. 551, 124 Am. St. Rep. 1021, 3 L. R. A. (N. S.) 370, 14 L. R. A. (N. S.) 710, 19 L. R. A. (N. S.) 494, L. R. A. 1916A, 1250, 10 A. L. R. 1123; State v. Stockman, 82 S. C. 388, 64 S. E. 595, 129 Am. St. Rep. 888, 31 L. R. A. (N. S.) 1168, 45 L. R. A. (N. S.) 72, L. R. A. 1915B, 1149, Ann. Cas. 17C, 628, 25 A. L. R. 519; State v. Moody, 94 S. C. 26, 77 S. E. 713; State v. Stockman, 82 S. C. 388, 64 S. E. 595, 129 Am. St. Rep. 888, 31 L. R. A. (N. S.) 1168, 45 L. R. A. (N. S.) 72, L. R. A. 1915B, 1149, Ann. Cas. 17C, 628, 25 A. L. R. 519; State v. Emerson, 78 S. C. 83, 58 S. E. 974, 46 L. R. A. (N. C.) 14.

Previous threats by statements amounting to threats.—State v. Williams, 125 S. C. 385, 118 S. E. 783. See also, State v. Faile, 43 S. C. 52, 20 S. E. 798, 89 Am. St. Rep. 709, 56 L. R. A. 365, 381, 397, Ann. Cas. 12C, 482; State v. Thrailkill, 71 S. C. 136, 50 S. E. 551, 124 Am. St. Rep. 1021, 3 L. R. A. (N. S.) 370, 14 L. R. A. (N. S.) 710, 19 L. R. A. (N. S.) 492, L. R. A. 1916A, 1250, 10 A. L. R. 1123; State v. Wise, 33 S. C. 582, 12 S. E. 556, 28 Am. St. Rep. 954, 82 Am. St. Rep. 37, 52, 135 Am. St. Rep. 76, 45 L. R. A. 689, 3 L. R. A. (N. S.) 543, 14 L. R. A. (N. S.) 708, Ann. Cas. 16A, 277; State v. Sullivan, 43 S. C. 205, 21 S. E. 4, 89 Am. St. Rep. 703, 3 L. R. A. (N. S.) 543, L. R. A. 1918A, 694, Ann. Cas. 12D, 1019.

Previous warning.—State v. Rochester, 72 S. C. 194, 51 S. E. 685, 2 L. R. A. (N. S.) 52, 4 L. R. A. (N. S.) 935.

And apprehension of danger.—State v. Summers, 36 S. C. 479, 15 S. E. 369, 19 L. R. A. (N. S.) 493.

The wife on one accused not on trial is a competent witness against his accomplices. State v. Drawdy, 14 Rich. 87, 27 Am. Dec. 379, 14 A. L. R. 1434.

Confession of one cannot be used against other defendant. State v. Anderson, 24 S. C. 109, 22 L. R. A. 723; State v. Adams, 68 S. C. 421, 47 S. E. 676, 17 A. L. R. 1123; State v. Thomas, 75 S. C. 477, 55 S. E. 893.

See generally, as to expert testimony, State v. Coleman, 20 S. C. 441, 66 Am. Dec. 238, 17 L. R. A. 707, 36 L. R. A. 727, 39 L. R. A. 313, 324, 743, 40 L. R. A. 563, 35 L. R. A. (N. S.) 988; State v. Senn, 32 S. C. 392, 11 S. E. 292, 48 Am. St. Rep. 572, 95 Am. St. Rep. 771, 17 L. R. A. 707, 70 L. R. A. 40, 25 L. R. A. (N. S.) 543, 562, L. R. A. 1915B, 1148, 17 A. L. R. 1162; State v. Bradley, 34 S. C. 136, 13 S. E. 315, 56 L. R. A. 365, 381, 397, 412, L. R. A. 1915A, 1089, Ann. Cas. 13C, 412; State v. Foote, 58 S. C. 218, 36 S. E. 551, 51 L. R. A. (N. S.) 880, L. R. A. 1915A, 1063; State v. Johnson, 66 S. C. 23, 44 S. E. 58.

See generally, as to confessions, *State v. Kirby*, 1 Strob. 155, 6 Am. St. Rep. 242, 18 L. R. A. (N. S.) 794, 7 A. L. R. 437; *State v. Clark*, 4 Strob. 311; *State v. Vaigneur*, 5 Rich. 391, 95 Am. St. Rep. 768, 53 L. R. A. 406, 70 L. R. A. 36, 18 L. R. A. 870; *State v. Motley*, 7 Rich. 327, 28 L. R. A. 197, 53 L. R. A. 405, 68 L. R. A. 39, 78; *State v. Gossett*, 9 Rich. 428, 97 Am. St. Rep. 786, 18 L. R. A. (N. S.) 777, 818, Ann. Cas. 13B, 307, 2 A. L. R. 1031; *State v. Clayton*, 11 Rich. 581, 27 L. R. A. 779, 846, 28 L. R. A. 35, Ann. Cas. 12C, 30; *State v. Cook*, 15 Rich. 29; *State v. Branhams*, 13 S. C. 389, 41 Am. St. Rep. 522, 18 L. R. A. (N. S.) 777, Ann. Cas. 13D, 488; *State v. Dodson*, 14 S. C. 628, L. R. A. 1917F, 900; *State v. Workman*, 15 S. C. 540, 18 L. R. A. (N. S.) 777; *State v. Dodson*, 16 S. C. 453, 59 Am. Dec. 579, 132 Am. St. Rep. 570, 35 L. R. A. (N. S.) 988, 47 L. R. A. (N. S.) 206, 17 A. L. R. 1123; *State v. Shorter*, 85 S. C. 170, 67 S. E. 131.

b. Dying Declarations.

Dying declarations admissible where made by deceased fully expecting to die.—*State v. Bradley*, 34 S. C. 136, 13 S. E. 315, 56 L. R. A. 365, 381, 397, 412, L. R. A. 1915A, 1089, Ann. Cas. 13C, 412; *State v. Freeman*, 1 Speer 57, 56 L. R. A. 379; *State v. Quick*, 15 Rich. 342, 56 L. R. A. 393, 441, Ann. Cas. 13E, 228, 25 A. L. R. 1372; *State v. McEvoy*, 9 S. C. 208, 12 Am. St. Rep. 904, 86 Am. St. Rep. 647, 27 L. R. A. 787, 56 L. R. A. 388, 27 L. R. A. (N. S.) 705.

Without hope of recovery.—*State v. McCoomer*, 79 S. C. 63, 60 S. E. 237, 30 L. R. A. (N. S.) 394, L. R. A. 1918F, 966; *State v. Taylor*, 56 S. C. 360, 34 S. E. 939, 86 Am. St. Rep. 660, 56 L. R. A. 395, 414, 442, 37 L. R. A. (N. S.) 254, 16 A. L. R. 417; *State v. Marshall*, 111 S. C. 356, 98 S. E. 130; *State v. Banister*, 35 S. C. 290, 14 S. E. 678, 86 Am. St. Rep. 664, 56 L. R. A. 365, 381, 397, 422, 440, Ann. Cas. 13C, 412; *State v. Hall*, 127 S. C. 256, 120 S. E. 849; *State v. Taylor*, 56 S. C. 360, 34 S. E. 939, 86 Am. St. Rep. 660, 56 L. R. A. 395, 414, 442, 37 L. R. A. (N. S.) 254, 16 A. L. R. 417; *State v. Washington*, 13 S. C. 453, 458, 17 L. R. A. 484, 56 L. R. A. 447; *State v. Gill*, 14 S. C. 410, 415, 56 L. R. A. 393, 424, 17 A. L. R. 1123, 1157; *State v. Johnson*, 26 S. C. 152, 1 S. E. 510, 86 Am. St. Rep. 642, 56 L. R. A. 365, 381, 397, 408, Ann. Cas. 13C, 412; *State v. Belton*, 24 S. C. 185, 58 Am. St. Rep. 245, 16 Am. St. Rep. 31, 89 Am. St. Rep. 698, 124, Am. St. Rep. 306, 19 L. R. A. 608, 42 L. R. A. 553, 564, 56 L. R. A. 374, 393, 14 A. L. R. 759; *State v. Wyse*, 32 S. C. 45, 10 S. E. 612, 56 L. R. A. 390, 19 L. R. A. (N. S.) 803, Ann. Cas. 12B, 1237; *State v. Bradley*, 34 S. C. 136, 13 S. E. 315, 56 L. R. A. 365, 381, 397, 412, L. R. A. 1915A, 1089, Ann. Cas. 13C, 412; *State v. Head*, 60 S. C. 516,

39 S. E. 6, 86 Am. St. Rep. 655, 56 L. R. A. 393, 30 L. R. A. (N. S.) 395; *State v. Jagers*, 58 S. C. 41, 36 S. E. 434, 86 Am. St. Rep. 658, 56 L. R. A. 381, 394, Ann. Cas. 14D, 1271; *State v. Lee*, 58 S. C. 335, 36 S. E. 706, 86 Am. St. Rep. 649, 56 L. R. A. 376, 42 L. R. A. (N. S.) 663, Ann. Cas. 12C, 430, Ann. Cas. 13E, 228, 25 A. L. R. 1372, 1393; *State v. Faile*, 43 S. C. 52, 20 S. E. 798, 89 Am. St. Rep. 709, 56 L. R. A. 365, 381, 397, Ann. Cas. 12C, 482.

And aware of mortal wound.—*State v. Rish*, 104 S. C. 250, 88 S. E. 531; *State v. Head*, 60 S. C. 516, 39 S. E. 6, 86 Am. St. Rep. 655, 56 L. R. A. 393, 30 L. R. A. (N. S.) 395.

At the time of making declarations.—*State v. Jagers*, 58 S. C. 41, 36 S. E. 434, 86 Am. St. Rep. 658, 56 L. R. A. 381, 394, Ann. Cas. 14D, 1271; *State v. Brown*, 108 S. C. 490, 95 S. E. 61, 16 A. L. R. 417.

With reference to cause of approaching death.—*State v. Long*, 93 S. C. 502, 77 S. E. 61. See also, *State v. Petsch*, 43 S. C. 132, 20 S. E. 993, 86 Am. St. Rep. 652, 109 Am. St. Rep. 806, 45 L. R. A. 689, 704, 56 L. R. A. 374, 3 L. R. A. (N. S.) 376, 543, 19 L. R. A. (N. S.) 493, Ann. Cas. 12C, 430, 14 A. L. R. 759.

And made in apprehension of impending death.—*State v. Thomas*, 103 S. C. 316, 88 S. E. 20; *State v. Riley*, 98 S. C. 386, 82 S. E. 621; *State v. Brown*, 108 S. C. 490, 95 S. E. 61, 16 A. L. R. 417.

Believing himself to be in extremis.—*State v. Wideman*, 110 S. C. 394, 96 S. E. 688.

But competent as a witness.—*State v. Quick*, 107 S. C. 435, 93 S. E. 127; *State v. Brown*, 108 S. C. 490, 95 S. E. 61, 16 A. L. R. 417.

The sufficiency of showing such state being determined by court from all said and surrounding circumstances.—*State v. Johnson*, 26 S. C. 152, 1 S. E. 510, 86 Am. St. Rep. 642, 56 L. R. A. 365, 391, 397, 408, Ann. Cas. 13C, 412; *State v. Gallman*, 79 S. C. 229, 60 S. E. 682, 16 A. L. R. 1307. See also, *State v. Smalls*, 87 S. C. 550, 70 S. E. 300; *State v. Jagers*, 58 S. C. 41, 36 S. E. 434, 86 Am. St. Rep. 658, 56 L. R. A. 381, 394, Ann. Cas. 14D, 1271; *State v. Hall*, 127 S. C. 256, 120 S. E. 849; *State v. Swygert*, 130 S. C. 91, 124 S. E. 636; *State v. Marshall*, 111 S. C. 356, 98 S. E. 130.

And the preliminary evidence.—*State v. Burton*, 111 S. C. 526, 98 S. E. 856; *State v. Gallman*, 79 S. C. 229, 60 S. E. 682, 16 A. L. R. 1307; *State v. Franklin*, 80 S. C. 332, 60 S. E. 953, 19 L. R. A. (N. S.) 493, 33 L. R. A. (N. S.) 146, judgment affirmed in *Franklin v. State*, 218 U. S. 161, 30 S. Ct. 640, 54 L. Ed. 980.

And the jury passing upon its credibility.—*State v. Banister*, 35 S. C. 290, 14 S. E. 678, 86 Am. St. Rep. 664, 56 L. R. A. 365, 381, 397, 422, Ann. Cas. 13C, 412.

For example sending for a physician does not necessarily infer hope of recovery.—State v. Marshall, 111 S. C. 356, 98 S. E. 130.

Nor does the fact that physician did not think declarant would die.—State v. Johnson, 20 S. C. 387.

Nor does deceased's reference to future.—State v. McCoomer, 79 S. C. 63, 60 S. E. 237, 30 L. R. A. (N. S.) 394, L. R. A. 1918F, 966.

And the fact that time intervened before death does not affect admissibility.—State v. Banister, 35 S. C. 290, 14 S. E. 678, 86 Am. St. Rep. 664, 56 L. R. A. 365, 381, 397, 422, 440, Ann. Cas. 13C, 412.

Nor does the fact that declaration was made at request of a physician.—State v. Burton, 111 S. C. 526, 98 S. E. 856.

Or under oath.—State v. Talbert, 41 S. C. 526, 19 S. E. 852, 86 Am. St. Rep. 644, 56 L. R. A. 432, 450.

Or declaration constituted opinion based on facts.—State v. Lee, 58 S. C. 335, 36 S. E. 706, 86 Am. St. Rep. 649, 56 L. R. A. 376, 42 L. R. A. (N. S.) 663, Ann. Cas. 12C, 430, Ann. Cas. 13E, 228, 25 A. L. R. 1372, 1393.

Or was contradicted by statements made when not in extremis.—State v. Stuckey, 56 S. C. 576, 35 S. E. 263, 56 L. R. A. 442, 454, 37 L. R. A. (N. S.) 254, 16 A. L. R. 417; State v. Taylor, 56 S. C. 360, 34 S. E. 939, 86 Am. St. Rep. 660, 56 L. R. A. 395, 414, 442, 37 L. R. A. (N. S.) 254, 16 A. L. R. 417; State v. Mills, 79 S. C. 187, 60 S. E. 664, 37 L. R. A. (N. S.) 254, 16 A. L. R. 417.

But it is error to charge that the law presumes a party who has given up all hope will tell the truth. State v. Riley, 98 S. C. 386, 82 S. E. 621.

See generally, State v. Crank, 2 Bail. 66, 1 Am. Dec. 574, 23 Am. Dec. 117, 35 Am. Dec. 756, 36 Am. Dec. 533, 39 Am. Dec. 451, 45 Am. Dec. 473, 47 Am. Dec. 238, 51 Am. Dec. 375, 58 Am. Dec. 248, 80 Am. Dec. 97, 3 Am. St. Rep. 280, 6 Am. St. Rep. 248, 18 L. R. A. (N. S.) 790, 50 L. R. A. (N. S.) 951, Ann. Cas. 14C, 326; State v. Belcher, 13 S. C. 459, 43 Am. Dec. 83, 86 Am. St. Rep. 641, 664, 103 Am. St. Rep. 160, 17 L. R. A. 484, 56 L. R. A. 360, 396, 24 L. R. A. (N. S.) 779; State v. Terrell, 12 Rich. 321, 59 Am. Dec. 180, 65 Am. Dec. 588, 66 Am. Dec. 234, 86 Am. St. Rep. 639, 666, 40 L. R. A. 566, 56 L. R. A. 359, Ann. Cas. 13C, 413, 14 A. L. R. 759.

c. Proceedings at Inquest.

On trial for murder, the coroner may testify as to inquiries he made. State v. Sanders, 75 S. C. 409, 56 S. E. 35, 41 L. R. A. (N. S.) 751, L. R. A. 1918A, 671, L. R. A. 1918B, 851.

And defendant's statements at cor-

oner's inquest may be admitted.—State v. Simmons, 112 S. C. 451, 100 S. E. 149.

But his testimony at inquest inadmissible unless cautioned as to his right to refuse incrimination.—State v. Tapp, 105 S. C. 55, 89 S. E. 394.

Defense witness may be required to state what he said when examined before coroner.—State v. Merriman, 34 S. C. 16, 12 S. E. 619, 82 Am. St. Rep. 28, 95 Am. St. Rep. 771, 15 L. R. A. 672, 20 L. R. A. 615, 45 L. R. A. 689, 700, 14 L. R. A. (N. S.) 740, 30 L. R. A. (N. S.) 848, L. R. A. 1918A, 667, 694.

2. Presumption and Burden of Proof.

The State must prove malice.—State v. Coleman, 6 S. C. 185, 186; State v. Hopkins, 15 S. C. 153, 157.

But malice is presumed in absence of circumstances of excuse.—State v. Mason, 54 S. C. 240, 32 S. E. 357, 38 L. R. A. (N. S.) 1078; State v. Henderson, 74 S. C. 477, 55 S. E. 117, 18 L. R. A. (N. S.) 796. See also, State v. Smith, 2 Strob. 77, 47 Am. Dec. 589, 19 Am. Rep. 3, 90 Am. St. Rep. 583, 63 L. R. A. 374, 660, 35 L. R. A. (N. S.) 623, 38 L. R. A. (N. S.) 1089, 18 A. L. R. 919.

As where one intentionally kills another with a deadly weapon.—State v. Levelle, 34 S. C. 120, 13 S. E. 319, 27 Am. St. Rep. 799, 28 Am. St. Rep. 898, 63 Am. St. Rep. 100, 90 Am. St. Rep. 581, 18 L. R. A. 225, 63 L. R. A. 365, 663, 4 L. R. A. (N. S.) 156, 38 L. R. A. (N. S.) 1089, 1100, Ann. Cas. 12A, 39, 13 A. L. R. 1264; State v. Sisson, 3 Brev. 58, 59, 63 L. R. A. 374; State v. Jackson, 36 S. C. 487, 15 S. E. 559, 31 Am. St. Rep. 890, 41 L. R. A. 530, 29 A. L. R. 1131; State v. Way, 38 S. C. 333, 17 S. E. 39, 134 Am. St. Rep. 1041, 4 L. R. A. (N. S.) 157, 5 L. R. A. (N. S.) 823, 19 L. R. A. (N. S.) 493, 22 A. L. R. 268.

Or from circumstances showing a depraved spirit.—State v. Ford, 1 Speers, 146.

Or from whipping slave of unknown owner to death, after pursuit and capture.—State v. Motley, 7 Rich. 327, 28 L. R. A. 197, 53 L. R. A. 405, 68 L. R. A. 39, 78.

Or from misconduct of defendant resulting in the homicide.—State v. Hammond, 5 Strob. 91, 101; State v. Smith, 2 Strob. 77, 47 Am. Dec. 589, 19 Am. Rep. 3, 90 Am. St. Rep. 583, 63 L. R. A. 374, 660, 35 L. R. A. (N. S.) 623, 38 L. R. A. (N. S.) 1089, 18 A. L. R. 919; State v. Ferguson, 2 Hill 619, 27 Am. Dec. 412, 35 Am. Dec. 756, 86 Am. St. Rep. 644, 56 L. R. A. 388, 5 L. R. A. (N. S.) 814, 27 L. R. A. (N. S.) 704.

Or from continuous brutal conduct of husband accused of murdering wife.—State v. Jones, 86 S. C. 17, 67 S. E. 160, Ann. Cas. 12D, 446, 13 A. L. R. 1263.

In which cases accused has onus of

repelling such presumption.—State v. Byrd, 72 S. C. 104, 51 S. E. 542, 33 L. R. A. (N. S.) 144, 38 L. R. A. (N. S.) 1099, 1 A. L. R. 587.

But no such presumption arises from mere fact of killing.—State v. Jones, 29 S. C. 201, 7 S. E. 296, 31 L. R. A. 490, 25 L. R. A. (N. S.) 1030, 37 L. R. A. (N. S.) 794, 806, Ann. Cas. 12C, 818, 20 A. L. R. 1195; State v. Alexander, 30 S. C. 74, 8 S. E. 440, 14 Am. St. Rep. 879, 16 Am. St. Rep. 20, 28 Am. St. Rep. 899, 953, 63 Am. St. Rep. 100, 76 Am. St. Rep. 93, 90 Am. St. Rep. 576, 18 L. R. A. 225, 39 L. R. A. 740, 4 L. R. A. (N. S.) 934, 10 L. R. A. (N. S.) 1002, Ann. Cas. 12A, 39; State v. Ariel, 38 S. C. 221, 16 S. E. 779, 19 L. R. A. (N. S.) 493; State v. Rochester, 72 S. C. 194, 51 S. E. 685, 2 L. R. A. (N. S.) 52, 4 L. R. A. (N. S.) 935.

And on plea of accidental homicide state must overcome such plea beyond reasonable doubt.—State v. McDaniel, 68 S. C. 304, 47 S. E. 384, 102 Am. St. Rep. 661, 124 Am. St. Rep. 1024, 3 L. R. A. (N. S.) 354, 367, 1161, 41 L. R. A. (N. S.) 878, 899, 912, 934, L. R. A. 1916A, 1250.

As the burden of proof is not on defendant.—State v. Ferguson, 91 S. C. 235, 74 S. E. 502, 51 L. R. A. (N. S.) 840.

But defendant must prove self-defense.—State v. Welch, 6 S. E. 894, 29 S. C. 4, 19 L. R. A. (N. S.) 493, Ann. Cas. 12C, 48.

With all its necessary elements.—State v. Hutto, 66 S. C. 449, 45 S. E. 13, 19 L. R. A. (N. S.) 493, Ann. Cas. 12C, 50, Ann. Cas. 13C, 488; State v. Hibler, 79 S. C. 170, 60 S. E. 438, 19 L. R. A. (N. S.) 493, 45 L. R. A. (N. S.) 72, Ann. Cas. 12C, 48, 25 A. L. R. 524; State v. Gandy, 113 S. C. 147, 101 S. E. 644.

Unless the same is established by evidence of state.—On a trial for murder, the plea of self-defense may be established by the evidence of the state, but the burden of proof still remains on the defense. State v. Moss, 77 S. C. 391, 57 S. E. 1098, 19 L. R. A. (N. S.) 493, Ann. Cas. 12C, 48.

3. Weight and Sufficiency.

Sufficiency of circumstantial evidence.—State v. Anderson, 20 S. C. 581; State v. Milling, 35 S. C. 16, 14 S. E. 284, 97 Am. St. Rep. 799, 57 L. R. A. 882; State v. Sanders, 75 S. C. 409, 56 S. E. 35, 41 L. R. A. (N. S.) 751, L. R. A. 1918A, 671, L. R. A. 1918B, 851. See also, State v. Love, 1 Bay 167.

Sufficiency of evidence of corpus delicti.—State v. Gillis, 73 S. C. 318, 53 S. E. 487, 114 Am. St. Rep. 95, 5 L. R. A. (N. S.) 571.

Of infanticide.—State v. O'Neill, 79 S. C. 571, 60 S. E. 1121.

Of malice.—State v. Jones, 29 S. C.

201, 7 S. E. 296, 31 L. R. A. 490, 25 L. R. A. (N. S.) 1030, 37 L. R. A. (N. S.) 794, 806, Ann. Cas. 12C, 818, 20 A. L. R. 1195.

Of motive.—State v. Aughtry, 49 S. C. 285, 26 S. E. 619, 27 S. E. 199, 97 Am. St. Rep. 776, 41 L. R. A. (N. S.) 751, Ann. Cas. 12C, 236, 17 A. L. R. 1128; State v. Underwood, 127 S. C. 1, 120 S. E. 719; State v. Barton, 126 S. C. 413, 120 S. E. 489.

Of commission of or participation in act by accused.—State v. Smalls, 87 S. C. 550, 70 S. E. 300; State v. Graham, 107 S. C. 139, 92 S. E. 188.

Of conspiracy.—State v. Norton, 69 S. C. 454, 48 S. E. 464, 68 L. R. A. 218; State v. Marks, 70 S. C. 448, 50 S. E. 14.

Of participation in crime committed by another.—State v. Davis, 88 S. C. 204, 70 S. E. 417; State v. Graham, 107 S. C. 139, 92 S. E. 188; State v. Turner, 117 S. C. 470, 109 S. E. 119, 17 A. L. R. 914.

Of cause of death.—State v. Cunningham, 87 S. C. 453, 69 S. E. 1093.

Of insanity.—State v. Coyle, 86 S. C. 81, 67 S. E. 24, 138 Am. St. Rep. 1022; State v. Hyde, 90 S. C. 296, 73 S. E. 180, 44 L. R. A. (N. S.) 123, 127; State v. Tidwell, 100 S. C. 248, 84 S. E. 778.

Of self-defense.—State v. Hollis, 108 S. C. 442, 95 S. E. 74; State v. Brown, 34 S. C. 41, 12 S. E. 662, 20 L. R. A. 613, 19 L. R. A. (N. S.) 493, 806, Ann. Cas. 13E, 25, 10 A. L. R. 92, 118; State v. Summers, 36 S. C. 479, 15 S. E. 369, 19 L. R. A. (N. S.) 493; State v. Ariel, 38 S. C. 221, 16 S. E. 779, 19 L. R. A. (N. S.) 493; State v. Workman, 39 S. C. 151, 17 S. E. 694, 4 L. R. A. (N. S.) 155, 19 L. R. A. (N. S.) 493, Ann. Cas. 12C, 237; State v. Thrailkill, 71 S. C. 136, 50 S. E. 551, 124 Am. St. Rep. 1021, 3 L. R. A. (N. S.) 370, 14 L. R. A. (N. S.) 710, 19 L. R. A. (N. S.) 494, L. R. A. 1916A, 1250, 10 A. L. R. 1123; State v. Reeder, 72 S. C. 223, 51 S. E. 702, 3 L. R. A. (N. S.) 1023, 19 L. R. A. (N. S.) 493; State v. Lindsay, 82 S. C. 486, 63 S. E. 1064, 19 L. R. A. (N. S.) 493, order staying remittitur revoked 82 S. C. 486, 63 S. E. 1135; State v. Strother, 84 S. C. 503, 66 S. E. 877, 31 L. R. A. (N. S.) 1168; State v. Chastain, 85 S. C. 64, 67 S. E. 6, 31 L. R. A. (N. S.) 1168, Ann. Cas. 12C, 49; State v. Ferguson, 91 S. C. 235, 74 S. E. 502, 51 L. R. A. (N. S.) 840; State v. Mattison, 95 S. C. 101, 78 S. E. 1038.

Of degree of homicide in general.—State v. Lemacks, 98 S. C. 498, 82 S. E. 879; State v. Alverson, 120 S. C. 273, 113 S. E. 120; State v. Culbreath, 121 S. C. 89, 113 S. E. 476; State v. Talley, 122 S. C. 24, 114 S. E. 859; State v. Ashmore, 126 S. C. 465, 120 S. E. 244; State v. Council, 129 S. C. 116, 123 S. E. 788; State v. Revels, 86 S. C. 213, 68 S. E. 523, Ann. Cas. 14B, 1013.

Of first degree murder.—State v. Big-
ham, 119 S. C. 368, 112 S. E. 332.

B. Trial.

1. General Consideration.

State not required to call hostile witness.—In a prosecution for homicide, the state is not required by law to call a hostile witness, though he was an eye-witness to the homicide. State v. Mason, 115 S. C. 214, 105 S. E. 286.

Judge may permit jury to disperse during trial. State v. Belcher, 13 S. C. 459, 43 Am. Dec. 83, 86 Am. St. Rep. 641, 664, 103 Am. St. Rep. 160, 17 L. R. A. 484, 56 L. R. A. 360, 396, 24 L. R. A. (N. S.) 779.

Judge must not allow his opinion as to the facts of the case, either inadvertently, intentionally or otherwise, to reach the jury. State v. White, 15 S. C. 381; State v. Jenkins, 21 S. C. 595.

As to what is a charge upon the facts, see State v. Summers, 19 S. C. 90, 95; State v. Atterberry, 19 S. C. 597; State v. Jenkins, 21 S. C. 595, 596.

2. Instructions.

Elements of offense in general.—State v. Taylor, 56 S. C. 360, 34 S. E. 939, 86 Am. St. Rep. 660, 56 L. R. A. 395, 414, 442, 37 L. R. A. (N. S.) 254, 16 A. L. R. 417; State v. Stukes, 73 S. C. 386, 53 S. E. 643.

Intent.—State v. Clardy, 73 S. C. 340, 53 S. E. 493, Ann. Cas. 12D, 1228.

Malice.—State v. Ariel, 38 S. C. 221, 16 S. E. 779, 19 L. R. A. (N. S.) 493; State v. Byrd, 72 S. C. 104, 51 S. E. 542, 33 L. R. A. (N. S.) 144, 38 L. R. A. (N. S.) 1099, 1 A. L. R. 587; State v. Miller, 73 S. C. 277, 53 S. E. 426, 114 Am. St. Rep. 82, 38 L. R. A. (N. S.) 1061; State v. Jones, 74 S. C. 456, 54 S. E. 1017, 17 A. L. R. 1157; State v. Gallman, 79 S. C. 229, 60 S. E. 682, 16 A. L. R. 1307; State v. Crosby, 88 S. C. 98, 70 S. E. 440, 38 L. R. A. (N. S.) 1101.

Deliberation and premeditation.—State v. Andrews, 73 S. C. 257, 53 S. E. 423, 124 Am. St. Rep. 1032, 3 L. R. A. (N. S.) 370, 14 L. R. A. (N. S.) 708, L. R. A. 1916A, 1250.

Motive.—State v. Ferguson, 91 S. C. 235, 74 S. E. 502, 51 L. R. A. (N. S.) 840.

Commission of or attempt to commit other crime.—State v. Martin, 122 S. C. 286, 115 S. E. 252.

Cause of death.—State v. Chiles, 44 S. C. 338, 22 S. E. 339, 51 L. R. A. (N. S.) 880, L. R. A. 1915A, 1063; State v. Foote, 58 S. C. 218, 36 S. E. 551, 51 L. R. A. (N. S.) 880, L. R. A. 1915A, 1063; State v. Portee, 122 S. C. 298, 115 S. E. 238.

Elements of assault with intent to kill.—State v. Milam, 88 S. C. 127, 70 S. E. 447, 38 L. R. A. (N. S.) 1072; State v. DuRant, 87 S. C. 532, 70 S. E. 306.

Matters of defense in general.—State v. Howard, 35 S. C. 197, 14 S. E. 481.

Insanity or intoxication.—State v. Driggers, 84 S. C. 526, 66 S. E. 1042, 137 Am. St. Rep. 855, 25 L. R. A. (N. S.) 377, L. R. A. 1916A, 1195, 19 Ann. Cas. 1166, 8 A. L. R. 1220, 12 A. L. R. 879, 900; State v. Lloyd, 85 S. C. 73, 67 S. E. 9, 27 L. R. A. (N. S.) 465, 52 L. R. A. (N. S.) 232.

Passion and provocation.—State v. Way, 38 S. C. 333, 17 S. E. 39, 134 Am. St. Rep. 1041, 4 L. R. A. (N. S.) 157, 5 L. R. A. (N. S.) 823, 19 L. R. A. (N. S.) 493, 22 A. L. R. 268; State v. Davis, 50 S. C. 405, 27 S. E. 905, 62 Am. St. Rep. 837, 4 L. R. A. (N. S.) 156, 5 L. R. A. (N. S.) 811; State v. Gallman, 79 S. C. 229, 60 S. E. 682, 16 A. L. R. 1307; State v. Driggers, 84 S. C. 526, 66 S. E. 1042, 137 Am. St. Rep. 855, 25 L. R. A. (N. S.) 377, L. R. A. 1916A, 1195, 19 Ann. Cas. 1166, 8 A. L. R. 1220, 12 A. L. R. 879, 900; State v. Rish, 104 S. C. 250, 88 S. E. 531; State v. Hardin, 114 S. C. 280, 103 S. E. 557; State v. Stephenson, 85 S. C. 247, 67 S. E. 239, 25 A. L. R. 520; State v. Stevens, 106 S. C. 272, 91 S. E. 302, 17 A. L. R. 1125.

Resistance to unlawful acts.—State v. Brownfield, 60 S. C. 509, 39 S. E. 2, 66 L. R. A. 369, judgment affirmed in Brownfield v. State, 189 U. S. 426, 23 S. Ct. 513, 47 L. Ed. 882; State v. Franklin, 80 S. C. 332, 60 S. E. 953, 19 L. R. A. (N. S.) 493, 33 L. R. A. (N. S.) 146, judgment affirmed in Franklin v. State, 218 U. S. 161, 30 S. Ct. 640, 54 L. Ed. 980; State v. Messervey, 105 S. C. 254, 89 S. E. 662.

Excuse or justification in general.—State v. Harmon, 79 S. C. 80, 60 S. E. 230, Ann. Cas. 14D, 1271; State v. Lemacks, 98 S. C. 498, 82 S. E. 879; State v. Swygert, 130 S. C. 91, 124 S. E. 636.

Exercise of authority or duty.—State v. Whittle, 59 S. C. 297, 37 S. E. 923, 67 L. R. A. 309.

Form and language of instructions on self-defense.—State v. Jacobs, 28 S. C. 29, 4 S. E. 799, 27 Am. St. Rep. 810, 74 Am. St. Rep. 731, 45 L. R. A. 689, 4 L. R. A. (N. S.) 155, Ann. Cas. 14D, 1271; State v. Jackson, 32 S. C. 27, 10 S. E. 769, 45 L. R. A. 689, 3 L. R. A. (N. S.) 543, 4 L. R. A. (N. S.) 158, L. R. A. 1916A, 816; State v. Owens, 79 S. C. 125, 60 S. E. 305, 19 L. R. A. (N. S.) 493, Ann. Cas. 12C, 48; State v. Hampton, 79 S. C. 179, 60 S. E. 669, Ann. Cas. 12D, 1233; State v. Ferguson, 91 S. C. 235, 74 S. E. 502, 51 L. R. A. (N. S.) 840; State v. Rish, 104 S. C. 250, 88 S. E. 531; State v. Burdette, 118 S. C. 164, 101 S. E. 664, 8 A. L. R. 660.

Construction and sufficiency of instructions on self-defense.—State v. Summer, 55 S. C. 32, 32 S. E. 771, 74 Am. St. Rep. 707, 82 Am. St. Rep. 50,

109 Am. St. Rep. 805, 2 L. R. A. (N. S.) 51, 5 L. R. A. (N. S.) 817, Ann. Cas. 14D, 1271, 18 A. L. R. 1282; State v. Foster, 66 S. C. 469, 45 S. E. 1; State v. Dean, 72 S. C. 74, 51 S. E. 524, 3 L. R. A. (N. S.) 370, 14 L. R. A. (N. S.) 710; State v. Miller, 73 S. C. 277, 53 S. E. 426, 114 Am. St. Rep. 82, 38 L. R. A. (N. S.) 1061; State v. Ross, 75 S. C. 533, 55 S. E. 977; State v. Rowell, 75 S. C. 494, 56 S. E. 23, 134 Am. St. Rep. 1047, 17 L. R. A. (N. S.) 611, 51 L. R. A. (N. S.) 840, Ann. Cas. 12D, 442, 22 A. L. R. 263; State v. Williams, 76 S. C. 135, 56 S. E. 783, 122 Am. St. Rep. 759, 24 L. R. A. (N. S.) 785, Ann. Cas. 13C, 488; State v. Owens, 79 S. C. 125, 60 S. E. 305, 19 L. R. A. (N. S.) 493, Ann. Cas. 12C, 48; State v. Hibler, 79 S. C. 170, 60 S. E. 438, 19 L. R. A. (N. S.) 493, 45 L. R. A. (N. S.) 72, Ann. Cas. 12C, 48, 25 A. L. R. 524; State v. Brown, 79 S. C. 390, 60 S. E. 945; State v. Franklin, 80 S. C. 332, 60 S. E. 953, 19 L. R. A. (N. S.) 493, 33 L. R. A. (N. S.) 146, judgment affirmed Franklin v. State, 218 U. S. 161, 30 S. Ct. 640, 54 L. Ed. 980; State v. Lindsay, 82 S. C. 486, 63 S. E. 1064, order staying remittitur revoked 82 S. C. 486, 63 S. E. 1135, 19 L. R. A. (N. S.) 493; State v. Stephenson, 85 S. C. 247, 67 S. E. 239, 25 A. L. R. 520; State v. Duncan, 86 S. C. 370, 68 S. E. 684, Ann. Cas. 1912A, 1016; State v. Crosby, 88 S. C. 98, 70 S. E. 440, 38 L. R. A. (N. S.) 1101; State v. Ferguson, 91 S. C. 235, 74 S. E. 502, 51 L. R. A. (N. S.) 840; State v. Boozer, 92 S. C. 495, 75 S. E. 864; State v. Scruggs, 94 S. C. 304, 77 S. E. 944; State v. Watson, 94 S. C. 458, 78 S. E. 324; State v. Ellison, 95 S. C. 127, 78 S. E. 704; State v. Hollis, 108 S. C. 442, 95 S. E. 74; State v. George, 113 S. C. 154, 102 S. E. 284; State v. Hardin, 114 S. C. 280, 103 S. E. 557; State v. Shuler, 116 S. C. 152, 107 S. E. 147; State v. Herron, 116 S. C. 282, 108 S. E. 93; State v. Graham, 120 S. C. 216, 112 S. E. 923; State v. Williams, 125 S. C. 385, 118 S. E. 783; State v. Council, 129 S. C. 116, 123 S. E. 788; State v. Hill, 129 S. C. 166, 123 S. E. 817; State v. Swygert, 130 S. C. 91, 124 S. E. 636; State v. Ballentine, 130 S. C. 123, 125 S. E. 291.

Misleading or inconsistent instructions on self-defense.—State v. Hollis, 108 S. C. 442, 95 S. E. 74; State v. Davis, 50 S. C. 405, 27 S. E. 905, 62 Am. St. Rep. 837, 4 L. R. A. (N. S.) 156, 5 L. R. A. (N. S.) 811; State v. Jordan, 109 S. C. 409, 96 S. E. 221; State v. Bethune, 112 S. C. 100, 99 S. E. 753.

Applicability of self-defense Instructions to issue and evidence.—State v. Jones, 29 S. C. 201, 7 S. E. 296, 31 L. R. A. 490, 25 L. R. A. (N. S.) 1030, 37 L. R. A. (N. S.) 794, 806, Ann. Cas.

12C, 818, 20 A. L. R. 1195; State v. Lee, 85 S. C. 101, 67 S. E. 141, 137 Am. St. Rep. 869, 51 L. R. A. (N. S.) 840; State v. Babb, 88 S. C. 395, 70 S. E. 309; State v. Shuler, 116 S. C. 152, 107 S. E. 147; State v. Randall, 118 S. C. 158, 110 S. E. 123; State v. Gordon, 128 S. C. 422, 122 S. E. 501.

Instructions on self-defense where issue fairly raised.—State v. Turner, 63 S. C. 548, 41 S. E. 778; State v. Coyle, 86 S. C. 81, 67 S. E. 24, 138 Am. St. Rep. 1022.

Instructions on self-defense in absence of evidence.—State v. Byrd, 52 S. C. 480, 30 S. E. 482; State v. Anderson, 85 S. C. 229, 67 S. E. 237, 137 Am. St. Rep. 887, 46 L. R. A. (N. S.) 907, L. R. A. 1916A, 1195; State v. Murrell, 33 S. C. 83, 11 S. E. 682, 26 L. R. A. (N. S.) 922.

Instruction on self-defense when evidence shows contrary.—State v. Peeples, 126 S. C. 422, 120 S. E. 361.

Instructions excluding self-defense.—State v. Turner, 29 S. C. 34, 6 S. E. 891, 13 Am. St. Rep. 706, 14 Am. St. Rep. 40, 16 Am. St. Rep. 19, 28 Am. St. Rep. 911, 124 Am. St. Rep. 1021, 3 L. R. A. (N. S.) 353, L. R. A. 1916A, 1250, 1267; State v. Bodie, 33 S. C. 117, 11 S. E. 624, 48 Am. St. Rep. 569, 19 L. R. A. (N. S.) 493, Ann. Cas. 12C, 482; State v. Corley, 43 S. C. 127, 20 S. E. 989, 2 L. R. A. (N. S.) 51; State v. Sullivan, 43 S. C. 205, 21 S. E. 4, 89 Am. St. Rep. 703, 3 L. R. A. (N. S.) 543, L. R. A. 1918A, 694, Ann. Cas. 12D, 1019; State v. Bethune, 86 S. C. 143, 67 S. E. 466, 134 Am. St. Rep. 731, Ann. Cas. 12B, 971, 10 A. L. R. 862, 17 A. L. R. 1120, 1136; State v. Messervey, 105 S. C. 254, 89 S. E. 662.

Self-defense instructions ignoring aggression or provocation.—State v. Murrell, 33 S. C. 83, 11 S. E. 682, 26 L. R. A. (N. S.) 922; State v. Brownfield, 60 S. C. 509, 39 S. E. 2, 66 L. R. A. 369, affirmed Brownfield v. State, 189 U. S. 426, 23 S. Ct. 513, 47 L. Ed. 882; State v. Dean, 72 S. C. 74, 51 S. E. 524, 3 L. R. A. (N. S.) 370, 14 L. R. A. (N. S.) 710; State v. Stockman, 82 S. C. 388, 64 S. E. 595, 129 Am. St. Rep. 888, 31 L. R. A. (N. S.) 1168, 45 L. R. A. (N. S.) 72, L. R. A. 1915B, 1148, Ann. Cas. 17C, 628, 25 A. L. R. 519; State v. Stevens, 106 S. C. 272, 91 S. E. 302, 17 A. L. R. 1125; State v. Hardin, 114 S. C. 280, 103 S. E. 557.

Self-defense instruction excluding evidence as to imminence of danger.—State v. Bright, 89 S. C. 228, 71 S. E. 821, 10 A. L. R. 1123.

Self-defense instruction excluding evidence as to duty to retreat.—State v. Chastain, 85 S. C. 64, 67 S. E. 6, 31 L. R. A. (N. S.) 1168, Ann. Cas. 12C,

49; *State v. Swygert*, 130 S. C. 91, 124 S. E. 636; *State v. Ballentine*, 130 S. C. 123, 125 S. E. 291.

Defense of habitation.—*State v. Stephenson*, 85 S. C. 247, 67 S. E. 239, 25 A. L. R. 520; *State v. Gunter*, 126 S. C. 375, 119 S. E. 844.

Defense of property.—*State v. Ellison*, 95 S. C. 127, 78 S. E. 704.

Accident or misfortune.—*State v. Morgan*, 40 S. C. 345, 18 S. E. 937, 36 L. R. A. 465, 3 L. R. A. (N. S.) 1153; *State v. Davis*, 53 S. C. 150, 31 S. E. 62, 69 Am. St. Rep. 845, 74 Am. St. Rep. 726, 84 Am. St. Rep. 702, 61 L. R. A. 299, 66 L. R. A. 355, 365; *State v. Lee*, 58 S. C. 355, 36 S. E. 706, 86 Am. St. Rep. 649, 56 L. R. A. 376, 42 L. R. A. (N. S.) 663, Ann. Cas. 12C, 430, Ann. Cas. 13E, 228, 25 A. L. R. 1372, 1393; *State v. Mack*, 77 S. C. 388, 57 S. E. 1107; *State v. Jones*, 101 S. C. 111, 85 S. E. 239.

Principals and accessories.—*State v. Prater*, 26 S. C. 198, 613, 2 S. E. 108, 95 Am. St. Rep. 773; *State v. Bodie*, 33 S. C. 117, 11 S. E. 624, 48 Am. St. Rep. 569, 19 L. R. A. (N. S.) 493, Ann. Cas. 12C, 482; *State v. Carson*, 36 S. C. 524, 15 S. E. 588, 12 A. L. R. 279; *State v. White*, 67 S. C. 320, 45 S. E. 210, 16 A. L. R. 1044; *State v. Hunter*, 77 S. C. 119, 57 S. E. 637, 12 A. L. R. 279; *State v. Kenny*, 77 S. C. 236, 57 S. E. 859; *State v. Moody*, 94 S. C. 26, 77 S. E. 713; *State v. Hays*, 121 S. C. 163, 113 S. E. 362; *State v. Jeffords*, 121 S. C. 443, 114 S. E. 415, 26 A. L. R. 541.

Grade or degree of offense in general.—*State v. Wilson*, 104 S. C. 351, 89 S. E. 301; *State v. Barfield*, 128 S. C. 384, 122 S. E. 856; *State v. Perry*, 78 S. C. 184, 59 S. E. 851, 21 A. L. R. 623; *State v. Norton*, 28 S. C. 572, 6 S. E. 820; *State v. Jenkins*, 21 S. C. 595, 596; *State v. Summers*, 19 S. C. 90, 94; *State v. Nance*, 25 S. C. 168, 86 Am. St. Rep. 656, 103 Am. St. Rep. 160, 41 L. R. A. 538, 56 L. R. A. 382, 24 L. R. A. (N. S.) 784, 29 A. L. R. 1141, 1180; *State v. Jenkins*, 21 S. C. 595, 596.

Grade or degree of murder.—*State v. Foster*, 66 S. C. 469, 45 S. E. 1; *State v. McDaniel*, 68 S. C. 304, 47 S. E. 384, 102 Am. St. Rep. 661, 124 Am. St. Rep. 1024, 3 L. R. A. (N. S.) 354, 367, 1161, 41 L. R. A. (N. S.) 878, 899, 912, 934, L. R. A. 1916A, 1250; *State v. Rochester*, 72 S. C. 194, 51 S. E. 685, 2 L. R. A. (N. S.) 52, 4 L. R. A. (N. S.) 935; *State v. Wilson*, 104 S. C. 351, 89 S. E. 301; *State v. Bramlett*, 114 S. C. 389, 103 S. E. 755; *State v. Ellison*, 95 S. C. 127, 78 S. E. 704.

Grade or degree of manslaughter.—*State v. Summer*, 55 S. C. 32, 32 S. E. 771, 74 Am. St. Rep. 707, 82 Am. St. Rep. 50, 109 Am. St. Rep. 805, 2 L. R. A. (N. S.) 51, 5 L. R. A. (N. S.) 817, Ann. Cas.

14D, 1271, 18 A. L. R. 1282; *State v. Bowers*, 65 S. C. 207, 43 S. E. 656, 95 Am. St. Rep. 795, 109 Am. St. Rep. 805, 134 Am. St. Rep. 727, 5 L. R. A. (N. S.) 815, 38 L. R. A. (N. S.) 1062, 1105; *State v. Adams*, 68 S. C. 421, 47 S. E. 676, 17 A. L. R. 1123; *State Hampton*, 79 S. C. 179, 60 S. E. 669, Ann. Cas. 12D, 1233; *State v. Brown*, 79 S. C. 390, 60 S. E. 945; *State v. Seigler*, 94 S. C. 117, 77 S. E. 731; *State v. Hanahan*, 111 S. C. 58, 96 S. E. 667, 16 A. L. R. 914; *State v. English*, 115 S. C. 535, 106 S. E. 781; *State v. Portee*, 122 S. C. 298, 115 S. E. 238; *State v. Hughes*, 107 S. C. 429, 93 S. E. 6.

Grade and degree of assault with intent to kill.—*State v. Knox*, 98 S. C. 114, 82 S. E. 278; *State v. Milam*, 88 S. C. 127, 70 S. E. 447, 38 L. R. A. (N. S.) 1072.

3. Jury Questions.

It is for jury to determine whether defendant was present and aiding and abetting in killing deceased.—*State v. Williams*, 76 S. C. 135, 56 S. E. 783, 122 Am. St. Rep. 759, 24 L. R. A. (N. S.) 785, Ann. Cas. 13C, 488. See also, *State v. Epps*, 122 S. C. 272, 114 S. E. 631.

Whether disease of which deceased died was produced by wound.—*State v. Williams*, 118 S. C. 20, 110 S. E. 79.

Whether defendant was able to distinguish right from wrong.—*State v. Chandler*, 126 S. C. 149, 119 S. E. 774.

Whether character of acts of deceased was unlawful.—*State v. Douglas*, 115 S. C. 483, 101 S. E. 648, 8 A. L. R. 656.

Whether defendant was entitled to kill in self-defense.—*State v. Coyle*, 86 S. C. 81, 67 S. E. 24, 138 Am. St. Rep. 1022; *State v. McKeller*, 85 S. C. 236, 67 S. E. 314, 14 A. L. R. 996; *State v. Ferguson*, 91 S. C. 235, 74 S. E. 502, 51 L. R. A. (N. S.) 840; *State v. Harmon*, 127 S. C. 424, 121 S. E. 257.

Whether it was necessary to kill to save life of another.—*State v. Harvey*, 110 S. C. 274, 96 S. E. 399.

Whether killing was result of accident or misfortune.—*State v. Hopkins*, 109 S. C. 271, 96 S. E. 128; *State v. Harmon*, 127 S. C. 424, 121 S. E. 257.

4. Verdict.

Form and requisites.—*State v. Harvey*, 110 S. C. 274, 96 S. E. 399.

Construction and operation.—*State v. Robinson*, 31 S. C. 453, 10 S. E. 101, 3 Am. St. Rep. 283.

Sufficiency of specification of grade or degree of offense.—*State v. Waring*, 109 S. C. 52, 95 S. E. 143.

Upon trial for the greater offense defendant may be found guilty of the less. *State v. Gaffney*, Rice 431, 80 Am. Dec. 372, 21 L. R. A. (N. S.) 2.

C. New Trial.

Grounds in general.—*State v. Davis* 129

S. C. 5, 123 S. E. 320.

Order granting or refusing.—State v. Wilson, 115 S. C. 248, 105 S. E. 341.

D. Appeal and Error.

Grounds of review must be presented and reserved in lower court.—State v. Mills, 79 S. C. 187, 60 S. E. 664, 37 L. R. A. (N. S.) 254, 16 A. L. R. 417.

And exception must be to degree of offense found by jury.—Where defendant was indicted for murder, and the jury found him guilty of manslaughter, exceptions relating to murder will not be reviewed. State v. Stuckey, 56 S. C. 576, 35 S. E. 263, 56 L. R. A. 442, 454, 37 L. R. A. (N. S.) 254, 16 A. L. R. 417.

But discretion of lower court will not be reviewed.—State v. Marshall, 111 S. C. 356, 98 S. E. 130.

Unless improper and prejudicial.—State v. McCoomer, 79 S. C. 63, 60 S. E. 237, 30 L. R. A. (N. S.) 394, L. R. A. 1918F, 966; State v. Franklin, 80 S. C. 332, 60 S. E. 953, 19 L. R. A. (N. S.) 493, 33 L. R. A. (N. S.) 146, judgment affirmed in Franklin v. State, 218 U. S. 161, 30 S. Ct. 640, 54 L. Ed. 980; State v. Marshall, 111 S. C. 356, 98 S. E. 130.

Instruction on hip pocket defense was not prejudicial in view of other instructions.—State v. Glenn, 88 S. C. 162, 70 S. E. 453.

Nor was expression of opinion by Circuit Judge against admission of evidence of decedent's acts to show his vicious humor.—State v. Bright, 89 S. C. 228, 71 S. E. 821, 10 A. L. R. 1123.

Or expression of opinion as to proof of malice where defendant was found guilty of manslaughter.—State v. Bright, 89 S. C. 228, 71 S. E. 821, 10 A. L. R. 1123.

Or allusion of trial judge to a conviction for murder in another state.—State v. Scruggs, 94 S. C. 304, 77 S. E. 944.

Admission of evidence, although erroneous, may be harmless. State v. Cannon, 52 S. C. 452, 30 S. E. 589, 62 L. R. A. 348, 3 L. R. A. (N. S.) 542, 6 L. R. A. (N. S.) 1155, 15 A. L. R. 917; State v. Thrailkill, 71 S. C. 136, 50 S. E. 551, 124 Am. St. Rep. 1021, 3 L. R. A. (N. S.) 370, 14 L. R. A. (N. S.) 710, 19 L. R. A. (N. S.) 494, L. R. A. 1916A, 1250, 10 A. L. R. 1123; State v. Herring, 118 S. C. 386, 110 S. E. 668; State v. Davis, 55 S. C. 339, 33 S. E. 449, L. R. A. 1918A, 667.

So also exclusion of evidence may be harmless. State v. Messervy, 86 S. C. 503, 68 S. E. 766, 140 Am. St. Rep. 176, 203, L. R. A. 1918B, 1126; State v. Harmon, 79 S. C. 80, 60 S. E. 230, Ann. Cas. 14D, 1271; State v. Gardner, 83 S. C. 476, 65 S. E. 630; State v. Hollis, 108 S. C. 442, 95 S. E. 74; State v. Gregory, 127 S. C. 87, 120 S. E. 499.

Where the verdict is undeniably correct.—State v. James, 34 S. C. 49, 12 S. E. 657, rehearing denied, 34 S. C. 579, 13 S. E. 325, Ann. Cas. 12A, 787, Ann. Cas. 13A, 32, 19 A. L. R. 1068; State v. Stuckey, 56 S. C. 576, 35 S. E. 263, 56 L. R. A. 442, 454, 37 L. R. A. (N. S.) 254, 16 A. L. R. 417; State v. Bowers, 122 S. C. 275, 115 S. E. 303.

And where the admission or exclusion is not prejudicial.—State v. Underwood, 127 S. C. 1, 120 S. E. 719; State v. Tapp, 105 S. C. 55, 89 S. E. 394; State v. McCoomer, 79 S. C. 63, S. E. 237, 30 L. R. A. (N. S.) 394, L. R. A. 1918F, 966.

Giving of instructions may constitute harmless error.—State v. Gilliam, 66 S. C. 419, 45 S. E. 6, 124 Am. St. Rep. 324, 63 L. R. A. 389, 41 L. R. A. (N. S.) 934, Ann. Cas. 14B, 1013, Ann. Cas. 15D, 339; State v. Owens, 79 S. C. 125, 60 S. E. 305, 19 L. R. A. (N. S.) 493, Ann. Cas. 12C, 48; State v. Chastain, 85 S. C. 64, 67 S. E. 6, 31 L. R. A. (N. S.) 1168, Ann. Cas. 12C, 49; State v. Brown, 94 S. C. 115, 77 S. E. 734; State v. Wilson, 104 S. C. 351, 89 S. E. 301; State v. Herron, 116 S. C. 282, 108 S. E. 93; State v. Portee, 122 S. C. 298, 115 S. E. 238.

So also refusal of instructions may constitute harmless error.—State v. Seigler, 94 S. C. 117, 77 S. E. 731; State v. Barwick, 89 S. C. 153, 71 S. E. 838, L. R. A. 1918A, 731; State v. Anderson, 24 S. C. 109, 113, 23 L. R. A. 723; State v. Gill, 14 S. C. 410, 415, 56 L. R. A. 393, 424, 17 A. L. R. 1123, 1157.

Where not prejudicial to defendant's rights.—State v. Sanders, 103 S. C. 216, 88 S. E. 10, Ann. Cas. 17C, 1168; State v. Campbell, 111 S. C. 112, 96 S. E. 543; State v. Holmes, 115 S. C. 238, 105 S. E. 347; State v. Cooper, 118 S. C. 300, 110 S. E. 152; State v. Seaborn, 120 S. C. 227, 112 S. E. 916; State v. Bradley, 126 S. C. 528, 120 S. E. 240; State v. Brooks, 79 S. C. 144, 60 S. E. 518, 128 Am. St. Rep. 836, 17 L. R. A. (N. S.) 483, 45 L. R. A. (N. S.) 72, 15 Ann. Cas. 49.

Or where unnecessary and inapplicable.—State v. Whittle, 59 S. C. 297, 37 S. E. 923, 67 L. R. A. 309; State v. Edwards, 68 S. C. 318, 47 S. E. 395; State v. Rochester, 72 S. C. 194, 51 S. E. 685, 2 L. R. A. (N. S.) 52, 4 L. R. A. (N. S.) 935; State v. Anderson, 85 S. C. 229, 67 S. E. 237, 137 Am. St. Rep. 887, 46 L. R. A. (N. S.) 907, L. R. A. 1916A, 1195; State v. Weldon, 89 S. C. 308, 71 S. E. 828; State v. Spears, 95 S. C. 438, 79 S. E. 315; State v. Williams, 110 S. C. 286, 96 S. E. 494; State v. Burdette, 118 S. C. 164, 101 S. E. 664, 8 A. L. R. 660; State v. Brown, 113 S. C. 513, 101 S. E. 847; State v. Martin, 122 S. C. 286, 115 S. E. 252.

Or where the errors are favorable to

defendant.—State v. Davis, 50 S. C. 405, 27 S. E. 905, 62 Am. St. Rep. 837, 4 L. R. A. (N. S.) 156, 5 L. R. A. (N. S.) 811; State v. Byrd, 72 S. C. 104, 51 S. E. 542, 33 L. R. A. (N. S.) 144, 38 L. R. A. (N. S.) 1099, 1 A. L. R. 587; State v. Brown, 108 S. C. 490, 95 S. E. 61, 16 A. L. R. 417; State v. Williams, 110 S. C. 286, 96 S. E. 404; State v. Gregory, 127 S. C. 87, 120 S. E. 499.

Or where error is cured by verdict.—State v. McIntosh, 40 S. C. 349, 18 S. E. 1033, 19 L. R. A. (N. S.) 493, 18 A. L. R. 1232, 25 A. L. R. 524; State v. Robertson, 54 S. C. 147, 31 S. E. 868, 50 L. R. A. (N. S.) 971; State v. Ferguson, 91 S. C. 235, 74 S. E. 502, 51 L. R. A. (N. S.) 840; State v. Simmons, 112 S. C. 451, 100 S. E. 149; State v. Richardson, 47 S. C. 18, 24 S. E. 1028; State v. Owens, 79 S. C. 125, 60 S. E. 305, 19 L. R. A. (N. S.) 493, Ann. Cas. 12C, 48; State v. Henderson, 80 S. C. 165, 60 S. E. 314; State v. Hampton, 79 S. C. 179, 60 S. E. 669, Ann. Cas. 12D, 1233; State v. Strother, 84 S. C. 503, 66 S. E. 877, 31 L. R. A. (N. S.)

1163; State v. Lee, 85 S. C. 101, 67 S. E. 141, 137 Am. St. Rep. 869, 51 L. R. A. (N. S.) 340; State v. Seigler, 94 S. C. 117, 77 S. E. 731; State v. Brown, 94 S. C. 115, 77 S. E. 734; State v. Mulwee, 94 S. C. 323, 77 S. E. 1027; State v. Williams, 110 S. C. 286, 96 S. E. 404.

Likewise where the evidence tends to show defendant guilty of murder, he cannot complain of a conviction of manslaughter. State v. Perry, 78 S. C. 184, 59 S. E. 851, 21 A. L. R. 623; State v. Henderson, 80 S. C. 165, 60 S. E. 314.

Defendant is properly put on second trial when former conviction was simply reversed by the Supreme Court. State v. Stephens, 13 S. C. 285, 135 Am. St. Rep. 74, 44 L. R. A. (N. S.) 346, L. R. A. 1916A, 816.

Constitution of 1868 exempted from second trial only where there had been an acquittal. State v. Shirer, 20 S. C. 392, 404, 98 Am. Dec. 126, 87 Am. St. Rep. 22, 33, 17 L. R. A. 484; State v. Jenkins, 20 S. C. 351, 353, 77 Am. Dec. 697, 92 Am. St. Rep. 115, 148.

§ 1102. Punishment for murder.—Whoever is guilty of murder shall suffer the punishment of death: *provided, however*, that in each case where the prisoner is found guilty of murder, the jury may find a special verdict recommending him or her to the mercy of the court, whereupon the punishment shall be reduced to imprisonment in the penitentiary with hard labor during the whole lifetime of the prisoner.

1932 Code, § 1102; Cr. C. '22, § 2; Cr. C. '12, § 136; Cr. C. '02, § 109; G. S. 2454; R. S. 109; 1868 (14) 175; 1894 (21) 735.

Act changing punishment from hanging to electrocution not ex post facto.

—Act 1912 (27 St. at Large, p. 702), changing the punishment for murder in the first degree from hanging to electrocution, and changing the place where the execution should be conducted and the number of witnesses permitted or required, was not disadvantageous to one convicted of such offense for an act performed prior to the enactment of the law, and therefore, in so far as it applied to him, was not objectionable as an ex post facto law. State v. Malloy, 95 S. C. 441, 78 S. E. 995, Ann. Cas. 15C, 1053.

Court must simply inform jury they may recommend defendant to mercy of

court.—In murder case, court under statute should simply inform jury that they may recommend defendant to mercy of court, and that recommendation will result in life imprisonment. State v. King, 158 S. C. 251, 155 S. E. 409.

Statements of court, in instructions as to jury's right to recommend defendant to mercy of court, that jury had nothing to do with mercy, and citing instances in which jury should recommend mercy, were erroneous. State v. King, 158 S. C. 251, 155 S. E. 409.

Judge's statement that law justified order to sheriff to take defendant out and hang him was erroneous. State v. King, 158 S. C. 251, 155 S. E. 409.

§ 1103. Killing by stabbing, etc.—Whoever shall stab or thrust any person or persons that has not then any weapon drawn, or that has not then first stricken the party which shall so stab or thrust, so as the person or persons so stabbed or thrust shall thereof die within the space of six months then next following, although it cannot be proved that the same was done of malice aforethought, yet the party so offending, and being thereof convicted, shall suffer death as in the case of wilful murder: *provided*, that nothing herein contained shall extend to any person who shall

kill any person or persons in self-defense, or by misfortune, or in any other manner than as aforesaid; nor to any person who, in keeping and preserving the peace, shall chance to commit manslaughter, so as the said manslaughter be not committed wittingly, willingly, and of purpose, under pretext and color of keeping the peace; nor shall extend to any person who, in chastising or correcting his child, shall, besides his or their intent and purpose, chance to commit manslaughter.

1932 Code, § 1103; Cr. C. '22, § 3; Cr. C. '12, § 137; Cr. C. '02, § 110; G. S. 2455; R. S. 110; 1712 (2) 507.

§ 1104. Death from obstructing railroad.—Where the death of any human being results from any obstruction placed upon a railroad, as described in section 1116 of this chapter, the person placing or causing to be placed such obstruction or impediment on said railroad shall be adjudged guilty of murder, and shall suffer death.

1932 Code, § 1104; Cr. C. '22, § 4; Cr. C. '12, § 138; Cr. C. '02, § 111; G. S. 2456; R. S. 111; 1879 (18) 101.

§ 1105. Killing by poison.—All wilful killing by poisoning of any person shall be adjudged, taken, and deemed wilful murder, of malice prepense, and the offender therein, his aiders, abettors, procurers, and counsellors, shall suffer death, as in other cases of wilful murder.

1932 Code, § 1105; Cr. C. '22, § 5; Cr. C. '12, § 139; Cr. C. '02, § 112; G. S. 2457; R. S. 112; 1712 (2) 479.

§ 1106. Killing in a duel.—In case any person shall kill another in any duel with a deadly weapon, or shall inflict a wound or wounds upon any person in any duel, so as the person so wounded shall thereof die within the space of six months then next following, such person so killing another, or so wounding any person whereby such person so wounded shall die as aforesaid, being thereof convicted, shall suffer death, as in the case of wilful murder.

1932 Code, § 1106; Cr. C. '22, § 6; Cr. C. '12, § 140; Cr. C. '02, § 113; G. S. 2458; R. S. 113; 1880 (17) 501.

§ 1107. Manslaughter.—Manslaughter, or the unlawful killing of another without malice, express or implied, shall be punishable by hard labor in the penitentiary, not exceeding thirty years nor less than two years: *provided*, that in case where the jury returns a verdict of guilty of involuntary manslaughter the punishment shall be not less than three (3) months nor more than three (3) years in the discretion of the judge.

1932 Code, § 1107; Cr. C. '22, § 10; Cr. C. '12, § 148; Cr. C. '02, § 120; G. S. 2465; R. S. 120; 1869 (14) 175; 1931 (38) 332; 1934 (38) 1463.

Manslaughter is taking life of another without premeditation or malice.—Manslaughter is the taking the life of another in sudden heat and passion, under reasonable provocation, without premeditation or malice. *State v. Ferguson*, 2 Hill 619, 27 Am. Dec. 412, 35 Am. Dec. 756, 86 Am. St. Rep. 644, 56 L. R. A. 388, 5 L. R. A. (N. S.) 814, 27 L. R. A. (N. S.) 704; *State v. Smith*, 10 Rich. 341, 5 L.

R. A. (N. S.) 812; *State v. Jacobs*, 28 S. C. 29, 4 S. E. 799, 27 Am. St. Rep. 810, 74 Am. St. Rep. 731, 45 L. R. A. 689, 4 L. R. A. (N. S.) 155, Ann. Cas. 14D, 1271.

Manslaughter defined in Act of 1821 as the killing of a slave in sudden heat and passion, includes killing by or under excessive provocation. *State v. Fleming*, 2 Strob. 464.

Instruction that manslaughter was "not

the felonious, but the unlawful taking of human life * * * upon * * * sufficient legal provocation," was erroneous. *State v. King*, 158 S. C. 251, 155 S. E. 409.

As to distinction between murder and manslaughter, see *State v. Summer*, 55 S. C. 32, 34, 32 S. E. 771, 74 Am. St. Rep. 707, 82 Am. St. Rep. 50, 109 Am. St. Rep. 805, 2 L. R. A. (N. S.) 51, 5 L. R. A. (N. S.) 817, Ann. Cas. 14D, 1271, 18 A. L. R. 1282.

As to charge properly defining manslaughter, see *State v. Lee*, 79 S. C. 223, 60 S. E. 524; *State v. Bowers*, 65 S. C. 207, 213, 43 S. E. 656, 95 Am. St. Rep. 795, 109 Am. St. Rep. 805, 134 Am. St. Rep. 727, 5 L. R. A. (N. S.) 815, 38 L. R. A. (N. S.) 1062, 1105; *State v. Hunter*, 82 S. C. 153, 158, 63 S. E. 685, 51 L. R. A. (N. S.) 840.

And is a felony.—*State v. O'Shields*, 163 S. C. 408, 161 S. E. 692.

Thus killing a man whom father detects in illicit intercourse with his daughter is manslaughter.—A father killing man whom he detects in his home in illicit intercourse with daughter, a member of his family, would be guilty of manslaughter. *State v. Emerson*, 78 S. C. 83, 58 S. E. 974, 46 L. R. A. (N. S.) 14.

So also killing by officer of man fleeing to avoid arrest.—An officer shooting a person charged with a misdemeanor and fleeing to avoid arrest, is guilty of manslaughter. *State v. Sudduth*, 74 S. C. 498, 54 S. E. 1013, 25 L. R. A. (N. S.) 567.

And killing by negligent use of deadly weapon is manslaughter. *State v. Gilliam*, 66 S. C. 419, 423, 45 S. E. 6, 124 Am. St. Rep. 324, 63 L. R. A. 389, 41 L. R. A. (N. S.) 934, Ann. Cas. 14B, 1013, Ann. Cas. 15D, 339; *State v. Tucker*, 86 S. C. 211, 68 S. E. 523, Ann. Cas. 14B, 1013; *State v. Revels*, 86 S. C. 213, 68 S. E. 523, Ann. Cas. 14B, 1013.

Jury determines whether killing was under sudden heat and passion.—Whether the killing was under sudden heat and passion, or from a settled, deliberate purpose, must be concluded by the jury upon the facts of the case. *State v. Ford*, 1 Speers 146, 154; *State v. Wyse*, 32 S. C. 45, 10 S. E. 612, 56 L. R. A. 390, 19 L. R. A. (N. S.) 808, Ann. Cas. 12B, 1237.

And whether defendant had time to cool.—Where the original provocation, given shortly before the killing, was then sufficient to reduce the killing to manslaughter, the jury must inquire, not whether the suspension of reason under such sudden heat and passion continued down to the moment of the killing, but whether the prisoner did cool, or there was time, all circumstances being considered, for a man of ordinary reason to have cooled. *State v. McCants*, 1 Speers 384, 389, 36 L. R. A. 465, 5 A. L. R. (N. S.) 823, 12 A. L. R. 894.

But no mere words, however insulting, can excuse the killing and reduce the offense to manslaughter. *State v. Levelle*, 34 S. C. 120, 13 S. E. 319, 27 Am. St. Rep. 799, 28 Am. St. Rep. 898, 63 Am. St. Rep. 100, 90 Am. St. Rep. 581, 18 L. R. A. 225, 63 L. R. A. 365, 663, 4 L. R. A. (N. S.) 156, 38 L. R. A. (N. S.) 1089, 1100, Ann. Cas. 12A, 39, 13 A. L. R. 1264; *State v. Davis*, 50 S. C. 405, 27 S. E. 905, 62 Am. St. Rep. 837, 4 L. R. A. (N. S.) 156, 5 L. R. A. (N. S.) 811; *State v. Gilliam*, 66 S. C. 419, 423, 45 S. E. 6, 124 Am. St. Rep. 324, 63 L. R. A. 389, 41 L. R. A. (N. S.) 934, Ann. Cas. 14B, 1013, Ann. Cas. 15D, 339.

Nor can provocation where intention to kill is manifest.—No provocation, however grievous, will excuse from the crime of murder, where, from the weapons used or the manner of assault, an intention to kill or do some bodily harm, is manifest. *State v. Way*, 38 S. C. 333, 17 S. E. 39, 134 Am. St. Rep. 1041, 4 L. R. A. (N. S.) 157, 5 L. R. A. (N. S.) 823, 19 L. R. A. (N. S.) 493, 22 A. L. R. 268.

All elements in manslaughter may be proved by circumstantial evidence. *State v. Gillis*, 73 S. C. 318, 53 S. E. 487, 114 Am. St. Rep. 95, 6 Ann. Cas. 993, 5 L. R. A. (N. S.) 571.

As to evidence sufficient to support verdict for manslaughter, see *State v. Suber*, 82 S. C. 159, 63 S. E. 684.

And where defendant is convicted of manslaughter, error in charging as to murder is eliminated. *State v. Stuckey*, 56 S. C. 576, 35 S. E. 263, 56 L. R. A. 442, 454, 37 L. R. A. (N. S.) 254, 16 A. L. R. 417; *State v. Robertson*, 54 S. C. 147, 31 S. E. 868, 50 L. R. A. (N. S.) 971; *State v. Richardson*, 47 S. C. 18, 24 S. E. 1028; *State v. Owens*, 79 S. C. 125, 60 S. E. 305, 19 L. R. A. (N. S.) 493, Ann. Cas. 12C, 48; *State v. Henderson*, 80 S. C. 165, 60 S. E. 314; *State v. Perry*, 78 S. C. 184, 59 S. E. 851, 21 A. L. R. 623.

If it is error to charge that defendants could not under certain circumstances be convicted of manslaughter only, it is not material when verdict was for manslaughter. *State v. Jenkins*, 21 S. C. 595, 596.

And omitting to charge as to manslaughter not error where no evidence whereon to base it.—Where the testimony indicates either murder or self-defense, and there is no testimony to show manslaughter, it is not error to omit to charge the law as to manslaughter. *State v. Adams*, 68 S. C. 421, 427, 47 S. E. 676, 17 A. L. R. 723.

Persons aiding and abetting in the commission of manslaughter are guilty of the crime. *State v. Putman*, 18 S. C. 175, 177, 44 Am. Rep. 569.

Accessory before the fact.—One cannot be convicted of accessory before the

fact of manslaughter. *State v. O'Shields*, 163 S. C. 408, 161 S. E. 692.

This section implies that the trial judge is to exercise a discretion in imposing sentences. Therefore any reasonable means by which his mind can be enlightened should not be prohibited to him. *State v. Reeder*, 79 S. C. 139, 60 S. E. 434, 435, 129 Am. St. Rep. 28, 14 Ann. Cas. 968.

And can therefore hear affidavits in aggravation or mitigation of sentence.—Where the punishment is within the discretion of the trial judge, as in cases of manslaughter, it is not error for him to hear, after conviction, affidavits in aggravation or mitigation of sentence. *State v. Reeder*, 79 S. C. 139, 60 S. E. 434, 129

Am. St. Rep. 28, 14 Ann. Cas. 968.

The solicitor is properly permitted to read affidavits in aggravation of the manslaughter for which defendant was convicted, on his being called for sentence; it being a reasonable means to enable the court to exercise the discretion vested in it by this section. *State v. Reeder*, 79 S. C. 139, 60 S. E. 434, 129 Am. St. Rep. 28, 14 Ann. Cas. 968.

If error be only in the sentence, defendant is not entitled to new trial. *State v. Aultman*, 23 S. C. 601.

As to sentence postponed to allow application for pardon, see *State v. Frink*, 1 Bay 168, 17 A. L. R. 1157.

§ 1108. Administering, or attempting to administer, poison with intent to kill a felony.—Whoever shall unlawfully and maliciously administer to, or attempt to administer to, or in any way aid or assist therein, or cause to be taken by any person, any poison or other destructive thing, with intent to kill such person, every such offender, and every person counselling, aiding or abetting such offender, shall be guilty of felony, and shall be punished by imprisonment in the penitentiary not exceeding ten years nor less than two.

1932 Code, § 1108; Cr. C. '22, § 11; Cr. C. '12, § 149; Cr. C. '02, § 121; G. S. 2466; R. S. 121; 1859 (12) 832; 1898 (22) 812.

Common-law offense not superseded by this section.—The common-law offense of assault with intent to kill, by administering a drug believed to be deadly in character, is not superseded by the provisions of this section, providing a punishment for administering poison. *State v. Glover*, 27 S. C. 602, 4 S. E. 564.

And offense is complete regardless of quantity of poison.—When a person, with intent to kill, administers to a little child a drug which he believes to be poisonous and of sufficient quantity to destroy life, such common-law offense is complete, even though the dose is insufficient for the purpose intended. *State v. Glover*, 27 S. C. 602, 4 S. E. 564. See also, *State v. Ready*, 110 S. C. 177, 96 S. E. 287.

Or its capacity to produce death.—The administering of a drug which a de-

fendant has been informed will produce death, whether such drug in fact is so poisonous or not, constitutes assault with intent to kill. *State v. Glover*, 27 S. C. 602, 4 S. E. 564.

Relative to offenses under this section, evidence of color and effect of water of well is prima facie proof it was sufficiently strong from concentrated lye to be poisonous or injurious to health. *State v. Ready*, 110 S. C. 177, 96 S. E. 287.

Intent manifested in attempt being the gravamen of the offense, under this section, it is immaterial that enough concentrated lye was not put in a well to cause death or serious sickness from the water. *State v. Ready*, 110 S. C. 177, 96 S. E. 287.

Applied in *State v. Griffin*, 129 S. C. 200, 124 S. E. 81, 35 A. L. R. 1227.

§ 1109. Rape.—Whosoever shall ravish a woman, married, maid, or other, where she did not consent, either before or after, and likewise where a man ravisheth a woman with force, although she consent after, he shall be deemed guilty of rape, and shall, upon conviction, suffer death in the same form and manner as is now provided by law for wilful murder: *provided, however*, that in each case where a prisoner is found guilty, the jury may find a special verdict recommending him to the mercy of the court, whereupon the punishment shall be reduced to imprisonment in the penitentiary with hard labor as provided in section 1110.

1932 Code, § 1109; Cr. C. '22, § 7; Cr. C. '12, § 141; Cr. C. '02, § 114; G. S. 2459; R. S. 114; 1712 (2) 422; 1869 (14) 175; 1878 (16) 631.

This section is constitutional. State v. Glover, 91 S. C. 562, 75 S. E. 218, Ann. Cas. 16D, 12, 45, Ann. Cas. 17D, 280.

Having intercourse by force and without female's consent is rape.—An instruction that "if there was force on the part of the defendant, and that consent was not given by the female, that would be rape," sufficiently defines the crime. State v. Sudduth, 52 S. C. 488, 30 S. E. 408.

Being distinct from § 1111.—Where the conviction is for rape, under this section, or the common-law indictment, § 1111 does not apply, though the woman child is under 14 years of age, since the two offenses are separate and distinct. State v. Haddon, 49 S. C. 308, 27 S. E. 194.

When Constitution of 1895, art. 3, § 33, and this section and § 1111 are construed together, it is apparent that this section has reference to rape at common law, and that § 1111 refers to carnal knowledge of an unmarried woman who has not attained the age of 14 years, and who, by reason of her tender years, cannot legally consent to sexual intercourse. State v. Gilchrist, 54 S. C. 159, 31 S. E. 866.

Right to compel state to elect between prosecutions for distinct offenses may be waived.—Where accused did not move to require the state to elect under which of two sections of the Code it would proceed, some of the allegations of the indictment applying to one and some to the other, and did not object to the indictment for this defect by demurrer or motion to quash before jury sworn, he cannot complain, after conviction, of the court's charge, which was good as to one section, since the charge would be considered with reference to that section which would support a conviction. State v. Gilchrist, 54 S. C. 159, 31 S. E. 866.

And while it is unnecessary to allege woman's age or that she is unmarried.—An indictment which charges that defendant upon a person named "did make an assault, and her, the said P. W., then and there violently, against her will, feloniously did ravish and carnally know,"

is an indictment under this section, and it is not necessary to allege the woman's age, or whether she is married or not. State v. Haddon, 49 S. C. 308, 27 S. E. 194, State v. Wilson, 162 S. C. 413, 161 S. E. 104.

State may prove these facts to establish lack of consent.—Since, under this section there may be an indictment for rape without alleging the woman's age, or that she is unmarried, under such indictment the state may prove that the woman is unmarried, and under 14 years of age, in order to establish that the sexual intercourse was without consent, within Constitution of 1895, art. 3, § 33; or such proof may be offered by the state in reply to defendant's defense that the woman actually consented. State v. Haddon, 49 S. C. 308, 27 S. E. 194.

Admitting connection while denying the rape is not affirmative defense, but leaves the burden of proof on the State. State v. Taylor, 57 S. C. 483, 35 S. E. 729, 76 Am. St. Rep. 575, 14 L. R. A. (N. S.) 948, L. R. A. 1918A, 732.

And if defendant testifies in his own behalf, his general reputation for veracity may be assailed. State v. Robertson, 26 S. C. 117, 1 S. E. 443, 9 Am. St. Rep. 569, 20 L. R. A. 616.

But deposition of injured party since deceased, made for warrant and in absence of prisoner is not admissible. State v. Hill, 2 Hill 607, 27 Am. Dec. 406, Ann. Cas. 16A, 1067, 15 A. L. R. 513.

As to evidence as to identification of persons by victim, see State v. Johnson, 85 S. C. 265, 67 S. E. 453.

As to evidence supporting verdict of guilty of assault with intent to ravish, see State v. Johnson, 84 S. C. 45, 65 S. E. 1023; State v. Butler, 85 S. C. 45, 66 S. E. 1041.

As to conviction for assault and battery of high and aggravated nature, see State v. Dalby, 86 S. C. 367, 68 S. E. 633.

For damages for assault with intent to have improper relations, see generally Blackmon v. Kirven, 170 S. C. 190; 170 S. E. 157.

§ 1110. Punishment for rape, or assault with intent to ravish.—Any person convicted of rape or assault with intent to ravish shall suffer death unless the jury shall recommend to the mercy of the court, in which event the defendant shall be confined at hard labor in the state penitentiary for a term not exceeding forty years or less than five years, at the discretion of the presiding judge.

1932 Code, § 1110; Cr. C. '22, § 8; Cr. C. '12, § 142; 1909 (26) 206.

Cross reference.—As to testimony by deposition in trials for rape or assault with intent to ravish, see § 1016.

This section is constitutional. State v. Butler, 85 S. C. 45, 66 S. E. 1041.

Sentence to serve fifteen year's imprisonment on defendant convicted of assault with intent to ravish with recommendation of mercy upheld. State v. Wilson, 162 S. C. 416, 161 S. E. 104.

Applied in *State v. McNeal*, 103 S. C. 197, 87 S. E. 1004.

§ 1111. Carnal knowledge of woman child—age of consent—special verdicts.—If any person shall unlawfully and carnally know and abuse any woman child under the age of sixteen years, every such unlawful and carnal knowledge shall be felony, and the offender thereof being duly convicted shall suffer as for a rape: *provided, however*, that in any case where the woman or child is over the age of ten years and the prisoner is found guilty the jury may find a special verdict recommending him to the mercy of the court, whereupon the punishment shall be reduced to imprisonment in the penitentiary for a term not exceeding fourteen years, at the discretion of the court: *provided, further*, that in any case where the woman or child is over the age of fourteen (14) years and under the age of sixteen (16) years and the prisoner is found guilty, the punishment shall be in the discretion of the court, not exceeding five (5) years' imprisonment: *provided however*, that in cases where the defendant is under eighteen years of age and the woman-child is above the age of fourteen (14) years, previous unchastity may be defensively shown, and if such want of chastity be found by a special verdict of the jury, the punishment imposed by the court shall not exceed one year's imprisonment, or a fine of not more than five hundred (\$500.00) dollars, alternatively awarded.

1932 Code, § 1111; Cr. C. '22, § 9; Cr. C. '12, § 143; Cr. C. '02, § 115; G. S. 2460; R. S. 115; 1712 (2) 498; 1896 (22) 223; Const., 1895, Art. 3, § 33; 1921 (32) 282.

This is a statutory offense, distinct from rape. *State v. Haddon*, 49 S. C. 308, 27 S. E. 194; *State v. Coleman*, 54 S. C. 162, 31 S. E. 866. And a boy between seven and fourteen years of age may be convicted of it, if the physical capacity be shown.

And does not conflict with constitutional provision declaring unmarried women under age of 14 years incapable of consenting. *State v. Smith*, 181 S. C. 485, 188 S. E. 132.

As provided for in § 1109.—When Const. of 1895, Art. 3, § 33, and § 1109 and this section are construed together, it is apparent that § 1109 has reference to rape at common law, and that this section refers to carnal knowledge of an

unmarried woman who has not attained the age of 14 years, and who, by reason of her tender years, cannot legally consent to sexual intercourse. *State v. Gilchrist*, 54 S. C. 159, 31 S. E. 866, 867.

Where the conviction is for rape, under § 1109 or the common-law indictment, this section does not apply, though the woman child is under 14 years of age, since the two offenses are separate and distinct. *State v. Haddon*, 49 S. C. 308, 27 S. E. 194.

Conviction under this section does not disqualify person as witness.—*State v. Jeffcoat*, 148 S. C. 322, 146 S. E. 95.

See also, *State v. Wilson*, 162 S. C. 413, 161 S. E. 104.

§ 1112. Punishment for administering substance to cause miscarriage, abortion or premature labor which results in death.—Any person who shall administer to any woman with child, or prescribe for any such woman, or suggest to or advise or procure her to take, any medicine, substance, drug or thing whatever, or who shall use or employ, or advise the use or employment of, any instrument or other means of force whatever, with intent thereby to cause or procure the miscarriage or abortion or premature labor of any such woman, unless the same shall have been necessary to preserve her life, or the life of such child, shall, in case the death of such child or of such woman results in whole or in part therefrom, be deemed guilty of a felony, and, upon conviction thereof, shall be punished by imprisonment in the penitentiary for a term not more than twenty years nor

less than five years. But no conviction shall be had under the provisions of this section upon the uncorroborated evidence of such woman.

1932 Code, § 1112; Cr. C. '22, § 12; Cr. C. '12, § 150; Cr. C. '02, § 122; R. S. 122; 1883 (18) 547.

See § 1114-1 time prosecution commence.

This section is constitutional.—So much of the act from which this section was taken, as makes it an offense to advise the committing of an abortion, was held unconstitutional, as not being embraced in the title to that act. *State v. Fields*, 68 S. C. 148, 149, 46 S. E. 771. This objection to the act has been removed by its re-enactment in the Code of Laws.

And applies even though drug be sent from another state.—The courts of South Carolina have jurisdiction of defendant for the offense of advising and procuring a woman of that state to take

a drug with intent thereby of causing her to abort, though the drug has been procured by defendant in another state, and sent to the woman by mail. *State v. Morrow*, 40 S. C. 221, 18 S. E. 853, 44 Am. St. Rep. 83, 33 L. R. A. (N. S.) 333.

And though abortion was in fact caused by use of instruments.—A person who gives a woman a drug with intent to cause her to abort may be convicted, though the abortion was in fact caused by the use of instruments. *State v. Morrow*, 40 S. C. 221, 18 S. E. 853, 44 Am. St. Rep. 83, 33 L. R. A. (N. S.) 333.

§ 1113. Punishment for certain means or advice to woman to cause abortion, etc.—evidence.—Any person who shall administer to any woman with child, or prescribe or procure or provide for any such woman, or advise or procure any such woman to take any medicine, drug, substance or thing whatever, or shall use or employ or advise the use or employment of, any instrument or other means of force whatever, with intent thereby to cause or produce the miscarriage or abortion or premature labor of any such woman, shall, upon conviction thereof, be punished by imprisonment in the penitentiary for a term not more than five years, or by fine not more than five thousand dollars, or by such fine and imprisonment both, at the discretion of the court, but no conviction shall be had under the provisions of this section upon the uncorroborated evidence of such a woman.

1932 Code, § 1113; Cr. C. '22, § 25; Cr. C. '12, § 170; Cr. C. '02, § 139; 1882 (18) 547; R. S. 137.

See § 1114-1 time prosecution commence.

Conviction does not depend upon third party's seeing crime.—Conviction for procuring an abortion, in violation of this section, does not depend on some third party's seeing the crime, but corroboration of the woman on whom the act was committed may come from words or acts of defendants or from circumstances. *State v. Sharpe*, 138 S. C. 58, 135 S. E. 635, *State v. Parsons*, 171 S. C. 449, 172 S. E. 424.

The "corroboration," required under the terms of the statute, means "anything which tends to strengthen, add to, add weight, or credulity, or that which makes more certain." *State v. Teal*, 108 S. C. 455, 95 S. E. 69, 70; 14A C. J. 1428, 1429.

State v. Parsons, 171 S. C. 449; 172 S. E. 424.

Medicines used may be admitted in evidence.—In prosecution under this section, for procuring an abortion, medicines used by woman involved are properly admitted in evidence, in view of showing that they were provided and used under instructions of defendant. *State v. Sharpe*, 138 S. C. 58, 135 S. E. 635.

And evidence showing warrant was signed without improper pressure.—In prosecution under this section for procuring an abortion, evidence showing prosecuting witness signed warrant without improper pressure being brought upon her is proper, where there was evidence

tending to show undue influence. *State v. Sharpe*, 138 S. C. 58, 135 S. E. 635.

Or absence of denial of payment for operation.—In prosecution under this section for procuring an abortion, solicitor is properly permitted to argue that defendant had not denied payment for operation as testified to by state witness, in view of fact that defendant had not directly denied it. *State v. Sharpe*, 138

S. C. 58, 135 S. E. 635.

See generally, *State v. Fields*, 68 S. C. 148, 149, 46 S. E. 771.

Continuance.—Request for continuance because that codefendant in the indictment with the appellant, was absent from the trial, and that his testimony would be material to the defense of the appellant refused. *State v. Parsons*, 171 S. C. 449; 172 S. E. 424.

§ 1114. Punishment for use of certain means by women to cause abortion.

—Any woman with child who shall apply to or solicit from any physician, druggist or other person whomsoever, any medicine, drug, substance or thing whatever, or shall take or administer the same, or shall submit to or perform upon herself any operation of any sort or character whatever, with intent thereby to cause or produce a miscarriage or abortion or premature labor, unless the same shall have been necessary to preserve her life or the life of such child, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by imprisonment in the county jail or state penitentiary for a term not more than two years, or by fine not exceeding one thousand dollars, or by such fine and imprisonment, both, at the discretion of the court.

1932 Code, § 1114; Cr. C. '22, § 26; Cr. C. '12, § 171; Cr. C. '02, § 140; R. S. 138; 1882 (18) 547.

§ 1114-1. Time commence prosecutions under §§ 1112, 1113 and 1114, administering substances cause abortions, etc.—All prosecution under sections 1112, 1113, and 1114 shall be commenced within two years after the commission of the offense.

1932 Code, § 1013; Cr. P. '22, § 99; Cr. C. '12, § 172; Cr. C. '02, § 141; 1882 (18) 547.

§ 1115. Punishment for placing obstructions on railroads.—If any person or persons shall by himself or others place, or cause to be placed, on the track or other part of the passage way of any railroads on which steam engines or hand cars are used, any timber, stone, or other obstruction, with intent to injure or impede the passage of any cars or means of conveyance, or shall in any other manner obstruct any engine or car passing upon such railroad, or endangers the safety of persons conveyed in or upon the same, or aids or assists therein, such person or persons shall be deemed guilty of felony, and, on being thereof convicted by due course of law, shall be punished by imprisonment in the penitentiary for not exceeding thirty years, and fined in the discretion of the court, except where the death of some human being results from such impediment, and in that case the offender shall be adjudged guilty of murder and shall suffer death: *provided*, that nothing herein shall in any manner take away any right of action for damages for injuries to the person or property of any person or body corporate caused by any injury, obstruction, or damage done to any railroad or its buildings, tracks, or constructions.

1932 Code § 1115; Cr. C. '22, § 13; Cr. C. '12, § 151; Cr. C. '02, § 123; G. S. 1520; R. S. 123; 1882 (17) 109.

§ 1116.—Obstructing railroad, without death ensuing.—Any person who shall wilfully and maliciously place, or cause to be placed, on the track

or other part of the passage way of any railroads, on which steam engines or hand cars are used, any timber, stone, or obstructions, with intent to injure or impede the passage of any cars or means of conveyance, shall be deemed guilty of felony, and, on being convicted thereof, shall be punished by imprisonment in the penitentiary for not less than one nor more than thirty years, and fined in the discretion of the court.

1932 Code, § 1116; Cr. C. '22, § 14; Cr. C. '12, § 152; Cr. C. '02, § 124; G. S. 2467; R. S. 124.

§ 1117. Sending or accepting challenge to fight.—Whoever shall challenge another to fight at sword, pistol, rapier, or any other deadly weapon, or who shall accept any such challenge, shall, for every such offense, on conviction thereof, be deprived of the right of suffrage, and be disabled from holding any office of honor or trust whatever in this State, and shall be imprisoned in the penitentiary for a term not exceeding two years, at the discretion of the court.

1932 Code, § 1117; Cr. C. '22, § 15; Cr. C. '12, § 153; Cr. C. '02, § 125; G. S. 2468; R. S. 125; 1880 (17) 501.

Indictment will lie in this State for challenge to fight a duel in Georgia. State v. Taylor, 3 Brev. 243, 25 L. R. A. 437; State v. Cunningham, 2 Speers 246.

Or for a verbal challenge. State v. Strickland, 2 N. & McC. 181.

Or against the principal who sends challenge or fights. State v. Strickland, 2 N. & McC. 181; State v. Dupont, 2

McC. 334.

Or for any agreement to fight with loaded pistols and actual fighting. State v. Herriott, 1 McC. 126, Ann. Cas. 15B, 549.

And the disability to hold office, imposed by the section, does not constitute a part of the sentence. State v. Dupont, 2 McC. 334.

§ 1118. Carrying or delivering challenge.—Whoever shall willingly or knowingly carry or deliver any such challenge in writing, or verbally deliver any message intended as, or purporting to be, such challenge, or who shall be present at the fighting of any duel as a second or who shall aid or give countenance thereto, shall, for every such offense, on conviction thereof, be forever disabled from holding any office of honor or trust in this State, and shall be imprisoned in the penitentiary for a term not exceeding two years, at the discretion of the court, and shall be fined in a sum not less than five hundred dollars nor more than one thousand.

1932 Code, § 1118; Cr. C. '22, § 16; Cr. C. '12, § 154; Cr. C. '02, § 126; G. S. 2469; R. S. 126; 1880 (17) 502.

§ 1119. Misdemeanor to point pistol or gun at any person.—It shall be unlawful for any person to present or point at any other person any loaded or unloaded firearm, and any one, on conviction therefor, shall be punished by fine or imprisonment, in the discretion of the court: *provided*, that nothing contained herein shall be construed to abridge the right of self-defense or to apply to theatricals or like performances.

1932 Code, § 1119; Cr. C. '22, § 17; Cr. C. '12, § 162; 1910 (26) 694.

Applied in State v. Smith, 133 S. C. 291, 130 S. E. 884.

§ 1120. Unlawful to discharge firearms at or into dwellings.—Any person who shall unlawfully discharge, or cause to be discharged, any firearms at or into any house or houses, occupied as a dwelling, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be liable to either fine or imprisonment at hard labor, or both fine and imprisonment, in the

discretion of the court.

1932 Code, § 1120; Cr. C. '22, § 18; Cr. C. '12, § 163; 1910 (26) 785.

Municipal ordinance against firing guns in town or city limits is construed and upheld in *State v. Johnson*, 76 S. C. 39, 56 S. E. 544, 20 L. R. A. (N. S.) 1005, 11 Ann. Cas. 721, Ann. Cas. 16D, 12.

§ 1121. Unlawful to place loaded trap gun, spring gun, or like device.—It shall be unlawful for any person, firm, or corporation to construct, set, or place a loaded trap gun, spring gun, or any like device in any manner in any building, or in any place within this State, and any violation of the provisions of this section shall be deemed a misdemeanor and punished by a fine of not less than one hundred (\$100.00) dollars nor more than five hundred (\$500.00) dollars, or by imprisonment of not less than thirty (30) days nor more than one (1) year, or by both fine and imprisonment, in the discretion of the court.

1932 Code, § 1121; 1931 (37) 78.

§ 1122. Unlawful seize, confine, inveigle, decoy, kidnap, abduct, or carry away any other person and hold for ransom.

(1) **Punishment.**—Whoever shall unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away any other person by any means whatsoever, and hold such person for ransom or reward, except in a case where a minor is seized or taken by a parent thereof, shall be guilty of a felony, and, upon conviction, shall suffer the punishment of death: *provided however*, that in each case where the convicted person is found guilty of such felony, the jury may find a special verdict recommending him or her to the mercy of the court, whereupon the punishment shall be reduced to imprisonment in the penitentiary with hard labor during the whole lifetime of the convicted person: *provided further*, that notwithstanding the foregoing provisions of this subsection with respect to punishment of death, if the kidnapped person be released and returned alive prior to the opening of the trial, the death penalty shall not be imposed and the convicted person shall be punished by imprisonment in the same manner as though the jury had recommended him or her to the mercy of the court.

(2) **Conspiracy violate subsection 1—punishment.**—If two or more persons enter into an agreement, confederation, or conspiracy to violate the provisions of subsection 1 of this section, and any of such persons do any overt act towards carrying out such unlawful agreement, confederation, or conspiracy, each such person shall be guilty of a felony, and, upon conviction, shall be punished in like manner as provided for the violation of said subsection 1 of this section.

(3) **§ 1122. 1932 Code, act 47 of 1933, and act 651 of 1934 repealed—such laws continue of force for prosecutions for offenses committed thereunder.**—Section 1122 of the Code of Laws of South Carolina, 1932, relating to the kidnapping of a minor, and Act No. 47 of the Acts of 1933, entitled “An Act to Declare it a Felony to Receive or to Attempt to Take Money or Other Property, under Threat of Kidnapping, or the Commission of Some Other Felony, and to Provide Punishment therefor, and to Define Kidnapping and Provide a Penalty therefor,” approved February 11, 1933, and act No. 651 of the Acts of 1934, entitled “An Act to Declare the

Attempted Abduction, Terrorizing and/or Detention of Any Person with the Purpose of Demanding Ransom for the Release of such Person, the Plotting of Such Abduction, Terrorizing and/or Detention, to Be a Felony; and to Provide a Penalty therefor", approved February 9, 1934, and each of them are hereby repealed: *provided, however*, that each and all of said provisions of law are hereby continued of full force and effect for the purpose of sustaining the arrest, indictment, trial, conviction, sentence and punishment of any person or persons who heretofore has been or hereafter may be indicted for the violation of the same or any of them.

1937 (40) 137.

See *State v. Woods et al.*, 189 S. C. 281, 1 S. E. (2d) 190, where it was held that in prosecution of six prisoners for murder of captain of guards held as hostage

during attempted prison break, court did not err in reading this statute to jury.

§ 1123. Husband fail support wife and children, misdemeanor.—Any able-bodied man or a man capable of earning or making a livelihood who shall, without just cause or excuse, abandon or fail to supply the actual necessities of life to his wife or to his minor, unmarried child or children dependent upon him, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be imprisoned for a term of not exceeding one year, or be liable to a fine of not less than three hundred dollars nor more than fifteen hundred dollars, or both, in the discretion of the court: *provided*, that if he, either before or after conviction, shall give bond, with one or more sureties, approved by the clerk of the court, in the sum of not less than \$100.00, nor more than \$3,000.00, under such terms and conditions as the court in its discretion may deem wise and proper for the maintenance and support of the defendant's wife or minor unmarried child or children, he shall not be imprisoned or the fine imposed, until the condition of said bond is broken: *provided, further*, if a fine be imposed, the court may in its discretion order that a portion of the fine be paid to a proper and suitable person or agency for the maintenance and support of defendant's wife or minor unmarried child or children.

1932 Code, § 1123; Cr. C. '22, § 20; Cr. C. '12, § 697; 1910 (26) 545; 1925 (34) 143.

In General.—Before this section was amended it gave the court discretion to impose either fine or imprisonment, but required it to determine which of the two should be imposed. *State v. Goins*, 122 S. C. 192, 115 S. E. 232.

Thus a sentence of a man, convicted of a failure to support his wife and minor child, to imprisonment for one year, but suspending the imprisonment so long as he shall pay into court \$50 a month for their support and shall give bond to secure such payment, was erroneous in failing to determine whether the sentence should be imprisonment or a fine, and also as imposing an alternative sentence that exceeded the fine of \$200 permitted by this section for that offense, and as depriving defendant of his right to avoid imprisonment by giving the bond as provided in the statute. *State v. Goins*, 122 S. C. 192, 115 S. E. 232.

Constitutionality and validity. — This

section is not invalid as contrary to Const. of 1895, art. 1, § 24, prohibiting imprisonment for debt. *State v. Redmond*, 150 S. C. 452, 148 S. E. 474, since the imprisonment is not for any "debt," but for failure to obey the statutory obligations incident to the marriage contract or relation. *State v. English*, 101 S. C. 304, 85 S. E. 721, L. R. A. 1915F, 977, Ann. Cas. 16A, 857. Nor is it unconstitutional as going beyond the scope of title; and it is not contrary to Const. of 1895, art. 3, § 17, requiring that every act relate to one subject expressed in title; word "penalty" referring to penalty for violation of act, not penalty of bond. *State v. Redmond*, 150 S. C. 452, 148 S. E. 474.

This section is not so contradictory and misleading as to warrant inference that General Assembly was imposed upon in its passage. *State v. Redmond*, 150 S. C. 452, 148 S. E. 474.

The proceedings had in a case of abandonment or nonsupport, declared by statute to be a misdemeanor, are criminal rather than civil; and are governed by the rules applicable to trial of criminal cases as respects place of trial rather than by the rules applicable to civil actions. *State v. Nesmith*, 185 S. C. 341; 194 S. E. 160.

Admission of wife's testimony, in husband's trial for desertion and nonsupport of wife and children. *State v. Haynes*, 174 S. C. 460, 177 S. E. 785.

The offense of nonsupport is a continuing one. *State v. Nesmith*, 185 S. C. 341; 194 S. E. 160.

State need not prove wife dependent upon husband.—In trial of husband for abandoning and failing to support his wife and minor child, state need not prove that wife is dependent upon husband for support; words "dependent upon him" in this section referring to minor unmarried children. *State v. Redmond*, 150 S. C. 452, 148 S. E. 474.

It is no defense to a prosecution under this section that wife was not dependent upon her husband for support, and that her parents were able to support her. *State v. English*, 101 S. C. 304, 85 S. E. 721, L. R. A. 1915F, 977, Ann. Cas. 16A, 857.

While the burden is on defendant to show just cause or excuse.—The burden rests on defendant to show a just cause or excuse for failure to support his wife and minor daughter. *State v. Goins*, 122 S. C. 192, 115 S. E. 232.

To be determined by jury.—What constitutes "just cause or excuse" for failure to support wife and minor child within this section is for jury, and fact that judge singled out one circumstance which could constitute just cause or excuse in charge to jury did not exclude consideration of any other. *State v. Redmond*, 150 S. C. 452, 148 S. E. 474.

Whether wife's immorality before marriage, and unknown to husband, is a good defense as a just cause or excuse in a prosecution under this section is a jury question. *State v. English*, 101 S. C. 304, 85 S. E. 721, L. R. A. 1915F, 977, Ann. Cas. 16A, 857.

In such prosecution the exclusion of evidence that the wife before her marriage to defendant, and without his knowledge thereof until after the marriage, had been guilty of immoral conduct with a particular man, was harmless, where other evidence of like character was received, and where her confession after marriage that before marriage she had been guilty of incest was likewise received. *State v. English*, 101 S. C. 304, 85 S. E. 721, L. R. A. 1915F, 977, Ann. Cas. 16A, 857.

In trial of husband for abandonment and nonsupport of his minor children, instruction that wife's unfaithfulness

does not excuse husband from supporting his minor children was not erroneous, as it was for jury to say whether defendant failed to supply children actual necessities of life without just cause or excuse and wife's alleged fidelity could not affect such issue, *State v. Stafford*, 193 S. C. 474, 8 S. E. (2d) 849.

In prosecution for nonsupport of wife and minor child, whether prosecutrix was defendant's legal wife, and whether defendant had just cause or excuse for failure to support her, as well as all questions of fact made by the evidence, were for the jury. *State v. Nesmith*, 185 S. C. 341; 194 S. E. 160.

Omission of "or excuse" in judge's charge not prejudicial.—Judge's charge that defendant, on trial for abandonment and non-support of his wife, was guilty if he was without "sufficient cause" held not prejudicial; although this section states "sufficient cause or excuse." *State v. Craig*, 161 S. C. 232, 159 S. E. 559.

See also *State v. Lynch*, 180 S. C. 11, 184 S. E. 153.

The fact that defendant married to escape penalty for seduction is no defense.—In a prosecution under this section it is no defense that the marriage was contracted under the proviso of a statute, permitting a seducer to escape the penalty of his wrong by marrying his victim. *State v. English*, 101 S. C. 304, 85 S. E. 721, L. R. A. 1915F, 977, Ann. Cas. 16A, 857.

Liability when marriage entered into unwillingly or under duress.—*State v. Edgins*, 171 S. C. 81; 171 S. E. 444.

That wife left her husband to live with her parents is no violation of section.—Testimony that defendant's wife left the home provided for her and went and lived with her parents is not sufficient to sustain a conviction for nonsupport, under this section. *State v. Collins*, 123 S. C. 487, 124 S. E. 338.

Unless acts of husband or his relatives make departure necessary.—Evidence that defendant husband took his wife to his mother's home, and that after remaining there about four months, during which time she was subjected to violent and insulting language and threatened with violence by her mother-in-law, the wife left and rented another house, in which defendant refused to live with her, authorizes a conviction for non-support under this section. *State v. Bagwell*, 125 S. C. 401, 118 S. E. 767.

Where a husband abandons his wife, destroys his home, and provides no other place for her, his failure to supply her with necessities at the place where circumstances compel her to live constitutes a violation of this section. *State v. Stone*, 111 S. C. 496, 98 S. E. 333.

In which case widow and minor children have legal interest in continuance of life of husband.—Under this section

the widow and minor unmarried child of a deceased had prima facie and presumptively a legal pecuniary interest in the continuance of his life, though he had abandoned them and failed to perform the duty imposed upon him by law, and in an action for his death, the failure to introduce evidence to show that they sustained any actual pecuniary loss did not justify a directed verdict. *Gilliam v. Southern R. Co.*, 108 S. C. 195, 93 S. E. 865, 18 A. L. R. 1410.

In prosecution under this section county of husband's residence proper venire.—In prosecution of husband, under this section, the county of husband's residence, and not that of residence of wife and children, is proper county for trial; the offense having been committed in such county. *State v. Peeples*, 112 S. C. 310, 99 S. E. 813.

Husband, who neglected to contribute to the support of his wife and minor child after he had sent them to adjoining state for a visit with wife's mother,

was properly indicted for nonsupport in county in which he had been established in business, and in which he and his wife had been living together prior to her departure. *State v. Nesmith*, 185 S. C. 341; 194 S. E. 160.

Unless wife be compelled to leave by husband.—Where a husband by his conduct compels his wife to leave him, and she, of necessity, seeks a home in another county, his prosecution for failure to support, in violation of this section, was properly instituted in such other county. *State v. Stone*, 111 S. C. 496, 98 S. E. 333.

The state had no right to appeal from judgment acquitting husband in prosecution for non-support of his wife and appeal was dismissed by the Supreme Court. *State v. Rogers*, (S. C.), 17 S. E. (2d) 563.

Applied in *State v. Tucker*, 118 S. C. 238, 110 S. E. 398.

See *Yarborough v. Yarborough*, 290 U. S. 202, 78 Law Ed. 269.

§ 1124. Illtreating children, apprentices, etc.—Whoever, being legally liable, either as parent, guardian, master or mistress, to provide for any child or children, apprentice or servant, idiot or helpless person, necessary food, clothing or lodging, or medical treatment, or other modes of treatment as recognized by section 5150 regulating the practice of medicine, shall wilfully and without lawful excuse refuse or neglect to provide for the same, or shall unlawfully and maliciously do, or cause to be done, any bodily harm to any such child or children, apprentice, servant, idiot or helpless person so that the life of such child or children, apprentice, servant, idiot or helpless person shall be endangered, or the health or comfort of such child, apprentice, servant, idiot, or helpless person shall have been, or is likely to be, permanently injured, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be liable to a fine of not less than two hundred dollars nor more than one thousand dollars or to be imprisoned for any term not exceeding two years, with or without hard labor, one or both, at the discretion of the court.

1932 Code, § 1124; Cr. C. '22, § 21; Cr. C. '12, § 166; Cr. C. '02, § 135; G. S. 2476; R. S. 133; 1874 (15) 704; 1927 (35) 106; 1927 (35) 250.

§ 1125. Cruelty to children.—Whoever tortures, torments, cruelly ill-treats, or whoever deprives of necessary sustenance or shelter, or whoever inflicts unnecessary pain or suffering, upon any child, or whosoever causes the same to be done, whether such person be the parent or guardian of such child, or have charge or custody of the same, shall, for every such offense, be deemed guilty of a misdemeanor, and be punished by imprisonment in jail not exceeding thirty (30) days, or by fine not exceeding one hundred (\$100) dollars. All the provisions of chapter 77 in reference to the prevention of cruelty to animals shall be extended to the enforcement of this section.

1932 Code, § 1125; Cr. C. '22, § 22; Cr. C. '12, § 167; Cr. C. '02, § 136; 1892 (21) 3.

§ 1126. Unskillful or negligent management of steamboats, etc.—If any

person within this State shall suffer injury to life or limb by the explosion of any boiler of a steamboat, or by reason of the unskillfulness, mismanagement, or negligence of the persons having the charge or command of the said boat, or her engine, or by reason of any defect in the said engine or boat, or by reason of the deficiency or want of any matter or thing necessary and proper for the management or seaworthiness of the said boat, the captain, master, or other person having the command or charge of such boat, shall, for every such injury, be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine or imprisonment, or both, at the discretion of the court before which such conviction shall be had: *provided, however*, that nothing contained in this section shall be so construed as to prevent the defendant from showing, on the trial, that the injury arose from unavoidable accident, or without fault on his part, and that this section shall not in any manner be construed to restrict the liability of any person to be indicted, tried, and punished under any law existing.

1932 Code, § 1126; Cr. C. '22, § 23; Cr. C. '12, § 168; Cr. C. '02, § 137; G. S. 2477; R. S. 135; 1837 (6) 571.

§ 1126-1. Light entrance to elevator shafts when elevator in operation.—

It shall be unlawful for any person, firm or corporation in this state to operate any elevator without having a proper light at the entrance of all elevator shafts while such elevator is in operation. Any person, firm or corporation violating the provisions hereof shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined or imprisoned in the discretion of the court.

1934 (38) 1217.

§ 1127. Wilful neglect of railroad employees.—Any engineer or conductor of any railroad company in the State, who shall wilfully neglect to observe, or shall wilfully violate, any rule or regulation of the company to which such engineer or conductor may belong, whereby any person or persons shall sustain, or be in danger of sustaining, any bodily injury, such engineer or conductor shall be liable to be indicted for every such offense, and, upon conviction thereof, shall be fined two hundred dollars, and be imprisoned not exceeding one year, at the discretion of the judge before whom such case may be tried: *provided, however*, that nothing herein contained shall be so construed as to relieve such engineer or conductor from responsibility, in cases where the life of any person is destroyed, under the law as it now exists.

1932 Code, § 1127; Cr. C. '22, § 24; Cr. C. '12, § 169; Cr. C. '02, § 138; G. S. 2478; R. S. 136; 1857 (12) 634.

§ 1128. Penalty upon officer from whom prisoner is taken.—In the case of any prisoner lawfully in the charge, custody or control of any officer, state, county or municipal, being seized and taken from said officer through his negligence, permission or connivance, by a mob or other unlawful assemblage of persons, and at their hands suffering bodily violence or death, the said officer shall be deemed guilty of a misdemeanor, and, upon true bill found, shall be deposed from his office pending his trial, and upon conviction shall forfeit his office, and shall, unless pardoned by the Governor, be ineligible to hold any office of trust or profit within this State. It shall be the duty of the prosecuting attorney within whose circuit or county the of-

fense may be committed to worthwhith institute a prosecution against said officer, who shall be tried in such county in the same circuit, other than the one in which the offense was committed, as the attorney general may elect. The fees and mileage of all material witnesses, both for the State and the defense, shall be paid by the county treasurer of the county in which the case originated, on a certificate issued by the clerk and signed by the presiding judge, showing the amount of said fee due the witness.

1932 Code, § 1128; Cr. C. '22, § 27; Cr. C. '12, § 173; Cr. C. '02, § 142; 1896 (22) 213; 1908 (25) 1019.

§ 1129. Disturbing schools attended by girls, or women.—It shall be unlawful for any person wilfully or unnecessarily to interfere with or to disturb in any way or in any place the students or teachers of any school or college in this State attended by women or girls, or to loiter about such school or college premises, or to act in an obnoxious manner thereon, or for any person to enter upon any such school or college premises, or loiter around the premises, except on business, without the permission of the principal or president in charge.

Any person violating any of the provisions of this section shall be guilty of a misdemeanor, and, on conviction thereof, shall pay a fine of not less than ten dollars nor more than one hundred dollars, or be imprisoned in the county jail for not less than ten days nor more than thirty days.

1932 Code, § 1129; Cr. C. '22, § 28; 1919 (31) 239.

§ 1130. Misuse of aircraft.—Any aeronaut or passenger who, while in flight over a thickly inhabited area or over a public gathering within this State, shall engage in trick or acrobatic flying, or in any acrobatic feat, or shall, except while in landing or taking off, fly at such a low level as to endanger the persons on the surface beneath, or drop any object except loose water or loose sand ballast, shall be guilty of a misdemeanor and punishable by a fine of not more than one hundred (\$100.00) dollars, or imprisonment for not more than thirty (30) days, or both.

1932 Code, § 1130; 1929 (36) 220.

§ 1131. Assault, etc., by masked person.—It shall be unlawful for any person, individually or as a group of individuals, assembled under any pretext whatsoever, while wearing a mask or otherwise disguised, to assault, offer to assault, threaten, menace or intimidate any other person or persons, and any person convicted of same shall be deemed guilty of a felony and be punished by a penalty of not less than one year nor more than ten (10) years at hard labor upon the chaingang of the county wherein the crime is committed or for a like period in the state penitentiary.

1932 Code, § 1131; 1928 (35) 1232.

CHAPTER 69

Offenses against Property

- 1132. Arson defined.
- 1133. Building not subject of arson.
- 1134. Crops and personal property.
- 1135. Burning to defraud insurer.
- 1136, 1137. Attempt to burn.
- 1138. Burglary.
- 1139. House breaking.
- 1140. Dwelling house defined.
- 1140-1. Robbery.
- 1141. Entering bank with felonious intent.
- 1142. Stealing bills and notes.
- 1143. Stealing boats.
- 1144. Stealing stock.
- 1145. Larceny of bicycles.
- 1146. Stealing bedding.
- 1147. Stealing from person or house.
- 1148. Restitution of stolen goods.
- 1149. Fraudulent breach of trust.
- 1150. Safe cracking.
- 1151, 1152. Train robbery.
- 1153. Removing packing from car journal boxes.
- 1154. Felonious entry of house or vessel.
- 1154-1. Rob motor vehicles.
- 1155. Theft of electric current.
- 1156 and 1157. Illegal appropriation of gas.
- 1158. Defrauding producers of electricity.
- 1159. Misusing rented electric storage batteries.
- 1159-1. Electric storage batteries.
- 1160. Petit larceny.
- 1161. Receiving stolen goods.
- 1162. Firing turpentine farms.
- 1163. Burning hay, grain or kilns in night-time.
- 1164. Interference with fire or police alarm.
- 1165. Possessing tools for committing crimes.
- 1166. Altering or removing landmarks.
- 1167. Obtaining property by fraudulent check.
- 1168. Fraudulently obtaining credit or appropriating funds by corporate employee.
- 1169. Stealing melons or fruit.
- 1169-1. Tobacco plants.
- 1170 and 1171. Obtaining property by false pretense.
- 1172. Stealing grain or cotton.
- 1173. Fraudulent impersonation.
- 1174. Misusing property of Oconee County.
- 1174-1. Property of Berkeley and Cherokee Counties.
- 1175. Mutilating Chester court house.
- 1176. Mutilating court houses of Marion and Pickens.
- 1177. Willful injury to court house or jail.
- 1177-1. Stink bombs.
- 1178. Keeping sheep-killing dogs.
- 1179. Burning corn, grain or kilns in daytime.
- 1180. Burning carts or wood.
- 1181. Carrying fire on another's land.
- 1182 thru 1185. Malicious injury to property.
- 1186 and 1187. Misbranding or disfiguring stock.
- 1188. Illegal handling of timber.
- 1189. Leaving abandoned well open.
- 1190 thru 1192. Entry on another's land.
- 1192-1. Eavesdropper—peeping tom.
- 1193. Walking on roof of state house.
- 1194. Trespassing on state house grounds.
- 1195. Using driveways of state house grounds.
- 1196. Stealing or defacing books.
- 1197. Placing explosives on railroad rails.
- 1198. Injuring railroads.
- 1199. Entering or shooting into cars.
- 1199-1. Shooting or throwing at trains.
- 1199-2. Obstructing railroads.
- 1200. Injury to signals.
- 1201 and 1202. Injury to electric lines or appurtenances.
- 1203. Unauthorized use of municipal water system.
- 1204. Interference with sewers.
- 1205. Failure to return boat or tool for mining phosphate.
- 1206. Selling drifted boat without advertising.
- 1207. Stealing crude turpentine.
- 1208 and 1208-1. Burning woods or fields.
- 1209. Use of vehicle or stock without permission.
- 1210. Misappropriation of cotton by warehouseman.
- 1211. Forgery.
- 1212. Failure to provide railing for ferry boats.
- 1213 thru 1217. Obstructing and cleaning out streams.
- 1218. Digging ginseng on another's land.
- 1219. Defrauding hotels or hospitals.
- 1220. Procuring board by false written misrepresentation.
- 1222. Removing, destroying or leaving down fences.
- 1223. Rescuing impounded stock.
- 1224. Traveling outside of road.
- 1225. Effect of satisfaction to party aggrieved.
- 1226. Injury to corporate property.
- 1227. Embezzling military funds.
- 1228. Injury to drainage works.
- 1229. Takers of estrays failing to obey law.

§ 1132. Arson defined.—Any person who wilfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels, or procures the burning of any dwelling house, or any kitchen, shop, barn, stable or other outhouse that is parcel thereof, or belonging to or adjoining thereto, whether the property of himself or of another, shall be guilty of arson and upon conviction thereof be sentenced to the penitentiary for not less than two or more than twenty years.

1932 Code, § 1132; 1928 (35) 1226.

In general.—Setting fire to the dwelling house itself, as well as to the parcels thereof, is arson. *State v. Carter*, 49 S. C. 265, 27 S. E. 106.

It is not arson to burn one's own house, however. *State v. Sarvis*, 45 S. C. 688, 24 S. E. 53, 55 Am. St. Rep. 806, 101 Am. St. Rep. 26, 32 L. R. A. 647, 21 L. R. A. (N. S.) 28, Ann. Cas. 13C, 1165, 5 A. L. R. 783, 17 A. L. R. 1169. But see § 1135.

Punishment under the former statute is discussed in *State v. Collins*, 125 S. C. 267, 118 S. E. 423.

Arson is an offense against the possession rather than the property. *State v. Copeland*, 46 S. C. 13, 23 S. E. 980, 92 Am. St. Rep. 116; *State v. Perry*, 74 S. C. 551, 554, 54 S. E. 764, 18 L. R. A. (N. S.) 778. See also, *State v. Alford*, 142 S. C. 43, 140 S. E. 261.

Soliciting another to commit arson, and bribing him and preparing him to do it, is an indictable offense. *State v. Bowers*, 35 S. C. 262, 14 S. E. 488, 28 Am. St. Rep. 847, 101 Am. St. Rep. 28, 15 L. R. A. 199, 25 L. R. A. 434, 6 L. R. A. (N. S.) 804, 41 L. R. A. (N. S.) 441.

Allegation as to ownership.—The house may be alleged as the property of either the owner or the occupant. *State v. Carter*, 49 S. C. 265, 27 S. E. 106.

Allegations as to county.—An indictment is not fatally defective because it omits to state the court-house or other place where crime was committed, when it names the county. *State v. Moore*, 24 S. C. 150, 58 Am. Rep. 241, 3 Am. St. Rep. 279, 2 A. L. R. 1517.

But it is good practice to allege that the crime was committed at court-house. *State v. Colclough*, 31 S. C. 156, 9 S. E. 811, Ann. Cas. 13D, 1099, Ann. Cas. 16D, 144.

The indictment need not allege location of stable or gin house burned, nor charge that it was within the curtilage. *State v. Gwinn*, 24 S. C. 146, Ann. Cas. 16B, 144; *State v. Moore*, 24 S. C. 150, 58 Am. Rep. 241, 3 Am. St. Rep. 279, 7 A. L. R. 1517.

The objection as to variance between allegation and proof as to ownership when not made in lower court will not be reviewed on appeal. *State v. Gadsden*, 70 S. C. 430, 50 S. E. 16, 29 A. L. R. 1149, 1180.

Autrefois acquit and convict.—Acquittal under charge of arson is not a good plea to indictment for statutory offense of burning an untenanted house. *State v. Jenkins*, 20 S. C. 351, 352, 77 Am. Dec. 697, 92 Am. Rep. St. Rep. 115, 148.

An indictment, at common law, for attempting to burn a storehouse within the curtilage, is a bar to a subsequent indictment under the statute for burning the same storehouse. *State v. Switzer*, 65 S. C. 187, 43 S. E. 513.

Evidence.—Evidence of defendant's pecuniary condition, is irrelevant and incompetent. *State v. Moore*, 24 S. C. 150, 58 Am. Rep. 241, 3 Am. St. Rep. 279, 7 A. L. R. 1517.

Where one is on trial as accessory before the fact, conversations at and after fire inadmissible. *State v. Dukes*, 40 S. C. 481, 19 S. E. 134, 62 L. R. A. 197, Ann. Cas. 15D, 174.

A confession must be shown to have been voluntary. *State v. Moorman*, 27 S. C. 22, 2 S. E. 621.

As to confession of co-conspirator, see *State v. Green*, 40 S. C. 328, 18 S. E. 933, 42 Am. St. Rep. 872, L. R. A. 1918A, 735.

In prosecution for statutory arson, testimony of assistant fire chief, who qualified as expert, as to how long fire had been burning when he arrived, competent, where witness testified fully as to facts on which opinion was based, and witness was crossexamined by accused as to how long fire and subsequent fire had been burning when he arrived. *State v. Browder*, 183 S. C. 447; 191 S. E. 302.

In prosecution for arson, based on circumstantial evidence, where accused resided in father's house with mother, evidence as to existence of mortgage on house, commencement of foreclosure proceedings shortly before house was burned, existence and cancellation of fire policy payable to mortgagee, that shortly before fire mortgagee took out another fire policy, and that accused's mother took out fire policy just prior to fire, which was payable to herself and covered all personalty in the house belonging to insured and all members of his family, was admissible to be considered in determining whether accused had willfully and maliciously set fire to the house. *State v. Chisholm*, 187 S. C. 275, 197 S. E. 308.

See also, *State v. Jones*, 192 S. C. 327, 6 S. E. (2d) 479.

Charge.—See *State v. Rhodes*, 44 S. C. 325, 21 S. E. 807, 22 S. E. 306.

§ 1133. Penalty for burning building not subject of arson.—Any person who wilfully and maliciously sets fire to or burns or causes to be burned, or who aids, counsels or procures the burning of any barn, stable, garage, or other building, whether the property of himself or of another, not a parcel of a dwelling house; or any shop, storehouse, warehouse, factory, mill or other building, whether the property of himself or of another; or any church, meeting house, court house, work house, school, jail or other public building or public bridge, shall, upon conviction thereof, be sentenced to the penitentiary for not less than one nor more than ten years.

1932 Code, § 1133; 1928 (35) 1226.

The acquittal of a charge of an attempt to burn a storehouse is a bar to another prosecution for attempting to burn the

same storehouse. *State v. Switzer*, 65 S. C. 187, 43 S. E. 513.

§ 1134. Burning of crops, personal property, etc.—Any person who wilfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels or procures the burning of any barracks, cock, crib, rick, or stack of hay, corn, wheat, oats, barley or other grain or vegetable product of any kind; or any field of standing hay or grain of any kind; or any pile of coal, wood or other fuel; or any pile of planks, boards, posts, rails or other lumber; or any street car, railway car, ship, boat or other water craft, automobile or other motor vehicle; or any other personal property not herein specifically named (such property being of the value of twenty-five dollars and the property of another person); shall upon conviction thereof be sentenced to the penitentiary for not less than one or more than three years.

1932 Code, § 1134; 1928 (35) 1226.

See §§ 1163 and 1179.

For case decided prior to the enactment of this section, holding burning of

corn-crib not arson, see *State v. Jeter*, 47 S. C. 2, 24 S. E. 889, Ann. Cas. 12B, 453, Ann. Cas. 16B, 145.

§ 1135. Burning to defraud insurer.—Any person who wilfully and with intent to injure or defraud the insurer sets fire to or burns or causes to be burned, or who aids, counsels or procures the burning of any goods, wares, merchandise or other chattels or personal property of any kind, whether the property of himself or of another, which shall at the time be insured by any person or corporation against loss or damage by fire, shall upon conviction thereof be sentenced to the penitentiary for not less than one nor more than five years.

1932 Code, § 1135; 1928 (35) 1226.

For case decided prior to the enactment of this section, holding that it is no felony, in the absence of statute, to burn house with intent to defraud an insurance company, see *State v. Sarves*, 45

S. C. 668, 24 S. E. 53, 55 Am. St. Rep. 806, 101 Am. St. Rep. 26, 32 L. R. A. 647, 21 L. R. A. (N. S.) 28, Ann. Cas. 13C, 1165, 5 A. L. R. 783, 17 A. L. R. 1169.

§ 1136. Attempt to burn.—Any person who wilfully and maliciously attempts to set fire to or attempts to burn or to aid, counsel or procure the burning of any of the buildings or property mentioned in the foregoing

sections, or who commits any act preliminary thereto or in furtherance thereof, shall upon conviction thereof be sentenced to the penitentiary for not less than one nor more than two years or fined not to exceed one thousand dollars.

1932 Code, § 1136; 1928 (35) 1226.

§ 1137. Placing of combustibles, etc.—The placing or distributing of any inflammable, explosive or combustible materials or substance, or any device in any building or property mentioned in the foregoing sections in an arrangement or preparation with intent to eventually wilfully and maliciously set fire to or burn same, or to procure the setting fire to or burning of same shall for the purposes of the foregoing section constitute an attempt to burn such building or property.

1932 Code, § 1137; 1928 (35) 1226.

§ 1138. Burglary.—Any person who shall commit the crime of burglary at common law shall, upon conviction, be imprisoned in the state penitentiary, with hard labor, during the whole lifetime of the prisoner: *provided, however*, that in each case where the prisoner is found guilty, the jury may find a special verdict, recommending him to the mercy of the court, whereupon the punishment shall be reduced to imprisonment in the penitentiary, with hard labor for a term of not less than five years.

1932 Code, § 1138; Cr. C. '22, § 32; Cr. C. '12, § 177; Cr. C. '02, § 144; G. S. 2481; R. S. 141; 1883 (18) 290.

I. What Constitutes Burglary.

II. The Indictment.

III. Evidence.

IV. Charge.

V. Verdict.

VI. New Trial.

I. WHAT CONSTITUTES BURGLARY.

Burglary cannot be committed in mill-house, which was not a parcel of dwelling house and was separated by public road. *State v. Sampson*, 12 S. C. 567, 32 Am. Rep. 513, 2 Am. St. Rep. 388, Ann. Cas. 13D, 876. Or in a storage house, where no one slept, which was near, but not appurtenant to, the dwelling house. *State v. Anderson*, 24 S. C. 109, 23 L. R. A. 723.

But breaking into a dwelling house with intent to steal an article of less value than \$20, is burglary. *State v. Clary*, 24 S. C. 116.

And where a party breaks out of a dwelling house at night, having committed a felony, no matter how he entered, it is burglary. *State v. Bee*, 29 S. C. 81, 6 S. E. 911, L. R. A. 1915D, 973, Ann. Cas. 16B, 538.

Evidence that out-house is separated from dwelling by public road does not show it is not appurtenant to the dwelling. *State v. Johnson*, 45 S. C. 483, 23 S. E. 619.

Where a servant, having a right to sleep in his master's dwelling, goes in, not with intent to lodge, but with intent to steal, by opening the door or raising

the sash, and actually steals and carries away his master's goods, he commits a burglary. *State v. Howard*, 64 S. C. 344, 42 S. E. 173, 174, 92 Am. St. Rep. 804, 58 L. R. A. 685, 68 L. R. A. 859, L. R. A. 1915D, 1015, Ann. Cas. 16E, 534.

Neither the Act of 1866, enlarging the limits within which burglary may be committed, nor the Act of 1878, increasing its punishment, repealed the common law offense of burglary. *State v. Branham*, 13 S. C. 389, 41 Am. St. Rep. 522, 18 L. R. A. (N. S.) 777, Ann. Cas. 13D, 488.

As to definition of burglary, see *State v. Ginns*, 1 N. & McC, 583, 22 Am. Dec. 149, Ann. Cas. 13D, 877; *State v. Sampson*, 12 S. C. 567, 32 Am. Rep. 513, 2 Am. St. Rep. 388, Ann. Cas. 13D, 876; *State v. Clary*, 24 S. C. 116.

II. THE INDICTMENT.

General note as to necessary allegations.—An indictment may join a count for burglary with a count for receiving stolen goods. *State v. Strickland*, 10 S. C. 191, 192, 58 Am. Dec. 248. And a misnomer not fatal, unless objected to. *State v. Branham*, 13 S. C. 389, 41 Am. St. Rep. 522, 18 L. R. A. (N. S.) 777, Ann. Cas. 13D, 488. The precise day or year need not be alleged, provided day named is anterior to bill. *State v. Branham*, 13 S. C. 389, 41 Am. St. Rep. 522, 18 L. R. A. (N. S.) 777, Ann. Cas. 13D, 488; *State v. Dawkins*, 32 S. C. 17, 10 S. E. 772, 23 L. R. A. 734, 17 A. L. R. 1139; *State v. Howard*, 32 S. C. 91, 10 S. E.

831. But it must allege that offense was committed in night-time. *State v. Dawkins*, 32 S. C. 17, 10 S. E. 772, 23 L. R. A. 734, 17 A. L. R. 1139. Although it is not necessary to specify the particular chattels defendant intended to steal. *State v. Langford*, 55 S. C. 322, 33 S. E. 370, 74 Am. St. Rep. 746, 88 Am. St. Rep. 589.

Ownership of house was properly laid in a wife, who had a separate estate when she leased house, and furnishings were hers. *State v. Trapp*, 17 S. C. 467, 470, 43 Am. Rep. 614, 2 Am. St. Rep. 394, 16 Am. St. Rep. 25, 20 A. L. R. 510.

Where two are indicted for burglary, if one convicted only of larceny, the other cannot be convicted of burglary. *State v. Wilson*, 3 McC. 187.

As to how allegation that out-house was within the curtilage, made, see *State v. Evans*, 18 S. C. 137, Ann. Cas. 13D, 875.

III. EVIDENCE.

Confession may be proved, though manner of attending officer was rude. *State v. Branham*, 13 S. C. 389, 41 Am. St. Rep. 522, 18 L. R. A. (N. S.) 777, Ann. Cas. 13D, 488.

Parol.—The false denial, by a party charged, of an important fact, made voluntarily at preliminary hearing, may be proved by parol. *State v. Howard*, 32 S. C. 91, 10 S. E. 831.

Prosecutor may testify that house was his, *State v. Brown*, 33 S. C. 151, 11 S. E. 641, 92 Am. St. Rep. 115, 23 L. R. A. 347, 40 L. R. A. (N. S.) 38.

Proof of acquittal of burglary in house of one no bar to conviction of burglary in house of another. *State v. Brown*, 33 S. C. 151, 11 S. E. 641, 92 Am. St. Rep. 115, 23 L. R. A. 347, 40 L. R. A. (N. S.) 38.

Corroboration of accomplice.—Whether circumstances shown are sufficient to corroborate the testimony of an accomplice, must be left wholly to the jury. *State v. Robinson*, 35 S. C. 340, 14 S. E. 766, 3 A. L. R. 1219.

Tracks as evidence of defendant's guilt. *State v. Wilkes*, 82 S. C. 163, 63 S. E. 688; *State v. Burris*, 85 S. C. 328, 67 S. E. 306.

Possession of skeleton keys as evidence.—*State v. Clark*, 85 S. C. 273, 67 S. E. 300, Ann. Cas. 13 C, 517.

Duress.—As to evidence obtained by duress from defendant, see *State v. Middleton*, 69 S. C. 72, 48 S. E. 35, 18 L. R. A. (N. S.) 777, 820, 858, 32 L. R. A. (N. S.) 773, 24 A. L. R. 706.

Corporate Existence.—As to corporate existence of owner of goods or dwelling, see *State v. Sowell*, 85 S. C. 278, 67 S. E. 316, 7 A. L. R. 1543.

IV. CHARGE.

No error to decline to give legal definition of burglary when correct principles of law applicable had already been stated. *State v. Dawkins*, 32 S. C. 17, 10 S. E. 772, 23 L. R. A. 734, 17 A. L. R. 1139.

Judge cannot charge as to weight to be given testimony of an accomplice. *State v. Clark*, 85 S. C. 273, 67 S. E. 300, Ann. Cas. 13C, 517; *State v. Sowell*, 85 S. C. 378, 67 S. E. 316, 7 A. L. R. 1543.

Inconsequential Error.—There being one count for burglary and another for larceny, upon conviction of burglary, error in charge as to larceny immaterial, and no ground for new trial. *State v. Dawkins*, 32 S. C. 17, 10 S. E. 772, 23 L. R. A. 734, 17 A. L. R. 1139.

Unconstitutional charge.—Charge to effect that prisoner was a thief, and was guilty, violates Article 4, § 26, of the Constitution of 1868. *State v. Brown*, 33 S. C. 151, 11 S. E. 641, 92 Am. St. Rep. 115, 23 L. R. A. 347, 40 L. R. A. (N. S.) 38.

V. VERDICT.

General verdict on indictment with three counts, one for burglary, one for another burglary, and the third for petit larceny, is good. *State v. Nelson*, 14 Rich. 169, 58 Am. Dec. 248, 92 Am. Dec. 663, 94 Am. Dec. 130.

Published verdict final.—Jury having published their verdict cannot afterwards reassemble and render a second verdict with recommendation to mercy. *State v. Dawkins*, 32 S. C. 17, 10 S. E. 772, 23 L. R. A. 734, 17 A. L. R. 1139.

VI. NEW TRIAL.

Cause for new trial.—Must be granted if sentence was based upon second verdict, after first had been rendered. *State v. Dawkins*, 32 S. C. 17, 10 S. E. 772, 23 L. R. A. 734, 17 A. L. R. 1139.

When entire failure of proof as to the breaking, the only remedy is by motion for. *State v. Dawkins*, 32 S. C. 17, 10 S. E. 772, 23 L. R. A. 734, 17 A. L. R. 1139.

Plea for former acquittal not sustained, where defendant was by order of court acquitted on first count, and convicted by jury on second, and the judgment set aside and new trial ordered on application by defendant. *State v. Hamilton*, 80 S. C. 435, 442, 61 S. E. 965, 128 Am. St. Rep. 881.

General verdict of guilty on indictment for burglary and larceny is discussed in *State v. Hendrix*, 86 S. C. 64, 68 S. E. 129.

§ 1139. Housebreaking which is not burglary—felony.—Every person who shall break and enter, or who shall break with intent to enter, in the daytime, any dwelling house or other house, or who shall break and enter, or shall break with intent to enter, in the nighttime, any house, the breaking

and entering of which would not constitute burglary, with intent to commit a felony or other crime of a lesser grade, shall be held guilty of a felony, and punishable at the discretion of the court by imprisonment in the county jail or penitentiary for a term not exceeding one year.

1932 Code, § 1139; Cr. C. '22, § 33; Cr. C. '12, § 178; Cr. C. '02, § 145; G. S. 2482; R. S. 142 (17) 60; 1887 (19) 792.

Purpose of Enactment.—This section was evidently passed to cover wrongdoing, which could not properly be held to be burglary. *State v. Alford*, 142 S. C. 43, 140 S. E. 261.

Act of 1893 attempting to reduce the punishment where the property did not exceed a certain value was held unconstitutional in *State v. Crosby*, 51 S. C. 247, 248, 28 S. E. 529.

Intent is essential element.—In the case of *State v. Clark*, 85 S. C. 273, 67 S. E. 300, Ann. Cas. 13C, 517, this court, in construing that section, said: "Under this statute the mere breaking into a house is not a crime, nor is the mere breaking into and entering a house or mere breaking with intent to enter a house any crime. It is only where they is a breaking and entering, or a breaking with intent to enter, 'with intent to commit a felony, or other crime of a lesser grade,' that the crime denounced by the statute is complete." *State v. Green*, 118 S. C. 279, 110 S. E. 145, 19 A. L. R. 1431. See also *State v. Cokley*, 83 S. C. 197, 65 S. E. 174, *State v. Melton*, 181 S. C. 482, 188 S. E. 133, *State v. Christensen*, 194 S. C. 132, 9 S. E. (2d) 555.

Crime against possession.—Housebreaking, denounced by this section, is a crime against possession, and not against property. *State v. Alford*, 142 S. C. 43, 140 S. E. 261.

Indictment for house-breaking may properly allege the house broken into to be the property of the person who occupies it. *State v. Alford*, 142 S. C. 43, 140 S. E. 261.

Where an indictment charges both burglary under the preceding section and housebreaking under this section, it is not an abuse of discretion for the court to compel the state to elect on which count it would go to trial. *State v. Bouknight*, 55 S. C. 353, 33 S. E. 451, Ann. Cas. 13D, 867.

The clause of this section "the break-

ing and entering of which would not constitute burglary" is not descriptive of the offense, and such facts about the house need not be alleged in the indictment. *State v. Bouknight*, 55 S. C. 353, 33 S. E. 451, Ann. Cas. 13D, 867, holding that alleging that the house was a "weather house" sufficed to bring it within the section. See also, *State v. Goins*, 122 S. C. 192, 115 S. E. 232, 235.

As to amendment of indictment, see note to sec. 1005.

A verdict finding accused guilty of "housebreaking" would not support a sentence; as it does not find accused guilty of a crime, under this section. *State v. Clark*, 85 S. C. 273, 67 S. E. 300, Ann. Cas. 13C, 517, *State v. Melton*, 181 S. C. 482, 188 S. E. 133.

This section does not justify the setting of a spring gun to prevent breaking or entry. *State v. Green*, 118 S. C. 279, 110 S. E. 145, 19 A. L. R. 1431.

Plea of guilty no bar to testify.—A defendant, after plea of guilty, may be used as witness against a co-defendant. *State v. Boyles*, 80 S. C. 352, 60 S. E. 233, Ann. Cas. 16A, 554.

Truth of evidence.—As to letters purporting to be written by defendant, see *State v. Head*, 38 S. C. 258, 16 S. E. 892; *State v. Weldon*, 39 S. C. 318, 17 S. E. 688, 24 L. R. A. 126, 62 L. R. A. 324, L. R. A. 1916F, 1206, 9 A. L. R. 483.

Evidence for jury.—Whether landlord's agent who went to the house of a tenant in his absence with a distress warrant, raised the window, and took from the house certain articles under the warrant, was guilty of breaking and entering with the intent to commit a trespass within statute, was for jury. *State v. Christensen*, 194 S. C. 132, 9 S. E. (2d) 555.

See generally, *State v. Ross*, 83 S. C. 434, 65 S. E. 443, 23 A. L. R. 292, *State v. Christensen*, 194 S. C., 132, 9 S. E. (2d) 555.

§ 1140. Dwelling house defined in case of burglary and arson.—With respect to the crimes of burglary and arson, and to all criminal offenses which are constituted or aggravated by being committed in a dwelling house, any house, outhouse, apartment, building, erection, shed, or box, in which there sleeps a proprietor, tenant, watchman, clerk, laborer, or person who lodges there with a view to the protection of property shall be deemed a dwelling house; and of such a dwelling house, or of any other dwelling house, all houses, outhouses, buildings, sheds, and erections which are within two hundred yards of it, and are appurtenant to it, or to the same

establishment of which it is an appurtenance, shall be deemed parcels.

1932 Code, § 1140; Cr. C. '22, § 34; Cr. C. '12, § 179; Cr. C. '02, § 146; G. S. 2483; R. S. 143; 1866 (13) 405.

An indictment should allege that the house in which burglary was committed was within two hundred yards of the dwelling house and appurtenant thereto. *State v. Evans*, 18 S. C. 137, 139, Ann. Cas. 13D, 875; *State v. Langford*, 55 S. C. 322, 33 S. E. 370, 74 Am. St. Rep. 746, 88 Am. St. Rep. 589. So as to arson. *State*

v. Jeter, 47 S. C. 2, 24 S. E. 889, Ann. Cas. 12B, 453, Ann. Cas. 16B, 145.

For case construed not to be arson, see *State v. Pope*, 9 S. C. 273, 81 Am. Dec. 68. As to original act, see *State v. Bosse*, 8 Rich. 276; *State v. DeBruhl*, 10 Rich. 23, 81 Am. 67, 101 Am. St. Rep. 24, 1 A. L. R. 1168.

§ 1140-1. Punishment commit robbery while armed with deadly weapon.

—Any person convicted for the crime of robbery while armed with a weapon or weapons as defined in section 1256, or any amendments thereto, shall suffer punishment by imprisonment at hard labor for a term of not exceeding twenty-five (25) years, in the discretion of the presiding judge.

1941 (42) 86.

§ 1141. Enter bank with intent to steal—felony.—Whoever shall break and enter, or enter without breaking, any building or part of a building occupied as a bank, with intent to steal any money or securities for money or other thing of value, either by force, intimidation, threats, stealth or otherwise, shall be deemed guilty of a felony, and upon conviction thereof, shall be punished by imprisonment in the penitentiary at hard labor for not less than ten years.

1932 Code, § 1141; Cr. C. '22, § 35; Cr. C. '12, § 180; 1908 (25) 1112.

§ 1142. Stealing of bonds, etc.—The stealing, or taking by robbery, of any bond, warrant, bill, or promissory note, for the payment, or securing the payment of any money, being the property of any other person, or of any corporation, notwithstanding any of the said particulars are termed in law a chose in action, shall be deemed and construed to be a felony if of or above the value of twenty dollars, and a misdemeanor if below the value of twenty dollars; and such offender shall suffer such punishment as if he had stolen other goods of the like value with the moneys due on such bond, warrant, bill, or note, respectively, or secured thereby and remaining unsatisfied.

1932 Code, § 1142; Cr. C. '22, § 36; Cr. C. '12, § 181; Cr. C. '02, § 147; G. S. 2486; R. S. 144; 1737 (3) 470.

§ 1143. Stealing boats, etc.—in trespass offenders shall pay damages.—

Whoever shall steal, take away, or let loose any boat, periauger or canoe, or steal or take away any grappling, painter, rope, sail or oar from any landing or place whatsoever where the owners or persons in whose service or employ they were last had made fast or laid the same (except all boats or canoes as are let loose from another boat, canoe or vessel), shall be liable to such fine or fines as the court of sessions shall impose in its discretion if the matter of fact be felony or larceny, and make good to the person or persons injured all damage they shall sustain; and in case the matter of fact be a trespass only, the person or persons committing such offense shall make good to the person injured all damages that may accrue

thereby, and, moreover, forfeit and pay, for every time he or they shall be found guilty thereof, the sum of twenty dollars, one moiety thereof to be paid to the state treasurer for the public use, the other moiety to him or them that will sue and prosecute for the same in any court of competent jurisdiction in this State, beside his charges therein expended: *provided*, that when the boat, periauger, canoe, grappling, painter, rope, sail or oar, or any or all of them so taken away, stolen or let loose shall be of the value of twenty dollars or less the offender, upon conviction before a magistrate, shall be subject to a fine not to exceed one hundred dollars or imprisonment not exceeding thirty days, in lieu of the penalties prescribed in the foregoing section.

1932 Code, § 1143; Cr. C. '22, § 37; Cr. C. '12, § 182; Cr. C. '02, § 148; G. S. 2488; R. S. 145; 1695 (2) 105; 1897 (22) 422.

§ 1144. Stealing live stock.—Any person found guilty of the larceny of any horse, mule, cow, hog, or any other live stock, shall suffer imprisonment in the state penitentiary at hard labor for a period of not less than one year nor more than ten years, and such fine as the court, in its discretion, may see fit to impose: *provided*, that if the value of the live stock is less than twenty (\$20.00) dollars the punishment shall be not more than thirty (30) days.

1932 Code, § 1144; Cr. C. '22, § 38; Cr. C. '12, § 183; Cr. C. '02, § 149; G. S. 2489; R. S. 146; 1878 (16) 632; 1929 (36) 101.

In general.—This section provides punishment without regard to value, and the jurisdiction is not that of the magistrate. *State v. Moore*, 30 S. C. 69, 8 S. E. 437.

As to repeal of all former acts on the subject, see *State v. Corley*, 13 S. C. 1. As to definition of larceny, see *State v. Garvin*, 48 S. C. 258, 26 S. E. 570, 101 Am. St. Rep. 486, 503.

Indictment.—In an early case it was held that an indictment for stealing a colt cannot be sustained, as "colt" is not a term used in the section. *State v. Major*, 14 Rich. 76, 88 Am. St. Rep. 587. But the word "mare" was held to be included in the term "horse." *State v. Dunnivant*, 3 Brev. 9, 5 Am. Dec. 22.

The property may be laid in one who has merely the lawful possession. *State v. Addington*, 1 Bail. 310, 21 L. R. A. (N. S.) 313. So a mortgagor of personal property in possession after condition broken has such ownership as will sustain indictment alleging ownership in him. *State v. Stokes*, 84 S. C. 579, 66 S. E. 993. And the property may be alleged in an agent for another. *State v. Philips*, 73 S. C. 236, 53 S. E. 370, 21 L. R. A. (N. S.) 312.

Where horse is stolen in one county and carried into and sold in another, the indictment may be in the latter county. *State v. Bryant*, 9 Rich. 113.

An indictment cannot be quashed because the prosecution is barred by lapse of time. *State v. Howard*, 15 Rich. 274, 35 L. R. A. 706, 3 A. L. R. 1331.

As to indictment sufficient under Act of 1789, see *State v. Hamblin*, 4 S. C. 1.

Arraignment.—Where the value of the stock stolen is under twenty dollars, the State is only entitled to two peremptory challenges. *State v. Anderson*, 59 S. C. 229, 37 S. E. 820, 29 A. L. R. 1131, 1180.

Evidence.—The proof must sustain the allegation of ownership. *State v. Thomas*, 14 Rich. 163.

But it is not necessary to prove the time as laid in the indictment. *State v. Porter*, 10 Rich. 145. Any time prior to finding of indictment is sufficient. *State v. Anderson*, 59 S. C. 229, 37 S. E. 820, 29 A. L. R. 1131, 1180; *State v. Reynolds*, 48 S. C. 384, 26 S. E. 679, 106 Am. St. Rep. 765, 2 L. R. A. (N. S.) 862.

As to possession of stolen property, see *State v. Hamilton*, 77 S. C. 383, 57 S. E. 1098. As to tracks, see *State v. Wideman*, 68 S. C. 119, 120, 46 S. E. 769; *State v. Langford*, 74 S. C. 460, 55 S. E. 120, 50 L. R. A. (N. S.) 971; *State v. Wilkes*, 82 S. C. 163, 63 S. E. 688. As to voluntary confession of prisoner, see *State v. Cook*, 15 Rich. 29. As to circumstantial evidence, see *State v. Jackson*, 68 S. C. 53, 54, 46 S. E. 538. As to proof of ownership, see *State v. Washington*, 15 Rich. 39, 21 L. R. A. (N. S.) 312; *State v. London*, 3 S. C. 230; *State v. Pitts*, 12 S. C. 180, 32 Am. Rep. 508, 69 L. R. A. 364, 11 L. R. A. (N. S.) 389, 2 A. L. R. 352, *State v. Evans*, 23 S. C. 209; *State v. Garvin*, 48 S. C. 258, 26 S. E. 570, 101 Am. St. Rep. 486, 503. As to rebuttal of presumption arising from possession of recently stolen goods, see *State v. Wallace*, 44 S. C. 357, 22 S. E. 411.

Charge.—As to case illustrative of dif-

ference between stealing a horse, and riding one off without knowledge or consent of owner, see *State v. Sanders*, 56 S. C. 415, 35 S. E. 133.

Chasing and shooting hog, without removing it after it is shot, held not larceny. *Sate v. Seagler*, 1 Rich. 30, 42 Am.

Dec. 404, 57 Am. Dec. 273, 45 Am. Rep. 69, 88 Am. St. Rep. 562, 29 L. R. A. (N. S.) 40, 19 A. L. R. 727.

New Trial.—Refused; testimony tending to support charge. *State v. Porter*, 80 S. C. 450, 61 S. E. 1087.

§ 1145. Larceny of bicycles.—The larceny of any bicycle shall be punishable at the discretion of the court: provided, that where the value of the bicycle stolen does not exceed twenty (\$20.00) dollars, the offender shall be punished by imprisonment for not more than thirty days, or by a fine of not more than one hundred (\$100.00) dollars.

1932 Code, § 1145; Cr. C. '22, § 39; Cr. C. '12, § 184; Cr. C. '02, § 150; 1901 (23) 749; 1919 (31) 215; 1931 (37) 343.

§ 1146. Stealing beddings, etc., from lodgings.—Whoever shall take away, with intent to steal, embezzle, or purloin, any chattel, bedding, or furniture, which by contract or agreement he is to use, or shall be let to him to use, in or with lodging, such taking, embezzling, or purloining, shall be, to all intents and purposes, taken, reputed and adjudged to be larceny and felony, and the offender shall suffer as in case of felony.

1932 Code, § 1146; Cr. C. '22, § 40; Cr. C. '12, § 185; Cr. C. '02, § 151; G. S. 2490; R. S. 147; 3 and 4 W. & M., c. 9; 1712 (2) 532.

Applied in *State v. Gandy*, 87 S. C. 523, 70 S. E. 163, Ann. Cas. 17E, 934.

§ 1147. Privily stealing from person or house.—The offense of privily stealing from the person or of privily entering and stealing from any house, in the nighttime or daytime, shall in all cases be deemed and adjudged grand larceny, and subject to the same punishment.

1932 Code, § 1147; Cr. C. '22, § 41; Cr. C. '12, § 186; Cr. C. '02, § 152; G. S. 2491; R. S. 148; 8 Eliz. 2, c. 4; 1712 (2) 496; 1858 (12) 706; 1902 (23) 1094.

The State is not bound to prove that no force was used. *State v. Chavis*, 34 S. C. 132, 13 S. E. 317.

Not error to charge that the State need not show that the property was not taken by force, when the judge had already charged that it must have been secretly and privately taken from the person. *State v. Chavis*, 34 S. C. 132, 13 S. E. 317.

Indictment insufficient under this sec-

tion but sufficient to charge petit larceny.—Where an indictment is defective under this section, if it is sufficient to sustain a charge of petit larceny, the insufficient allegations, under this section, will be regarded as surplusage. *State v. Banks*, 84 S. C. 543, 66 S. E. 999.

Applied in *State v. Major*, 70 S. C. 387, 50 S. E. 13, 25 L. R. A. (N. S.) 543.

§ 1148. Restitution of stolen goods.—Any felon who shall rob, or take away, any money, goods or chattels, from any person, from their person or otherwise, and be found guilty thereof, the party so robbed, or owner, shall be restored to his said money, goods and chattels; and the judge, before whom any such felon shall be found guilty, shall award, from time to time, writs of restitution for said money, goods and chattels.

1932 Code, § 1148; Cr. C. '22, § 42; Cr. C. '12, § 187; Cr. C. '02, § 153; G. S. 2492; R. S. 149; 21 H. 8, c. 11; 1712 (2) 458.

§ 1149. Breach of trust with fraudulent intent.—Any person committing a breach of trust with a fraudulent intention shall be held guilty of larceny; and so shall any person who shall hire or counsel any other person to commit a breach of trust with a fraudulent intention.

1932 Code, § 1149; Cr. C. '22, § 43; Cr. C. '12, § 188; Cr. C. '02, § 154; G. S. 2493; R. S. 150; 1866 (13) 406.

Section includes cases arising at common law.—This section applies not only to cases which the common law did not reach, but also to cases where a fraudulent appropriation did constitute larceny at common law. *State v. Shirer*, 20 S. C. 392, 98 Am. Dec. 126, 87 Am. St. Rep. 22, 33, 17 L. R. A. 484. It merely extends the crime of larceny at common law. *State v. Butler*, 21 S. C. 353, 87 Am. St. Rep. 39, L. R. A. 1917B, 1268.

Intention essential element. — It is apparent from the terms of this section that there may be a breach of trust, without a fraudulent intention, which is not a crime under the section; and so it has been construed by this court in numerous instances. In *State v. Shirer*, 20 S. C. 392, 98 Am. Dec. 126, 87 Am. St. Rep. 22, 33, 17 L. R. A. 484, the court said: "A breach of trust is where personal property of appreciable value and of which larceny may be committed is put into the possession of another; and when it is so put into his possession it becomes a trust, and while it so remains, if he conceives the purpose to convert that property to his own use, and does it with intention to deprive the owner of the use of that property, then that is a breach of trust with a fraudulent intent." *Bell v. Clinton Oil Mill*, 129 S. C. 242, 124 S. E. 7, 11.

In *State v. Butler*, 21 S. C. 353, 87 Am. St. Rep. 39, L. R. A. 1917B, 1268, the defendant secretary of a lodge was indicted for breach of trust with fraudulent intent in appropriating to his own use certain funds of the lodge. The defendant requested the charge: "The mere fact of not paying over the money by the defendant was not sufficient evidence in itself to convict him of a breach of trust with fraudulent intent." It was refused by the circuit judge, and upon appeal the refusal was held reversible error; the court saying: "The object of the breach of trust act, as we have said, was not to make criminal the failure to pay a debt. This often happens from misfortune, or from other causes far removed from fraud or crime; and the mere fact of nonpayment affords no ground whatever upon which to base a charge of larceny or breach of trust. To constitute this offense as to property, there must be an appropriation thereof, accompanied with a fraudulent purpose to destroy the right of the true owner. This is not a necessary inference from mere nonpayment, and the defendant was entitled to have it declared to the jury, as a matter of law, that failure to pay, in itself, did not constitute the offense charged." *Bell v. Clinton Oil Mill*, 129 S. C. 242, 124 S. E. 7, 11.

In *Murray v. Aiken Min., etc., Co.*, 37

S. C. 468, 16 S. E. 143, a question raised involved the liability of a bonding company under a bond indemnifying the company against loss by reason of fraud or dishonesty of an employee "amounting to embezzlement or larceny." The court held that the evidence must have been sufficient to convict the employee in the court of general sessions of the offense of breach of trust with a fraudulent intention. After quoting from *State v. Shirer*, 20 S. C. 392, 98 Am. Dec. 126, 87 Am. St. Rep. 22, 33, 17 L. R. A. 484, and *State v. Butler*, 21 S. C. 353, 87 Am. St. Rep. 39, L. R. A. 1917B, 1268, holding that all the elements of larceny must exist, except that of depriving the owner of possession, the court concludes: "The animus furandi must exist. * * * We must be satisfied beyond a reasonable doubt, by the testimony, that this * * * passed into the hand of Murray, * * * and that while so in his hands * * * he, with a fraudulent intent, converted the same to his own use. It will not be enough, if any of these elements is wanting. They must all exist." *Bell v. Clinton Oil Mill*, 129 S. C. 242, 124 S. E. 7, 11.

Where an agent receives and retains money which he knows belongs to his principal, with intent to defraud his principal, he is guilty. *State v. Ezzard*, 40 S. C. 312, 313, 18 S. E. 1025, 87 Am. St. Rep. 28, 43.

Bailee driving automobile out of state.

—In view of this section, the conduct of bailee, hiring automobile, in driving car out of state and failing to return it, held to constitute theft within meaning of policy insuring automobile against loss by theft, robbery, or pilferage. *Simpson v. Palmetto Fire Ins. Co.*, 145 S. C. 405, 143 S. E. 184.

Indictment. — Where the indictment shows the trust to consist in that which is different from that alleged in the indictment, it is fatal. *State v. Green*, 5 S. C. 65, 66.

The state must prove the exact trust which has been breached. *State v. Cody*, 180 S. C. 417; 186 S. E. 165.

The charge of breach of trust with fraudulent intention relating to the unlawful conversion of mill stock cannot be sustained by proof of a breach of trust with a fraudulent intention relating to the subsequent conversion of money, the proceeds derived from the sale of the stock. *State v. Cody*, 180 S. C. 417; 186 S. E. 165.

An indictment in breach of trust with fraudulent intention is sufficient if the offense be so described that the defendant may know how to answer it, the court what judgment to pronounce, and that a conviction or acquittal on it may

be pleaded in bar of another indictment for the same offense. *State v. Wells*, 162 S. C., 509, 161 S. E., 177.

As to sufficiency of indictment, see note to § 1003.

Time.—Time is not an element in the crime of breach of trust with fraudulent intention; and it is not necessary to prove either the precise time or the precise amount laid in the indictment. *State v. Wells*, 162 S. C., 509, 161 S. E., 177.

See generally *State v. Daniel*, 165 S. C., 280, 163 S. E., 721.

Proof. — Proof beyond a reasonable doubt of a fraudulent intention is necessary before the crime of breach of trust is complete. *State v. McCann*, 167 S. C. 393; 166 S. E. 411.

Venue.—Having been entrusted with property in one county, if the person entrusted, in that county, formed the in-

tention of fraudulently appropriating it to his own use, and, pursuant to such intention, "what" with it to another county where he accomplished his object his crime maybe deemed committed in the place where he received the property and formed the criminal intent. (9 RCL 1293). *State v. McCann*, 167 S. C. 393; 166 S. E. 411.

State cannot appeal.—Where, at conclusion of testimony offered by prosecution, magistrate granted defendant's motion to dismiss warrant on ground that evidence did not sustain charge tht defendant had breached a trust with fraudulent intent, the state could not appeal from order of circuit court sustaining order of magistrate dismissing the charge. *State v. Ludlaw*, 189 S. C. 69, 200 S. E. 361.

§ 1150. Safe-cracking.—Any person convicted of using any explosive in or about a safe used for keeping money or other valuables, with intent to commit larceny or any other crime, shall be deemed guilty of felony, and be sentenced to the penitentiary during the term of his life: *provided*, that if the jury recommend the defendant to the mercy of the court, a sentence of not less than ten years' imprisonment may be imposed, in the discretion of the court.

1932 Code, § 1150; Cr. C. '22, § 44; Cr. C. '12, § 191; 1904 (14) 396; 1907 (25) 580.

This section is constitutional. — The subject of the act from which it is taken was expressed in the title thereof. *State*

v. O'Day, 74 S. C. 448, 54 S. E. 607, Ann. Cas. 15A, 83.

§ 1151. Train robbery.—Any person or persons who may stop, or cause to be stopped, or impede, or cause to be impeded, or conspire together for that purpose, any locomotive engine, or any car or cars, on any road, in this State, by intimidation of those in charge thereof, by force, threats, intimidation or otherwise for the purpose of taking therefrom or causing to be delivered up to such persons or person forcing, threatening or intimidating, anything of value, to be appropriated to his or their own use, shall be guilty of train robbery, and, on conviction thereof, shall be punished by confinement in the penitentiary not less than two years nor more than twenty years.

1932 Code, § 1151; Cr. C. '22, § 45; Cr. C. '12, § 192; 1902 (23) 1095.

§ 1152. Robbery on trains, etc.—Any and all persons who may hereafter enter upon any locomotive engine, car or cars, on any railroad in this State, and by threats, the exhibition of deadly weapons, or by the discharge of any pistol or gun on or near any such engine, car or cars, induce or compel any person or persons, on such engine, car or cars, to submit and deliver up, or allow to be taken therefrom, or from him or them, anything of value, shall be guilty of train robbery, and, on conviction thereof shall be punished by imprisonment in the penitentiary not less than ten years nor more than twenty years.

1932 Code, § 1152; Cr. C. '22, § 46; Cr. C. '12, § 193; 1902 (23) 1095.

§ 1153. Removing, etc., brasses and packing from cars, a misdemeanor.—Any person who shall wilfully and maliciously, or with intent to steal, or with intent to injure, take or remove the brasses, bearings, waste, or packing from out any journal box or boxes, of any locomotive, engine, tender, carriage, coach, car, caboose, or truck used or operated upon any railroad, whether the same be operated by steam or electricity, shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by imprisonment in the penitentiary, or labor on the chaingang, for a period of not less than six months nor more than two years, or fined not less than fifty (\$50.00) dollars nor more than two hundred (\$200.00) dollars.

1932 Code, § 1153; Cr. C. '22, § 47; Cr. C. '12, § 196; 1905 (24) 965; 1906 (25) 6.

§ 1154. Entering house or vessel without breaking with intent to steal.—Any person who shall enter, without breaking, or attempt to enter, any house or vessel whatsoever, with intent to steal or commit any other crime, or shall conceal himself or herself in any house or vessel, with like intent, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished in the discretion of the court.

1932 Code, § 1154; Cr. C. '22, § 48; Cr. C. '12, § 198; 1905 (24) 849.

An indictment alleging entry with intent to steal, is sufficient, although it does not allege it was without breaking. *State v. Ross*, 83 S. C. 434, 65 S. E. 443, 23 A. L. R. 292, cited in *State v. Goins*, 122 S. C. 192, 115 S. E. 232, 235.

§ 1154-1. Break, or attempt break into any motor vehicle or compartment thereof or any vessel where kerosene, gasoline or lubricating oil is kept, with intent to steal or perpetrate crime misdemeanor. — Whoever shall break or attempt to break into any motor vehicle, or any compartment thereof, in the day time or in the night time, with intent to steal the same or any thing of value therefrom, or attached or annexed thereto or used in connection therewith, or in the perpetration of any criminal offense, or whoever shall break or attempt to break any tank, pump or other vessel where kerosene, gasoline or lubricating oil is stored or kept with intent to steal any such product therein contained shall be deemed guilty of a misdemeanor, and upon conviction, punishable by imprisonment on the public works of the county in which the offense is committed, or in the state penitentiary at hard labor for a term of not more than five years or by a fine of not more than one thousand (\$1,000.00) dollars, either or both, in the discretion of the court.

1935 (39) 478; 1936 (39) 1342.

§ 1155. Theft of electric current a misdemeanor.—Any person who has no contract, agreement, license or permission with or from any person or corporation authorized to manufacture, sell or use electricity for the purpose of light, heat or power, or with or from any authorized agent of such person or corporation for, the use of electrical current belonging to, or produced or furnished by, any such person or corporation, who shall wilfully withdraw, or cause to be withdrawn, in any manner, and appropriate such current from the wires of any such person or corporation, for his own use, or for the use of any other person or corporation, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding one hundred (\$100) dollars, or by imprisonment, not exceeding thirty (30) days. Any* person who shall aid, abet or assist such other

person in such withdrawing and appropriating of such current from such wires to or for the use of such other person, or to or for the use of any other person or corporation, shall be guilty of a misdemeanor, and shall, upon conviction, be punished in like manner.

1932 Code, § 1155; Cr. C. '22, § 49; Cr. C. '12, § 199; 1904 (24) 409; 1929 (36) 50.

§ 1156. Unlawful appropriation of gas a misdemeanor.—Any person who has no contract, agreement, license or permission with or from any person or corporation authorized to manufacture, sell or use gas for the purpose of light, heat or power, or with or from any authorized agent of such person or corporation, for the use of gas belonging to, or produced or furnished by, any such person or corporation, who shall willfully withdraw, or cause to be withdrawn, in any manner and appropriate such gas from the pipes or conduits of any such person or corporation, for his own use, or for the use of any other person or corporation, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not exceeding one hundred (\$100) dollars, or by imprisonment not exceeding thirty (30) days, or by both such fine and imprisonment. Any person who shall aid, abet or assist such other person in such withdrawing and appropriating of such gas from such pipes or conduits to or for the use of such other person, or to or for the use of any other person or corporation, shall be guilty of a misdemeanor, and shall, upon conviction, be punished in like manner.

1932 Code, § 1156; Cr. C. '22, § 50; Cr. C. '12, § 200; 1911 (27) 148.

§ 1157. Wrongful use of gas a misdemeanor.—Any person who has a contract, agreement, license or permission, oral or written with or from any person or corporation authorized to manufacture, sell or use gas for the purpose of light, heat or power, or with or from any authorized agent of the same, for the use of the gas belonging to, or produced or furnished by, any such person or corporation, for certain specified purposes, who shall wilfully and intentionally withdraw, or cause to be withdrawn, in any manner and appropriate to his own use, or to the use of any other person or corporation, for purposes other than those specified, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished as provided in section 1156. And any such person to whom such gas is furnished from or by means of a meter, who shall wilfully and with intention to cheat and defraud any of said persons or corporations, alter or interfere with such meter, or by any contrivance whatsoever withdraw or take off gas in any manner except through such meter, shall be guilty of a misdemeanor, and be punished as provided in section 1156.

1932 Code, § 1157; Cr. C. '22, § 51; Cr. C. '12, § 201; 1911 (27) 148.

§ 1158. Persons cheating or defrauding producers of electricity guilty of misdemeanor.—Any person who has a contract, agreement, license or permission, oral or written, with or from any person or corporation authorized to manufacture, sell or use electricity for the purpose of light, heat or power, or with or from any authorized agent of the same, for the use of the electrical current belonging to, or produced or furnished by, any such person or corporation, for certain specified purposes, who shall wilfully and intentionally withdraw, or cause to be withdrawn, in any manner, and

appropriate to his own use, or to the use of any other person or corporation, for purposes other than those specified, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished as provided in section 1155. And any such person to whom such electrical current is furnished from or by means of a meter, who shall wilfully and with intention to cheat and defraud any of said persons or corporations, alter or interfere with such meter, or by any contrivance whatsoever withdraw or take off electrical current in any manner except through such meter, shall be guilty of a misdemeanor, and be punished as provided in section 1155.

1932 Code, § 1158; Cr. C. '22, § 52; Cr. C. '12, § 202; 1904 (24) 410.

§ 1159. Renting of electric storage batteries and penalties for misuse.

(1) **"Rental battery" defined—mark of ownership—wrongful marking.**—As used in this section the words "rental battery" are defined as an electric storage battery loaned, rented or furnished for temporary use by any person, firm or corporation engaged in the business of buying, selling, repairing or recharging electric storage batteries. All such persons, firms or corporations may mark any such batteries belonging to them with the word "rental" or any other word of similar meaning, printed or stamped upon or attached to such battery together with such words as shall identify such batteries as the property of the person, firm or corporation so marking the same. It shall be unlawful for any person, firm or corporation to so mark any such batteries which are not the property of such person, firm or corporation.

(2) **Alteration of label unlawful.**—It is unlawful for any person, firm or corporation to remove, deface, alter or destroy the word "rental" on any rental battery or any other word, mark or character printed, painted or stamped upon or attached to any rental battery to identify the same as belonging to or being the property of any person, firm or corporation.

(3) **Unlawful for person other than owner to rent, etc., battery.**—It is unlawful for any person, firm or corporation other than the owner thereof to sell, dispose of, deliver, rent or give to any other person, firm or corporation any rental battery marked by the owner thereof as provided by subsection 1 hereof.

(4) **Unlawful to recharge, etc., battery owned and marked by another.**—It is unlawful for any person, firm or corporation engaged in the business of buying, selling, repairing or recharging electric storage batteries to recharge or repair any rental battery not owned by such person, firm or corporation marked by the owner thereof as provided by subsection 1 of this section.

(5) **Unlawful retention of rented battery—demand for possession.**—It is unlawful for any person, firm or corporation to retain in his, their or its possession for a longer period than ten (10) days, without the written consent of the owner, any rental battery marked as such by the owner, as provided by subsection 1 of this section. Demand must be made on any person who so retains a rental battery in his possession at least five days before a prosecution can be instituted: *provided, however*, that proof of a registered letter having been sent to the person so offending at his last known address shall be accepted as conclusive evidence of such demand.

(6) **Penalties.**—Any person, firm or corporation and the officers, agents,

employees and members of any firm or corporation violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof shall be sentenced to pay a fine not exceeding one hundred (\$100.00) dollars, or be imprisoned for a term of not exceeding thirty (30) days, at the discretion of the court.

1932 Code, § 1159; 1926 (34) 979; 1933 (38) 256; 1939 (41) 452.

§ 1159-1. Sale of rebuilt electric storage batteries.—Whoever assembles or rebuilds an electric storage battery for use on automobiles, in whole or in part, out of second-hand or used material such as containers, separators, plates, groups, or other battery parts, and sells same or offers for sale in the state of South Carolina without the word "Rebuilt" moulded into the side of the container in letters which are at least one inch high and five-eighths of an inch wide shall be guilty of a misdemeanor and upon conviction thereof shall be sentenced to pay a fine not exceeding one hundred (\$100.00) dollars or be imprisoned for a term not exceeding thirty (30) days.

1933 (38) 482.

§ 1160. Petit larceny.—Any simple larceny of any article of goods, choses in action, bank bills, bills receivable, chattels, or any article of personalty, of which by law larceny may be committed, and all of such fixtures and parts of the soil as were severed from the soil by an unlawful act, below the value of twenty dollars, shall be a misdemeanor and considered a petit larceny, and be punished by imprisonment in the county jail for not more than thirty days, or by a fine of not more than one hundred dollars.

1932 Code, § 1160; Cr. C. '22, § 53; Cr. C. '12, § 203; Cr. C. '02, § 164; G. S. 2498; R. S. 160; 1866 (13) 407; 1887 (19) 820.

General consideration.—Petit larceny is not a felony, but only a misdemeanor. *Cherry v. McCants*, 7 S. C. 224. See also, *State v. Clary*, 24 S. C. 116.

Prior to its amendment in 1887 (19 stat. 819), magistrates did not have jurisdiction of petit larceny under this section. *State v. Williams*, 13 S. C. 546, 73 Am. St. Rep. 101, Ann. Cas. 14A, 1081. But now a justice of the peace has jurisdiction of the offense. *State v. Cooler*, 30 S. C. 105, 8 S. E. 692, 37 Am. St. Rep. 595, 3 L. R. A. 881, 18 L. R. A. 474, 50 L. R. A. (N. S.) 970, Ann. Cas. 12A, 889, Ann. Cas. 17D, 457.

Property subject of larceny. — This section does not include stealing of live stock. *State v. Moore*, 30 S. C. 69, 8 S. E. 437. But a dog is chattel within the meaning of this section. *State v. Langford*, 55 S. C. 322, 33 S. E. 370, 74 Am. St. Rep. 746, 8 Am. St. Rep. 589. See also, *State v. Wheeler*, 15 Rich. 362.

Larceny may be committed of goods obtained by delivery from owner, *animo furandi*. *State v. Gorman*, 2 N. & McC. 90, 10 Am. Dec. 576, 43 Am. Dec. 658, 45 Am. Dec. 186, 57 Am. Dec. 272, 26 A. L. R. 384. So also of goods taken and carried away without felonious intent, afterwards feloniously appropriated. *State v. Davenport*, 38 S. C. 348, 17 S. E. 37,

88 Am. St. Rep. 602, 97 Am. St. Rep. 794.

Indictment.—This offense being exclusively a statutory one, an indictment at common law will not lie; and the indictment, therefore, must conclude, "contrary to the form of the statute," etc. *State v. Gray*, 14 Rich. 174.

An indictment for stealing chickens of the value of five dollars from fowl house charges only petit larceny. *State v. Johnson*, 45 S. C. 483, 23 S. E. 619.

As to sufficiency of description of money in indictment, see *State v. Evans*, 15 Rich. 31, 51 Am. Dec. 234, 36 L. R. A. (N. S.) 942. As to variance between proof and allegation pertaining to description of property, see *State v. Cockfield*, 15 Rich. 316.

On indictment for grand larceny jury may find petit larceny. *State v. Wood*, 1 Mill 29. But where two are jointly indicted, one cannot be convicted of petit larceny and the other of grand larceny. *State v. Wilson*, 3 McC. 187. And verdict against only one of the defendants may be rendered. *State v. Lee*, 29 S. C. 113, 7 S. E. 44.

Exact value need not be shown.—If article is of any value, the exact value need not be shown to sustain a conviction for petit larceny. *State v. Slack*, 1 Bail. 330, 78 Am. Dec. 258.

§ 1161. Receiving stolen goods misdemeanor.—In all cases whatever, where any goods or chattels, or other property of which larceny may be committed, shall have been feloniously taken or stolen by any person or persons, every person who shall buy or receive any such goods or chattels or other property, knowing the same to have been stolen, shall be held and deemed guilty of, and may be prosecuted for, a misdemeanor, and upon conviction thereof shall be punished by imprisonment, although the principal felon or felons be not previously convicted, and whether he, she or they is, or are, amenable to justice or not: *provided*, that when the chattel or other property stolen shall be of less value than twenty dollars, the punishment shall not exceed imprisonment in the county jail for thirty days, or a fine of not more than one hundred dollars.

1932 Code, § 1161; Cr. C. '22, § 54; Cr. C. '12, § 204; Cr. C. '02, § 165; G. S. 25, 26a; R. S. 161; 1712 (2) 543; 1760 (4) 309; 1887 (19) 814.

I. General Consideration.

II. Guilty Knowledge and Fraudulent Intent.

III. The Indictment.

IV. Evidence.

V. Sentence and Punishment.

I. GENERAL CONSIDERATION.

At common law, receiver was not an accessory. State v. Butler, 3 McC. 383, Ann. Cas. 17C, 501; State v. Council, Harp. 53.

It is not necessary that the whole of the property should have come into possession of the accused. It is enough if he "received" one of several articles. Neither is it required that he should have received all the property at the same time. State v. Crawford, 39 S. C. 343, 17 S. E. 799, 801, 62 L. R. A. 274, 10 A. L. R. 1123.

Where party received goods from a servant and concealed them, under circumstances sufficient to indicate that servant had stolen them, he was held guilty of receiving stolen goods. State v. Teideman, 4 Strob. 303.

A wife receiving stolen goods, knowing them to be stolen, jointly with her husband and under his coercion, her greater activity in consummating the offense will not, as a matter of law, make her guilty. State v. Houston, 29 S. C. 108, 6 S. E. 943, 33 Am. St. Rep. 94, 22 L. R. A. (N. S.) 840, Ann. Cas. 12B, 1113, 4 A. L. R. 270.

An instruction "that if defendant received less than \$20 worth of stolen goods, he is not guilty," if erroneous, is harmless. State v. Crawford, 39 S. C. 343, 17 S. E. 799, 62 L. R. A. 274, 10 A. L. R. 1123.

Instruction that one can be convicted of receiving stolen goods if he receives the goods under such circumstances that a person of ordinary reason, judgment, prudence would know they were stolen is erroneous. State v. Hamilton et al., 166 S. C., 274, 164 S. E., 639.

II. GUILTY KNOWLEDGE AND FRAUDULENT INTENT.

Knowledge completes the crime.—The buying of goods and receiving them, knowing them to be stolen, completes the crime. State v. Winters, 83 S. C. 251, 253, 65 S. E. 243; State v. Scovel, 1 Mill 274; State v. Gibson, 83 S. C. 34, 64 S. E. 607, 916.

And must be alleged with the intent.—It is necessary that the guilty knowledge should be alleged, as well as the fraudulent intent. State v. Crawford, 39 S. C. 343, 17 S. E. 799, 801, 62 L. R. A. 274, 10 A. L. R. 1123.

Knowledge must exist at time property is received.—Knowledge of the theft, on the part of the receiver, is an essential element of the offense of receiving stolen goods, which knowledge must exist at the moment the property is received. State v. Rountree, 80 S. C. 387, 61 S. E. 1072, 22 L. R. A. (N. S.) 833, Ann. Cas. 13D, 166.

Although such knowledge need not be actual, a belief being sufficient.—Actual and positive knowledge that goods have been stolen is not required on the part of the receiver, in order to establish the offense of receiving stolen goods; a belief that the goods have been stolen being sufficient. State v. Rountree, 80 S. C. 387, 61 S. E. 1072, 22 L. R. A. (N. S.) 833, Ann. Cas. 13D, 166.

But failure to pursue an inquiry is not the equivalent of guilty knowledge.—The rule, in civil actions, that knowledge of such facts as are sufficient to put a reasonably prudent man on inquiry, is equivalent to notice, does not apply to a prosecution for receiving stolen goods, in which mere inadvertent failure to pursue an inquiry with reasonable diligence is not the equivalent of guilty knowledge and a fraudulent intent, which are essential elements of that crime. State v. Rountree, 80 S. C. 387, 61 S. E. 1072, 22 L. R. A. (N. S.) 833, Ann. Cas. 13D, 166. See also, State v. Daniels, 80 S. C. 368, 61 S. E. 1073, 22 L. R. A. (N. S.) 834.

A conviction of one of stealing cer-

tain property is not conclusive against another, who received the property, on his prosecution for receiving stolen property, that the property was stolen. *State v. Daniels*, 80 S. C. 368, 61 S. E. 1073, 22 L. R. A. (N. S.) 834.

III. THE INDICTMENT.

Time or place of larceny, or value of property received need not be stated.—*State v. Crawford*, 39 S. C. 343, 17 S. E. 799, 62 L. R. A. 274, 10 A. L. R. 1123.

Nor name of principal felon.—In an indictment for receiving stolen goods it is not necessary to state the name of the principal felon, or, if stated, to prove it. *State v. Coppenburg*, 2 Strob. 277.

An indictment for buying and receiving stolen goods is good. *State v. Posey*, 7 Rich. 484, 497.

Joinder of counts and parties.—As to joinder of counts for larceny and receiving stolen good in same indictment, the same parties not being in both counts, see *State v. Thomas*, 75 S. C. 477, 55 S. E. 893.

It is not a misjoinder of parties to charge three defendants with burglary in one count of an indictment, and larceny in the second count, and to charge two of them with receiving stolen goods from the other in a third count. *State v. Woodard*, 38 S. C. 353, 17 S. E. 135.

One cannot be convicted for this offense under same indictment against him and others for burglary and grand larceny, and against him alone for this offense. *State v. Nelson*, 14 Rich. 169, 199, 58 Am. Dec. 248, 92 Am. Dec. 663, 94 Am. Dec. 130.

IV. EVIDENCE.

Evidence as to previous purchases.—In a prosecution for receiving stolen goods, evidence as to previous purchases from one of the defendants by his co-defendants is admissible. *State v. Rountree*, 80 S. C. 387, 61 S. E. 1072, 22 L. R. A. (N. S.) 833, Ann. Cas. 13D, 166.

Other stolen goods.—Evidence that other stolen goods were found in defendant's possession is admissible to show guilty knowledge. *State v. Crawford*, 39 S. C. 343, 17 S. E. 799, 62 L. R. A. 274, 10 A. L. R. 1123.

Finding similar goods in possession of another.—The admission of evidence of finding in the possession of another goods similar to those found in defendant's possession is harmless. *State v. Crawford*, 39 S. C. 343, 17 S. E. 799, 62 L. R. A. 274, 10 A. L. R. 1123.

Evidence to show goods received prior to evidence of larceny.—In a prosecution for buying or receiving stolen goods, admitting evidence that the goods were

received prior to other evidence tending to show the larceny, was not erroneous. *State v. Johnson*, 119 S. C. 55, 110 S. E. 460.

See generally, *State v. Winters*, 83 S. C. 153, 65 S. E. 209.

V. SENTENCE AND PUNISHMENT.

Omission of alternative punishment does not make section unconstitutional.

—In a prosecution under this section, an exception that the statute violates the fourteenth amendment by depriving the accused of liberty without due process of law, and denying him the equal protection of the law because it declares that receiving stolen goods is a misdemeanor, and fixes the punishment, upon conviction, by imprisonment without the alternative of paying a fine, whereas all other misdemeanors in the state and under its laws are punished by fine or imprisonment with the alternative of paying a fine or being imprisoned, and because it fails to fix the alternative of paying a fine upon conviction of a misdemeanor, regardless of the value of the property received or stolen, is not well taken. *State v. Johnson*, 119 S. C. 55, 110 S. E. 460.

Thus, the imposition of a three-year sentence upon the defendant upon conviction of receiving stolen goods without the alternative of paying a fine, was not error. *State v. Johnson*, 119 S. C. 55, 110 S. E. 460.

The length of prison sentence rests in the sound discretion of the trial court, and the appellate court is not warranted in disturbing that discretion simply upon a challenge of it by the accused. *State v. Johnson*, 119 S. C. 55, 110 S. E. 460.

Effect of the proviso.—At first view, it might seem that the proviso contains a qualification, but it has no requirement, as to the value of the property, necessary to be traced to the accused on trial; it may be to meet the possible case of confederates, each of whom may have received his share of the fruits of a common enterprise. But, on the contrary, it would seem that the only purpose of the proviso was to reduce the punishment as therein declared "when the chattels or other property stolen shall be of less value than twenty dollars," showing clearly that conviction was contemplated even where the property stolen was of less value than \$20, the test as to the proper punishment being, not the value of the property found in possession of the defendant, but the value of the whole property stolen. *State v. Crawford*, 39 S. C. 343, 17 S. E. 799, 801, 62 L. R. A. 274, 10 A. L. R. 1123.

§ 1162. Firing turpentine farms.—It shall be unlawful for any person to set fire to any woods so near to any turpentine farm in this State as to injure or burn any such farm; and whoever shall wilfully and maliciously

set fire to any woods at any time, whereby such farm or farms are injured or burned, shall be adjudged guilty of a felony and liable to be punished at hard labor in the penitentiary for the period of one year, or fined in the sum of five hundred dollars.

1932 Code, § 1162; Cr. C. '22, § 55; Cr. C. 12, § 189; Cr. C. '02, § 155; G. S. 2494; R. S. 151; 1876 (16) 61.

§ 1163. Punishment for burning ricks of hay, kilns, etc., in night time.—Whoever shall in the night time maliciously, unlawfully and wilfully burn, or cause to be burned or destroyed, any ricks or stacks of hay straw, or grain or kilns shall, for every such offense, be punished by hard labor in the penitentiary for life or for a period not less than two years, according to the aggravation of the offense.

1932 Code, § 1163; Cr. C. '22, § 56; Cr. C. '12, § 190; Cr. C. '02, § 157; G. S. 2484; R. S. 154; 22 and 33 C. 2, c. 7; 1712 (II) 521; 1869 (14) 175; 1887 (19) 793.

See §§ 1134 and 1179.

§ 1164. Misdemeanor to interfere with fire and police alarm boxes.—Any person or persons who shall wilfully, maliciously or mischievously interfere with, cut or injure any pole or poles, wire or wires, insulator or insulators, alarm box or alarm boxes, giving false alarm from said box or boxes, breaking the glass in said box or boxes of the fire or police alarm systems in this State or any of the appliances or apparatus connected therewith, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be sentenced to hard labor in the state penitentiary, or on the chaingang, in such counties having chaingangs, for a term of not less than sixty days, or the payment of a fine of not more than two hundred (\$200.00) dollars.

1932 Code, § 1164; Cr. C. '22, § 57; Cr. C. '12, § 194; Cr. C. '02, § 156; R. S. 152; 1888 (20) 8; 1904 (24) 382; 1931 (37) 37.

§ 1165. Making, mending or possessing tools, etc., to be employed in crime, a misdemeanor.—A person who makes or mends, or causes to be made or mended, or has in his possession in the day or nighttime, any engine, machine, tool, false-key, picklock, bit, nippers, nitroglycerine, dynamite-cap, coil or fuse, steel wedges, drills, tap-pins or other implements or things adapted, designed or commonly used for the commission of burglary, larceny, safe cracking, or other crime, under circumstances evincing any intent to use or employ, or allow the same to be used or employed in the commission of a crime, or knowing that the same are intended to be so used, shall, upon conviction, be guilty of a misdemeanor. In either case he shall, upon conviction, be punished at the discretion of the court.

1932 Code, § 1165; Cr. C. '22, § 58; Cr. C. '12, § 195; 1907 (25) 580.

§ 1166. Altering and removing landmarks, a misdemeanor.—If any person or persons shall knowingly, wilfully, maliciously or fraudulently cut, fell, alter or remove any certain boundary tree, or other allowed landmark, such person or persons so offending shall be guilty of a misdemeanor, and upon conviction, shall be fined not exceeding one hundred dollars, or imprisoned not exceeding thirty days.

1932 Code, § 1166; Cr. C. '22, § 59; Cr. C. '12, § 197; 1902 (23) 1094.

See generally, *Williams v. Atlantic Coast Lumber Corp.*, 136 S. C. 423, 134 S. E. 390.

§ 1167. Drawing and uttering fraudulent check.—It shall be unlawful for any person in his own name or in any other capacity whatsoever, to obtain money or other property of any kind or nature whatever with fraudulent intent, or to obtain credit with like intent by means of a check, draft or order of which such person is maker or drawer, or which, though he is not maker or drawer, he, with like intent, utters or delivers or aids or abets another to utter or deliver. If such check, draft or order is not paid by the drawee, the person making, drawing or uttering the same shall be guilty of a misdemeanor; and the fact that such check, draft or order was not paid by the drawee because the maker or drawer did not have on deposit with the bank, person or firm or corporation upon which such draft, check or order was drawn, sufficient funds to pay the same in full when presented; and the further fact that the maker or drawer of such check, draft or order failed to pay the amount of same within seven (7) days after written notice sent to his last known address, shall, as against the maker or drawer of such check, draft or order, be prima facie evidence of fraudulent intent; and any person so convicted shall be punished by a fine or imprisonment, in the discretion of the court: *provided*, that if the amount of the check, draft or order be less than twenty (\$20.00) dollars the offense may be triable within the jurisdiction of the magistrate's court. The word "credit," as used in this section shall be construed to mean securing further advances of money or goods by means of a check, draft or order given in whole or in part payment of a then existing account.

1932 Code, § 1167; Cr. C. '22, § 60; Cr. C. '12, § 208; 1909 (26) 21; 1914 (28) 489; 1923 (33) 120.

See § 1549 for costs of magistrates in worthless check cases; for Marion county § 4949.

Editor's note.—Prior to the amendment of 1923 this section did not require the presence of fraudulent intent. In *State v. Moore*, 128 S. C. 192, 122 S. E. 672, Mr. Justice Cothran in an able and interesting concurring opinion reviews the effect of this amendment, gives the history of the "bogus check" law, and discusses in detail the civil and criminal liability of the bad check "flasher."

The giving of an antedated check is but a promise to pay at a future time, and is not within this section. *State v. Winter*, 98 S. C. 294, 82 S. E. 419, L. R. A. 1918F, 986.

Effect of payment.—The clause of this section permitting payment within 7 days provides ample protection to one who innocently may have broken the law, and also offers a privilege to one who has guiltily done so. It is also conclusive that only the fraud mongers were aimed at by the law. *State v. Moore*, 128 S. C. 192, 122 S. E. 672, 677.

The amendment of 1923, not directing, as did the section of the 1922 code, which it supersedes, that prosecution for

drawing and uttering a check, without having sufficient deposit to meet it, shall be discontinued on payment of amount of check and costs, the prosecution still had the right to proceed with the trial of the case, notwithstanding such payment, and so defendant had right to insist on a trial. *State v. Lackey*, 142 S. C. 62, 140 S. E. 232.

Evidence.—In prosecution for drawing draft on employer payable to named bank without sufficient funds with employer to meet the draft, in violation of this section, in which there was no evidence that he did not have ample money in the hands of his employer to meet the draft, or that the draft was turned down for that reason, or that he obtained any money from the bank, and where the evidence showed that the cashier of the bank to whom he had given draft represented third party from whom employee had purchased goods for employer and did not act in his capacity as cashier of the bank, the court should have directed a verdict for the defendant. *State v. Poe*, 118 S. C. 144, 110 S. E. 118.

Damages.—See generally *Turner v. Montgomery Ward & Co. et al.*, 165 S. C., 253, 163 S. E., 796.

§ 1168. Unlawful fraudulently to use name of corporation or appropriate its property.—Any officer, agent, clerk or servant of a corporation which is organized or doing business in this State who wilfully uses the name of such corporation, or his own name as such officer, agent, clerk or servant to obtain money or anything of value or credit upon the credit of such corporations for his own use or benefit, without authority from such corporation, or who fraudulently lends, invests or appropriates the money or disposes of the property of such corporation, or fraudulently converts it, shall be punished by imprisonment in the state prison for not more than ten years.

1932 Code, § 1168; Cr. C. '22, § 61; Cr. C. '12, § 210; 1909 (26) 21.

This section is listed in *State v. Moore*, 128 S. C. 192, 122 S. E. 672, as an example of a section in which the element of intention to defraud is omitted.

§ 1169. Stealing melons and fruit—punishment.—Whoever shall steal from the premises of another any melons or fruits, whether severed from the freehold or not, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by imprisonment for not more than thirty days, or by fine of not more than fifty dollars.

1932 Code, § 1169; Cr. C. '22, § 62; Cr. C. '12, § 218; Cr. C. '02, § 166; R. S. 162; 1886 (19) 522.

§ 1169-1. Steal tobacco plants from tobacco plant beds—misdemeanor.—Whoever shall steal tobacco plants from tobacco plant beds, the property of another, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by imprisonment of not more than thirty (30) days, or by a fine of not more than one hundred (\$100.00) dollars.

1938 (40) 1621.

§ 1170. Obtaining goods under false tokens or letters in another's name.—Whoever shall, falsely and deceitfully, obtain or get into his or their hands or possession, any money, goods, chattels, jewels or other things, of any other person or persons, by color and means of any false token or counterfeit letter made in any other man's name, every person or persons so offending and being thereof lawfully convicted, shall suffer such imprisonment as the court may adjudge: *provided*, that when the money, goods, chattels and other things so obtained do not exceed in value twenty dollars, then the said offense shall be punished by a fine not to exceed one hundred dollars, or by imprisonment for a term not exceeding thirty days.

1932 Code, § 1170; Cr. C. '22, § 63; Cr. C. '12, § 219; Cr. C. '02, § 167; 33 H. 8, c. 1; 1712 (2) 476; 1894 (21) 824.

§ 1171. Obtaining property by false pretenses.—Any person who shall, by any false pretense or representation, obtain the signature of any person to any written instrument, or shall obtain from any other person any chattel, money, valuable security, or other property, real or personal, with intent to cheat and defraud any person of the same, shall be guilty of a misdemeanor, and shall, on conviction, be sentenced to pay a fine not exceeding five hundred dollars, and undergo an imprisonment not exceeding three years: *provided, always*, that if the sum in the written instrument or the value of the property so obtained does not exceed twenty dollars, the punishment shall be by fine not exceeding one hundred dollars, or by imprisonment not exceeding thirty days: *and provided, further*, that if upon

the trial of any person indicted for such a misdemeanor, it shall be proved that he obtained the property in such a manner as to amount in law to larceny, he shall not, by reason thereof, be entitled to be acquitted of such misdemeanor; and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for larceny upon the same facts.

1932 Code, § 1171; Cr. C. '22, § 64; Cr. C. '12, § 220; Cr. C. '02, § 168; G. S. 2499; R. S. 162; 1876 (26) 39; 1893 (21) 507; 1894 (21) 824.

Intent an essential element.—It is perfectly manifest from the express terms of the statute that an intent to cheat and defraud is an essential element of the statutory crime, and it is elementary that every essential element of the crime must be alleged and proven. *State v. Hicks*, 77 S. C. 289, 57 S. E. 842, 843.

And such intent is a question for jury.—On trial for obtaining property under false pretenses, where the false pretenses are shown, the question of intent is a question of fact to be submitted to the jury, and it is error for the court to draw the inference of a fraudulent intent. *State v. Hicks*, 77 S. C. 289, 57 S. E. 842.

Promise to do something in the future not a pretense.—False pretense is such a fraudulent representation of an existing or past fact, by one who knows it not to be true, as is adapted to induce the person to whom it is made to part with something of value. A mere promise to do something in the future is not such a pretense. *State v. Haines*, 23 S. C. 170, 25 Am. St. Rep. 379, 7 L. R. A. (N. S.) 280, 17 A. L. R. 200.

But representation of material fact constitutes the offense.—An indictment, under this section, charging that accused falsely pretended that a certain horse was sound in every respect, which pretense he knew to be false, whereby he obtained another horse, the property of such witness, with intent to cheat and defraud him, stated facts constituting a crime; the representation that the horse was sound in every respect being the statement of a material fact and not an opinion. *State v. Stone*, 95 S. C. 390, 79 S. E. 108, 49 L. R. A. (N. S.) 481.

Whether misdemeanor or felony attempt.—In *State v. Redman*, 121 S. C. 139, 113 S. E. 467, Mr. Justice Cothran discusses this question with his habitual perspicuity. He says: "In the first place, I think that the characterization of the offense, declared in section 1316 as a misdemeanor, was intended rather as the declaration of a legal infraction than as a classification, in contradistinction to a felony, particularly in reference to an

offense essentially *malum in se*, and possibly involving many times the standard of valuation in grand larceny. But, construing the statute strictly as classifying the offense as a misdemeanor in the technical sense of the word, I do not think it follows by any means as 'elementary law' that an indictment will not lie for an attempt to commit a misdemeanor."

Indictment.—In *State v. Gellis*, 158 S. C. 471, 155 S. E. 849, the indictment was held to sufficiently indicate the person to whom the representation was made, to show in what particular such representations were false, and to charge the crime with sufficient particularity to put defendant on notice.

On an indictment for obtaining money from a county by false pretenses, it is immaterial whether the county supervisor and the commissioner knew of, and participated in, the fraud or not. *State v. Talley*, 77 S. C. 99, 57 S. E. 618, 122 Am. St. Rep. 559, 11 L. R. A. (N. S.) 938, 43 L. R. A. (N. S.) 669, Ann. Cas. 17D, 628, 21 A. L. R. 180.

In a prosecution for falsely pretending, in connection with a horse trade, that the horse traded by accused was sound in every respect, evidence as to the representations made by him and as to his knowledge of their falsity was held sufficient to support a conviction. *Staate v. Stone*, 95 S. C. 390, 79 S. S. 108, 49 L. R. A. (N. S.) 481.

Evidence.—As to admissibility of telephone conversations in prosecution for obtaining money by false pretenses, see *State v. Gellis*, 158 S. C. 471, 155 S. E. 849.

As to obtaining goods by means of false representation as to the balance due on a note, see *State v. Freeman*, 43 S. C. 105, 20 S. E. 974.

An indictment, charging obtaining money by false pretenses, is not sustained by proof of obtaining the satisfaction of a debt by false representation of the value of the property given in satisfaction. *State v. Daniel*, 83 S. C. 309, 65 S. E. 236, Ann. Cas. 12C, 800, 17 A. L. R. 912, 923.

§ 1172. Stealing grain or cotton from the field.—Whoever shall steal from the field any grain, cotton or vegetables, whether severed from the freehold or not, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by imprisonment for not more than five years,

or by fine of not more than five hundred dollars; except that when the amount stolen shall not exceed ten dollars in value, the punishment shall be by imprisonment for not more than thirty days nor less than twenty days, or by a fine of not more than one hundred nor less than fifty dollars.

1932 Code, § 1172; Cr. C. '22, § 65; Cr. C. '12, § 221; Cr. C. '02, § 169; G. S. 2487; R. S. 164; 1826 (6) 284; 1866 (13) 405; 1879 (17) 77; 1885 (19) 140; 1903 (24) 111.

What property included.—Corn growing in the field is included in this section, though not severed from the soil. *State v. Stephenson*, 2 Bail. 334, 57 Am. Dec. 277, 88 Am. St. Rep. 591, 49 L. R. A. (N. S.) 970, Ann. Cas. 17C, 501. Peas are included under grain. *State v. Williams*, 2 Strob. 474, 475, 49 L. R. A. (N. S.) 970.

Section applies to crops before they are gathered.—This section applies to the taking of the particular kind of property mentioned from the field, before it is gathered by the owner, and not to the taking of the said property simply because it happened to be in the field; the object of the section being to protect field crops until they are gathered and housed, or at least severed and harvested. *State v. Washington*, 26 S. C. 604, 2 S. E. 623, 49 L. R. A. (N. S.) 970, approving the holding in *State v. Shuler*, 19 S. C. 142.

Therefore, an indictment charging stealing corn "in the field" is fatal under this section, which makes stealing corn "from the field" a felony. But the words "stealing from the field" are not error in an indictment for petit larceny. *Id.* See also, *State v. Nelson*, 28 S. C. 16, 4 S. E. 792.

The 1866 amendment of this section, making stealing from the field any grain or cotton not yet severed a felony, was evidently intended to remove the doubt arising under the act of 1826 whether stealing grain not yet severed from the

field was a crime; nothing having been said in that act as to severance from the field. *State v. Washington*, 26 S. C. 604, 2 S. E. 623, 49 L. R. A. (N. S.) 970.

Unsevered crops are regarded as realty with certain statutory exceptions (this section, section 8717, and section 8996), and claim and delivery will not lie for such crops. *Norwood v. Canton*, 176 S. C. 472, 180 S. E. 453.

A laborer working under a verbal contract with a farmer for a part of the crop may commit a larceny by taking and carrying away a portion of the crop with intent to steal it. *State v. Saunders*, 52 S. C. 580, 582, 30 S. E. 616, 82 Am. St. Rep. 45, 88 Am. St. Rep. 566, 115 Am. St. Rep. 437, Ann. Cas. 12C, 800, 17 A. L. R. A. 912; *State v. Gay*, 1 Hill 364, 88 Am. St. Rep. 596.

Court's discretion as to alternative punishment.—This section, in making provision for an alternative punishment, leaves it to the court, and not to the prisoner, to determine whether the sentence shall be by fine or imprisonment. *State v. Davis*, 86 S. C. 208, 68 S. E. 532.

Property which was valued at more than twenty dollars.—The Act of 1893, XXI, 411, attempting to give magistrates jurisdiction where the property did not exceed \$20 in value, was held unconstitutional in *State v. Crosby*, 51 S. C. 247, 28 S. E. 529. And the provision as to larceny from the field was left out of the amended Act of 1894, XXI, stats. 824.

§ 1173. Fraudulent impersonation of officers a misdemeanor.—Whoever, with intent to defraud either the state of South Carolina, any county or municipal government or any person, shall falsely assume or pretend to be an officer or employee acting under the authority of the government, county, State or municipal, or any department thereof, and shall take upon himself or herself to act as such officer, or shall in such pretensive or pretended character demand, obtain or receive from any person or persons or any officer of the State, county or municipal government any money, paper, document or other valuable things, shall be guilty of a misdemeanor and be punished by fine or imprisonment, or by fine and imprisonment, in the discretion of the court: *provided*, that if the property or thing obtained shall be of less value than twenty (\$20.00) dollars, the fine shall not exceed one hundred (\$100.00) dollars, or imprisonment for thirty days and shall be in the jurisdiction of the magistrate's court.

1932 Code, § 1173; Cr. C. '22, § 66; 1920 (31) 753.

A constable collecting excessive taxes, self, was not guilty of impersonating an part of which he appropriated to him- officer in violation of this section. He

was an officer; and the fact that he was authority, does not constitute the offense. not legally authorized to make the col-State v. Robertson, 133 S. C. 126, 130 S. E. lection, although apparently armed with 212.

§ 1174. Use of property of Oconee county, except by employees, unlawful.

—It shall be unlawful for any person or persons to use any automobile, truck, automobile accessories, gas, motor oils or other property, the property of Oconee County, except such person or persons being in the actual employment of said county at such time. It shall be unlawful for any person or persons to use any automobile, truck, automobile accessories, gas, oils or other property of the county unless such person or persons so using same shall at such time be in the actual discharge of their duties as agents or servants of said county and at such time in the actual discharge of such duties. It shall be unlawful for any person or persons who may have the custody or control of any property mentioned in this section to permit the same to be used in violation hereof. Any person or persons violating the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction be fined not less than twenty-five (\$25.00) dollars nor more than one hundred (\$100.00) dollars, or sentenced not less than ten days nor more than thirty days, and shall forfeit all pay due them by said county and shall be subject to be removed from office.

1932 Code, § 1174; 1928 (35) 1151.

§ 1174-1. Use of property of Cherokee or Berkeley Counties by non-employees.

—It shall be unlawful for any person or persons to use any automobile, truck, automobile accessories, gas, motor oils or other property, the property of Cherokee County, and county of Berkeley, except such person or persons being in the actual employment of said county at such time. It shall be unlawful for any person or persons to use any automobile, truck, automobile accessories, gas, oils or other property of the county unless such person or persons so using same shall at such time be in the actual discharge of their duties as agents or servants of said county and at such time in the actual discharge of such duties. It shall be unlawful for any person or persons who may have the custody or control of any property mentioned herein to permit the same to be used in violation of this section. Any person or persons violating the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction be fined not less than twenty-five (\$25.00) dollars nor more than one hundred (\$100.00) dollars or sentenced to not less than ten days nor more than thirty days and shall forfeit all pay due them by said county and shall be subject to be removed from office.

1932 Code, § 1323; 1928 (35) 1163.

§ 1175. Abusing or mutilating court house of Chester County.—(1) It shall be unlawful for any one to spit upon the stairway, floors or walls in any of the halls, offices, court rooms, toilets, or any other room of the court house of Chester County, or strike matches upon any of the walls of, or throw burning matches upon any of the floors of the said court house, or in any other way abuse or mutilate the said court house building, or to abuse or mutilate any of the furniture or equipment of the same in any of the ways above mentioned.

(2) That it shall be the duty of the sheriff and his deputies, the magistrate of district No. 1 and his constable, the members of the board of directors, the clerk of court and his deputy, and all other county officers whose offices are in the court house, to enforce the provisions of this section. Any violations of the provisions of this section during any sessions of this court shall be construed as contempt of court and punishable by the court as such. Anyone violating the provisions of subsection 1 of this section shall be guilty of a misdemeanor, and be punished by fine not exceeding ten (\$10.00) dollars, or imprisonment for ten (10) days, in the discretion of the court.

1932 Code, § 1175; 1929 (36) 94.

§ 1176. Abusing or mutilating court houses of Marion and Pickens Counties.—It shall be unlawful for any person to spit upon the floors, stairway or walls in any of the halls, offices, court rooms, toilets, or any other room of the court house of Marion and Pickens Counties, or strike matches upon any of the walls, or throw burning matches, lighted cigars or cigarettes upon any of the floors of the said court house, or otherwise abuse or mutilate the said court houses, or to abuse or mutilate any of the furniture or equipment therein. It shall be the duty of the sheriffs and their deputies, the magistrates of the towns of Marion and Pickens and their constables, the members of the board of county commissioners, the clerk of court and all other county officers whose offices are in the court house to enforce the provisions of this section. Any violations of the provisions of this section during any session of the court shall be construed as contempt of court and punishable by the court as such.

Any one violating the provisions of this section shall be guilty of a misdemeanor, and shall be punished by a fine not exceeding ten dollars, or imprisonment for ten days, in the discretion of the court. The board of commissioners of the counties are hereby required to have printed and properly posted in conspicuous places throughout the court house, placards containing the provisions of this section in its entirety.

1932 Code, § 1176; 1930 (36) 1136.

§ 1177. Wilful injury to court house or jail.—If any person, shall wilfully injure or destroy any part of any court house or jail in this State, or the enclosures of the same, or any part thereof, such person shall be liable to be indicted for such offense, and, upon conviction, be fined or imprisoned, at the discretion of the court.

1932 Code, § 1177; Cr. C. '22, § 67; Cr. C. '12, § 942; Cr. C. '02, § 656; G. S. 2708; R. S. 543; 1827 (6) 321.

§ 1177-1. Placing or throwing stink bombs, etc., in certain buildings or public places prohibited. — It shall be unlawful for any person or persons to place or deposit or throw any stink bombs or tear gas bomb or any substitute or device used therefor which contains foul or offensive odors in any public building, or store house, or theatre, or motion picture theatre, or any private residence, or any boarding house or other building where people lodge or reside, or within the curtilage of any such building, or on any sidewalk or street in front of any such building or in front of or near any rear or side entrance to any such building, or at any exit to any such

building, or in, at, or near any hole or vent, or ventilator in any such buildings: *provided, however*, the provisions hereof shall not apply to peace officers engaged in the discharge of their duty. Any person violating any of the provisions hereof shall be guilty of a misdemeanor and on conviction shall be punished by imprisonment for not more than one year, or by a fine of not more than one thousand (\$1,000.00) dollars, or both at the discretion of the trial judge.

1932 (38) 1534; 1933 (38) 137.

§ 1178. Keeping of sheep killing dogs prohibited.—All persons are hereby prohibited from buying, selling, receiving, giving away, or otherwise owning, controlling, having or keeping in possession any dog or dogs commonly called “sheep-killing,” and known to be such. The violation, knowingly, in any one or all respects, of the foregoing prohibition, shall be a misdemeanor, punishable, upon conviction, by a fine of not exceeding one hundred dollars, or imprisonment for not exceeding thirty days.

1932 Code, § 1178; Cr. C. '22, § 68; Cr. C. '12, § 212; 1909 (26) 121.

§ 1179. Burning stacks of corn, etc., in daytime.—Whoever shall maliciously, unlawfully, and wilfully burn, or cause to be burned or destroyed, any ricks or stacks of corn, or grain, or kilns, in the daytime, shall be adjudged guilty of a misdemeanor, and liable to be fined and imprisoned, in the discretion of the court, for said offense.

1932 Code, § 1179; Cr. C. '22, § 69; Cr. C. '12, § 213; Cr. C. '02, § 158; G. S. 2495; R. S. 155; 1828 (6) 367.

See §§ 1134 and 1163.

By construction of similar words in statutes 22 and 23, Charles II, chapter 7, it seems that the words “burn or caused to be burned or destroyed,” in this section, mean that the property must be de-

molished or unfitted for its purpose, and that by use of fire. *State v. De Bruhl*, 10 Rich. 23, 81 Am. Dec. 67, 101 Am. St. Rep. 24, 1 A. L. R. 1168.

§ 1180. Burning carts, wood, etc.—Whoever shall maliciously, wilfully, and unlawfully burn, or cause to be burned, any wain, cart, laden or to be laden, with coals or any other goods of merchandise, of any other person or persons, or maliciously, wilfully and unlawfully do burn, or cause to be burned, any heap of wood of any other person, prepared, cut, and felled, or to be prepared, cut, or felled, for making of coals, billets, or talwood, shall not only lose and forfeit unto the party grieved treble damages for such offense, to be recovered by action, but also shall be punished by fine and imprisonment, in the discretion of the court.

1932 Code, § 1180; Cr. C. '22, § 70; Cr. C. '12, § 214; Cr. C. '02, § 159; G. S. 2496; R. S. 156.

§ 1181. Carrying fire on lands of another, without permit.—It shall be unlawful for any person to carry a lighted torch, chunk, or coals of fire, in or under any mill or wooden building, or over and across any of the enclosed or unenclosed lands of another person at any time without the special permit of the owner of such lands, mill or wooden building, whether any damage result therefrom or not. Any person, upon conviction of a violation of the provisions of this section, shall be deemed guilty of a misdemeanor, and shall be subject to imprisonment in the county jail for a

term not to exceed thirty days, or to a fine not to exceed one hundred dollars.

1932 Code, § 1181; Cr. C. '22, § 71; Cr. C. '12, § 216; Cr. C. '02, § 161; R. S. 158; 1891 (20) 1045.

§ 1182. Burning, cutting, etc., untenanted or unfinished buildings—punishment.—Whoever shall maliciously, unlawfully and wilfully burn or cause to be burned, cut or cause to be cut or destroyed, any untenanted or unfinished house or building of any frame or frames of timber of any other person, made and prepared, or hereafter to be made or prepared, for or towards the making of any house or houses, so that the same shall not be suitable for the purposes for which it was prepared; and any tenant or tenants who shall wilfully and maliciously cut, deface, mutilate, burn, destroy or otherwise injure any dwelling house, outhouse, erection, building or crops then in the possession of such tenant or tenants, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by fine or imprisonment, or both, in the discretion of the court.

1932 Code, § 1182; Cr. C. '22, § 72; Cr. C. '12, § 217; Cr. C. '02, § 162; G. S. 2845; R. S. 159; 27 H. 8, c. 6, 1712 (2) 478; 1887 (19) 794; 1911 (27) 129.

Burning fodder house.—An indictment charging the burning of a fodder house is insufficient to charge a misdemeanor under this section, in the absence of an allegation that defendant was a tenant of the building burned. *State v. Jeter*, 47 S. C. 2, 24 S. E. 889, Ann. Cas. 12B, 453, Ann. Cas. 16B, 145.

Effect of acquittal of arson.—It is not

a defense upon trial for burning an untenanted house, that prisoner had been acquitted on trial for arson for same burning. *State v. Jenkins*, 20 S. C. 351, 77 Am. Dec. 697, 92 Am. St. Rep. 115, 148.

Defendant is entitled only to five peremptory challenges. *State v. Workman*, 15 S. C. 540, 18 L. R. A. (N. S.) 777.

§ 1183. Malicious injury to personal property—wounding of horses, etc.—Whoever shall wilfully, unlawfully and maliciously cut, shoot, maim, wound or otherwise injure or destroy any horse, mule, neat cattle, hog, sheep, goat, or any other kind, class, article, or description of personal property, the goods and chattels of another, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined or imprisoned, at the discretion of the judge before whom the case shall be tried: *provided*, that when the injury or loss of the property affected by such act or acts does not exceed twenty dollars, the punishment shall be a fine of not more than one hundred dollars, or imprisonment for a period of not more than thirty days.

1932 Code, § 1183; Cr. C. '22, § 73; Cr. C. '12, § 222; Cr. C. '02, § 170; G. S. 2500; R. S. 165; 37 H. 8, c. 6; 1712 (2) 478; 22 and 23 C. 3, c. 7; 1712 (2) 521; 1857 (12) 605; 1861 (12) 903; 1892 (21) 115; 1894 (21) 824.

What included by words other personal property.—Destruction of a large amount of oil in an oil tank was held to be within the meaning of the words personal property as used in this section in *State v. Switzer*, 59 S. C. 225, 37 S. E. 818, 128 Am. St. Rep. 165.

Whether a dog is embraced in the term "other personal property" was not determined in *State v. Trapp*, 14 Rich. 203, 40 L. R. A. 513. But in *State v. Cooper*, 110 S. C. 256, 96 S. E. 398, it was applied in the matter of the malicious killing of a hound dog.

Malicious injury to cow.—See *State v. Howard*, 15 Rich. 274, 35 L. R. A. 706, 3 A. L. R. 1331.

Indictment.—It is sufficient if the indictment contains a general description of the offense in the words of the section, although the manner of killing be not described. *State v. Cantrell*, 2 Hill 389.

Thus, a charge that the prisoner shot "one sow," is good. *Shubrick v. State*, 2 S. C. 21, 32 Am. Dec. 666, 128 Am. St. Rep. 167.

Evidence.—It is not necessary to prove malice towards the owner of the prop-

erty. *State v. Toney*, 15 S. C. 409, 70 Am. Dec. 498, 36 L. R. A. 207, 41 L. R. A. (N. S.) 436, L. R. A. 1915A, 1059; *State v. Doig*, 2 Rich. 179, 128 Am. St. Rep. 170, 61 L. R. A. 869, 19 L. R. A. (N. S.) 275. As to evidence of malice, see *State v. Murphy*, 86 S. C. 268, 68 S. E. 570.

Where a defendant admits that he is

on bad terms with another, he cannot be asked as to special collateral acts of bad humor. *Cobb v. Cater*, 59 S. C. 462, 38 S. E. 114, 19 L. R. A. (N. S.) 836.

The Act of 1857 was not repealed by the Act of December 19, 1865. *State v. Alexander*, 14 Rich. 247.

§ 1184. Malicious injury to real property.—Whoever shall wilfully, unlawfully, and maliciously cut, mutilate, deface, or otherwise injure any tree, house, outside fence, or fixture of another, or commit any other trespass upon real property in the possession of another, shall be guilty of a misdemeanor, and upon conviction thereof, shall be fined and imprisoned, at the discretion of the judge before whom the case shall be tried: *provided*, that when the damage to such property does not exceed twenty dollars, the punishment shall be a fine of not more than one hundred dollars, or imprisonment for a period of not more than thirty days. For the purpose of determining whether or not any school property has been maliciously injured as the offense of malicious mischief as above defined and as to whether or not there has been a trespass upon such property as this offense is defined in section 1190 and for all prosecutions under these penal statutes, and other statutes of a like nature, now, or hereafter to be enacted, the trustees of the respective school districts in this state in their official capacity shall be deemed to be the owners and possessors of all school property.

1932 Code, § 1184; Cr. C. '22, § 74; Cr. C. '12, § 223; Cr. C. '02, § 171; G. S. 2501; R. S. 166; 1857 (12) 605; 1892 (21) 93; 1893 (21) 411; 1894 (21) 824; 1935 (39) 262.

A magistrate is not deprived of jurisdiction by a plea of title to land.—Under this section a magistrate has jurisdiction of a complaint for a criminal trespass, where the damages are less than \$20, even though defendant sets up as his defense, under a plea of not guilty, that the prosecutors have no title, but that title is in his wife. *State v. Holcomb*, 63 S. C. 22, 40 S. E. 1017.

But magistrates had no jurisdiction before the act of 1892, the punishment being left to the discretion of the trial judge. *State v. Mays*, 24 S. C. 190.

The rule of proximate cause determines amount of damages.—Under this section, limiting the punishment for malicious injury to realty where the damage does not exceed \$20, the amount of damage is that which results from the wrongful act or trespass as a natural and probable consequence. *State v. DesChamps*, 126 S. C. 416, 120 S. E. 491.

For example, where defendant threw live nuts of nut grass on another's land, the damages to the land from a crop of nut grass was the proximate result, and it was improper to limit the damages to that occurring at the time the nuts were thrown on the land. *Id.*

And an indictment charging defendant with setting fire to a fodder-house and a corn-crib, which fails to allege that the damage exceeded \$20, is not

within the jurisdiction of the court of general sessions. *State v. Jeter*, 47 S. C. 2, 24 S. E. 889, Ann. Cas. 12B, 453, Ann. Cas. 16B, 145.

A mere license to plant the land in possession of owner does not give possession of real property required by this section such as will sustain an indictment for malicious trespass for cutting up the crop planted. *State v. Gadsden*, 20 S. C. 456.

Corporation which had agreed to purchase, as and when cut, all of merchantable timber on land did not have such ownership or possession of trees on land as to permit it to bring prosecution for wilfully, unlawfully, and maliciously cutting trees, especially as against one acting under instruction of owners in fee of land. *State v. Weeks*, 185 S. C. 277; 194 S. E. 12.

Act must be malicious.—To justify conviction for unlawfully and maliciously cutting trees, state required prove defendant was acting maliciously. *State v. Weeks*, 185 S. C. 277; 194 S. E. 12.

"Maliciously," as used above regarding cutting of trees, should be construed with a view to the popular concept of its meaning; that is, that the act was done from an innate or sheer meanness, and the act must denote a depraved and wicked spirit. *State v. Weeks*, 185 S. C. 277; 194 S. E. 12.

§ 1185. Merger of civil injury in crime.—Whenever any person shall be prosecuted for any of the misdemeanors in the two preceding sections created, the owner of the property injured shall not have the right to maintain a civil action for the same injury.

1932 Code, § 1185; Cr. C. '22, § 75; Cr. C. '12, § 224; Cr. C. '02, § 172; G. S. 2502; R. S. 167; 1857 (12) 605.

§ 1186. Penalty for marking or disfiguring animals of another—second offense.—Whoever shall be lawfully convicted of wilfully and knowingly marking, branding or disfiguring any horse, mare, gelding, filly, ass, mule, bull, cow, steer, ox or calf of, or belonging to, any other person, shall, for each and every horse, mare, gelding, colt, filly, ass, mule, bull, cow, steer, ox or calf which he shall or may be convicted of marking, branding or disfiguring as aforesaid, be subject to a penalty of one hundred dollars, or to imprisonment for a term not exceeding six months, or both, in the discretion of the court; and in case the said offender shall afterwards repeat or commit a like offense, on conviction thereof he shall be liable to a fine of two hundreds dollars, or to imprisonment for a term not exceeding one year, or both, in the discretion of the court, for each and every horse, mare, gelding, colt, filly, ass, mule, bull, cow, steer, ox or calf by him so marked, branded or disfigured.

1932 Code, § 1186; Cr. C. '22, § 77; Cr. C. '12, § 226; Cr. C. '02, § 173; G. S. 2503; R. S. 168; 1789 (5) 139; 1892 (21) 115.

Shaving the mane and cropping the hair from the tail of a mare does not constitute the offense of disfiguring. *State v. Smith, Chev.* 157.

§ 1187. Penalty for marking smaller animals of another—second offense.—Whoever shall be lawfully convicted of wilfully and knowingly marking, branding or disfiguring any sheep, goat or hog of, or belonging to, any other person shall, for each and every sheep, goat or hog which he shall or may be convicted of marking, branding or disfiguring, as aforesaid, be subject to a penalty of twenty-five dollars, or to imprisonment for a term not exceeding twenty days; and, in case the said offender shall afterwards repeat or commit a like offense, on conviction thereof he shall be liable to a fine of fifty dollars, or to imprisonment for a term not exceeding thirty days for each and every sheep, goat or hog by him so marked, branded, or disfigured.

1932 Code, § 1187; Cr. C. '22, § 78; Cr. C. '12, § 227; Cr. C. '02, § 174; G. S. 2504; R. S. 169; 1789 (5) 140; 1892 (21) 115.

See generally, *State v. Nichols*, 12 Rich. 15.
672, 32 Am. Dec. 666, 24 L. R. A. (N. S.)

§ 1188. Cutting or floating trees, etc., in rivers at night without sufficient light or men.—Any person who shall be found guilty of cutting any trees or tree tops, brush or logs, or throwing any refuse material whatever into any navigable river or harbor in South Carolina, or who shall float logs singly or in rafts in any manner whatsoever without being properly or plainly lighted at night, and attended by day with sufficient number of men to prevent said rafts and logs from negligently damaging property along the river banks, or from catching on snags, sinking and forming obstructions, or in any manner whatsoever interfering with the navigation or obstructing said rivers or harbors, shall be deemed guilty of a mis-

demeanor, and punished by fine not exceeding two hundred and fifty dollars, or by imprisonment not exceeding two years. And all such trees, logs, rafts, floating booms or pens of timber dangerous to navigation in said river may be captured and secured and properly rafted to market and sold, one half of the net proceeds over the expense of capturing and marketing to be paid to the county treasurer of the county in which such timber may be captured, and the other half to the person or persons capturing the same: *provided*, this section shall not apply to logs or timber accidentally drifting loose from a raft or from any stationary boom where timber is kept for proper use or for proper rafting, or to any logs floated off from the owner by a sudden freshet before his having an opportunity to raft the same.

1932 Code, § 1188; Cr. C. '22, § 79; Cr. C. '12, § 235; Cr. C. '02, § 181; G. S. 2505; R. S. 175; 1894 (21) 715; 1897 (22) 426.

§ 1189. Unlawful to leave abandoned wells open.—It shall be unlawful for any owner or tenant to permit or allow any abandoned wells to remain open and unprotected, curbed or fenced in, on any place or premises owned or occupied in this State.

Any person convicted of allowing or permitting such abandoned wells to remain open and unprotected, curbed or fenced in, shall be fined in the sum of ten dollars, or imprisoned not more than thirty days.

1932 Code, § 1189; Cr. C. '22, § 80; Cr. C. '12, § 240; 1904 (24) 383.

§ 1190. Entry on lands of another after notice prohibiting same a misdemeanor.—Every entry upon the lands of another, after notice from the owner or tenant prohibiting the same, shall be a misdemeanor, and be punished by fine not to exceed one hundred dollars, or imprisonment with hard labor on the public works of the county not exceeding thirty days: *provided*, that whenever any owner or tenant of any lands shall post a notice in four conspicuous places on the borders of any land prohibiting entry thereon, and shall publish once a week for four consecutive weeks such notice in any newspaper circulating in the county where such lands are situate, a proof of the posting and of publishing of such notice within twelve months prior to the entry, shall be deemed and taken as notice conclusive against the person making entry as aforesaid for hunting and fishing.

1932 Code, § 1190; Cr. C. '22, § 81; Cr. C. '12, § 241; Cr. C. '02, § 186; G. S. 2507; R. S. 176; 1866 (13) 406; 1883 (18) 43; 1898 (22) 811.

In general.—This section was meant to furnish the owner or tenant in possession of land the legal means to prevent any intrusion thereon by another after notice prohibiting any entry on the same. *State v. Green*, 35 S. C. 266, 268, 14 S. E. 619.

Where a tenant leases land for a calendar year, but does not go into actual possession until several days after the first of January, the tenant for the former year is the owner or tenant of the land. *State v. Gay*, 76 S. C. 83, 56 S. E. 668.

An affidavit must show plainly that the offense charged is entry upon lands

with notice, and not mere trespass upon them. *State v. Mays*, 24 S. C. 190.

An affidavit alleging trespass after notice is sufficient. *State v. Tenny*, 58 S. C. 215, 36 S. E. 555, 60 L. R. A. 199; *State v. Hallback*, 40 S. C. 298, 18 S. E. 919, L. R. A. 1916A, 816.

It is not necessary that the person giving the notice should hold the legal title to the land. *State v. Green*, 35 S. C. 266, 14 S. E. 619.

But its terms must be their ordinary acceptance, and they do not restrict the offense to those only who so enter under claim of title. *State v. Cockfield*, 15 Rich. 53.

§ 1191. Entry on another's lands for certain purposes.—Any person or persons entering upon the lands of another, for any one of the following purposes, of hunting, fishing, trapping, netting, gathering fruit, wild flowers, cultivated flowers, shrubbery, straw or turf, vegetables, herbs or cutting timber on the same, without the consent of the owner or manager thereof, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall pay a fine of not more than twenty (\$20) dollars, or be imprisoned at hard labor not more than thirty (30) days, for each and every offense.

1932 Code, § 1191; Cr. C. '22, § 82; Cr. C. '12, § 242; 1905 (24) 906; 1927 (35) 377.

§ 1192. Entry without permission on lands to gather shell fish for sale a misdemeanor.—It shall be unlawful for any person or persons to enter upon any lands owned or leased by another without the permission of the owner or the lessee, for the purpose of gathering clams, oysters or other shell fish for sale. Any person or persons entering upon the lands of another without permission from the owner or lessee of said lands for the purpose of gathering clams, oysters or other shell fish for sale, shall be deemed guilty of a misdemeanor and shall be fined not less than twenty (\$20.00) dollars, nor more than one hundred (\$100.00) dollars, for each and every offense, or punished by imprisonment for not less than five days nor more than thirty days.

1932 Code, § 1192; Cr. C. '22, § 83; 1920 (31) 998.

§ 1192-1. Not to be eavesdropper or "Peeping Tom" on premises of another.—It shall be unlawful for any person or persons to be an eavesdropper or a "Peeping Tom" on or about the premises of another, or to go about or upon the premises of another for the purpose of becoming an eavesdropper or a "Peeping Tom." The term "Peeping Tom," as used in this section, shall be defined to be one who peeps through windows or doors, or other like places, on or about the premises of another, for the purpose of spying upon or invading the privacy of the persons spied upon, and the doing of any other acts of a similar nature, tending to invade the privacy of such persons. Nothing in this section shall prevent duly constituted officers of the law from performing their official duties in ferreting out offenders or suspected offenders against the law, or in secretly watching a person suspected of violating the laws of the state of South Carolina or any municipality therein, for the purpose of apprehending such suspected violator. Any person found guilty of the violation of this section shall be deemed guilty of a felony and, upon conviction, shall be punished by a fine of not more than five hundred (\$500.00) dollars or shall suffer imprisonment for not more than three (3) years, either or both in the discretion of the court. *Provided, however,* the provisions of this section shall not be construed as giving such officers any additional rights and or powers upon private property but shall be construed as preserving only such powers as they had before.

1937 (40) 478.

§ 1193. Walking on roof of state house.—It shall be unlawful for any person, without the permission of the commission on state house and grounds or any member of said commission who are the custodians of the state

house, to enter upon or walk upon the roof of the state house. Any person violating the provisions of this section shall be punished by a fine of not more than one hundred (\$100.00) dollars, or imprisoned for not more than thirty (30) days on the public works of Richland County for each offense.
1932 Code, § 1193; 1929 (36) 215.

§ 1194. Trespassing on state house grounds forbidden.

(1) **Injury to trees, grass, shrubs, etc.**—It shall be unlawful for any person or persons to trespass upon the grass plots or flower beds of the state house grounds, to cut down, deface, mutilate or otherwise injure any of the trees, shrubs, grasses or flowers on said grounds, or to commit any other trespass upon any property of the State, real or personal, located thereon.

(2) **Watchmen made constables.**—For the purpose of enforcing the provisions of this section, the watchmen of the state house, or either of them, shall have power to arrest any person or persons committing said trespass upon said grounds, and to carry any person or persons so arrested before either of the magistrates of the city of Columbia, to be dealt with as shall be hereinafter directed; and for such purpose the said watchmen shall have all the powers, privileges and immunities of constables.

(3) **Punishment for trespass.**—Any person or persons who shall violate the provisions of this section shall be guilty of a misdemeanor, and, upon conviction thereof before either of the magistrates of the city of Columbia, shall be fined not less than five nor more than one hundred dollars, or be imprisoned not less than five nor more than thirty days.

1932 Code, § 1194; Cr. C. '22, § 84; Cr. C. '12, § 243; Cr. C. '02, § 187; R. S. 177; 1889 (20) 317.

§ 1195. Unlawful to use driveways in front of state house—exceptions.

It shall be unlawful for anyone to use the driveway in front of the state house as a public thoroughfare, or to park automobiles or other motor vehicles on same; or to use the state house or grounds for any purpose not authorized by law: *provided*, the provisions of this section shall not apply to the employees or officers of the State, or to persons having business in the state house: *provided, however*, that nothing herein contained shall be construed to abridge the authority of the commission on state house and grounds to grant permission to use the state house grounds for educational, electrical decorations, and similar purposes. Any violation of the provisions of this section shall be punishable by imprisonment for a period not exceeding thirty (30) days, or by a fine of not over one hundred (\$100.00) dollars.

1932 Code, § 1195; 1931 (37) 150.

§ 1196. Embezzling, stealing, defacing or damaging books, etc., a misdemeanor.—Any person wilfully embezzling, stealing, defacing, damaging or in any manner mutilating or destroying while in his possession or in the custody of the state librarian, any book, document, or other property, confided to the safekeeping of the state librarian, or any person wilfully violating any of the rules and regulations prescribed by the board of trustees for the management of the state library, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished by a fine not exceeding

one hundred dollars, or by imprisonment not exceeding thirty days. The said board of trustees are hereby charged with the enforcement of this section. All fines when collected shall be paid into the state library fund and shall be expended for the increase of the state library.

1932 Code, § 1196; Cr. C. '22, § 85; Cr. C. '12, § 244; Cr. C. '02, § 188; 1898 (22) 764.

§ 1197. Misdemeanor to place any explosives on railroad rails.—It shall be unlawful for any unauthorized person or persons to place any explosive substance whatever upon the rail of any railroad, whether operated by steam, electricity or otherwise, in this State, and any person or persons who violates the provisions of this section, or aids or assists therein, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be sentenced to pay a fine of not more than one hundred dollars, or imprisonment not exceeding thirty days, in the discretion of the court or magistrate.

1932 Code, §§ 1197, 1711; Cr. C. '22, §§ 86, 656; Cr. C. '12, §§ 247, 681; 1905 (24) 904.

§ 1198. Penalty for injuring railroads.—Whoever wilfully and maliciously injures in any way any railroad or electric railway, or anything appertaining thereto, or any material or instrument for the construction or use thereof, or aids or abets in such trespass, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year. Whoever commits any of the acts mentioned in this section in such manner as thereby to endanger life, shall be punished as herein provided, or by imprisonment in the penitentiary not exceeding twenty years.

1932 Code, § 1198; Cr. C. '22, § 87; Cr. C. '12, § 248; Cr. C. '02, § 191; G. S. 1518, 1519; R. S. 180; 1882 (17) 832; 1906 (25) 47.

See § 8468.

§ 1199. Punishment for breaking or shooting into cars.—Whoever breaks and enters, in the nighttime, any railroad or electric railway car, or enters in the nighttime without breaking, or breaks and enters in the daytime, or shoots with any firearm into any railroad or electric railway car, with intent to commit the crime of larceny, or any other crime, shall, in addition to any other punishment now prescribed by law for such offense, be punished by imprisonment in the state penitentiary not exceeding ten years, or by fine not exceeding five hundred dollars.

1932 Code, § 1199; Cr. C. '22, § 88; Cr. C. '12, § 249; Cr. C. '02, § 192; G. S. 1522; R. S. 181; 1882 (17) 833; 1906 (25) 47.

An indictment under this section which charges defendant, substantially in the language of the statute, with "breaking into a railroad car in the nighttime, with the intent to commit the crime of larceny," and in addition thereto, charges

that defendant committed larceny, does not charge two distinct offenses, and hence it is not error to refuse to require the State to elect on which charge it will try defendant. *State v. Crawford*, 38 S. C. 330, 17 S. E. 36.

§ 1199-1. Shooting or throwing at trains a misdemeanor.—Whoever wilfully discharges any kind of firearms or throws any kind of missile at or into the engine or any car of a train shall be guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine of not more than five hundred dollars, or imprisonment for not more than five years.

1932 Code, 1709; Cr. C. '22, § 655; Cr. C. '12, § 680; Cr. C. '02, § 484; R. S. 1734a; 1898 (22) 776.

See generally, *State v. Godfrey*, 60 S. Ry., 64 S. C. 321, 42 S. E. 163, 164, 1 A. C. 498, 39 S. E. 1; *Loggins v. Southern* L. R. 588.

§ 1199-2. Obstructing railroads a crime.—Whoever wilfully does or causes to be done anything with intent to obstruct any engine or carriage or car passing upon a railroad or electric railway, or with intent to endanger the safety of persons conveyed in or upon the same, or aids or assists therein, shall be punished by imprisonment in the state penitentiary not more than five years, by fine not exceeding five hundred dollars, and imprisonment in the county jail not more than one year, and shall forfeit to the use of the corporation for each offense treble the amount of damages proved to have been sustained thereby, to be recovered in an action in any court of competent jurisdiction.

1932 Code, § 1708; Cr. C. '22, § 654; Cr. C. '12, § 679; Cr. C. '02, § 190; G. S. 1521; R. S. 179; 1906 (26) 46.

§ 1200. Penalties injury electric signals.—Whoever unlawfully and intentionally injures, molests, or destroys any of the electric signals of a railroad or electric railway corporation, or any of the lines, wires, posts, or any other structure or mechanism used in connection with such signals on any railroad, electric railway, or destroys, or in any way interferes with, the proper working of such signals, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished by a fine not exceeding five hundred dollars, or by imprisonment not exceeding two years, or both.

1932 Code, § 1200; Cr. C. '22, § 89; Cr. C. '12, § 250; Cr. C. '02, § 193; G. S. 1523; R. S. 182; 1882 (17) 834; 1906 (25) 47.

§ 1201. Unlawful to injure electric lines and appurtenances.—Every person who unlawfully or maliciously takes down, removes, injures, interferes with, or obstructs any wire or poles erected by any telegraph or telephone company, or maintained by proper authority for the purpose of transmitting intelligence, or any part thereof, or any insulator or cross-arms, appurtenance or apparatus connected therewith, or unlawfully severs or in any way unlawfully interferes with any wire, cable, or current thereof, upon conviction shall be deemed guilty of a misdemeanor and punishable by imprisonment not exceeding thirty days, or by fine not exceeding one hundred dollars.

1932 Code, § 1201; Cr. C. '22, § 90; Cr. C. '12, § 251; 1902 (23) 1102; 1904 (24) 443.

§ 1202. Unlawful to injure or interfere with electric lines.—It shall be unlawful for any person within the state of South Carolina, wilfully and wantonly, and without the consent of the owner, to take down, remove, injure, obstruct, displace, or destroy any line erected or constructed for the transmission of electrical current, or any poles, towers, wires, conduits, cables, insulators, or any support upon which wires or cables may be suspended, or any part of any such line or appurtenances or apparatus connected therewith, or to sever any wire or cable thereof, or in any manner to interrupt the transmission of electrical current over and along any such line, or to take down, remove, injure or destroy, any house, shop building, or other structure or machinery connected with or necessary to the use of any line erected or constructed for the transmission of electrical current, and to wantonly or wilfully cause injury to any of the property mentioned in this section by means of fire; and any person or persons violating any of the provisions of this section shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than five hundred dollars,

or imprisoned not longer than one year, or both fined or imprisoned, in the discretion of the court: *provided*, nothing herein contained shall operate to prevent any person from removing any such wires or apparatus affixed to his private property without his consent.

1932 Code, § 1202; Cr. C. '22, § 91; Cr. C. '12, § 252; 1908 (25) 1078; 1904 (24) 443; 1902 (23) 1102.

§ 1203. Unauthorized use of municipal water system.

(1) **Opening fire hydrants.**—It shall be unlawful for any person, persons, firm or corporation not connected with the commissioners of public works of any municipality of this State, or with the fire department of such municipality, to interfere with or open for any purpose whatever, any of the fire hydrants on the mains of the water works of such municipalities, except in case of fire, without first having obtained a proper permit so to do from the authorized representatives of the commissioners of public works of such municipalities.

(2) **Interference with appurtenances.**—It shall be unlawful for any person or persons, firms or corporations to interfere or tamper with any of the property or appurtenances belonging to the municipality or controlled by the commissioners of public works in connection with the water work system, or to turn on or off the supply of water to any premises at and with the curb cock, without first having obtained the proper permit so to do from the authorized representatives of said municipality or to the commissioners of public works.

(3) **Injury or obstructions to system or pollution of water.**—It shall be unlawful for any person, persons, firm or corporation to remove, obstruct, deface or injure, within or without the corporate limits of any municipality, any of the fire hydrants, public drinking fountains, valve covers, or any pipe, ditch, drain or appurtenances of the water works of any municipality or to pollute the water supply of any municipality of this State, controlled by such municipality or by the commissioners of public works of such municipality.

(4) **Unauthorized use of water.**—Any person who has a contract, agreement, license or permission, oral or written, with or from any municipality or the commissioners of public works thereof for the use of water belonging to or furnished by any such municipality or commissioner of public works, for certain specified purposes, who shall wilfully and intentionally withdraw or cause to be withdrawn, in any manner, and appropriate to his own use, or to the use of any other person or corporation, for purposes other than those specified, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished as hereinafter provided. Any such person to whom such water is furnished from or by means of a meter, who shall wilfully and with intention to cheat and defraud any of said municipalities or the commissioners of public works alter or interfere with such meter, or by any contrivance whatsoever withdraw or take off water, in any manner except through such meter, shall be guilty of a misdemeanor and be punished as hereinafter provided.

(5) **Use of water without contract a misdemeanor.**—Any person who has no contract, agreement, license or permission with or from any municipality or the commissioners of public works thereof, for the use of water belonging to or furnished by such municipality or commissioners of public

works, who shall wilfully withdraw, or cause to be withdrawn, in any manner, and appropriate such water from the water mains or pipes of such municipality or commissioners of public works, or any water mains or pipes connected therewith, for his own use or for the use of any other person or corporation, shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished as hereinafter provided.

(6) Tapping water main without permit.—It shall not be lawful for any person, firm or corporation to extend service pipes attached to the mains and water supply, or any premises within or without the municipality, without first obtaining permission therefor in writing from the municipality, or commissioners of public works, and before any workman or plumber shall perform any work connected with the extension of such, written permission for such extension shall be obtained therefor.

(7) Penalty for violation.—Any person violating any provision of this section shall be guilty of a misdemeanor and upon conviction shall be punished by a fine not exceeding two hundred (\$200.00) dollars, or by imprisonment not exceeding sixty days, or by both said fine and imprisonment.

1932 Code, § 1203; 1925 (34) 98.

In prosecution of defendant who was secretary and treasurer of municipal commissioner of public works for embezzlement, evidence that defendant installed a contrivance called a "by pass" around water meter at his house so that only about one-fourth of water used by defendant passed through meter, which

act was made a misdemeanor by statute, was inadmissible for purpose of showing intent, in view of statutory presumption that funds received and unaccounted for by defendant had been fraudulently appropriated. *State v. Gregory*, 191 S. C. 212, 4 S. E. (2d) 1.

§ 1204. Interference with sewers prohibited.—No person shall turn, remove, raise, or in any manner tamper with any cover of any manhole, filter, bed or other appurtenance of any public sewer, without a written permit from the proper authorities of such works; and no person except those engaged by the proper authorities shall enter any public sewer without special written permit.

And no person shall, either within or without any city or town, obstruct, damage or injure any pipe, ditch, drain, filter, beds or appurtenance of any waterworks, sewerage or drainage of any such city or town.

Every person violating the provisions of this section shall, upon conviction, be deemed guilty of a misdemeanor, and be subject to a fine not to exceed one hundred dollars, or imprisonment for thirty days.

1932 Code, § 1204; Cr. C. '22, § 92; Cr. C. '12, § 253; Cr. C. '02, § 194; 1900 (23) 446.

§ 1205. Failure to return boat, flat, or tool used for mining phosphate a misdemeanor.—Any person being intrusted with any boat, flat or tools for gathering phosphate rock, by the owner thereof, for the purpose of mining or gathering phosphate rock, who shall fail to return same to the owner within two days after being required by such owner so to do, shall be guilty of a misdemeanor, and, upon conviction thereof before a court of competent jurisdiction, shall be fined in the sum of not more than fifty dollars, or imprisoned not more than thirty days, in the discretion of the court: *provided*, it shall be a complete defense to any indictment or prosecution instituted under this section, if the defendant shall make it appear that his or her failure to return the said property was due to his or her inability so

to return the same, such inability not being the result of the defendant's act, or that the agreed time in which such property was to be returned had not expired at the time of his or her failure to return the same.

1932 Code, § 1205; Cr. C. '22, § 93; Cr. C. '12, § 254; Cr. C. '02, § 195; 1900 (23) 445.

§ 1206. No drifted boat, etc., to be sold without advertisement.—No person shall sell any drifted boat, float, or other water craft, lumber or timber, not the property of such person, without first advertising the sale of same at public auction at least three times, and at least three days prior to the date of such sale, in the newspaper having the greatest circulation in county where said drifted timber, boat or other water craft is found and taken, giving an accurate description of any and all marks by which said boat, float, or other water craft, lumber or timber, may be identified.

And if any person shall sell any drifted boat, float or other water craft, lumber or timber, without having first so advertised and without paying the proceeds to the owner on application, after deducting expenses, or if any person having advertised shall refuse to deliver any drifted boat, float, or other water craft, lumber or timber, claimed by the rightful owner, prior to the date of same, said owner to pay reasonable salvage expenses, such person shall be liable to indictment for misdemeanor, and fined or imprisoned in the discretion of the court, and any person who may purchase such drifted boat, float or other water craft, lumber or timber, that has not been advertised as hereinbefore provided, shall be liable to indictment as receiver of stolen goods, and fined or imprisoned in the discretion of the court.

1932 Code, § 1206; Cr. C. '22, § 94; Cr. C. '12, § 256; Cr. C. '02, 196; G. S. 1622; R. S. 183; 1853 (12) 294; 1907 (25) 196.

§ 1207. Penalty for stealing crude turpentine.—Whoever shall steal any crude turpentine of the value of five dollars, whether dipped or scraped from the trees or not, or whether barreled or not, from any place whatsoever, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine of not more than one hundred dollars or imprisonment not exceeding thirty days.

1932 Code, § 1207; Cr. C. '22, § 95; Cr. C. '12, § 257; Cr. C. '02, § 197; R. S. 184; 1893 (21) 506.

§ 1208. Penalties wilfully or maliciously set fire to or burn grass, brush, etc., or assist in so doing, so as to set fire to property of another.—Whoever shall wilfully or maliciously set fire to or burn any grass, brush or other combustible matter, so as thereby any woods, fields, fences or marshes of any other person or persons be set on fire, or cause the same to be done, or be thereunto aiding or assisting, shall, upon conviction thereof, be punished by a fine of not less than twenty-five nor more than five hundred dollars, or imprisonment of not more than one year in the county jail, and shall, moreover, be liable to the action of any person or persons who may have sustained damage thereby.

1932 Code, § 1208; Cr. C. '22, § 96; Cr. C. '12, § 215; Cr. C. '02, § 160; G. S. 2497; R. S. 157; 1787 (5) 125; 1857 (12) 617; 1891 (20) 1195; 1919 (31) 59; 1940 (41) 1820.

See also section 1208-1.

In general.—Prior to the amendment of 1891 only one who wilfully sets fire to his neighbor's grass or fence could

be indicted under this section. It did not apply to cases of negligently suffering fire to so burn. *State v. Lewis*, 10 Rich. 20. However, the amendment of

1940 struck out the word "negligently", so, apparently, there must be a wilful or malicious burning. As to circumstantial evidence, see *State v. Wideman*, 68 S. C. 119, 46 S. E. 769.

See generally, *McCandless v. Richmond*, etc., R. Co., 38 S. C. 103, 16 S. E. 429, 62 Am. St. Rep. 171, 18 L. R. A. 440, 21 L. R. A. 790, 25 L. R. A. 161, 35 L. R. A. (N. S.) 1017.

§ 1208-1. Penalties carelessly or negligently set fire to or burn grass, brush, etc., or assist in so doing, so as cause or allow said fire go to lands of another.—Whoever shall carelessly or negligently set fire to or burn grass, brush or other combustible matter so as thereby to cause or allow said fire to spread to or to be transmitted to the lands of another or whoever shall cause same to be done or to be thereunto aiding or assisting in doing or causing same to be done shall upon conviction thereof by a court of competent jurisdiction be imprisoned for a period of not less than twenty (20) nor more than thirty (30) days in the county jail or upon the county chaingang in the county in which the violation occurred or by a fine of not more than twenty-five (\$25.00) dollars, the same being within the jurisdiction of the office of the magistrate. *Provided, however*, that for a second or subsequent offense for careless or negligent burning, the sentence shall be imprisonment for not more than one (1) year in the county jail or upon the county chaingang in the county in which the violation occurred or a fine of not less than twenty-five (\$25.00) nor more than five hundred dollars. *Provided, further*, that in no instance shall any person or persons be prevented from firing woods, fields, lands or marshes within his own bounds, so that he suffer not the fire to get without the bounds of his land and injure the woods, fences, grass or other property of his neighbors.

1940 (41) 1820.

§ 1209. Use of motor vehicle, other vehicles or live stock without permission a misdemeanor.—Whoever knowingly and wilfully shall take and use any motor vehicle, bicycle or other vehicle or horse, mare or mule without the consent of the owner thereof, and without intent to steal the same, shall be deemed guilty of a misdemeanor, and upon conviction, shall be punished by a fine of not more than five hundred dollars, or by imprisonment for a period of not more than one year, or both fine and imprisonment, in the discretion of the court.

1932 Code, § 1209; Cr. C. '22, § 97; Cr. C. '12, § 228; Cr. C. '02, § 175; R. S. 170; 1883 (18) 434; 1917 (30) 43-47.

As to employee's using owner's property, see *Chantry v. Pettit Motor Co.*, 156 S. C. 1, 152 S. E. 753. As to a charge illustrating the distinction between steal-

ing a horse and taking it to use without consent of owner, see *State v. Sanders*, 56 S. C. 415, 35 S. E. 133.

§ 1210. Disposal or pledge of stored cotton by warehousemen, without consent of owner, a misdemeanor.—It shall hereafter be a misdemeanor for any person, firm or corporation doing business in this State as a cotton factor or warehouseman and having in their warehouses any cotton on storage the property of another, to either dispose of the said cotton, or any portion thereof by sale, loan, pledge or otherwise to any person, firm or corporation without the consent or approval of the owners of such stored cotton, and upon conviction thereof shall be punished by fine of not more than five hundred dollars or imprisonment for not more than one year: *provided*, that the rights of persons or corporations holding mortgages over

such cotton shall not be abridged or affected by the provisions hereof: *and provided, further*, that rights of persons, firms or corporations who have advanced or loaned, or who may hereafter advance or lend money on such cotton shall not be abridged or affected by the provisions hereof: *provided, further*, that provisions hereof shall not affect the warehouseman's claim for storage.

1932 Code, § 1210; Cr. C. '22, § 98; 1920 (31) 984.

§ 1211. Forgery.—Whoever shall be convicted of falsely making, forging, or counterfeiting, or causing or procuring to be falsely made, forged, or counterfeited, or of wilfully acting or assisting in the false making, forging or counterfeiting of any writing or instrument of writing, or of uttering or publishing as true any false, forged, or counterfeited writing or instrument of writing, or of falsely making, forging, counterfeiting, altering, changing, defacing, or erasing or causing or procuring to be falsely made, forged, counterfeited, altered, changed, defaced, or erased, any record or plat of land, or of willingly acting or assisting in any of the premises, with an intention to defraud any person, shall be guilty of forgery, and shall be sentenced to be imprisoned not less than one year nor more than seven years, and also to pay such fine as may be judged expedient, at the discretion of the judge who may try the case: *provided*, that if the amount obtained or sought to be obtained upon the forged instrument be less than twenty (\$20.00) dollars, the punishment shall be within the discretion of the judge.

1932 Code, § 1211; Cr. C. '22, § 99; Cr. C. '12, § 528; Cr. C. '02, § 373; G. S. 2527; R. S. 295; 1845 (11) 341; 1736-7 (3) 470-1, §§ 3-7; 1783 (4) 543; 1801 (5) 397; 1930 (36) 1203.

Cross references.—As to treating as a misdemeanor the forging of a discharge from military or naval forces, see § 8893, subd. 4, and note thereto.

In general.—This section, providing that whoever falsely forges or counterfeits, or assists in forging or counterfeiting any writing or instrument, and utters or publishes the same as true, is guilty of forgery, is within the power of the legislature. *State v. Murray*, 72 S. C. 508, 52 S. E. 189, 119 Am. St. Rep. 318, 8 L. R. A. (N. S.) 1166.

Forgery is still a common law offense.—*State v. Zimmerman*, 79 S. C. 289, 60 S. E. 680, Ann. Cas. 16E, 75; *McConnel v. Kennedy*, 29 S. C. 180, 7 S. E. 76, 28 Am. St. Rep. 142, 57 L. R. A. 688, 19 A. L. R. 673.

And its purpose is to protect society against fabrication, falsification, and the uttering, publishing, and passing of forged instruments which, if genuine, would establish or defeat some claim, impose some duty, or create some liability or work some prejudice in law to another in his right of person or property. *State v. Singletary*, 187 S. C. 19; 196 S. E. 527.

And may be committed against the state.—This and other sections of the code, providing punishment for forgery, were intended to enlarge the offense and

regulate the punishment thereof, and the use of the words "any person," in describing the party defrauded, does not abolish the common-law crime of forgery when committed with intent to defraud the state. *State v. Zimmerman*, 79 S. C. 289, 60 S. E. 680, Ann. Cas. 16E, 75.

A corporation, state, the United States, and the estate of a decedent, are each regarded as a person; and where the forged instrument is passed to a servant acting as such, the master is the person defrauded. 19 Cyc. 1378, cited with approval in *State v. Zimmerman*, 79 S. C. 289, 60 S. E. 680, 682, Ann. Cas. 16E, 75.

It is a felony.—*State v. Allen*, 56 S. C. 495, 35 S. E. 204, 62 L. R. A. 257, 28 L. R. A. (N. S.) 242, 24 A. L. R. 1209, 1211; *State v. Rowe*, 8 Rich. 17, 27 L. R. A. (N. S.) 946, 38 L. R. A. (N. S.) 325.

Uttering or publishing as true any false, forged, or counterfeited writing, constitutes the crime of forgery, under this section. It is a kindred form of forgery. It is usual to enact that various illegal acts shall constitute the crime of forgery, as will be seen by reference to the statutes of the different states. The legislature is vested with power to enact such statutes. *State v. Murray*, 72 S. C. 508, 52 S. E. 189, 190, 119 Am. St. Rep. 318, 8 L. R. A. (N. S.) 1166.

But it must be done with intent to

prejudice, damage, or defraud another.—In order to constitute forgery by uttering or publishing a forged instrument or writing, it must be uttered and published as true, and must be known by the party uttering or publishing it as false, forged, or counterfeited, and the act must be done with intent to prejudice, damage, or defraud another. *State v. Murray*, 72 S. C. 508, 52 S. E. 189, 119 Am. St. Rep. 318, 8 L. R. A. (N. S.) 1166; *State v. Singletary*, 187 S. C. 19, 196 S. E. 527.

But a judgment is warranted upon a verdict which finds the passing of a forged note with knowledge of the forgery.—*State v. Fuller*, 1 Bay 245, 1 Am. Dec. 610, 24 L. R. A. (N. S.) 35.

This section embraces forgery of school claims issued by county superintendent of education.—*State v. Morton*, 51 S. C. 323, 28 S. E. 945.

And the forgery of a receipt on the back of an indent, with fraudulent intent.—*State v. Washington*, 1 Bay 120, 1 Am. Dec. 601.

And the forgery of an order for the delivery of goods.—*State v. Holly*, 2 Bay 262, 32 L. R. A. (N. S.) 329, Ann. Cas. 14C, 469, 1 Brev. 35, 24 L. R. A. 36, 32 L. R. A. (N. S.) 330, Ann. Cas. 12A, 976.

And the forgery of a witness' pay-certificate.—*State v. Bullock*, 54 S. C. 300, 32 S. E. 424.

And the altering of the words and figures of a bank bill.—*State v. Waters*, 3 Brev. 507, 22 Am. Dec. 311.

Also, the alteration of a receipt.—*State v. Floyd*, 5 Strobb. 58, 22 Am. Dec. 310, 53 Am. Dec. 689, 8 Am. St. Rep. 467, 26 A. L. R. 1058.

As well as a false entry made in a public record.—*State v. Zimmerman*, 79 S. C. 289, 60 S. E. 680, Ann. Cas. 16E, 75.

The indictment should set forth a note in haec verba.—For "counterfeiting a note of hand, commonly called a promissory note, for the payment of money," is good if the note be set forth in haec verba. *State v. Houseal*, 2 Brev. 219, 31 L. R. A. (N. S.) 227.

So as to an order.—*State v. Jones*, 1 McM. 236, 36 Am. Dec. 257, 31 L. R. A. (N. S.) 220, Ann. Cas. 12A, 305.

It must state all the circumstances which constitute the offense.—*State v. Foster*, 3 McC. 442.

And is sufficient when charging sale made with intent to defraud.—An indictment charging that defendant forged a false entry in a bond registry book, and that he uttered a forged writing, to wit, such entry, and sold bonds which should have been entered as redeemed, "with intent to defraud" the state, is not insufficient as merely charging that the

sale was made with intent to defraud, without charging that the acts of forging and uttering were made with such intent. *State v. Zimmerman*, 79 S. C. 289, 60 S. E. 680, Ann. Cas. 16E, 75.

And need not charge possible injury as a result of the forgery.—An indictment charging that defendant forged a false entry in a state bond registry book of the redemption and cancellation of a previously redeemed and canceled bond, whereas another bond was redeemed and should have been entered as canceled, and that defendant sold such other bond with intent to defraud the state, is not insufficient for failing to aver that the forged writing was one which, if genuine, might injure another. *State v. Zimmerman*, 79 S. C. 289, 60 S. E. 680, Ann. Cas. 16E, 75.

Nor that the forgery was complete in all its parts.—An indictment for forgery need not charge that the forgery was complete in all its parts; the essence of the crime is the intent to defraud, and the indictment cannot be defeated merely because all the steps necessary to perfect the fraud are not set out therein. *State v. Zimmerman*, 79 S. C. 289, 60 S. E. 680, Ann. Cas. 16E, 75.

Evidence of a draft signed by a person with a fictitious name is sufficient.—Evidence that defendant represented himself to be a particular person of fictitious name, and falsely represented himself to be the brother of a particular person and as such signed draft, was sufficient to sustain conviction for forgery, under this section. *State v. Reed*, 137 S. C. 444, 135 S. E. 877.

Hand-writing in other papers, unless affirmatively proved to be defendant's, can not be compared with that in alleged forged instrument. *State v. Ezekiel*, 33 S. C. 115, 11 S. E. 635, 62 L. R. A. 857, 63 L. R. A. 436.

And defendant's other acts of forgery may be shown.—On indictment for forgery of one bank bill, it is admissible to prove that the prisoner had passed other forged bills for which indictments were pending. *State v. Williams*, 2 Rich. 418, 420, 45 Am. Dec. 741, 62 L. R. A. 264.

For constitutionality see *Singletary v. Wilson*, 191 S. C. 153, 3 S. E. (2d) 802.

Court's discretion.—The trial court's discretion in determining amount of fine imposed on conviction of crime, such as forgery, where maximum amount is not fixed by statute, must be subject to review on appeal to Supreme Court, if clearly abused. *Singletary v. Wilson*, 191 S. C. 153, 3 S. E. (2d) 802.

See generally, as to evidence to support charge of uttering a forged instrument, *State v. Berry*, 76 S. C. 86, 56 S. E. 662.

§ 1212. Failure to provide railing guards for ferry boats a misdemeanor.—All persons owning or operating any ferry boat or flats which are used on any of the navigable streams of this State, or are landed upon soil thereof, shall place and provide guards or railing around the same so as to protect the lives and property of those using them. Any person violating the provisions of this section, on conviction thereof, shall be liable to a fine of not less than twenty-five dollars nor more than one hundred dollars, or imprisoned not exceeding thirty days.

1932 Code, § 1212; Cr. C. '22, § 100; 1914 (28) 590.

§ 1213. Obstruction of running streams in counties having less than six hundred registered voters a misdemeanor.—The cutting or felling of trees across or into any of the running streams in all counties which have less than six hundred registered voters, obstructing the same by throwing any timber or other materials therein, or erecting any timber across any such streams, whereby the fall of such streams is lessened, and the flow of the water is obstructed, or whoever, having erected any such obstructions, refuses to remove the same within ten days after notice so to do, shall be deemed guilty of a misdemeanor and, on conviction thereof, shall be punished within the discretion of the court: *provided*, that nothing herein contained shall prevent the construction of dams for the purpose of generating power: *provided*, that each and every obstruction is hereby, made a separate and distinct offense.

1932 Code, § 1213; Cr. C. '22, § 101; 1918 (30) 719.

§ 1214. Obstructing streams in certain counties a misdemeanor—power dams excepted.—The cutting or felling trees across, or into, any of the running streams of the counties of Anderson, Bamberg, Barnwell, Colleton, Cherokee, Chester, Greenville, Oconee, Union, Fairfield, Laurens, Newberry, Abbeville, Pickens, Spartanburg and York, obstructing the same by throwing any timber or other materials therein, or erecting a dam across any such stream, whereby the fall in such stream is lessened and the flow of water and sand is obstructed, or the land along said stream above such obstruction is damaged, or the health of the community is endangered, or having erected any such obstruction and refusing to remove the same within eight and forty hours, after notice by any one to do so, shall be deemed a misdemeanor, and any person so convicted shall be punished by a fine of not less than five nor more than one hundred dollars, or imprisonment for not less than ten nor more than thirty days, at the discretion of the court: *provided*, that nothing contained in this section shall apply to the constructing of milldams or dams for the purpose of generating power for any purpose.

1932 Code, § 1214; Cr. C. '22, § 102; Cr. C. '12, § 236; 1899 (23) 102; 1900 (23) 448; 1908 (25) 1040; 1915 (19) 80.

See generally, *Ballentine v. Hammond*, 68 S. C. 153, 160, 46 S. E. 1000; *State v. Hammond*, 66 S. C. 219, 44 S. E. 797, 66 S. C. 300, 44 S. E. 933; *State v. Tucker*,

54 S. C. 251, 32 S. E. 361, 92 Am. St. Rep. 107, 56 S. C. 516, 35 S. E. 215, 1 A. L. R. 727.

§ 1215. Duty of landowners to clean out their streams.—It shall be the duty of all landowners to clean out all streams upon and adjacent to their lands at least twice in each year, at such particular times as said boards

may appoint, and according to the directions of said boards, and to keep the same clear of all obstruction to a free and uninterrupted flow of sand and water through the channels thereof: provided, that this section shall not be construed to prevent the erection and maintenance of any dam across any of said streams for any useful purpose: *provided, further*, that said boards shall have power and authority to require the owner of any such dam to build and maintain therein suitable and sufficient floodgates and waterways to afford free passage through the same of the sand and water, so that the streams above may be properly cleaned out and the lands adjacent thereto properly drained, for which purpose they may require the owner of any such dam to open the floodgates or waterways therein and keep them open for such reasonable time as they may deem to be necessary. Any person violating any of the provisions of this section shall be deemed guilty of maintaining a nuisance, and, upon conviction, shall be fined not more than fifty dollars or imprisoned not more than thirty days: *provided*, that ten days' notice to abate such nuisance shall have been given.

1932 Code, § 1215; Cr. C. '22, § 103; Cr. C. '12, § 237; Cr. C. '02, § 183; 1900 (23) 399.

Editor's note.—All the litigation pertaining to this section and similar sections in prior codes has developed around the question of constitutionality. In several early cases the effect of the constitution of 1895 on the subject was considered. In one case it was decided that the legislation was special, but that, as the constitutional restriction was not retroactive, it did not apply. *State v. Tucker*, 56 S. C. 516, 35 S. E. 215, 1 A. L. R. 727. This decision controlled until the sections were incorporated in the Code of 1902, whereupon it was held that this in effect constituted the passage of a new act, and, as the code excepted certain other counties, it was within the constitutional provision (formerly held not applicable because retroactive), was special legislation, and was null and void. *State v. Hammond*, 66 S. C. 300, 44 S. E. 933. Finally, in *Pierce v. Marion County Lumber Co.*, 108 S. C. 387, 94 S. E. 865, it was held constitutional, because under the act and amendment, which was added thereto on February 18, 1905 (24 stats. 830), the General Assembly can now pass local and special laws concerning drainage, and this is a

matter of drainage. This act was re-enacted in Code of 1912, after the creation of Dillon county, and Dillon county was not excepted.

Whether act is exercise of taxing power.—In speaking of the question the court, in *State v. Tucker*, 56 S. E. 516, 35 S. E. 215, 1 A. L. R. 727, said: "We do not see how it is possible to regard the legislation contained in §§ 1214 and 1215 as an exercise of the power of taxation. Those sections do not purport to impose any tax upon either persons or property."

Nothing more than an intention to impose upon certain landowners in the state the duty of performing a certain act appears from this legislation. *State v. Tucker*, 56 S. C. 516, 35 S. E. 215, 1 A. L. R. 727.

A private citizen could institute a prosecution for violating the similar provisions of the Gen. St. 1882, § 1181, enforcing said provisions, which were cumulative merely, and not exclusive. *State v. Tucker*, 54 S. C. 251, 32 S. E. 361, 92 Am. St. Rep. 107, reversed on other grounds.

§ 1216. Obstructing streams a misdemeanor.—Any person who shall fell, cut or throw, or cause to be felled, cut or thrown, across or into any of said streams, any tree, log or other timber, or any trash, brush, debris, or obstruction of any kind whatsoever, shall be guilty of a misdemeanor, and, on conviction, shall be punished by a fine of not more than fifty (\$50.00) dollars, or imprisonment for not more than thirty days.

1932 Code, § 1216; Cr. C. '22, § 104; Cr. C. '12, § 238; Cr. C. '02, § 184; 1900 (23) 399.

§ 1217. Exemptions.—The provisions of sections 1215 and 1216 shall not apply to, nor be enforced, in the following counties, to wit: Bamberg, Aik-

en, Greenwood, Colleton, Dorchester, Fairfield, Clarendon, Union, Chesterfield, Sumter, Darlington, Richland, Berkeley, Lancaster, Barnwell, Hampton, Florence, Beaufort, Horry, Lexington, Marlboro, Pickens, Abbeville, Georgetown, Saluda, Anderson, Kershaw, and Oconee: *provided*, that provisions of section 1215 shall not apply to, nor be enforced in, the county of Williamsburg and Sumter.

1932 Code, § 1217; Cr. C. '22, § 105; Cr. C. '12, § 239; Cr. C. '02, § 185; 1900 (23) 399; 1916 (29) 782; 1930 (36) 1266; 1931 (37) 384; 1932 (37) 1223; 1934 (38) 1280; 1937 (40) 495.

§ 1218. Digging ginseng on land of another.—Where any person in this State shall plant ginseng upon any lands belonging to such person or persons, whether the same be enclosed or not, then it shall be unlawful for any person to dig said ginseng at any time of the year without the permission of the person so planting the same; and any person convicted of a violation of the provisions of this section shall be fined for each and every such offense not exceeding one hundred (\$100.00) dollars, or imprisonment for a term not exceeding thirty days.

1932 Code, § 1218; Cr. C. '22, § 106; Cr. C. '12, § 298; Cr. C. '02, § 232; 1899 (23) 92.

§ 1219. Defrauding hotels, inns, boarding houses, hospitals, rooming houses, cafes and restaurants.—Any person who shall at any hotel, inn or boarding house, rooming house, hospital, cafe or restaurant order and receive or cause to be furnished any food or accommodation based upon contract with intent to defraud the owner or proprietor of such hotel, inn or boarding house, rooming house, hospital, cafe or restaurant out of the value or price of such food or accommodation based upon contract; and any person who shall obtain credit at any hotel, inn or boarding house, rooming house, hospital, cafe or restaurant by the use of any false pretense or devise or by fraudulently depositing at such hotel, inn or boarding house, rooming house, hospital, cafe or restaurant any baggage or property of less value than the amount of such credit or of the bill by such person incurred, unless credit be given by express agreement; and by any person who, after obtaining credit or accommodation based upon contract at any hotel, inn or boarding house, rooming house, hospital, cafe or restaurant and shall surreptitiously remove his or her baggage or property therefrom, shall be deemed guilty of a misdemeanor. Proof that lodging, food or other accommodation based upon contract was obtained by false pretense or by false or fictitious show or pretense of baggage, or that he absconded without paying or offering to pay for such food, lodging or other accommodation based upon contract or that he surreptitiously removed or attempted to remove his or her baggage, shall be *prima facie* proof of the fraudulent intent mentioned in this section. Any person convicted of violating the provisions of this section shall pay a fine of not more than fifty dollars or be imprisoned for not more than thirty days, in the discretion of the magistrate: *provided*, the provisions of this section shall not include the fees of physicians and surgeons.

1932 Code, § 1219; Cr. C. '22, § 107; Cr. C. '12, § 300; 1911 (27) 150; 1917 (30) 165; 1939 (41) 115; 1940 (41) 1885.

§ 1220. Procuring board by making falsely written representations.—Any person who procures board and lodging or board from any boarding house

or innkeeper in this State upon the representation in writing that there is money due or to become due to him, to be paid on a future day, out of which he promises to pay for such board and lodging or board, and fails or refuses to so apply such money when collected by him, shall be guilty of a misdemeanor, and, on conviction, shall pay a fine not exceeding fifty dollars, or be imprisoned not more than thirty days: *provided*, that if such person shall pay the amount due by him for such board and lodging, or board and the costs of the prosecution, the case may be discontinued, in the discretion of the magistrate issuing the warrant.

1932 Code, § 1220; Cr. C. '22, § 108; Cr. C. '12, § 301; Cr. C. '02, § 221; 1898 (22) 792.

§ 1222. Removing, destroying or leaving down fences—punishment.—

Any person, other than the owner, who shall remove or destroy, or leave down, any portion of any fence in this State intended to enclose animals of any kind, or crops or uncultivated lands, or who shall leave open any gate, or leave down any bars or other structure intended for a like purpose, shall be deemed guilty of a misdemeanor; and shall be punished by a fine of not less than five nor more than thirty dollars, or be imprisoned in the county jail not less than five and not more than thirty days.

1932 Code, § 1222; Cr. C. '22, § 110; Cr. C. '12, § 229; Cr. C. '02, § 176; G. S. 1190; R. S. 171; 1881 (17) 593; 1903 (24) 111; 1921 (32) 200.

§ 1223. Rescuing trespassing stock a misdemeanor.—Whenever any animal shall be taken up under the provisions of article 2 of chapter 133, it shall be unlawful for any person to rescue the same or deliver it from the custody of the person impounding it; and whoever shall violate this provision shall be deemed guilty of a misdemeanor, and be punished as provided in section 1222.

1932 Code, § 1223; Cr. C. '22, § 111; Cr. C. '12, § 230; Cr. C. '02, § 177; G. S. 1191; R. S. 172; 1881 (17) 593.

See § 6281 for reference article 2, chapter 133.

§ 1224. Traveling outside of road a misdemeanor.—It shall be a misdemeanor for any person wilfully to walk, drive, ride, or to allow his team to travel outside of the road on the cultivated lands of another, punishable as in section 1223: *provided*, that in case any person charged with this misdemeanor be brought before, or reported to, a magistrate, he may discharge himself from any further proceedings therein by paying such fine within the above limits as the magistrate may impose.

1932 Code, § 1224; Cr. C. '22, § 112; Cr. C. '12, § 232; Cr. C. '02, § 178; G. S. 1192; R. S. 173; 1881 (17) 593.

§ 1225. In criminal prosecutions defendant may plead satisfaction.—In all criminal prosecutions for violation of the provisions of sections 1222, 1223 and 1224, the defendant may plead, as a matter of defense, the full satisfaction of all reasonable demands of the party or parties aggrieved by such violation; and upon said plea being legally established, and upon payment of all costs accrued up to the time of such plea he shall be discharged from further penalty.

1932 Code, § 1225; Cr. C. '22, § 113; Cr. C. '12, § 233; Cr. C. '02, § 179; G. S. 1193; R. S. 173; 1881 (17) 594.

§ 1226. Wilful injury to property of corporation a misdemeanor.—Any officer, agent or member of any corporation created under sections 8158 to 8167, who shall knowingly or wilfully injure or damage any property belonging to the corporation, in violation of the charter or by-laws of said corporation, shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine not exceeding one hundred dollars or imprisoned not exceeding thirty days.

1932 Code, § 1226; Cr. C. '22, § 114; Cr. C. '12, § 258; Cr. C. '02, § 198; 1900 (23) 390.

§ 1227. Embezzlement of funds, by members of militia, a misdemeanor.—Any commissioned officer or enlisted man of the South Carolina reserve militia who shall misapply, embezzle, or convert to his own use without authority, any moneys received by or entrusted to him for disbursement, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be sentenced as for like offenses under the criminal laws of this State.

1932 Code, § 1227; Cr. C. '22, § 115; 1918 (30) 874.

§ 1228. Injury to drainage works.—It shall be unlawful for any person to injure or damage or obstruct or build any bridge, fence, or floodgate in such a way as to injure or damage any levee, ditch, drain, or water-course constructed or improved under the provisions of article 1, chapter 131, and any person causing such injury shall be guilty of a misdemeanor, and, upon conviction thereof, may be fined in any sum not exceeding twice the damage or injury done or caused.

1932 Code, § 1228; Cr. C. '22, § 117; Civ. C. '12, § 2224; 1911 (32) 92.

See § 6087 for reference Art. 1, Chap. 131.

§ 1229. Penalty on takers of estrays for not obeying the law.—Each and every person who shall take into his or her possession any estray, and neglect to pursue the directions of article 1, chapter 133, or shall convert to his or her use any such estray, shall be liable to a fine of twenty dollars, to be recovered upon information, in any court of record having jurisdiction of the same in this State, to be given to the informer, and shall also be liable to an action by the owner of any such estray for damages.

1932 Code, § 1229; Cr. C. '22, § 120; Civ. C. '12, § 3396; Civ. C. '02, § 2285; G. S. 1620; R. S. 1812; 1803 (5) 466.

See § 6270 for reference Art. 1, Chap. 133.

CHAPTER 70

Trade Regulations and Offenses against Public Policy

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| 1231 thru 1233. Lotteries. | 1241. Wearing or selling Confederate crosses. |
| 1234. Officers accepting passes. | 1242. Wearing by nonmember American Legion emblem. |
| 1235. Offering passes. | 1243. Imitation of emblem. |
| 1236. Bribes relative to employer's business. | 1244 thru 1248. Misuse of labels. |
| 1237. Gift or premium with sale of food. | 1249. Using or selling food trade mark. |
| 1238. Fraud by officer or stockholder. | 1250. Regulations as to trade marks for timber. |
| 1239. Discounting pension claims. | 1251. Removal of state line mark. |
| 1240. Fraudulent pension claims. | |

- 1253. When pulling of ginseng prohibited.
- 1254. Rebates by public officers.
- 1255. Carrying or selling pistols.
- 1256. Carrying concealed weapons.
- 1257. Sale of forfeited weapons.
- 1258. Assault with concealed weapon.
- 1258-1. Machine guns.
- 1259. Mining without license.
- 1261. Interference with aids to navigation.
- 1262. Anchoring to range lights.
- 1263 and 1264. Changing position of buoys.
- 1265. Mutilation of monument.
- 1266. Desecration of graveyards.
- 1267. Defacing monuments of United States coast surveys.
- 1269. Separation of races on electric cars.
- 1270. Conductors have power of peace officers.
- 1271. Separate tent show entrance for races.
- 1272. Separation of races in textile factories.
- 1273. Desecration of state flag.
- 1274. Desecration of United States flag.
- 1275. Publishing name of person raped.
- 1276. Selling property under lien.
- 1277. Selling mortgaged personality.
- 1278. Payment of laborers out of contract money.
- 1279. Removal of property levied on.
- 1279-1. Fraudulent watering of salt pork meat.
- 1280. Fraudulent packing of cotton.
- 1281. Charging "breakage" on weighing of cotton.
- 1282. Disposal of goods of cash sale without paying.
- 1283 and 1284. Factor failing to account.
- 1285. Licenses to traffic in cotton seed.
- 1286 and 1287. Deduction on sale of cotton.
- 1288. Statements by cotton factors.
- 1300. Standard weight for bushel of corn meal.
- 1301 thru 1303. Offenses relating to slot machines.
- 1304. Selling explosives.
- 1310. Using railroad crossing sign for advertisement.
- 1315. Sale of goods marked "sterling" or "coin silver."
- 1316, 1317. Regulations as to fireworks.
- 1322, 1323. Substitution of lubricating oil—description.
- 1324. Filling station near school or church in Union county.
- 1325. Peddling without license.
- 1326. Entry by hawkers on premises without permission.
- 1327, 1328. Horse trading and fortune telling.
- 1335, 1336. Changing name of race horses.
- 1342. Sale of goods near camp grounds.
- 1349. Handling motor vehicles with marks erased.
- 1350. Records by dealers in crossties.
- 1355, 1356. Discharging oil in harbor.
- 1373. Traffic in dead bodies.
- 1377, 1378. Soliciting emigrants without license.
- 1379. False statement in advertisement.

§ 1231. Penalty for setting up lotteries.—Whoever shall publicly or privately erect, set up or expose to be played, drawn at, or shall cause or procure to be erected, set up, exposed to be played, drawn or thrown at, any lottery, under the denomination of sales of houses, lands, plate, jewels, goods, wares, merchandise, or other things whatsoever, or for money, or by any undertaking whatsoever, in the nature of a lottery, by way of chances, either by dice, lots, cards, balls, numbers, figures, or tickets, or who shall make, write, print or publish, or cause to be made, written, or published, any scheme or proposal for any of the purposes aforesaid, and shall be convicted of any of the offenses aforesaid, on any indictment for the same, at the court of general sessions, shall forfeit the sum of one thousand dollars, one-third thereof to and for the use of this State, one-third part thereof to the informer, and the other third part thereof to the county where the offense shall be committed; and shall, also, for every such offense, be committed by the said court to the common jail for the space of twelve months.

1932 Code, 1231; Cr. C. '22, § 123; Cr. C. '12, § 259; Cr. C. '02, § 199; G. S. 2596; R. S. 185; 1762 (4) 180.

A merchant, who delivers to buyers of goods numbered tickets for the drawing of a prize, maintains a lottery. *Rountree v. Ingle*, 94 S. C. 231, 77 S. E. 931, 45 L. R. A. (N. S.) 776, Ann. Cas. 15A,

1002.

And a customer procuring a ticket is in in pari delicto with the merchant and cannot invoke the aid of the courts in the enforcement of any claim depend-

ing on it. *Rountree v. Ingle*, 94 S. C. 236, 77 S. E. 931, 45 L. R. A. (N. S.) 776, Ann. Cas. 15A, 1002.

Where a customer of a merchant, who maintained a lottery, obtained from him a ticket which drew a prize, but a third person obtained the ticket by unfair means and the prize by false pretenses, the customer could not recover the prize from the third person on the theory of any independent contractual claim beyond the illegal lottery drawing. *Rountree v. Ingle*, 94 S. C. 231, 77 S. E. 931, 45 L. R. A. (N. S.) 776, Ann. Cas. 15A, 1002.

Advertising plan held not to be a

"game of chance."—The operation of an alleged advertising plan for stimulating interest in theater by giving cash prize to one, whether patron or not, whose name is drawn from list prepared by theater owner, is not a scheme for issuance or delivery of tickets for money nor a scheme to give something away by way of a "game of chance" within lottery statute. *Darlington Theaters, Inc. v. Coker, Sheriff, et al.*, 190 S. C. 282, 2 S. E. (2d) 782.

See generally, *State v. Pinchback*, 2 Mill 128, 16 Am. St. Rep. 48, *Darlington Theaters, Inc. v. Coker, Sheriff, et al.*, 190 S. C. 282, 2 S. E. (2d) 782.

§ 1232. Penalty for adventuring in lotteries.—Whoever shall be adventurer in, or shall pay any moneys or other consideration, or shall in any way contribute unto or upon account of, any sales or lotteries, shall forfeit, for every such offense, the sum of one hundred dollars to be recovered, with costs of suit, by action or indictment in any court of competent jurisdiction in this State, one moiety thereof to and for the use of the State, and the other moiety thereof to the person or persons who shall inform and sue for the same.

1932 Code, § 1232; Cr. C. '22, § 124; Cr. C. '12, § 260; Cr. C. '02, § 200; G. S. 2597; R. S. 186; 1762 (4) 180.

See generally, *Darlington Theaters, Inc. v. Coker, Sheriff, et al.*, 190 S. C. 282, 2 S. E. (2d) 782.

§ 1233. Penalty for selling lottery tickets.—It shall be unlawful to offer for sale any lottery tickets, or to open or keep any office for the sale of lottery tickets; and if any person shall offend against any of the provisions of this section, he shall, on conviction thereof, forfeit and pay to the State a sum not exceeding ten thousand dollars; and it shall be the duty of the county treasurer of the county to prosecute the offender.

1932 Code, § 1233; Cr. C. '22, § 125; Cr. C. '12 § 261; Cr. C. '02, § 201; G. S. 2598; R. S. 187; 1846 (11) 368.

See generally, *State v. Allen*, 2 McC. 55, 48 Am. Dec. 192—prior to amendment of 1846. Also, see *Darlington Theaters, Inc. v. Coker, Sheriff, et al.*, 190 S. C. 282, 2 S. E. (2d) 782.

§ 1234. Unlawful for certain officers to accept passes.—It shall be unlawful for any person, while a member of the Senate, or of the House of Representatives, State or national, or any state or county official, or any judge of a court of record in this State, to use any free pass, express or telegraph frank, or complimentary ticket, or to ride without paying the usual fare on any railroad in this State. Any person, upon conviction of a violation of the provision of this section, shall be deemed guilty of a misdemeanor, and shall be liable to a fine not to exceed five hundred dollars, or imprisonment not to exceed six months: *provided*, that nothing herein contained shall apply to the commissioner of agriculture.

1932 Code, § 1234; Cr. C. '22, § 130; Cr. C. '12, § 273; Cr. C. '02, § 204; R. S. 190; 1891 (20) 1047; 1905 (24) 900; 1941 (42) 119.

§ 1235. Unlawful to offer passes.—It shall be unlawful for any transpor-

tation or transmitting company, or any person representing same, to issue, or offer to issue a free pass or any special or reduced rates not common to the public, to any member of the Legislature of the State, or member of Congress from this State, or any State or county official, or any judge of a court of record in this State: *provided*, that nothing herein contained shall apply to the commissioner of agriculture.

1932 Code, § 1235; Cr. C. '22, § 131; Cr. C. '12, § 274; Cr. C. '02, § 205; R. S. 191; 1891 (20) 1047; 1905 (24) 900; 1941 (42) 119.

§ 1236. Giving or taking bribes, etc., to or by certain agents, servants or employees.—Whoever corruptly gives, offers or promises to an agent, employee or servant, any gift or gratuity whatever, with intent to influence his action in relation to his principal's, employer's or master's business; or an agent, employee or servant who corruptly requests or accepts a gift or gratuity or a promise to make a gift, or to do an act beneficial to himself under an agreement or with an understanding that he shall act in any particular manner in relation to his principal's, employer's or master's business; or an agent, employee or servant who, being authorized to procure material supplies or other articles, either by purchase or contract for his principal, employer or master, receives directly or indirectly, for himself or for another, a commission, discount or bonus from the person who makes such sale or contract, or furnishes such materials, supplies or other articles, or from a person who renders such service or labor; and any person who gives or offers such an agent, employee or servant such commission, discount or bonus, shall be punished by a fine of not more than five hundred dollars, or by such fine and by imprisonment for not more than one year.

1932 Code, § 1236; Cr. C. '22, § 132; Cr. C. '12, § 277; 1905 (24) 942.

§ 1237. No gift or premium to be offered to the purchaser.—No person shall sell, exchange or dispose of any article of food, or attempt to do so, upon any representation, advertisement, notice or indictment that anything other than what is specially stated to be the subject of the sale or exchange is or is to be delivered or received, or in any way connected with or a part of the transaction as a gift, prize, premium, or reward to the purchaser. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding one hundred dollars, or by imprisonment not exceeding thirty days.

1932 Code, § 1237; Cr. C. '22, § 133; Cr. C. '12, § 278; Cr. C. '02, § 206; R. S. 192; 1887 (11) 812.

§ 1238. Fraud by officer or stockholder a misdemeanor.—Any officer or stockholder of any corporation who shall knowingly and wilfully make, or cause to be made, any fraudulent misrepresentation as to either capital, property or resources of the corporation, shall be held guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not more than two thousand dollars, or by imprisonment for not longer than two years, or both, at the discretion of the court.

1932 Code, § 1238; Cr. C. '22, § 134; Cr. C. '12, § 281; Cr. C. '02, § 209; R. S. 195; 1898 (19) 546; 1896 (22) 101.

Cross reference.—As to false statements made by corporation's officers, see section 7724-3.

"Fraudulent misrepresentation" must be strictly construed.—The words "fraudulent misrepresentation," as used in this section, must be strictly construed in view of the principle requiring strict construction of penal statutes.

State v. Bolyn, 143 S. C. 63, 141 S. E. 165.

Because it is essential to conviction.—Under this section, proof that defendant is a stockholder or officer in a corporation and that he made a "fraudulent misrepresentation," is essential to conviction. State v. Bolyn, 143 S. C. 63, 141 S. E. 165.

§ 1239. Penalty for discounting, etc., pension claims.—Any person who shall discount, shave, or in any manner speculate in, the claim or application of any soldier, sailor, or widow, made under the pension laws of this State shall be guilty of a misdemeanor, and, upon conviction, shall be fined not exceeding one thousand dollars, or imprisonment not exceeding thirty days, or both, at the discretion of the court.

1932 Code, § 1239; Cr. C. '22, § 135; Cr. C. '12, § 282; Cr. C. '02, § 210; R. S. 196; 1897 (19) 828.

§ 1240. Penalty for making fraudulent pension claims.—Any person who shall fraudulently personate any soldier, sailor, or widow, for the purpose of obtaining the benefit of the pension laws of this State, or who shall knowingly make or cause to be made any false application or statement, or by any false or fraudulent statement procure such statement to be made, approved or paid, shall be guilty of a misdemeanor, and, upon conviction, shall be punished by fine not exceeding two hundred dollars, or imprisonment not exceeding six months, or both, at the discretion of the court.

1932 Code, § 1240; Cr. C. '22, § 136; Cr. C. '12, § 283; Cr. C. '02, § 211; R. S. 197; 1897 (19) 828.

§ 1241. Unlawful to wear or sell Confederate Crosses of Honor except as prescribed—punishment.—It shall be unlawful for any person to wear as a badge, or expose upon their person, or to sell, or offer for sale, or otherwise dispose of, or use, or to manufacture, any badge or insignia known as the Confederate Cross of Honor, or any counterfeit or likeness of such badge, unless such badge has been conferred or bestowed, or authorized to be bestowed, by the United Daughters of the Confederacy, upon such wearer, or in any other way than that prescribed by the rules and regulations made and adopted by the United Daughters of the Confederacy. Any violation of the provision of this section shall be punished by a fine of not less than one hundred (\$100) dollars nor more than five hundred (\$500) dollars, or be imprisoned for not less than twelve (12) months nor more than five (5) years.

1932 Code, § 1241; Cr. C. '22, § 137; Cr. C. '12, § 284; '02 (23) 1097; 1905 (24) 954.

§ 1242. Only members wear emblems of The American Legion, The American Legion Auxiliary, The Sons of The American Legion, La Societe des 40 Hommes et 8 Cheveaux (Forty and Eight).—It shall be unlawful for any person other than a member of the American Legion, The American Legion Auxiliary, The Sons of The American Legion, or La Societe des 40 Hommes et 8 Cheveaux (Forty and Eight) and disabled American Veterans of the World War in good standing wilfully to wear the button, which is the official insignia or emblem of any of the said organizations. Any wil-

ful violation of the provisions of this section, shall subject the offender to a fine of not exceeding one hundred (\$100.00) dollars or imprisonment not exceeding thirty (30) days.

1932 Code, § 1242; Cr. C. '22, § 138; 1921 (32) 212; 1936 (39) 1480.

§ 1243. Imitation of names, emblems, etc., of certain organizations prohibited.

(1) **Names of organizations previously existing.**—No person, society, or organization shall assume, use, or adopt, or become incorporated under, or continue to use the name and style or emblems of any benevolent, fraternal, social, humane or charitable organization previously existing in this State, or a name and style or emblems, so nearly resembling the name and style of such incorporated organization as to be colorable imitation thereof. In all cases where two or more of such societies, associations or corporations claim the right to the same name, or to name substantially similar as above provided, the organization which was first organized and used the name, and first became incorporated under the laws of the United States or of any State of the Union, whether incorporated in this State or not, shall be entitled in this State to the prior and exclusive use of such name, and the rights of such societies, associations or corporations and of their individual members shall be fixed and determined accordingly.

(2) **Injunctions may be issued to restrain improper use thereof.**—Whenever there shall be an actual or threatened violation of the provisions of this section, the organization entitled to the exclusive use of the name in question, under the terms of said section, shall have the right to apply to the proper courts for an injunction to restrain the infringement of its name and the use of its emblems, and if it shall be made to appear to the court that the defendants are in fact infringing or about to infringe the name and style of a previously existing benevolent, fraternal, social, humane, or charitable organization in the manner prohibited in said subdivision 1 of this section, or that the defendant or defendants are wearing and using the badge, insignia or emblems of said organization, without the authority thereof in violation of said subdivision 1, an injunction may be issued by the court under the principles of equity, without requiring proof that any person has been in fact misled or deceived by the infringement of such name, or the use of such emblem.

(3) **Misdemeanor.**—Any person who shall wear a badge, button, or other emblem, or shall use the name, or claim to be a member of any benevolent, fraternal, social, humane, or charitable organization which is entitled to the exclusive use of such name and emblems under subdivision 1 of this section, either in the identical form or in such near resemblance thereto as to be a colorable imitation of such emblems and name, unless entitled so to do under the laws, rules and regulations of such organization, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than one hundred dollars or more than one thousand dollars, or imprisonment in the state penitentiary for not less than thirty days or more than one year.

1932 Code, § 1243; Cr. C. '22, § 139; Cr. C. '12, § 285; 1906 (25) 118; 1910 (26) 723, 779; 1925 (34) 20.

§ 1244. Unlawful to imitate or counterfeit labels, etc.—Whenever any person, or any association or union of workingmen, has heretofore adopted or used, or shall hereafter adopt or use, any label, trademarks, term, design, device or form of advertisement for the purpose of designation, making known, or distinguishing any goods, wares, merchandise, or other product of labor as having been made, manufactured, produced, prepared, packed, or put on sale by such person, or association or union of workingmen, or by a member, or members, of such association or union, it shall be unlawful to counterfeit or imitate such label, trademark, term, design, device, or form of advertisement, or to use, sell, offer for sale, or in any way utter or circulate any counterfeit or imitation of any such label, trademark, term, design, device, or form of advertisement. Whoever knowingly counterfeits or imitates any such label, trademark, term, design, device or form of advertisement which has been filed and recorded in the office of the secretary of state, as hereinafter provided; or knowingly sells, offers for sale, or in any way utters or circulates any counterfeit or imitation of any such label, trademark, term, design, device, or form of advertisement; or knowingly keeps or has in his possession, with intent that the same shall be sold or disposed of, any goods, wares, merchandise, or other product of labor to which or on which any such counterfeit or imitation is printed, painted, stamped, or impressed; or knowingly sells or disposes of any goods, wares, merchandise, or other product of labor contained in any box, case, can, or package to which or on which any such counterfeit or imitation is attached, affixed, printed, painted, stamped or impressed; or knowingly keeps or has in his possession, with intent that the same shall be sold or disposed of, any goods, wares, merchandise, or other product of labor in any box, case, can or package to which or on which any such counterfeit or imitation is attached, affixed, printed, painted, stamped, or impressed, shall be punished by a fine of not more than one hundred dollars, or by imprisonment for not more than three months.

1932 Code, § 1244; Cr. C. '22, § 140; Cr. C. '12, § 286; 1910 (26) 781.

§ 1245. Labels, etc., to be recorded with secretary of state.—Every such person, association, or union, that has heretofore adopted or used, or shall hereafter adopt or use, a label, trademark, term, design, device, or form of advertisement, as provided in section 1244, shall file the same for record in the office of the secretary of state by leaving two copies, counterparts or facsimiles thereof with said Secretary, and by filing therewith a sworn application specifying the name or names of the person, association, or union on whose behalf such label, trademark, term, design, device, or form of advertisement shall be filed, the class of merchandise and a description of the goods to which it has been or is intended to be appropriated, stating the parties so filing, or on whose behalf such label, trademark, term, design, device, or form of advertisement shall be filed, has the right to the use of the same; that no other person, firm, association, union, or corporation has the right to such use, either in the identical form or in any such near resemblance thereto as may be calculated to deceive, and that the facsimiles or counterparts filed therewith are true and correct, before there shall be any liability to any suit or proceeding for any violation of sections 1244 to 1248, inclusive. There shall be paid for such filing and recording a fee of ten dollars. Said secretary of state shall cause a description of such

label, trademark, term, design, device, or form of advertisements to be published once a week for three successive weeks, at the expense of the applicant, in some newspaper published in the city of Columbia. After such publication said secretary shall deliver to such person, association, or union, so filing or causing to be filed, any such label, trademark, term, design, device, or form of advertisement, so many duly attested certificates of the recording of the same as such person, association, or union may apply for, for each of which certificates said secretary shall receive a fee of one dollar. Any such certificate of record shall in all suits and prosecutions under this section be sufficient proof of the adoption of such label, trademark, term, design, device, or form of advertisement. Said secretary of state shall not record for any person, union, or association any label, trademark, term, design, device, or form of advertisement that would probably be mistaken for any label, trademark, term, design, device, or form of advertisement therefore filed by or on behalf of any other person, union, or association.

1932 Code, § 1245; Cr. C. '22, § 141; Cr. C. '12, § 287; 1910 (26) 781; 1930 (36) 1236.

§ 1246. Penalty for fraudulent registration of labels, etc.—Any person who shall, for himself or on behalf of any other person, association or union, procure the filing of any label, trademark, term, design, device, or form of advertisement in the office of the said secretary of state, under the provisions of §§ 1244 to 1248, by making any false or fraudulent representations, or declarations, verbally or in writing, or by any fraudulent means, shall be liable to pay any damages sustained in consequence of any such filing, to be recovered by or on behalf of the party injured thereby in any court having jurisdiction, and shall be punished by a fine not exceeding one hundred dollars, or by imprisonment not exceeding three months. In any suit or prosecution under the provisions of sections 1244 to 1248, inclusive, the defendant may show that he or it was the owner of such label, trademark, term, design, device, or form of advertisement prior to its being filed under the provisions of §§ 1244 to 1248, inclusive, and that it has been filed wrongly or without right by some other person, association, or union.

1932 Code, § 1246; Cr. C. '22, § 142; Cr. C. '12, § 288; 1910 (26) 781.

§ 1247. Unlawful use of labels, etc., may be enjoined.—Every such person, association, or union, adopting or using a label, trademark, term, design, device, or form of advertisement as aforesaid, may proceed by suit to enjoin the manufacture, use, display, or sale of any counterfeit or imitations thereof, and all courts of competent jurisdiction may grant injunctions to restrain such manufacture, use, display, or sale, and may award the complainant in any such suit damages resulting from such manufacture, use, sale, or display, as may be by said court deemed just and reasonable, and may require the defendants to pay to such persons, association, or union, all profits derived from such wrongful manufacture, use, display, or sale; and such may also order that all such counterfeits or imitations in the possession or under the control of any defendants in such case to be delivered to an officer of the court, or to the complainant, to be destroyed. In all cases where such association or union is not incorporated, suits under sections 1244 to 1248, inclusive, may be commenced and prosecuted by

an officer or member of such association or union, on behalf of and for the use of such association or union.

1932 Code, § 1247; Cr. C. '22, § 143; Cr. C. '12, § 289; 1910 (26) 781.

§ 1248. Unlawful to use seal—certain trademarks excepted.—Any person or persons who shall in any way use the name or seal of any such person, association, or union, or officer thereof, in and about the sale of goods or otherwise, not being authorized to use same, shall be guilty of a misdemeanor, and shall be punished by imprisonment for not more than three months, or by a fine of not more than one hundred dollars. The provisions of sections 1244 to 1248, inclusive, shall not abridge any rights to any trademarks existing at the time of the passage of this statute, whether the same shall be recorded or not, nor any remedies or rights of action otherwise or theretofore existing in favor of owners of trademarks. The judicial courts of the several judicial districts shall have jurisdiction of all complaints for violations of sections 1244 to 1248, inclusive.

1932 Code, § 1248; Cr. C. '22, § 144; Cr. C. '12, § 290; 1910 (26) 781.

§ 1249. Sale and use of a trademark advertising contents of food products, etc.—Any trademark or whatever name designated and used to advertise the chemical and other contents of food products grown in South Carolina, or other articles, shall not be sold, bartered or exchanged by any person, firm, or corporation or officer, except through and by the commission known as the South Carolina natural resources commission. Said commission is hereby authorized, empowered and entrusted with the handling by selling, or otherwise, of any trademark used for the purpose set forth in this section: *provided*, that said commission may use, under their direction, any officer of the State for the purpose of handling said trademark. Any person, firm, or corporation violating the provisions of this section shall be subject to a fine, or imprisonment, in the discretion of the court.

1932 Code, § 1249; 1929 (36) 223.

§ 1250. Registered trademark as "brand" for timber—notice of ownership—penalty for destroying.

(1) **Authority to use.**—Any person, firm, association or corporation that has heretofore adopted or used or shall hereafter adopt or use a label, trademark, term, design or device, and that has heretofore filed or shall hereafter file the same for record in the office of the secretary of state of South Carolina, as provided in sections 1244 to 1248, inclusive, is hereby authorized to use the same to mark and identify timber, and when such label, trademark, term, design or device shall be stamped, impressed or indented on timber, it shall constitute a "brand" within the meaning of this section, and shall be notice to the world that the owner of such brand is the owner of or has some property right or interest in said timber or lien thereon, as hereinafter set forth.

(2) **Lien on branded timber.**—When any owner of timber shall agree to sell the same, receive any portion of the purchase price therefor and consent to the purchaser's brand being placed thereon, then such purchaser shall have a lien on such timber to secure him in the amount of the purchase price paid to such owner, which shall exist so long as such purchaser is not in default under the contract of purchase: *provided*, that this shall

not prevent the title to said timber passing to the purchaser either by agreement of the parties or operation of law, and the provisions of this section shall apply also to such cases in which the title has passed to the purchaser.

(3) Destruction of brand or removal, etc., of timber a misdemeanor.—The owner of said timber or any other person or persons who shall cut out or off, obliterate, or in any manner deface or destroy the brand of the purchaser or owner upon such timber, or who shall injure, remove, secrete, take, receive, or attempt to sell or purchase such timber so long as such brand lawfully remains thereon shall be guilty of a misdemeanor and, upon conviction thereof, shall be imprisoned for a term of not less than thirty days nor more than three years, and be fined not less than one hundred (\$100.00) dollars, nor more than three thousand (\$3,000.00) dollars, either or both.

(4) Loss of lien of purchaser by default in payments—removal of brand.—The lien of the purchaser over such timber in cases where the title had not passed to such purchaser, shall cease to exist immediately upon his becoming in default under the contract of purchase, and it shall then be lawful for the owner of such timber to deface, destroy or otherwise remove the brand of the purchaser therefrom and resume full possession and control thereover.

(5) Terms defined.—The terms “owner” and “purchaser” as used in this section shall be held to include any person or persons, firm, association or corporation acting either in his, their, or its own behalf, or as an employee, agent or representative of any other person, persons, firm, association or corporation. The term “timber” as used in this section shall be held to include trees, lying or prepared for sale, sawlogs and all other logs, cross-ties, boards, plans, staves and headings, and all other timber cut or prepared for use or sale.

1932 Code, § 1250; 1925 (34) 27.

§ 1251. Misdemeanor to remove any state line marks.—Any person who shall deface, disturb or remove any granite post or marking, whether wood, stone, or metal, duly placed by competent authority on the state line of this State, shall be deemed guilty of a misdemeanor, and, on conviction, shall be fined not less than one hundred dollars, or imprisoned not less than six months.

1932 Code, § 1251; Cr. C. '22, § 145; Cr. C. '12, § 291; 1906 (25) 63.

§ 1253. Digging or pulling up ginseng a misdemeanor.—If any person shall dig in this State any ginseng, pull up the roots or in any manner injure them, from the 15th day of March till the 15th day of September in any year, such person shall be guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine of not more than one hundred dollars, or imprisonment for not more than thirty days.

1932 Code, § 1253; Cr. C. '22, § 148; Cr. C. '12, § 299; Cr. C. '02, § 231; 1899 (23) 92.

§ 1254. Rebates collected and retained by public officers misdemeanor.—Any state or county officer in this State who shall receive or collect any rebate, commission or discount from any person, persons or corporations upon the purchase of any books, or any other property, or supplies, or from

printing or advertising, whether for use of the State or county, and shall fail or refuse to pay same to the proper State or county authorities at the time of receiving the same, shall be deemed guilty of a misdemeanor, and upon conviction, shall be punished by a fine or imprisonment, in the discretion of the court, and shall also forfeit his said office.

1932 Code, § 1254; Cr. C. '22, § 149; Cr. C. '12, § 303; Cr. C. '02, § 223; 1897 (22) 519.

§ 1255. Carrying, sale, etc., of pistols regulated—exceptions.—It shall be unlawful for any one to carry about the person, whether concealed or not, any pistol less than twenty inches long and three pounds in weight, and it shall be unlawful for any person, firm or corporation to manufacture, sell or offer for sale, lease, rent, barter, exchange or transport for sale or into this State, any pistol of less length and weight. Any violation of this section shall be punished by a fine of not more than one hundred (\$100) dollars or imprisonment for not more than thirty (30) days; and in case of a sale by a person, firm or corporation, the sum of one hundred (\$100) dollars shall be forfeited to and for the use of the school fund of the county wherein the violation takes place, to be recovered as other fines and forfeitures: *provided*, this section shall not apply to peace officers in the actual discharge of their duties, or to carrying or keeping of pistols by persons while on their own premises. In case it shall appear to the satisfaction of the presiding judge or magistrate before whom such offense is tried that the defendant had good reasons to fear injury to his person or property, and carried said weapon to protect himself or property, he may, in his discretion, suspend sentence: *provided*, nothing herein contained shall abridge the right of self-defense.

1932 Code, § 1255; Cr. C. '22, § 150; Cr. C. '12, § 157; Cr. C. '02, § 129; 1901 (23) 748; 1910 (26) 718; 1903 (24) 127; 1902 (23) 1093; 1901 (23) 748.

This section does not prohibit a person from carrying weapons in his satchel.—Conviction of carrying unlawful weapons, in violation of this section, is not warranted where accused did not

carry the pistol about his person concealed or unconcealed, but it was taken about and placed in his satchel or suit case. *State v. Weston*, 108 S. C. 383, 94 S. E. 871.

§ 1256. Carrying concealed weapons a misdemeanor.—Any person carrying a pistol, dirk, slingshot, metal knuckles, razor, or other deadly weapon usually used for the infliction of personal injury, concealed about his person, shall be guilty of a misdemeanor, and, upon conviction thereof before a court of competent jurisdiction, shall forfeit to the county the weapon so carried concealed, and if convicted in a municipal court said weapon shall be forfeited to said municipality, and be fined in the sum of not more than one hundred dollars and not less than twenty dollars, or imprisoned not more than thirty nor less than ten days, in the discretion of the court. Nothing herein contained shall be construed to apply to persons carrying concealed weapons upon their own premises, or peace officers in the actual discharge of their duties as peace officers.

1932 Code, § 1256; Cr. C. '22, § 151; Cr. C. '12, § 158; Cr. C. '02, § 130; G. S. 2472; R. S. 129; 1880 (17) 448; 1894 (21) 824; 1897 (22) 423; 1900 (23) 446; 1922 (32) 905.

State must prove that weapon was concealed about the person.—*State v. Johnson*, 16 S. C. 187, 23 L. R. A. (N. S.) 175.

§ 1257. Clerks of courts and mayors authorized to sell forfeited weapons.—It shall be the duty of clerks of courts in each county of this State to

keep in a suitable book the make, brand, calibre, number and other descriptions that will identify any forfeited weapon. And the said clerks of court are hereby authorized to sell any forfeited weapon to any one who, under the law, may carry such weapons, to licensed dealers in this State, or to persons or dealers out of the State. The said clerks of court shall receive 10 per cent of the amount of sale as his fee: *provided*, in no event shall the fee exceed one dollar; the balance to go into the school fund of the county, and all mayors of towns and cities in which weapons are forfeited shall have the same duties and powers as the clerk of court, and the funds obtained from such sale shall go into the town or city treasury.

1932 Code, § 1257; Cr. C. '22, § 152; 1913 (28) 198.

§ 1258. Assault, etc., with concealed weapon.—If any person be convicted of assault, assault and battery, assault or assault and battery with intent to kill, or of manslaughter, and it shall appear upon the trial that the assault, assault and battery, assault or assault and battery with intent to kill, or manslaughter, shall have been committed with a deadly weapon of the character specified in section 1256 carried concealed upon the person of the defendant so convicted, the presiding judge shall, in addition to the punishment, provided by law for such assault, assault and battery, assault or assault and battery with intent to kill, or manslaughter, inflict further punishment upon the person so convicted, by confinement in the penitentiary for not less than three months, nor more than twelve months, with or without hard labor, or a fine of not less than two hundred dollars, or both fine and imprisonment, at the discretion of the said judge.

1932 Code, § 1258; Cr. C. '22, § 153; Cr. C. '12, § 160; Cr. C. '02, § 132; 1897 (22) 427.

This section must be construed with preceding section.—State v. Johnson, 70 S. C. 384, 50 S. E. 8.

The indictment must include count for carrying concealed weapons.—The bill of indictment must include count for carrying concealed weapons, and there must be a finding of guilty thereon before any punishment therefor can be imposed. State v. Johnson, 70 S. C. 384, 50

S. E. 8.

Under indictment for assault with pistol with intent to kill, where jury find a verdict of "guilty of an aggravated assault and battery," the words "and battery" were stricken out as surplusage and the verdict was held good. State v. Robinson, 31 S. C. 453, 10 S. E. 101, 3 Am. St. Rep. 283.

§ 1258-1. Use and possession of machine guns.

(1) **"Machine gun" defined.**—For the purpose hereof the words "machine gun" apply to and include all firearms commonly known as machine rifles, machine guns and submachine guns of any calibre whatsoever, capable of automatically discharging more than eight cartridges successively without reloading, in which the ammunition is fed to such gun from or by means of clips, disks, belts, or other separable mechanical device.

(2) **Transportation.**—It shall be unlawful for any person or persons in any manner to transport from one place to another in this State, or from any railroad company, or express company, or other common carrier, or any officer, agent, or employee of any of them, or any other person acting in their behalf knowingly to ship or to transport from one place to another in this State in any manner or by any means whatsoever, except as hereinafter provided, any firearm as described hereinabove or commonly known as a machine gun.

(3) **Storing, keeping, and/or possessing.**—It shall be unlawful for any person to store, keep, possess, or have in possession, or permit another to store, keep, possess, or have in possession except as hereinafter provided, any firearm of the type defined above or commonly known as a machine gun.

(4) **Selling, renting or giving away.**—It shall be unlawful for any person to sell, rent, or give away, or be interested directly or indirectly, in the sale, renting or giving away, or otherwise disposing of any firearm of the type above described or commonly known as a machine gun.

(5) **Exceptions—register.**—The provisions hereof shall not apply to the army, navy, or marine corps of the United States, the national guard, and organizations authorized by law to purchase or receive machine guns from the United States, or from this State, and the members of such corps. National guard and organizations while on duty or at drill, may possess, carry and transport machine guns, and, *provided, further*, that any peace officer of the State, counties or political sub-division thereof, state constable, member of the highway patrol, railway policemen, warden, superintendents, headkeeper or deputy of any state prison, penitentiary, workhouse, county jail, city jail, or other institution for the detention of persons convicted or accused of crime, or held as witnesses in criminal cases, or persons on duty in the postal service of the United States, or common carrier while transporting direct to any police department, military or naval organization, or person authorized by law to possess or use a machine gun, may possess machine guns when required in the performance of their duties, nor shall the provisions hereof be construed to apply to machine guns kept for display as relics and which are rendered harmless and not usable. Every person permitted by this section to possess a machine gun or immediately after any person is elected to or appointed to any office or position which entitles such person to possess a machine gun, shall file in the office of the secretary of state on a blank to be supplied by the secretary of state on application therefor, an application to be properly sworn to, which shall be approved by the sheriff of the county in which the applicant resides or has its principal place of business, which shall include the applicant's name, residence and business address, description including sex, race, age, weight, height, color of eyes, color of hair, whether or not ever charged or convicted of any crime, municipal, state or otherwise, and where, if so charged, and when same was disposed of. The applicant shall also give description including the serial number and make of the machine gun which he possesses or desires to possess. Thereupon, the secretary of state shall file such application in his office, registering such applicant together with the information required in the application in a book or index to be kept for that purpose, and assign to him a number, and issue to him a card which shall bear the signature of the applicant, and which he shall keep with him while he has such machine gun in his possession. Such registration shall be made on the date application is received and filed with the secretary of state, and shall expire on December 31, of the year in which said license is issued.

(6) **Penalties.**—Any person violating any of the provisions hereof shall be guilty of a felony, and, on conviction thereof, shall be sentenced to pay

a fine not exceeding one thousand dollars, and undergo imprisonment by separate or solitary confinement at labor not exceeding twenty (20) years.
1934 (38) 1288.

§ 1259. Penalty for interfering with phosphate commissioners or mining without license.—Any person or persons wilfully interfering with, molesting, or obstructing, or attempting to interfere with, molest, or obstruct the State or the said board of phosphate commissioners, or any one of them authorized or licensed, in the peaceable possession and occupation of any of the marshes and navigable streams and waters of the State, including the Coosaw River phosphate territory, or who shall dig or mine, or attempt to dig or mine, any of the phosphate rock or phosphate deposits of this State, without a license so to do by the board of phosphate commissioners, shall be punished for each offense by a fine of not less than one hundred dollars or more than five hundred dollars or imprisonment for not less than one or more than twelve months, or both, at the discretion of the court.

1932 Code, § 1259; Cr. C. '22, § 154; Cr. C. '12, § 305; Cr. C. '02, § 225; R. S. 515; 1900 (20) 694.

§ 1261. Misdemeanor to interfere with aids to navigation.—Any person who shall moor any vessel of any kind or name whatsoever, or any raft or any part of a raft, to any buoy, beacon or day-mark placed in the waters of South Carolina by the authority of the United States light house board, or shall in any manner hang on with any vessel or raft or a part of a raft to any such buoy, beacon or day-mark, or shall wilfully remove, damage or destroy any such buoy, beacon or day-mark, or shall cut down, remove, damage, or destroy any beacon erected on land in this State by the authority of the United States light house board, or through unavoidable accident run down, drag from its position, or in any way injure any buoy, beacon or day-mark, as aforesaid, and shall fail to give notice as soon as practicable of having done so, to the light house inspector or light house engineer of the district in which said buoy, beacon or day-mark may be located, shall, for every such offense, be guilty of a misdemeanor, and shall be punished by a fine not to exceed two hundred dollars, or imprisonment not to exceed three months, or both, at the discretion of the court.

1932 Code, § 1261; Cr. C. '22, § 156; Cr. C. '12, § 307; 1905 (24) 914.

§ 1262. Unlawful to anchor vessel to range lights.—It shall be unlawful for any vessel to anchor on the range-line of any range of lights established by the United States light house board, unless such anchorage is unavoidable, and the master of any vessel so anchoring shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine not to exceed fifty dollars.

1932 Code, § 1262; Cr. C. '22, § 157; Cr. C. '12, § 308; 1905 (24) 914.

§ 1263. Changing position of buoys, etc.—Any person having charge of any raft passing any buoy, beacon or day-mark, who shall not exercise due diligence in keeping clear of it, or, if unavoidably fouling it, shall not exercise due diligence in clearing such raft without dragging from its position such buoy, beacon, or day-mark, shall be guilty of a misdemeanor,

and, upon conviction, shall be punished by a fine not to exceed fifty dollars.

1932 Code, § 1263; Cr. C. '22, § 158; Cr. C. '12, § 309; 1905 (24) 914.

§ 1264. Cost of repairs to buoy, beacon, etc., a lien.—The cost of repairing or replacing any such buoy, beacon or day-mark which may have been misplaced, damaged, or destroyed by any vessel or raft whatsoever having been made fast to any such buoy, beacon, or day-mark, shall, when the same shall be legally ascertained, be a lien upon such vessel or raft, and may be recovered against said vessel or raft and the owner or owners thereof in an action of debt in any court of competent jurisdiction in this State.

1932 Code, § 1264; Cr. C. '22, § 159; Cr. C. '12, § 310; Cr. C. '02, § 229; R. S. 520; 1893 (21) 396.

§ 1265. Mutilation of any monument a misdemeanor.—Whoever shall unlawfully or wilfully cut, mutilate, deface, or otherwise injure any public, or private monument or tombstone, whether within or without any recognized cemetery, or on any battlefield, or who shall cut, injure or deface or mutilate any fence or enclosure erected around said such monument, or commit any other wilful trespass upon the grounds around said monument or tombstone, shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than fifty dollars or more than one hundred dollars, or imprisoned for a period of not less than twenty days or more than thirty days.

1932 Code, § 1265; Cr. C. '22, § 160; Cr. C. '12, § 245; 1910 (26) 748.

§ 1266. Destruction of graves and graveyards a misdemeanor.—Any person or persons who shall wilfully obliterate or desecrate any grave, or shall wilfully destroy any plants, trees, decorations, shrubbery, or deface or remove any gravestone, or shall wilfully destroy, tear down or injure any fence or other enclosure of any graveyard, shall be guilty of a misdemeanor, and, upon conviction, shall pay a fine of not exceeding two thousand (\$2,000.00) dollars, or be confined on the county chain gang, or in the state penitentiary, not exceeding five (5) years, either or both in the discretion of the court.

1932 Code, § 1266; Cr. C. '22, § 161; Cr. C. '12, § 246; Cr. C. '02, § 230; 1899 (23) 98; 1938 (40) 1576.

A digging up and removal of shrubbery from about a grave is a "willful destruction" of shrubbery within statute and a grave is thereby "desecrated"

without actual entrance of it. State v. Johnson, et al., 196 S. C. 497, 14 S. E. (2d) 24.

§ 1267. Destroying, defacing, etc., monuments of United States coast surveys.—If any person shall wilfully and maliciously destroy, or in any manner hurt, damage, or obstruct, or shall wilfully and maliciously cause, or aid, or assist, or counsel, or advise, any other person or persons to destroy, or in any manner to hurt, damage, injure, or obstruct, any signal, monument, building, or any appendage thereto, used or constructed under and by virtue of the act of Congress of the United States, passed the tenth day of February, 1807, entitled "An Act to Provide for Surveying the Coast of the United States," and the supplements thereto, he shall be liable to be indicted therefor, and, on conviction, shall be imprisoned not less than

one month, or pay a fine not exceeding fifty dollars, or both, at the discretion of the court before which such conviction shall take place, and shall be further liable to pay all expenses of repairing the same; and it shall not be competent for any person so offending to defend himself by pleading, or giving in evidence, that he was the owner, or agent, or servant of the owner, of the land where such damage was done, or caused, at the time the same was caused or done.

1932 Code, § 1267; Cr. C. '22, § 162; Cr. C. '12, § 311; Cr. C. '02, § 471; G. S. 2513; R. S. 368; 1847 (11) 444; St. at Large, U. S. Vol. II, 413.

§ 1269. Separation of races in electric cars.—Electric railways outside of the corporate limits of cities and towns shall have authority to separate the races in their cars, and the conductors in charge of said cars are hereby authorized and directed to separate the races in said cars under their charge and control. Any conductor who shall fail or refuse to separate the races as herein provided, shall, upon conviction, be fined not more than one hundred dollars, or be imprisoned for not exceeding thirty days for each offense.

1932 Code, § 1269; Cr. C. '22, § 164; Cr. C. '12, § 315; 1905 (24) 954.

§ 1270. Conductors to have powers of peace officers.—Conductors and other employees of electric railways while in charge of the cars of said railway, are hereby invested with the powers of peace officers and authorized to make arrests as in the case of conductors of steam railroads.

1932 Code, § 1270; Cr. C. '22, § 165; Cr. C. '12, § 316; 1905 (24) 954.

§ 1271. Tent shows to maintain separate entrances for races.—Any circus or other such traveling show exhibiting under canvas or out of doors for gain shall maintain two main entrances to such exhibition, and one shall be for white people and the other entrance shall be for colored people, and such main entrances shall be plainly marked "For White People," and the other entrance shall be marked "For Colored People," and all white persons attending such show or traveling exhibition other than those connected with the said show shall pass in and out of the entrance provided for white persons, and all colored persons attending such show or traveling exhibition shall pass in and out of the entrance provided for colored persons. Any circus or other such traveling show exhibiting under canvas and failing to comply with the provisions of this section shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined not more than \$500.00. The sheriffs of the counties in which such circus or traveling show shall exhibit shall be charged with the duty of enforcing the provisions of this section.

1932 Code, § 1271; Cr. C. '22, § 166; 1917 (30) 48.

§ 1272. Separation of employees of different races in cotton textile factories.—It shall be unlawful for any person, firm or corporation engaged in the business of cotton textile manufacturing in this State to allow or permit operatives, help and labor of different races to labor and work together within the same room, or to use the same doors of entrance and exit at the same time, or to use and occupy the same pay ticket windows or doors for paying off its operatives and laborers at the same time, or to

use the same stairway and windows at the same time, or to use at any time the same lavatories, toilets, drinking water buckets, pails, cups, dip-pers or glasses: *provided*, equal accommodations shall be supplied and furnished to all persons employed by said person, firm or corporation engaged in the business of cotton textile manufacturing as aforesaid, without distinction to race, color or previous conditions. Any firm, person or corporation engaged in cotton textile manufacturing violating the provisions of this section shall be liable to a penalty of not over one hundred (\$100.00) dollars for each and every offense, to be recovered in suit by any citizen of the county in which the offense is committed and to be paid to the school fund of the district in which offending textile manufacturing establishment is located. Any firm, person or corporation engaged in cotton textile manufacturing violating the provisions of this section shall be punished by a fine not to exceed one hundred dollars for each offense or imprisonment at hard labor for a period not to exceed thirty days or both at the discretion of the judge. This section shall not apply to employment of firemen as subordinates in boiler rooms, or to floor scrubbers and those persons employed in keeping in proper condition lavatories and toilets, and carpenters, mechanics and others engaged in the repair or erection of buildings.

1932 Code, § 1272; Cr. C. '22, § 167; 1915 (29) 79; 1916 (29) 706.

§ 1273. Misdemeanor to mutilate state flag.—Any person who mutilates, injuries or desecrates the flag of the State, wherever displayed, upon the state house, any court house, any building of the state university, or any state college, or upon any public school building, shall be guilty of a misdemeanor, and, upon conviction, be punished by a fine of not more than one hundred dollars or imprisonment for not more than thirty days.

1932 Code, § 1273; Cr. C. '22, § 168; Cr. C. '12, § 207; 1910 (26) 753.

§ 1274. Desecration, mutilation or improper use of U. S. flag prohibited.—Any person, who in any manner, for exhibition or display, shall, after this section takes effect, knowingly place or cause to be placed, any word, figure, mark, picture, design, drawing, or any advertisement, of any nature, upon any flag, standard, color or ensign of the United States, or shall knowingly expose or cause to be exposed to public view any such flag, standard, color or ensign, upon which, after this section takes effect, shall have been printed, painted, or otherwise placed, or to which shall be attached, appended, affixed, or annexed any word, figure, mark, picture, design or drawing or any advertisement of any nature, or who shall expose to public view, manufacture, sell, expose for sale, give away, or have in possession for sale or to give away, or for use for any purpose, any article or substance, being an article of merchandise, or a receptacle of merchandise or article or thing for camping or transporting merchandise, upon which after this section takes effect, shall have been printed, painted, attached, or otherwise placed a representation of any such flag, standard, color or ensign, to advertise, call attention to, decorate, mark, or distinguish, the article, or substance, on which placed, or who shall publicly mutilate, deface, defile or defy, trample upon, or cast contempt, either by word or act, upon any such flag, standard, color, or ensign, shall be deemed guilty of a misdemeanor, and shall be punished by a fine not exceeding one

hundred dollars or by imprisonment for not more than thirty days, or both, in the discretion of the court; and shall also forfeit a penalty of fifty dollars for each such offense, to be recovered with costs in a civil action, or suit in any court having jurisdiction, and such action or suit may be brought by and in the name of any citizen of this State, and such penalty when collected, less the reasonable cost and expense of action or suit and recovery to be certified by the clerk of court of the county in which the offense is committed, shall be paid into the treasury of this State; and two or more penalties may be sued for and recovered in the same action or suit. The words, flag, standard, color, or ensign, as used in this section, shall include any flag, standard, color, ensign, or any picture or representation, or either thereof, made of any substance, or represented on any substance, and of any size, evidently purporting to be, either of said flag, standard, color or ensign, of the United States of America, or a picture or a representation, or either thereof, upon which shall be shown the colors, the stars, and the stripes, in any number or either thereof, or by which the person seeing the same, without deliberation may believe the same to represent the flag, colors, standard, or ensign, of the United States of America. The possession by any person, other than a public officer, as such, of any such flag, standard, color or ensign, on which shall be anything made unlawful at any time by this section, or of any article or substance or thing on which shall be anything made unlawful at any time by this section, shall be presumptive evidence that the same is in violation of this section, and was made, done or created after this section took effect, and that such flag, standard, color, ensign, or article, substance, or thing, did not exist when this section took effect.

1932 Code, § 1274; Cr. C. '22, § 169; 1916 (29) 925.

Editor's note. — The last sentence of this section, which provides in substance that if a mutilated flag is found in the possession of any person it "shall be presumptive evidence that the same is in violation of this section, and was made, done or created after this section took effect," raises the question of an *ex post facto* law. Just what the ultimate effect of this provision will be, depends of course upon the construction to be given it by the Supreme Court.

The editors, in a brief search of the authorities, have found that similar statutes have been construed as depriving the defendant of the presumption of innocence while others have received a different construction. Where the presumption is treated as conclusive, such statutes are clearly unconstitutional, but

where not so construed, they have been held valid. *Voght v. State*, 124 Ind. 358, 24 N. E. 680; *State v. Thomas*, 47 Conn. 546, 36 Am. Rep. 98.

The legislature may convert a presumption of fact into a presumption of law, but where the province of the jury is invaded, the act of the legislature will usually be declared invalid. *Hepburn's Case*, 3 Bland (Md.) 95; *Janesville v. Carpenter*, 77 Wis. 288, 46 N. W. 128, 20 Am. St. Rep. 123, 8 L. R. A. 807, 12 C. J. 825. But between two constructions, the court will give the one which avoids a conflict with the constitution. *State v. Workman*, 35 W. Va. 367, 14 S. E. 9. See *Bailey v. Alabama*, 219 U. S. 219, 31 S. Ct. 145, 55 L. Ed. 191; *Mobile, etc., R. Co. v. Turnipseed*, 219 U. S. 35, 31 S. Ct. 136, 55 L. Ed. 78, 32 L. R. A. (N. S.) 226.

§ 1275. Misdemeanor to publish name of person raped.—Whoever publishes, or causes to be published, the name of any woman, maid or woman-child, upon whom the crime of rape or an assault with intent to ravish has been committed or alleged to have been committed in this State, in any newspaper, magazine, or other publication, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not more than one thousand dollars, or imprisonment of not more than

three years: *provided*, the provisions of this section shall not apply to publications made by order of court.

1932 Code, § 1275; Cr. C. '22, § 170; Cr. C. '12, § 317; 1909 (26) 208.

§ 1276. Selling property on which lien exists.—Any person or persons who shall wilfully and knowingly sell and convey any real or personal property on which any lien exists, without first giving notice of such lien to the purchaser or purchasers of such real or personal property, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be imprisoned for a term not less than ten days nor more than three years, and be fined not less than ten dollars nor more than five thousand dollars, or either or both, in the discretion of the court: *provided*, that the penalties enumerated in this section shall not apply to public officers in the discharge of their official duties: *provided*, further, when the value of such property does not exceed twenty dollars, the punishment shall not exceed a fine of one hundred dollars, or imprisonment not exceeding thirty days.

1932 Code, § 1276; Cr. C. '22, § 171; Cr. C. '12, § 446; Cr. C. '02, § 336; G. S. 2514; R. S. 276; 1872 (15) 332; 1892 (21) 93; 1893 (21) 411; 1894 (21) 824.

The object of this section is to prevent intentional fraud or deceit in the sale of property by the suppression of facts which it would be important for a purchaser to know before the sale is completed. *State v. Johnson*, 20 S. C. 387.

This section does not prescribe the degree or kind of notice to be given. *State v. Johnson*, 20 S. C. 387.

The lien of a judgment is as much within the meaning of the section as any other lien. *State v. Johnson*, 20 S. C. 387.

For example, a sale of cotton, subject to a landlord's lien, by a constable under judicial process, under a crop warrant issued by the landlord, is not such a sale by the owner, who objected thereto, as will subject him to the terms of

the statute, although he recovered back from the constable and owner of the lien the value of the cotton. *State v. Johnson*, 51 S. C. 268, 28 S. E. 905.

Mortgage lien not merged in absolute title when conveyance to satisfy said lien accepted in ignorance of outstanding liens.—Conveyance by mortgagor to mortgagee of property covered by mortgage for cancellation of indebtedness, mortgagee having no knowledge of second recorded mortgage and junior judgment lien on said property, is not a merger of the mortgage lien in the absolute estate. The conveyance considered as never having been made. *McCraney v. Morris*, 170 S. C. 250; 170 S. E. 276.

§ 1277. Selling mortgaged personal property.—Any person or persons who shall sell or dispose of any personal property on which any mortgage or other lien exists, without the written consent of the mortgagee or lienee, or the owner or holder of such mortgage or lien, and shall fail to pay the debt secured by the same within ten days after such sale or disposal, or shall fail in such time to deposit the amount of said debt with the clerk of the court of common pleas for the county in which the mortgage or lien debtor resides, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be imprisoned for a term not exceeding ten years, or be fined not more than five hundred dollars, or both, in the discretion of the court: *provided*, that the provisions of this section shall not apply in cases of sales made without knowledge or notice of such mortgage or lien by the person so selling such property: *provided*, further, that when the value of such property does not exceed twenty dollars, the punishment shall not exceed a fine of one hundred dollars, or imprisonment not exceeding thirty days.

1932 Code, § 1277; Cr. C. '22, § 172; Cr. C. '12, § 447; Cr. C. '02, § 337; G. S. 2515; R. S. 277; 1881 (17) 560; 1892 (21) 93; 1893 (21) 411; 1894 (21) 824.

General consideration.—This section is constitutional and not in contravention of art. 1, § 24, constitution. *State v. Barden*, 64 S. C. 206, 41 S. E. 959, L. R. A. 1915B, 649; *State v. Moore*, 128 S. C. 192, 122 S. E. 672.

The term debt includes "cotton" due by tenant to landlord, covered by landlord's lien. *State v. Pinckney*, 74 S. C. 445, 446, 54 S. E. 606.

The contract between landlord and laborer creating lien must be witnessed by one or more disinterested persons. *State v. Lanier*, 79 S. C. 103, 60 S. E. 225.

Violation of section not a felony; conviction does not render one incompetent as witness. *State v. Green*, 48 S. C. 136, 26 S. E. 234, 98 Am. St. Rep. 163, L. R. A. 1917F, 900.

When the existence and amount of the lien have been judicially determined and fixed by a final judgment of a court of competent jurisdiction, such lien dates back to the moment of the injury and attaches to the offending vehicle from that time; and in such case one who has disposed of such vehicle at any time after the injury may be indicted therefor under this section. *State v. Campbell*, 159 S. C. 128, 155 S. E. 750.

This section does not apply to offenses of building contractors. *State v. Hertzog*, 92 S. C. 14, 75 S. E. 374, 375, L. R. A. 1915B, 649.

As to agricultural liens, see *State v. Elmore*, 68 S. C. 140, 46 S. E. 939, 119 Am. St. Rep. 126.

As to confessions or admissions, see *State v. Shorter*, 85 S. C. 170, 67 S. E. 131.

A mere sale or disposal of personal property covered by a lien is not sufficient to constitute a criminal offense, but it must be accompanied by a failure to pay the debt secured by the lien, or a failure to deposit with the clerk the amount of such debt within the 10 days. *Whaley v. Lawton*, 57 S. C. 256, 35 S. E. 558, 2 L. R. A. (N. S.) 933, 1105, L. R. A. 1916F, 371, Ann. Cas. 13A, 927.

There is not a word in this statute which, even by implication, can be regarded as an indication of an intention on the part of the legislature to make the mere removal of property subject to a lien a criminal offense. *Id.*

Nor is it a crime for one to remove property under him for rent. *Whaley v. Lawton*, 57 S. C. 256, 35 S. E. 558, 2 L. R. A. (N. S.) 933, 1105, L. R. A. 1916F, 371, Ann. Cas. 13A, 927.

And it is not a crime to take the property beyond the limits of the state. *State v. Rice*, 43 S. C. 200, 20 S. E. 986.

For example, a warrant charging that at a certain place plaintiff was removing his goods, on which defendant had a chattel mortgage, to another state, did not charge an offense under this section.

Aiken v. Lancaster Cotton Mills, 85 S. C. 180, 67 S. E. 166, 36 L. R. A. (N. S.) 232.

Unless the purpose is to defeat the mortgage lien.—Removal of property from the jurisdiction of the state with the purpose or necessary effect of defeating the mortgage lien, is such a disposal of property as falls within the meaning of this section. *State v. Haynes*, 74 S. C. 450, 55 S. E. 118, 17 A. L. R. 1431.

Thus, a mortgagor will not be permitted to remove property beyond limits of state unless he gives ample security to protect rights of mortgagee, such removal impairing mortgagee's rights and being against policy of the law, in view of this section. *Hill v. Winnsboro granite Corp.*, 112 S. C. 243, 99 S. E. 836.

But if defendant disposes of the property, having knowledge of the lien, that facts implies fraud. *State v. Reeder*, 36 S. C. 497, 15 S. E. 544, 119 Am. St. Rep. 128, 9 A. L. R. 305; *State v. Boyer*, 86 S. C. 260, 68 S. E. 573.

And motive is immaterial.—In a prosecution for selling property under a mortgage on which a landlord held a superior lien for rent, it is proper to charge the jury that the motive was immaterial. *State v. Reeder*, 36 S. C. 497, 15 S. E. 544, 119 Am. St. Rep. 123, 9 A. L. R. 305.

Because one must be presumed to intended the necessary consequences of his voluntary acts.—*State v. Knight*, 118 S. C. 99, 109 S. E. 803.

And it is no defense that in disposing of the property defendant acted under advice of counsel. *State v. Reeder*, 36 S. C. 497, 15 S. E. 544, 119 Am. St. Rep. 128, 9 A. L. R. 305.

And it is no defense that the lien was a junior mortgage. *State v. Buice*, 115 S. C. 280, 105 S. E. 408.

Under this section, the holder of a junior mortgage or lien is liable if he disposes of the property without providing for the payment of the prior mortgage or lien. *State v. Reeder*, 36 S. C. 497, 15 S. E. 544, 119 Am. St. Rep. 128, 9 A. L. R. 305.

And it is not necessary for the prosecution to establish in the first instance the absence of a "written consent." *State v. Williams*, 35 S. C. 344, 14 S. E. 819, 27 L. R. A. 846, 28 L. R. A. 35, 198, 43 L. R. A. 39, Ann. Cas. 12C, 31.

A complaint, in an action for malicious prosecution, alleging that defendant obtained a warrant for the arrest of plaintiff on the charge of selling property on which defendant had a lien, was not demurrable for failing to allege that the warrant stated that the property was sold without the written consent of defendant. *McCall v. Alexander*, 81 S. C. 131, 61 S. E. 1106.

And the fact that the mortgage was

paid before the warrant was issued cannot affect the question as to want of probable cause for the prosecution, though it might bear on that of malice. *Stoddard v. Roland*, 31 S. C. 342, 9 S. E. 1027, 21 Am. St. Rep. 546, L. R. A. 1915D, 60, L. R. A. 1918A, 874.

And the indictment need not allege the name of the person to whom the property was sold. *State v. Perry*, 87 S. C. 535, 70 S. E. 304.

Nor is it necessary to allege in the indictment the absence of lienee's consent. *State v. Williams*, 35 S. C. 160, 14 S. E. 309, 85 Am. St. Rep. 190, 56 L. R. A. 534, Ann. Cas. 12D, 1274.

But the indictment should allege the value of the property. *State v. Perry*, 87 S. C. 535, 70 S. E. 304.

Party is entitled to opportunity of paying damages fixed by judgment.—Under this section a person charged with disposing of property subject to lien is entitled to opportunity, after lien has been determined, of preventing operation of statute by paying the amount of damages fixed by judgment. *State v. Campbell*, 159 S. C. 128, 155 S. E. 750.

Or to deposit such amount with the clerk of court within ten days.—*State v. Campbell*, 159 S. C. 128, 155 S. E. 750.

§ 1278. Contractors to pay laborers out of money received for contract.—

It shall be the duty of any contractor or contractors in the erection, alteration or repairing of buildings in the state of South Carolina to pay all laborers, subcontractors and material men for their lawful services and material furnished out of the money received for the erection, alteration or repairs of buildings upon which said laborers, subcontractors and material men are employed or interested, and said laborers, as well as all subcontractors and persons who shall furnish material for said building, shall have a first lien on the money received by said contractor or contractors for the erection, alteration or repair of said buildings in proportion to the amount of their respective claims. Nothing herein contained shall make the owner of the building responsible in any way: *provided*, that nothing contained in this section shall be construed to prevent any contractor or contractors or subcontractors from borrowing money on such contract.

Any contractor or contractors or subcontractors who shall, for other purposes than paying the money loaned upon said contract, expend and on that account fail to pay to any or all laborers, subcontractors and material men out of the money received as provided in this section and as admitted by such contractor or contractors, or as may be adjudged by any court of competent jurisdiction, shall be deemed guilty of a misdemeanor, and, upon conviction, when the consideration for such work and material shall exceed the value of one hundred dollars, shall be fined not less than one hundred dollars nor more than five hundred dollars, or imprisonment not less than three months nor more than twelve months; and when such consideration shall not exceed the value of one hundred dollars, shall be fined not more than one hundred dollars, or imprisoned not longer than thirty days: *provided*, said contractor or contractors or subcontractors may have the right of arbitration by agreement with said laborers, subcontractors and material men.

1932 Code, §§ 1278, 8770; Civ. C. '22, §§ 173, 5682; Civ. C. '12, §§ 451, 4152; Civ. C. '02, §§ 338, 3047; 1896 (22) 198; 1897 (22) 487.

This section is constitutional.—The natural and, indeed, the only reasonable construction of this section is that it makes penal, not the mere failure to pay a debt, but the disposition by the contractor of a specific sum of money held by him under a lien, so as to defeat the lien. This does not violate the constitutional inhibition against imprisonment

for debt, except in cases of fraud. *State v. Hertzog*, 92 S. C. 14, 75 S. E. 374, L. R. A. 1915B, 649.

It is an offense under this section not to pay laborers, etc., out of the money received on the contract. *State v. Campbell*, 85 S. C. 11, 66 S. E. 1059.

Application of payments by materialmen.—As to right of materialmen to ap-

ply payments by contractor to secured or unsecured contracts, and materialmen's recourse against surety on contractor's bond see Bryce Plumbing & Heating Co. v. American Surety Co., 162 S. C. 239, 160 S. E., 593.

Payment to materialmen for materials furnished under contract by contractor should be credited on bond given with contract regardless of where contractor receives the money. Southern States Supply Co. v. Union Indemnity Co., 161 S. C., 219, 159 S. E., 532.

Funds paid to materialmen by contractor may be applied on any accounts due by contractor if no definite account is specified by contractor, be the account secured or unsecured. *Ibid.*

Contractor's bond should be credited with money collected by contractor under his contract and paid to materialmen who furnished said contractor materials on other jobs. Southern States Supply Co. v. Union Indemnity Co., 161 S. C., 219, 159 S. E., 532.

§ 1279. Fraudulent removal of property levied on by sheriff.—Whoever, with intent to defraud, removes or secretes personal property which has been attached or levied on by the sheriff, or any other officer authorized by law to make such attachment or levy, shall be held guilty of a misdemeanor, and, upon conviction, shall be punished by imprisonment in the county jail for a period not less than sixty days nor more than one year, or by fine of not less than one hundred dollars nor more than two hundred.

1932 Code, § 1279; Cr. C. '22, § 174; Cr. C. '12, § 452, Cr. C. '02, § 339; G. S. 2516; R. S. 278; 1873 (15) 448; 1879 (17) 2.

§ 1279-1. Fraudulent watering of salt pork meats.—It shall be unlawful for any packer or wholesale or retail merchant, or any other person, firm or corporation, to increase the weight fraudulently of any salt pork meats by putting water thereon, soaking, sprinkling or otherwise and any person, firm or corporation violating the provisions hereof shall be guilty of a misdemeanor and upon conviction shall be fined not less than two hundred (\$200.00) dollars or more than one thousand (\$1,000.00) dollars, or imprisoned for not less than sixty (60) days, nor more than one (1) year or both, in the discretion of the court.

1936 (39) 1346.

§ 1280. Fraudulent packing of cotton.—Any person or persons convicted of knowingly and wilfully packing into any bag or bale of cotton any stone, wood, trash, cotton, cottonseed, water, or any matter or thing whatsoever, or causing the same to be done, with the intent and purpose of cheating or defrauding any person or persons whomsoever in the sale of such cotton, or who shall exhibit or offer for sale any bag or bale of cotton so fraudulently packed, at the time of the said exhibit, or offer for sale knowing the same to be so fraudulently packed, shall on conviction thereof, as aforesaid, be sentenced to pay a fine of not more than five hundred dollars nor less than twenty dollars, and to be imprisoned for a term of not more than six months nor less than one month.

1932 Code, § 1280; Cr. C. '22, § 175; Cr. C. '12, § 453; Cr. C. '02, § 340; G. S. 2517; R. S. 279; 1875 (15) 976.

This section embraces false packing of cotton bales with water. *State v. Holman*, 3 McC. 306, Ann. Cas. 16E, 49.

But it must be shown that defendant had knowledge of the false packing. *State v. Pitts*, 13 Rich. 27.

§ 1281. Charge of "breakage" on weighing of cotton.—Any person who shall put and make the charge known as "breakage" upon the weighing of cotton shall be guilty of a misdemeanor, and, upon conviction thereof, shall

be fined not more than twenty-five dollars, or be imprisoned not more than thirty days, or both, in the discretion of the court.

1932 Code, § 1281; Cr. C. '22, § 176; Cr. C. '12, § 456; Cr. C. '02, § 343; G. S. 2520; R. S. 282; 1878 (16) 713.

Punitive damages may be allowed in a civil action for violation of this section. McDaniel v. Monroe, 63 S. C. 307, 41 S. E. 456.

§ 1282. Making away with produce before paid for, fraud.—Any person engaged in the business of buying cotton, corn, rice, or such commodities, either on his own account or for others, who shall buy such on sale from a planter, commission merchant, or any other person or persons, for cash, and shall fail or refuse to pay for the same, and shall make away with or dispose of the same before he shall have paid therefor, shall be deemed guilty of fraud and embezzlement, and shall be liable, on conviction, to be imprisoned in the penitentiary for a term not less than one year nor more than five years, at the discretion of the court.

1932 Code, § 1282; Cr. C. '22, § 177; Cr. C. '12, § 457; Cr. C. '02, § 344; G. S. 2521; R. S. 283; 1877 (16) 250.

See generally. Lee v. Marion Nat. Bank, 167 S. C. 168, 166 S. E. 148.

§ 1283. Factors failing to account for produce guilty of fraud.—Any factor or commission merchant who shall receive from any planter any cotton, rice, or other agricultural produce, for sale, and shall sell the same and fail to pay over the net proceeds thereof to the planter on demand, or apply the same to his own use and benefit, or shall fail to account for the same in a satisfactory manner if unsold, shall be guilty of fraud and embezzlement, and, on conviction thereof, shall be imprisoned in the penitentiary not less than one year nor more than five years, at the discretion of the court.

1932 Code, § 1283; Cr. C. '22, § 178; Cr. C. '12, § 458; Cr. C. '02, § 345; G. S. 2522; R. S. 284; 1877 (16) 250.

§ 1284. Not guilty if products destroyed by accident.—No person shall be convicted under the provisions of the two preceding sections if he can show that the cotton, corn, rice or other products received by him were destroyed by accident, after due diligence on his part, or that he was forcibly deprived of the possession thereof.

1932 Code, § 1284; Cr. C. '22, § 179; Cr. C. '12, § 459; Cr. C. '02, § 346; G. S. 2523; R. S. 285; 1877 (16) 250.

§ 1285. Licensee must keep book—what must be entered.—Any person to whom license to traffic in seed cotton may be granted shall keep at place of business a book in which shall be entered the date of every purchase, from whom purchased, and the quantity purchased, which book shall always be opened to inspection of persons applying therefor. Any person to whom license may be granted failing to comply with the requirements of this section, shall, upon conviction, be punished by a fine of not less than twenty-five dollars nor more than fifty dollars, or by imprisonment of not less than fifteen days nor more than thirty days. One-half of the fine, when collected, shall be paid to the informer.

1932 Code, § 1285; Cr. C. '22, § 180; Cr. C. '12, § 460; Cr. C. '02, § 349; R. S. 287; 1887 (19) 794; 1901 (23) 728.

This section is constitutional. Parks v. S. E. 234, 23 A. L. R. 1481.
Laurens Cotton Mills, 75 S. C. 560, 56

§ 1286. No deduction to be made on sale of cotton under certain conditions.—It shall be unlawful for any person, firm or corporation engaged in the business of buying cotton in this State, as principal or agent, to deduct any sum for bagging and ties from the weight or price of any bale of cotton, when the weight of the bagging and ties does not exceed six per cent. of the gross weight of such bale of cotton. In the event that the weight of the bagging and ties exceed six per cent. of the gross weight of such bale of cotton, only the excess over the said six per cent. may be deducted.

For each and every violation of this section the offender shall be guilty of a misdemeanor and shall be fined in the sum of not less than five dollars nor more than twenty-five dollars, or imprisoned not less than ten days nor more than thirty days: *provided*, this section shall not apply to what is known in the trade as round bales, and bales of cotton which weigh less than three hundred pounds.

1932 Code, § 1286; Cr. C. '22, § 181; Cr. C. '12, § 461; 1910 (26) 612.

This section does not deprive one engaged in the business of buying cotton of his liberty and property without due process of law. State v. Mullins, 87 S. C. 510, 70 S. E. 9, Ann. Cas. 12C, 258, 23 A. L. R. 1484.

And this section is not unconstitutional as depriving one engaged in the business of buying cotton of the equal

protection of the laws, as the Legislature has the right to make different classes, and so long as all members of the same class are treated alike, if the classification be reasonable, the legislation making such classification will not be declared unconstitutional. State v. Mullins, 87 S. C. 510, 70 S. E. 9, Ann. Cas. 12C, 258, 23 A. L. R. 1484.

§ 1287. Cotton bales weighing not less than three hundred pounds made merchantable.—It shall be unlawful for any cotton buyer to refuse to accept any bale of cotton, after he has bought the same by sample thereof, weighing over three hundred pounds, provided same corresponds in quality with sample bought by; and any such buyer who docks or deducts any amount from the purchase price of any such bale of cotton, or attempts to dock or deduct any amount from the purchase price of such bale of cotton, shall be deemed guilty of a misdemeanor, and, upon conviction before any court of competent jurisdiction, shall be fined in the sum of not more than one hundred dollars nor less than twenty dollars.

1932 Code, § 1287; Cr. C. '22, § 182; Cr. C. '12, § 462; Cr. C. '02, § 351; 1899 (23) 90.

§ 1288. Cotton factors required to furnish sworn statements on demand—failure a misdemeanor.—Any person or persons, firm or corporation, by whatever name styled, doing business as sales agent, exporter, dealing in or handling cotton on commission, are hereby required to furnish to all persons for whom cotton is exported, sold or handled, when demanded by such person, a sworn itemized statement which shall show the name of the purchaser, the grade, the weight and the price received for such cotton. Such sworn itemized statement shall be furnished with final account of gross sales, or whenever demanded by any one who is doing business with such person or persons as are set forth in this section: *provided*, that any one upon whom demand is made for such sworn itemized statement shall be allowed ten days' time in which to furnish the same. Any one

refusing or neglecting to furnish such sworn itemized statement shall be guilty of a misdemeanor, and, upon conviction, shall be fined in a sum of not less than twenty-five dollars nor more than one hundred dollars, or be imprisoned for not less than ten days nor more than thirty days on the county chaingang.

1932 Code, § 1288; Cr. C. '22, § 183; 1915 (29) 113.

§ 1300. Standard weight for bushel of corn meal—sale in packages.—

The standard weight of a bushel of corn meal, whether bolted or unbolted, shall be forty-eight pounds. It shall be unlawful for any person or persons to pack for sale, sell, or offer for sale, in this State, any corn meal or grist, except in bags or packages containing by standard weight two bushels, or one bushel, or one-half bushel, or one-fourth bushel, or one-eighth bushel, respectively. Each bag or package of corn meal shall have plainly printed or marked thereon, whether the meal is "bolted" or "unbolted," the amount it contains, in bushels or fraction of a bushel, and the weight: *provided*, the provisions of this section shall not apply to the retailing of meal or grist direct to consumers from bulk stock when priced and delivered by actual weight or measure. Any person or persons guilty of violating this section shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine of not exceeding one hundred dollars, or by imprisonment not exceeding thirty days, or by both fine and imprisonment, in the discretion of the court.

1932 Code, § 1300; Cr. C. '22, § 195; Cr. C. '12, § 489; 1903 (26) 126; 1906 (25) 145.

§ 1301. Slot machines unlawful, except those giving certain returns.—

It shall be unlawful for any person to keep on his premises or operate or permit to be kept on his premises or operated within this State, any slot machine of whatever name or kind, except automatic weighing, measuring, musical and vending machines which are so constructed as to give a certain uniform and fair return value for each coin deposited therein, and in which there is no element of chance. Any person who shall violate this section shall be subject to a fine of not more than one hundred dollars, or imprisonment upon the public works of the county wherein the offense is committed for a period of not more than thirty days.

1932 Code, § 1301; Cr. C. '22, § 196; Cr. C. '12, § 490; 1904 (24) 427.

§ 1301-1. Unlawful to keep or operate vending or slot machines, punch board, etc., pertaining to game of chance.

(1) **Certain machines excepted.**—It shall be unlawful for any person, firm, or corporation to keep on his, her, or its premises, or operate or permit to be kept on his, her, or its premises, or operated within this State, any vending or slot machine, punch boards pull boards, or other devices pertaining to games of chance of whatever name or kind, except automatic weighing, measuring, musical and vending machines which are so constructed as to give a certain uniform and fair return in value for each coin deposited therein, and in which there is no element of chance. Any person, firm, or corporation violating this section shall be subject to a fine of not more than five hundred (\$500.00) dollars, or imprisonment upon the public works of the county wherein the

offense is committed or in the State penitentiary for a period of not more than one (1) year or both fine and imprisonment, in the discretion of the court: *provided*, that this section is also intended to prohibit all vending, slot machines, punch boards, pull boards, or other devices pertaining to games of chance, that display different pictures, words, or symbols, at different plays, or different numbers, whether in words or figures, or which deposit tokens or coins at irregular intervals, or in varying numbers to the player or in the machine.

(2) Seize said machines — magistrates to order destruction. — Any vending or slot machine, punch board, pull board, or other device pertaining to games of chance, prohibited by this section shall be seized by any officer of the law and at once taken before any magistrate of the county in which such machine is seized, who shall immediately examine same, and if he is satisfied that such vending or slot machine is in violation of this section or any other law of this State, he shall direct that said machine be immediately destroyed.

(3) Destruction of machines already seized.—All vending or slot machines, punch boards, pull boards, or other devices pertaining to games of chance, which have heretofore been seized under any law and not destroyed shall be immediately disposed of as provided herein, for machines seized under the provisions of this section.

(4) Supplemental to section 1301—destruction of machines already seized.—This section is intended to be in addition to and supplemental to section 1301, and all vending or slot machines, punch boards, pull boards, or other devices pertaining to games of chance, which have heretofore been seized under any law and not destroyed shall be immediately disposed of as provided for in subsection 2 of this section, for machines seized under the provisions of this section.

1932 Code, § 1301-A; 1931 (37) 368.

Constitutionality.—This section held constitutional. *Durant v. Bennett, Sheriff, et al.*, 54 S. (2nd) 634, State v. Kizer, 164 S. C. 383, 162 S. E. 444.

An unlawful machine cannot be recovered from the sheriff after seizure.—The owner of a slot machine, which is unlawful under this section, cannot, in an action in claim and delivery, recover the machine from the sheriff after seizure. *Griste v. Burch*, 112 S. C. 369, 99 S. E. 703.

And any machine not giving a certain and uniform return is unlawful.—A slot machine operated with nickles, which, wherever a nickel is deposited, gives chewing gum, etc., but might also give in addition a number of trade checks indicated in advance, is an unlawful machine under this section in that it does not give a certain and uniform return in value for each coin deposited. *Grist v. Burch*, 112 S. C. 369, 99 S. E. 703, *Alexander et al. v. Martin, Sheriff et al.*, 192 S. C. 176, 6 S. E. (2d) 20.

Where electrical and mechanical devices were so constructed that a player

received same number of balls for each coin deposited, but he might or might not make the same score for each coins worth of balls played and where, contingent upon the score recorded for a player, free games were awarded, the machines were illegal "gambling devices." *Alexander et al. v. Martin, Sheriff, et al.*, 192 S. C. 176, 6 S. E. (2d) 20.

Although the machine indicates in advance exactly what it will dispense.—*Harvie v. Heise*, 150 S. C. 277, 148 S. E. 66.

And although the tokens issued have no trade value.—A slot machine which gave a package of mints, and at irregular intervals issued tokens in varying amounts, was held as constituting a gambling device in violation of this section, even if the tokens had no monetary or trade value. *Harvie v. Heise*, 150 S. C. 277, 148 S. E. 66.

But a machine dispensing only gum on placing coin therein is not a gambling device.—*Harvie v. Heise*, 150 S. C. 277, 148 S. E. 66.

Licensing act does not make illegal machines legal.—The slot machine licensing act does not contemplate that illegal machines should be licensed or made legal merely because a license happens to have been granted, nor that previous laws relating to unlawful slot machines

be amended or repealed. *Alexander v. Hunnicut, Sheriff*, 196 S. C. 364, 13 S. E. (2d) 630; *Cannon v. Odom, Sheriff*, 196 S. C. 371, 13 S. E. (2d) 633.

See also *State v. Adcock*, 194 S. C. 234, 9 S. E. (2d) 730.

§ 1302. Use of slot machine without deposit or proper coin a misdemeanor.—Any person who shall operate, or cause to be operated, or who shall attempt to operate, or attempt to cause to be operated any automatic vending machine, slot machine, coin-box telephone, or other receptacle designed to receive lawful coin of the United States of America in connection with the sale, use or enjoyment of property or service, by means of slug or any false, counterfeited, mutilated, sweated or foreign coin or by any means, method, trick or device whatsoever not lawfully authorized by the owner, lessee or licensee of such machine, coin-box telephone or receptacle, or who shall take, obtain or receive from or in connection with any automatic vending machine, slot machine, coin-box telephone or other receptacle designed to receive lawful coin of the United States of America in connection with the sale, use or enjoyment of property or service, any goods, wares, merchandise, gas, electric current, article of value, or the use or enjoyment of any telephone or telegraph facilities or service, or of any musical instrument, phonograph or other property, without depositing in and surrendering to such machine, coin-box telephone or receptacle lawful coin of the United States of America to the amount required therefor by the owner, lessee or licensee of such machine, coin-box telephone or receptacle, shall be guilty of a misdemeanor, and, on conviction, be punished by a fine or imprisonment, in the discretion of the court.

1932 Code, § 1302; 1927 (35) 375.

§ 1303. Sale, etc., of any device for fraudulent operation of slot machines a misdemeanor.—That any person who, with intent to cheat or defraud the owner, lessee, licensee or other person entitled to the contents of any automatic vending machine, slot machine, coin-box telephone or other receptacle, depository or contrivance, designed to receive lawful coin of the United States of America in connection with the sale, use or enjoyment of property or service, or who, knowing that the same is intended for unlawful use, shall manufacture for sale, or sell or give away any slug, device, or substance whatsoever intended or calculated to be placed or deposited in any such automatic vending machine, slot machine, coin-box telephone or other such receptacle, depository, or contrivance, shall be guilty of a misdemeanor, and, on conviction, shall be punished by a fine, or imprisonment, in the discretion of the court.

1932 Code, § 1303; 1927 (35) 375.

§ 1304. No person to sell explosives except under certain conditions—sworn reports.—No person shall sell, deliver or dispose of dynamite or similar powerful explosives, except ordinary gunpowder, unless such person knows the purchaser or the party to receive the same, and is satisfied that the explosive is not to be used for killing fish, and then only upon a written application from party desiring to purchase, stating the purpose

for which he desires to use the said explosives; and a person selling, delivering or disposing of such explosive shall keep a book in which shall be recorded the name of the purchaser or party to whom the explosive is delivered, the quantity sold or so delivered, and the date of such sale or delivery. That such person selling or keeping for sale the explosives mentioned in this section be required to make sworn quarterly reports of such sales, name and race of purchaser or purchasers, amount sold and date of sale, to the county auditor of each county. Any person violating this section shall be guilty of a misdemeanor, punishable by fine not to exceed one hundred dollars, or imprisonment not to exceed thirty days.

1932 Code, § 1304; Cr. C. '22, § 197; Cr. C. '12, § 491; 1903 (24) 124.

§ 1310. Unlawful to use as advertisement cross usually used as crossing sign by railroads.—It shall be unlawful for any person, firm or corporation to use for advertising purposes the kind of a cross usually used as a crossing sign by steam and electric railroads. Any violations of the provisions of this section shall be punishable by a fine of not more than one hundred (\$100.00) dollars or imprisonment for not more than thirty (30) days. It shall be the duty of the road supervisor of the various counties in this State to remove and destroy any signs hitherto erected by any person, firm or corporation for advertising purposes, in violation of this section.

1932 Code, § 1319; Cr. C. '22, § 211; 1917 (30) 161.

§ 1315. Fraud in sale of goods marked "sterling," "coin," etc.—A person who makes or sells, or offers to sell or dispose of, or has in his possession with intent to sell or dispose of, any article of merchandise marked, stamped, or branded with the words "sterling" or "sterling silver," or encased or enclosed in any box, package, cover or wrapper, or other thing in or by which the said article is packed, enclosed or otherwise prepared for sale or disposition, having thereon any engraving or printed label, stamp, imprint, mark, or trademark indicating or denoting by such marking, stamping, branding, engraving or printing that such article is silver, sterling silver or solid silver, unless nine hundred and twenty-five one-thousandths of the component parts of the metal of which the said article is manufactured are pure silver, shall be deemed guilty of a misdemeanor. A person who makes or sells, or offers to sell or dispose of, or has in his possession with intent to sell or dispose of any article of merchandise marked, stamped or branded with the words "coin" or "coin silver," or enclosed in any box, package, cover or wrapper, or other thing in or by which the said article is packed, enclosed or otherwise prepared for sale or disposition, having thereon any engraving or printed label, stamp, imprint, "mark" or "trademark" indicating or denoting by such marking, stamping, branding, engraving or printing that such article is "coin" or "coin silver," unless nine hundred and twenty-five one-thousandths of the component parts of the metal of which the said article is manufactured are pure silver, shall be deemed guilty of a misdemeanor. Whoever violates the provisions of this section shall, upon conviction, be subject to a fine not exceeding one hundred dollars for each offense, or be imprisoned in the county jail for not more than thirty days.

1932 Code, § 1320; Cr. C. '22, § 212; Cr. C. '12, § 510; Cr. C. '02, § 363; 1894 (21) 797.

§ 1316. Fireworks.

(1) **Shipment—sale.**—All fireworks for transportation shall be packed in accordance with the regulations of the interstate commerce commission. Fireworks to be sold at wholesale shall be kept in a room set aside for the storage of fireworks only. Over each entrance to this room shall be displayed a sign in conspicuous type: "**Caution—Fireworks—No Smoking!!**" No person shall be permitted to be in this room while carrying a cigar, cigarette, or pipe.

The sale of the following fireworks is hereby prohibited:

(a) Toy torpedoes containing more than five grains of explosive mixture.
(b) Paper caps containing more than .35 grains of explosive mixture.
(c) Firecrackers and salutes exceeding three inches in length and 9/16 inch outside diameter.

(d) Roman candles exceeding 30 balls.
(e) Fountains throwing a display more than six feet in height.
(f) Balloons carrying a lighted substance.
(g) Any cannon, cane, pistol, or other device in which blank cartridges may be fired.

(h) Any article containing a compound or mixture of yellow or white phosphorus or mercury, or other poisonous ingredients.

(i) Any salute or aerial display shell fired from a mortar.

(2) **Permits for exhibitions—liability of purchasers—storage—municipalities may prohibit any sales.**—Upon written permission secured from the chief of the fire department, or in towns where there is no fire department then from the intendant, or similar official, fireworks may be sold for public exhibitions of fireworks in connection with fairs, carnivals, or other special celebrations: *provided*, an expert is secured to fire them. In such cases only, articles of fireworks will be permitted to be sold to parties in charge of such exhibitions who shall be held strictly responsible for any damage to persons or property resulting from the use of fireworks so used. Fireworks being held in storage for special exhibitions must be kept in a closed wooden box until they are to be used: *provided*, that nothing herein shall prevent any political subdivision of the State from prohibiting the sale of fireworks of any kind or description.

(3) **Certain fireworks prohibited in theatres.**—The use of what are technically known as fireworks showers, or of any mixture containing potassium chlorate and sulphur, mercury or any other poisonous substance in theatres, or public halls, is hereby prohibited.

(4) **Railroad signals.**—Nothing in these regulations shall be construed as prohibiting the use of signals necessary for the safe operations of railroads.

(5) **Sales to children regulated.**—It shall be unlawful for any one to sell fireworks of any kind to children under the age of ten (10) years.

(6) **Violation—separate offense.**—Any person who shall violate any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than five hundred (\$500.00) dollars, or by imprisonment in the county jail not more than one (1) year, or by both such fine and imprisonment. Each day during which such violation continues shall constitute a separate and distinct offense.

1932 Code, § 1321; Cr. C. '12, § 161; 1902 (23) 1095; 1921 (32) 158; 1928 (35) 1299.

§ 1317. License fireworks displays in counties with city over 60,000—sale or use of fireworks except in such displays prohibited.

(1) **Not use or shoot fireworks in licensed displays in counties with city over 60,000.**—In all counties in this State containing a city having a population greater than sixty thousand (60,000) according to the official United States census, it shall be unlawful to use, shoot, or discharge any fireworks in any such county except in displays or exhibits duly licensed, as hereinafter provided.

(2) **Issuance of licenses for fireworks displays.**—Any person, firm or corporation desiring to obtain a license for a fireworks display or exhibit shall make application therefor to the governing body of the municipality, if such display or exhibit is proposed to be held within the limits of any municipality in this State, or to the county supervisor of the county in which such display or exhibit is proposed to be held, if it is not to be held within the limits of any municipality, and the governing body of the municipality or the county supervisor, as the case may be, may, in their discretion, grant or refuse to grant the license applied for, or may grant the same, subject to such restrictions and limitations as they may, in their discretion, deem to be in the interest of public safety in connection with such display or exhibit.

(3) **Not sell, exchange, give or use fireworks except for licensed displays.**—It shall be unlawful to sell, offer for sale, exchange, give away, fire, shoot, discharge or otherwise use any fireworks in any such county except for use in, or during, a display or exhibit duly licensed under the provisions of subsection 2 of this section.

(4) **Penalties.**—Any violation of this section shall constitute a misdemeanor and shall be punishable by a fine of not exceeding one hundred (\$100.00) dollars or imprisonment of not exceeding thirty (30) days.

1940 (41) 1784.

§ 1322. Substitution of lubricating oil ordered for motor vehicles.

(1) **Explanation must be given.**—It shall be unlawful for any person, firm, or corporation to fill with a spurious or substitute article an order for lubricating oil for internal combustion engines of automobiles, auto-trucks, and tractors, if such oil ordered is designated by a trade mark or distinctive trade name unless and until it is explained to the person giving the order that the article offered is not the article that he ordered and the purchaser shall thereupon elect to take the substitute article that is being offered to him.

(2) **Display of false sign.**—It shall be unlawful for any person, firm, or corporation to display on any can, drum, or other container in which lubricating oil for internal combustion engines of automobiles, auto-trucks, and tractors is kept for sale, or from which it is poured or drawn for sale, a trademark or trade name which is not the distinctive designation of the oil actually contained therein.

(3) **Filling orders for oil.**—It shall be unlawful for any person, firm, or corporation to fill any order from a consumer for a lubricating oil for internal combustion engine of automobiles, auto-trucks, and tractors that is designated by a trademark or distinctive trade name unless, at the time of sale, the oil is poured, drawn, or taken for delivery from a can, drum, or other container or bottle rack marked in such a manner as to be legible

and clearly visible to the purchaser with the trade mark or distinctive trade name by which the oil is designated.

(4) **Sale of unbranded oil.**—It shall be unlawful for any person, firm, or corporation to fill an order from a consumer for lubricating oil for internal combustion engines of automobiles, auto-trucks, and tractors with oil that is not designated by a trademark or distinctive trade name unless, at the time of sale, the oil is poured, drawn, or taken for delivery from a can, drum, or other container or bottle rack marked in such manner as to be legible and clearly visible to the purchaser with the words "Unbranded Lubricating Oil."

(5) **Unlawful to display sign, unless oil for sale.**—It shall be unlawful for any person, firm, or corporation to display any sign, label, or other designating mark which describes any lubricating oil for internal combustion engines of automobiles, auto-trucks, and tractors not actually on sale in bona fide quantities at the place of business where such sign or label or other designated mark is displayed.

(6) **Display of this section.**—Every person, firm, or corporation selling or offering for sale lubricating oil for internal combustion engines of automobiles, auto-trucks and tractors in this State shall conspicuously display at every place of business a printed copy of this section.

(7) **Penalties.**—Any person, firm, or corporation violating any of the provisions of this section shall, for each offense, be deemed guilty of a misdemeanor and punishable, for the first offense, by a fine of not less than twenty (\$20.00) dollars, nor more than one hundred (\$100.00) dollars; or by imprisonment for not less than ten (10) days, nor more than thirty (30) days; and for any subsequent offense by a fine of not less than one hundred (\$100.00) dollars, nor more than three hundred (\$300.00) dollars; or by imprisonment for not less than thirty (30) days, nor more than ninety (90) days.

1932 Code, § 1322; 1928 (35) 1219.

See § 1323.

§ 1323. Deception in storage, selling or offering for sale liquid fuels, lubricating oils, greases, etc.

(1) **Prohibited.**—No person, firm or corporation shall store, sell, offer or expose for sale any liquid fuels, lubricating oils, greases or other similar products in any manner whatsoever which may deceive, tend to deceive or have the effect of deceiving the purchaser of said products as to the nature, quality or quantity of the products so sold, exposed or offered for sale.

(2) **Storage, selling or offering for sale such products from containers, pumps, etc.**—No person, firm or corporation shall keep, expose or offer for sale, or sell any liquid fuels, lubricating oils, greases or other similar products from any container, tank, pump or other distributing device other than those manufactured or distributed by the manufacturer or distributor indicated by the name, trade-mark, symbol, sign or other distinguishing mark or device appearing upon said tank, container, pump or other distributing device in which said products were sold, offered for sale or distributed.

(3) **Disguising buildings or equipment by imitating designs, etc., of rec-**

ognized oils, etc.—No person, firm or corporation shall disguise or camouflage his or their buildings, and/or own equipment, by imitating the design, symbol, trade-name of the equipment under which recognized brands of liquid fuels, lubricating oils and similar products are generally marketed.

(4) Selling under wrong trade-mark, etc.—No person, firm or corporation shall expose or offer for sale or sell under any trade-mark, trade-name or name or other distinguishing mark any liquid fuels, lubricating oils, greases or other similar products other than those manufactured or distributed by the manufacturer or distributor marketing such products under such trade-name, trade-mark or name or other distinguishing mark.

(5) Mixing, blending or compounding products—sale. — No person, firm or corporation shall mix, blend or compound the liquid fuels, lubricating oils, greases or similar products of the manufacturer or distributor with the products of any other manufacturer or distributor or adulterate the same, and expose or offer for sale or sell such mixed, blended or compounded products under the trade-name, trade-mark or name or other distinguishing mark of either of said manufacturers or distributors, or as the adulterated products of such manufacturer or distributor: *provided—however*, that nothing herein shall prevent the lawful owner thereof from applying its own trade-mark, trade-name or symbol to any product or material.

(6) Aiding others to violate section.—No person, firm or corporation shall aid or assist any other person in violating any of the provisions of this section by depositing or delivering into any tank, pump, receptacle or other container any liquid fuels, lubricating oils, greases or other like products other than those intended to be stored therein, as indicated by the name of the manufacturer or distributor, or the trade-mark, the trade-name, name or other distinguishing mark of the product displayed in the container itself, or on the pump or other distributing device used in connection therewith, or shall by any other means aid or assist another in the violation of any of the provisions of this section.

(7) Penalties.—Every person, firm or corporation violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction, shall be punished by a fine of not more than one thousand (\$1,000) dollars and by imprisonment not to exceed twelve (12) months, or by either or both in the discretion of the trial judge.

1933 (38) 443.

See § 1322.

§ 1324. Operating filling station within 100 feet of school or church in Union County.—It shall be unlawful for any person, firm or corporation doing business in Union County, in this State, to operate a filling station for the sale of gas, oil, and other commodities within one hundred (100) feet of any school building or buildings, while in use as a school and where children are attending school and/or any church building or buildings wherein congregations may be assembled for worship and/or while children are attending Sunday School. The willful violation of this section shall be punishable by a fine of not less than twenty-five (\$25.00) dollars; nor more than one hundred (\$100.00) dollars or by imprisonment for a period of not more than thirty (30) days.

1932 Code, § 1324; 1930 (36) 1197; 1932 (38) 1479.

§ 1325. Penalties for hawking and peddling without license.—If any hawker or peddler sell or expose for sale any goods, wares or merchandise in any county in this State, without having obtained a license for that purpose from the clerk of court of common pleas of the county within which he is exposing for sale or selling such goods, wares and merchandise, as required by law, he shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than fifty dollars, or imprisonment in the county jail not more than thirty days.

1932 Code, § 1325; Cr. C. '22, § 215; Cr. C. '12, § 511; Cr. C. '02, § 364; G. S. 1341; R. S. 294; 1876 (16) 64; 1893 (21) 408.

See §§ 7120 and 7121.

One who solicits orders for medicines to be shipped into the state from another state, and here to be delivered by another person, is not a hawker or peddler. State v. Ivey, 73 S. C. 282, 283, 53 S. E. 428, L. R. A. 1916B, 1299, Ann. Cas. 12D, 1290, Ann. Cas. 17D, 687.

See generally, State v. Belcher, 1 McM. 40, 42, L. R. A. 1916B, 1304, Ann. Cas. 12D, 1290; State v. Powell, 10 Rich. 373; State v. Morehead, 42 S. C. 211, 20 S. E.

544, 46 Am. St. Rep. 719, 26 L. R. A. 585, L. R. A. 1916B, 1302; Alexander v. Greenville County, 49 S. C. 527, 27 S. E. 469, L. R. A. 1916B, 1295, Ann. Cas. 12D, 1290; State v. Coop, 52 S. C. 508, 30 S. E. 609, 41 L. R. A. 501, 19 L. R. A. (N. S.) 316, L. R. A. 1916B, 1302, Ann. Cas. 12D, 1293; Laurens v. Elmore, 55 S. C. 477, 33 S. E. 560, 45 L. R. A. 249, 19 L. R. A. (N. S.) 316.

§ 1326. Vendors and hawkers prohibited from going on private or corporate premises without permission.—It shall be unlawful for any agent, vendor or hawker, whether representing a corporation or selling goods of any kind for his own personal gain, to enter upon the premises of another person for the purpose of soliciting business or orders from the employees of the place without first obtaining consent of the owner: *provided*, the provisions of this section shall apply only when the party takes a mortgage or lien for the goods or articles of property sold: *provided, however*, that the provisions of this section shall not apply to agents or representatives of insurance companies: *provided, further*, that the provisions of this section shall not apply to producers of agricultural products, nor to agents of persons, firms or corporations conducting regular mercantile or other business establishments within the county in which the sale or solicitation of business takes place. For each and every violation of this section the offender shall be deemed guilty of a misdemeanor, and, upon conviction in any court of competent jurisdiction, shall be punished by a fine of not less than twenty-five dollars, or imprisonment at hard labor for not less than twenty days: *provided*, that the provisions of this section shall not apply to farmers offering their products for sale and to persons taking orders for merchandise or delivering same for regular merchants. The provisions of this section shall not apply to incorporated towns and cities of this State nor to cotton mill villages.

1932 Code, § 1326; Cr. C. '22, § 216; 1914 (28) 581.

§ 1327. Itinerant horse trading and fortune telling unlawful without license—ineffective in absence of county action.—It shall be unlawful for any person or persons to follow the business of horse trading or fortune telling in any of the counties of this State, by traveling from place to place without first obtaining from the clerk of the court of the county in which they wish to follow their trade, a license permitting them to do so. Such li-

cense shall be issued by the clerks of the court of the counties of this State to any person applying for same upon payment by said applicant of the sum of \$100.00. Said license shall specify the name of the applicant, his or her former residence, and shall be for a period of one year from the issuance thereof: *provided*, this section shall not be effective in any county until the county board of commissioners of such county authorize, by resolution, the collection of such tax. Any person violating the provisions of this section, shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not more than \$100.00, or imprisonment for not more than thirty days for each and every offense, provided that the provisions of this section shall not apply to livery or sales stable owners, who have a permanent residence within the State.

1932 Code, § 1327; Cr. C. '22, § 217; 1916 (29) 703.

§ 1328. Unlawful for nomadic individuals to encamp, engage in fortune telling, or trade without a license.—It is hereby declared unlawful for any nomadic individual, or bands of such, to encamp, engage in fortune telling or to trade in horses or mules, or other animals or commodities within any county of this State, without first having obtained a license from the clerk of court therefor in the sum of three hundred dollars; a violation of this section shall be deemed a misdemeanor and punishable by fine or imprisonment, or both, in the discretion of the court: *provided*, that the provisions of this section shall not apply to Clarendon County: *provided*, this section shall not apply to Union County.

1932 Code, § 1328; Cr. C. '22, § 218; 1918 (30) 801.

§ 1335. Unlawful to enter race horses under assumed names or out of proper class.—It is hereby made unlawful in this State for any person or persons knowingly to enter, or cause to be entered, for competition, or to compete for any purse, prize, premium, stake or sweepstake offered or given by any agricultural or other society, association, person or persons, or to drive any horse, mare, gelding, colt or filly, under an assumed name, or out of its proper class, where such prize, purse, premium, stake or sweepstake is to be decided by a contest of speed. Any person or persons found guilty of a violation of this section shall, upon conviction thereof, be imprisoned for a period of not more than one year, or shall be fined in any sum not exceeding one thousand dollars.

1932 Code, § 1335; Cr. C. '22, § 225; Cr. C. '12, § 519; 1904 (24) 530.

§ 1336. Name of race horses not to be changed except under rules prescribed.—The name of any horse, for the purpose of entry for competition in any contest of speed, shall not be changed after once having contested for a prize, purse, premium, stake or sweepstake, except as provided by the code of rules of the society or association under which the contest is advertised to be conducted. The class to which a horse belongs, for the purpose of an entry in any such contest of speed, shall be determined by the public performance of said horse in any former contest or trial of speed, as provided by the rules of the society or association under which the proposed contest is advertised to be conducted. And any person or persons knowingly misrepresenting or fraudulently concealing the public performance in any former contest or trial of speed of any horse which he or they

propose to enter for competition in any such contest, shall, upon conviction thereof, be liable to the same punishment as provided in the preceding section, whether he or they shall succeed in making said entry or not.

1932 Code, § 1336; Cr. C. '22, § 226; Cr. C. '12, § 520; 1904 (24) 530.

§ 1342. Sale of goods, etc., prohibited within one-half mile of camp ground.—It shall be unlawful for any itinerant trader or tradesman, or other than established dealer of the community, to offer for sale any goods, wares or merchandise within one-half of a mile of any camp ground or other place of religious meeting, while meetings are in progress, outside any incorporated town or city, except with the permission of the trustees or other board of management of such meeting; *provided*, this section shall not apply to vendors of fresh fruit or vegetables or any farm product. Any person violating the provisions of this section shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined in a sum not exceeding fifty dollars, or be imprisoned not exceeding twenty days.

1932 Code, § 1342; Cr. C. '22, § 231; Cr. C. '12, § 525; Cr. C. '02, § 372; 1901 (23) 750.

§ 1349. Buy, sell, receive, etc., motor vehicle with manufacturer's identification mark altered with intent conceal or misrepresent identity thereof misdemeanor. — Whoever knowingly buys, sells, receives, disposes of, conceals or has in his possession any motor vehicle from which the manufacturer's serial number or any other distinguishing number or identification mark has been removed, defaced, covered, altered or destroyed, for the purpose of concealment or misrepresenting the identity of the said motor vehicle, shall be guilty of a misdemeanor, and on conviction shall be fined not more than two hundred dollars, or imprisoned not more than six months, or both.

1932 Code, § 1349; Cr. C. '22, § 237; 1918 (30) 823.

§ 1350. Record to be kept by dealers in crossties—penalty for violation.—Any person, firm or corporation within South Carolina dealing in crossties shall keep a book of record, which shall be open to the public, in which shall be legibly written the name of the party or parties from whom crossties are purchased, the number of crossties purchased, and the lands or premises from which the said crossties are cut or harvested. Any person violating the terms of this section shall be subject to a fine of twenty-five dollars for each offense.

1932 Code, § 1350; Cr. C. '22, § 238; 1918 (30) 701.

§ 1355. Unlawful to discharge oil or any oil product from vessel in harbor.—It shall be unlawful for any person, or persons, their agents, servants or employees in charge of, or having custody of any vessel entering, or while within any harbor in this State, to discharge, or permit to be discharged, from any vessel any seepage, or refuse of fuel oil, or any other oil product.

Any violation of this section shall be a misdemeanor, and upon conviction thereof shall be subject to a fine not exceeding five hundred (\$500.00) dollars; and if said fine is not paid the same, shall be deemed

to be a lien on the vessel over which said person had control; said lien shall be a prior lien to all other liens except state taxes, and shall be enforceable as other liens are by the laws of this State.

It shall be the duty of the port commissioner or other officer or person in charge of, or having supervision, over vessels entering the ports of this State, to see that the provisions of this section are in force.

1932 Code, § 1355; Cr. C. '22, § 252; 1921 (32) 159.

§ 1356. Discharge of petroleum, fuel oil or coal products which drain in harbor of county containing city over 60,000 unlawful.—It shall be unlawful for any person or persons to dump or discharge intentionally any products, waste or refuse of fuel oil, petroleum, or coal at any place within this State, from which the same shall drain into the waters of any harbor in any county in this State containing a city of more than sixty thousand (60,000) population according to the United States census of 1930. Any violation hereof shall be a misdemeanor, and any person convicted thereof shall be subject to a fine not exceeding five hundred (\$500.00) dollars, or imprisonment not exceeding six (6) months, or both. It shall be the duty of the port or harbor commissioners, as well as that of all law enforcing officers, to see that the provisions hereof are enforced.

1933 (38) 389.

§ 1373. Traffic in dead bodies.—If any person sell or buy any such body, or in any way traffic in the same, or transmit or convey, or procure in order to be transmitted or conveyed, any such body to any place outside of this State, he shall be fined not exceeding two hundred dollars, or, in the discretion of the court, be confined in jail not exceeding one year: *provided*, that the board may, in its discretion, on the application of any person, empower such person to import into this State and traffic in such anatomical material and pathological specimens as the board may designate.

1932 Code, § 1373; Cr. C. '22, § 276; Civ. C. '12, § 934; 1909 (26) 166.

§ 1377. Misdemeanor to solicit emigrants without license — who are emigrant agents. — No person shall carry on the business of emigrant agent in this State without having first obtained a license therefor from the state treasurer. The term "emigrant agent," as contemplated in this section, shall be construed to mean any person engaged in hiring laborers or soliciting emigrants in this State to be employed beyond the limits of the same. Any person shall be entitled to a license, which shall be good for one year, upon payment into the state treasury for the use of the State of five hundred dollars in each county in which he operates or solicits emigrants for each year so engaged. Any person doing business of an emigrant agent without having first obtained such license shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished by fine not less than five hundred dollars, and not more than five thousand dollars, or may be imprisoned in the county jail not less than four months, or confined in the state prison, at hard labor, not exceeding two years for each and every offense, within the discretion of the court.

1932 Code, § 1377; Cr. C. '22, § 308; Cr. C. '12, § 895; Cr. C. '02, § 608; R. S. 488; 1891 (20) 1084; 1893 (21) 429; 1898 (22) 812.

The constitutionality of this section has been sustained. *State v. Napier*, 63 S. C. 60, 41 S. E. 13, 129 Am. St. Rep. 282, 2 L. R. A. (N. S.) 860.

§ 1378. Emigrant agents to obtain a license—misdemeanor to do business of emigrant agent without a license.—No person shall carry on the business of an emigrant agent in this State without having first obtained a license therefor from the county treasurer of each county in which he solicits emigrants. Any person shall be entitled to a license, which shall be good for one year, upon payment into the county treasury, for the use of said county, two thousand dollars in each county in which he operates or solicits emigrants, for each year so engaged. Any person doing business of an emigrant agent, without having first obtained said license, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished by fine, not less than one thousand dollars and not more than five thousand dollars, or may be imprisoned in the county jail or on the public works not less than four months, or confined in the state prison, at hard labor, not exceeding two years for each and every offense, within the discretion of the court.

The term "emigrant agent," as contemplated in this section, shall be construed to mean any person engaged in hiring laborers or soliciting emigrants in this State, to be employed beyond the limits of the same.

1932 Code, § 1378; Cr. C. '22, § 309; Cr. C. '12, § 896; 1907 (25) 543.

This section was enacted in the exercise of the State's police power, to protect the State's laborers and its agricultural and manufacturing interests. *State v. Reeves*, 112 S. C. 383, 99 S. E. 841, 24 A. L. R. 1413.

One who hires employees for work outside of the state is an "emigrant agent," within the meaning of this section, though in so doing he is, as an agent of a corporation, employing men to work for such corporation. *State v. Bates*, 113 S. C. 129, 101 S. E. 651.

And each hiring is a separate transaction.—In a prosecution for carrying on the business of emigrant agent without a license, each hiring or solicitation is to

be considered as a separate transaction by the jury in determining whether defendant was engaged in the occupation of hiring or soliciting laborers to be employed beyond state limits, though the laborers so solicited were all to have left on the same day. *State v. Reeves*, 112 S. C. 383, 99 S. E. 841, 24 A. L. R. 1413.

And papers found on defendant after arrest may be used as evidence.—In a prosecution for carrying on the business of emigrant agent without securing a license, papers and documents, found on defendant after arrest and taken from him by police officers, are admissible. *State v. Reeves*, 112 S. C. 383, 99 S. E. 841, 24 A. L. R. 1413.

§ 1379. Making intentionally untrue statement in advertising.—Any person, firm, corporation or association who knowingly with intent to sell or in any wise dispose of merchandise, securities, service, or anything offered by such person, firm, corporation, or association, directly or indirectly, to the public for sale or distribution, or with intent to increase the consumption thereof, or to induce the public in any manner to enter into any obligation relating thereto, or to acquire title thereto, or an interest therein, makes, publishes, disseminates, circulates, or places before the public, or causes, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in this State, in a newspaper or other publication, or in the form of a book, notice, handbill, poster, bill, circular, pamphlet, or letter, or in any other way, an advertisement of any sort regarding merchandise, securities, service, or anything so offered to the public, which advertisement contains any assertion, representation or statement of fact which is intentionally untrue, shall be deemed guilty

of a misdemeanor; and upon conviction shall be punished by a fine of not less than one hundred (\$100.00) dollars or more than five hundred (\$500.00) dollars, or imprisonment at hard labor for not less than thirty (30) days or more than six months, in the discretion of the court.

1932 Code, § 1379; 1924 (33) 1133.

CHAPTER 71

Offenses against the Public Peace

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| 1380. Conspiracy. | 1389. Power and duty of sheriffs and other officers. |
| 1381. Punishment for commission of other crime. | 1390 thru 1393. Emergency power of Governor. |
| 1382. Power and duty of sheriffs and other officers. | 1393-1. Prize fighting prohibited. |
| 1383. Hindering officer or rescuing prisoner. | 1394. Boisterous conduct. |
| 1384. Liability of county to person obstructed in exercise of legal rights. | 1395. Criminal libel and slander. |
| 1385 and 1386. Destruction of property. | 1396. Disorderly conduct. |
| 1387. Liability of participants to injured person. | 1396-1. Disturbing patients in sanitarium. |
| 1388. Prosecution of offenders. | 1396-2. Hours operate musical machines, Clarendon, Kershaw and Richland Counties. |

§ 1380. Conspiracy against persons.—If any two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to injure, oppress, or violate the person or property of any citizen, because of his political opinion or his expression or exercise of the same, or shall attempt, by any means, measures, or acts, to hinder, prevent, or obstruct any citizen in the free exercise and enjoyment of any right or privilege secured to him by the Constitution and laws of the United States, or by the Constiitution and laws of this State, such persons shall be deemed guilty of a felony, and, on conviction thereof, be fined not less than one hundred or more than two thousand dollars, or be imprisoned not less than six months or more than three years, or both, at the discretion of the court; and shall thereafter be ineligible to, and disabled from, holding any office of honor, trust, or profit in this State.

1932 Code, § 1380; Cr. C. '22, § 310; Cr. C. '12, § 320; Cr. C. '02, § 233; G. S. 2567; R. S. 198; 1871 (14) 560.

This section does not abrogate the law of conspiracy in the State v. Ameker, 73 S. C. 330, 53 S. E. 484, State v. McAdams, 167 S. C. 405, 166 S. E. 405. And has no reference to conspiracy to commit offenses punishable at common law. State v. McAdams, 167 S. C. 405, 166 S. E. 405.

§ 1381. If another crime committed, how punished.—If in violating any of the provisions of sections 1380 and 1383, any other crime, misdemeanor, or felony shall be committed, the offender or offenders shall, on conviction thereof, be subjected to such punishment for the same as is attached to such crime, misdemeanor, and felony, by the existing laws of this State.

1932 Code, § 1381; Cr. C. '22, § 311; Cr. C. '12, § 321; Cr. C. '02, § 234; G. S. 2568; R. S. 199; 1871 (14) 560.

§ 1382. Sheriffs, etc., to execute warrants, may call out posse comitatus.—It shall be the duty of all sheriffs, constables, and other officers who may be specially empowered, to obey and execute all warrants and other processes issued under the provisions of sections 1380 to 1383, inclusive, to them directed; and should any sheriff, constable, or other officer specially empowered, refuse to receive such warrant or other process, when tendered to him, or neglect or refuse to execute the same, he shall, on conviction thereof, be fined in the sum of five hundred dollars, to the use of the citizens deprived of the rights secured by the provisions of this chapter, or be imprisoned in the county jail, in the discretion of the court. And the better to enable the sheriffs, constables and other officers specially empowered to execute all such warrants and other processes as may be directed to them, they shall have authority to summon and call to their aid the bystanders or posse comitatus of the proper county; and all persons refusing to obey the summons or call of the officers thus empowered shall be deemed guilty of a misdemeanor, and, on conviction thereof, be punished. And such warrants and other processes shall run and be executed by said officers anywhere within the circuit or county in which they are issued.

1932 Code, § 1382; Cr. C. '22, § 312; Cr. C. '12, § 322; Cr. C. '02, § 235; G. S. 2569; R. S. 200; 1871 (14) 560.

§ 1383. Penalty for hindering officers or rescuing prisoners.—Any person who shall hinder, prevent, or obstruct any officer or other person charged with the execution of any warrant or other process issued under the provisions of sections 1380 to 1383, inclusive, in arresting any person for whose apprehension such warrant or other process may have been issued, or shall rescue, or attempt to rescue, such person from the custody of the officer or person or persons lawfully assisting him, as aforesaid, or shall aid, abet, or assist any person so arrested, as aforesaid, directly or indirectly, to escape from the custody of the officer or person or persons assisting him, as aforesaid, or shall harbor or conceal any person for whose arrest a warrant or other process shall have been issued, so as to prevent his discovery and arrest, after notice or knowledge of the fact of the issuing of such warrant or other process, shall, on conviction for either of said offenses, be subject to a fine of not less than fifty nor more than one thousand dollars or imprisonment of not less than three months nor more than one year, or both, at the discretion of the court having jurisdiction.

1932 Code, § 1383; Cr. C. '22, § 313; Cr. C. '12, § 323; Cr. C. '02, § 236; G. S. 2570; R. S. 201; 1871 (14) 561.

§ 1384. Persons injured may prosecute county for damages.—Any citizen who shall be hindered, prevented, or obstructed in the exercise of the rights and privileges secured to him by the Constitution and laws of the United States, or by the Constitution and laws of this State, or shall be injured in his person or property because of his exercise of the same, may claim and prosecute the county in which the offense shall be committed for any damages he shall sustain thereby; and the said county shall be responsible for the payment of such damages as the court may award, which shall be paid by the county treasurer of such county on a warrant

drawn by the county commissioners thereof; which warrant shall be drawn by the county commissioners as soon as a certified copy of the judgment roll is delivered to them for file in their office.

1932 Code, § 1384; Cr. C. '22, § 314; Cr. C. '12, § 324; Cr. C. '02, § 237; G. S. 2571; R. S. 202; 1871 (14) 561.

This section does not render county liable for injuries inflicted by mob, when not inflicted because of exercise of political rights. *Brazzill v. Lancaster County*, 132 S. C. 347, 128 S. E. 728.

§ 1385. Indemnify owners for their property destroyed by mob or riot.—

In all cases where any dwelling house, building, or any property, real or personal, shall be destroyed in consequence of any mob or riot, it shall be lawful for the person or persons owning or interested in such property to bring suits against the county in which such property was situated and being, for the recovery of such damages as he or they may have sustained by reason of the destruction thereof; and the amount which shall be recovered in said action shall be paid in the manner provided by section 1384.

1932 Code, § 1385; Cr. C. '22, § 315; Cr. C. '12, § 325; Cr. C. '02, § 238; G. S. 2572; R. S. 203; 1871 (14) 561.

Complaint in action against county to recover damages for destruction of tobacco crop by mob of disorderly and riotous persons demurrable as not stating cause of action. *Warr v. Darlington County*, 181 S. C. 254; 186 S. E. 920.

§ 1386. When damages cannot be recovered.—No person or persons shall be entitled to the recovery of such damages if it shall appear that the destruction of his or their property was caused by his or their illegal conduct, nor unless it shall appear that he or they, upon knowledge had of the intention or attempt to destroy his or their property, or to collect a mob for that purpose, and sufficient time intervening, gave notice thereof to a constable, sheriff, or magistrate of the county in which such property was situated and being; and it shall be the duty of such constable, sheriff or magistrate, upon receipt of such notice, to take all legal means necessary for the protection of such property as is attacked, or threatened to be attacked; and if such constable, sheriff, or magistrate, upon receipt of such notice, or upon knowledge of such intention or attempt to destroy such property, in any wise received, shall neglect or refuse to perform his duty in the premises, he or they so neglecting or refusing shall be liable for the damages done to such property, to be recovered by action, and shall also be deemed guilty of a misdemeanor in office, and, on conviction thereof, shall forfeit his commission.

1932 Code, § 1386; Cr. C. '22, § 316; Cr. C. '12, § 326; Cr. C. '02, § 239; G. S. 2573; R. S. 204; 1871 (14) 561.

§ 1387. Persons injured may sue participants.—Nothing in the foregoing sections of this chapter shall be construed to prevent the person or persons whose property is so injured or destroyed from having and maintaining his or their action against all and every person and persons engaged or participating in said mob or riot, to recover full damages for any injury sustained: *provided, however*, that no damages shall be recovered by the party against any of said rioters for the same injury for which compensation shall be made by the county.

1932 Code, § 1387; Cr. C. '22, § 317; Cr. C. '12, § 327; Cr. C. '02, § 240; G. S. 2574; R. S. 205; 1871 (14) 562.

§ 1388. County commissioners may prosecute offenders.—It shall be lawful for the county commissioners of the county against which damages shall be recovered under the provisions of §§ 1380 thru 1389 to bring suit or suits, in the name of the county, against any and all persons engaged or in any manner participating in said mob or riot, and against any constable, sheriff, magistrate, or other officer charged with the maintenance of the public peace, who may be liable, by neglect of duty, to the provisions of §§ 1380 thru 1389, for the recovery of all damages, costs, and expenses incurred by said county; and such suits shall not abate or fail by reason of too many or too few parties defendant being named therein.

1932 Code, § 1388; Cr. C. '22, § 318; Cr. C. '12, § 328; Cr. C. '02, § 241; G. S. 2575; R. S. 206; 1871 (14) 562.

§ 1389. Sheriffs, et al, enforce preceding provisions.—Sheriffs, constables and other officers in the several circuits or counties vested with powers of arresting, imprisoning, and bailing offenders against the laws of this State, are hereby specially authorized and required to institute proceedings against all and every person and persons who shall violate the provisions of the preceding sections of this chapter, and cause him and them to be arrested, imprisoned, or bailed, as the case may require, for a trial before such court as shall have jurisdiction of the offense.

1932 Code, § 1389; Cr. C. '22, § 319; Cr. C. '12, § 329; Cr. C. '02, § 242; G. S. 2576; R. S. 207; 1871 (14) 566.

§ 1390. When governor may call out militia.—Whenever, by reason of unlawful obstructions, combinations, or assemblages of persons, or rebellion against the authority of the government of this State, it shall become impracticable, in the judgment of the Governor of the State, to enforce, by the ordinary course of judicial proceedings, the laws of the State within any county or counties of the State, it shall be lawful for the Governor of the State to call forth the militia of any or all the counties of the State, and employ such parts thereof as he may deem necessary to enforce the faithful execution of the laws, or to suppress such rebellion.

1932 Code, § 1390; Cr. C. '22, § 320; Cr. C. '12, § 331; Cr. C. '02, § 244; G. S. 2578; R. S. 209; 1868 (14) 85.

Governor calling out militia and suspending writ of habeas corpus, in effect, declared martial law. *Hearn v. Calus*, 178 S. C., 381; 183 S. E., 13.

Governor has no power or right in law to use the militia to discharge the duties of a civil office. *Ibid.*

Action of the Governor in declaring a state of insurrection exists may not be enjoined by supreme court, nor reviewed by it. *Ibid.*

After proclamation which declares ex-

istence of a state of insurrection, acts of the Governor, lawfully done in suppression of insurrection, are immune from interference with by supreme court; but when his acts exceed authority given him by constitution and statutes and are injurious to personal liberty and property rights of the citizens of the state, they are open to the inquiry and control of the courts. *Hearon v. Calus*, 178 S. C., 381; 183 S. E., 13.

§ 1391. Proclamation to disperse.—Whenever, in the judgment of the Governor, it may be necessary to use the military force hereby directed to be employed and called forth, the Governor shall forthwith, by proclamation, command such insurgents to disperse and retire peaceably to their

respective abodes within a limited time.

1932 Code, § 1391; Cr. C. '22, § 321; Cr. C. '12, § 332; Cr. C. '02, § 245; G. S. 2579; R. S. 210; 1868 (14) 86.

Governor declaring state of insurrection and calling out militia.—See § 1390 and notes thereto.

§ 1392. When governor may take possession of telegraph, etc.—The Governor of the State, when, in his judgment, the public safety may require it, is hereby authorized to take possession of any or all of the telegraph lines in the State, their offices and appurtenances; to take possession of any or all railroad lines in the State, their rolling stock, their offices, shops, buildings, and all their appendages and appurtenances; to prescribe rules and regulations for the holding, using, and maintaining of the aforesaid telegraph and railroad lines in the manner most conducive to the interest and safety of the government; to place under military control all the officers, agents and employees belonging to the telegraph and railroad lines thus taken possession of, so that they shall be considered a part of the military establishment of the State, subject to all the restrictions imposed by the rules and articles of war.

1932 Code, § 1392; Cr. C. '22, § 322; Cr. C. '12, § 335; Cr. C. '02, § 248; G. S. 2582; R. S. 213; 1868 (14) 86.

§ 1393. Governor to employ sufficient force.—The Governor is authorized to employ as many persons as he may deem necessary and proper for the suppression of such insurrection, rebellion, or resistance to the laws; and for this purpose he may organize and use them in such manner as he may judge best for the public welfare.

1932 Code, § 1393; Cr. C. '22, § 323; Cr. C. '12, § 336; Cr. C. '02, § 249; G. S. 2583; R. S. 214; 1868 (14) 86.

§ 1393-1. Prize fighting prohibited.—It shall be unlawful for any person or persons to engage in prize fighting, or to be a second in a prize fight, within the limits of this State; and any person violating the provisions of this section shall be punished by a fine not exceeding one thousand dollars, or imprisonment not exceeding three years, or both fine and imprisonment, in the discretion of the court. Any person or persons, either upon their responsibility or as officers or agents of any club or association, who shall aid or abet by offer of a purse or money or other valuable inducement, or by letting or giving the use of a house or grounds, or who shall in any way whatsoever effect or cause a violation of this section, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished by imprisonment not exceeding six months, or by a fine not exceeding two hundred dollars.

1932 Code, § 1393-A; Cr. C. '22, § 324; Cr. C. '12, § 338; Cr. C. '02, § 251; R. S. 216; 1893 (21) 397; 1896 (22) 224.

See §§ 7152 thru 7157.

§ 1394. Shooting or boisterous conduct on public highways a misdemeanor.—Any person who shall, without just cause or excuse, or while under the influence, or feigning to be under the influence, of intoxicating liquors, engage in any boisterous conduct, or who shall, without just cause or excuse, discharge any gun, pistol, or other firearm while upon or within

fifty yards of any public road or highway, except upon his own premises, shall be guilty of a misdemeanor, and, upon conviction thereof, shall pay a fine of not more than one hundred dollars, or be imprisoned for not more than thirty days.

1932 Code, § 1394; Cr. C. '22, § 325; Cr. C. '12, § 339; Cr. C. '02, § 252; 1899 (23) 97; 1900 (23) 449.

§ 1395. Slander and libel.—Any person who shall with malicious intent originate, utter or circulate, or publish, any false statement or matter concerning another, the effect of which shall tend to injure such person in his or her character or reputation, shall be deemed guilty of a misdemeanor, and, upon conviction therefor, be subject to punishment by fine not to exceed five thousand dollars, or by imprisonment for a term not exceeding one year, or by both fine and imprisonment, in the discretion of the court: *provided*, that nothing herein shall be construed to abridge any right any person may have by way of an action for damages for libel or slander, or libel under the existing law.

1932 Code, § 1395; Cr. C. '22, § 326; 1912 (27) 775.

§ 1396. Public disorderly conduct.—Any person or persons who shall be found on any highway or at any public place or public gathering in a grossly intoxicated condition or conducting himself or herself in a disorderly manner, or who shall use obscene or profane language, on any highway or at any public place or gathering or in hearing distance of any school house or church, shall be deemed guilty of a misdemeanor, and, upon conviction of either of said offenses, shall be fined not less than five dollars nor more than fifty dollars, or imprisoned not less than five days nor more than thirty days. All fines collected for any and all of the offenses enumerated in this section shall be paid to the county treasurer and become a part of the public school fund of such county.

1932 Code, § 1396; Cr. C. '22, § 327; Cr. C. '12, § 394; Cr. C. '02, § 299; 1894 (21) 720; 1908 (25) 1033; 1918 (30) 694; 1916 (29) 703.

§ 1396-1. Not disturb patients in hospital or sanitarium with musical instruments.—It shall be unlawful for any person to operate any radio or other musical instrument in such a manner that it annoys or disturbs any patient confined to a hospital or sanitarium. Any person violating the provisions of this section shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be subject to a fine of not more than one hundred (\$100.00) dollars or imprisonment of not more than thirty (30) days.

1939 (41) 410.

§ 1396-2. Hours operate music machines outside of municipal corporations, Clarendon, Kershaw and Richland Counties.—It shall be unlawful for any owner, lessee or custodian or other person, for himself or another, of any nicolodeon, piccolo, phonograph or other mechanical or automatic music box or machine to operate the same, or suffer or permit the operation thereof, in or about any store, filling station, highway or other public or semi-public place outside of the limits of any incorporated town in Clarendon, Richland and Kershaw Counties after 10:30 o'clock P. M., or before 7:00 o'clock A. M., or at any time in hearing distance of any church during church or other religious services. Every violation of the terms

hereof shall be a misdemeanor and any person upon conviction shall be subject, for each violation to a fine of not less than five (\$5.00) dollars, and not more than fifty (\$50.00) dollars, or imprisonment for not more than thirty (30) days.

1939 (41) 433.

CHAPTER 72

Offenses against Public Justice

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| 1397 thru 1401. Perjury and subornation. | 1420. Place of trial. |
| 1402. Bribes to officers. | 1421. Assault on account of political opinion. |
| 1403. Acceptance of bribes by officers. | 1422. Impersonation of voters. |
| 1404. Corrupting jurors. | 1423. Perjury by voters. |
| 1405. Acceptance of bribes by jurors. | 1424. Punish managers for violating duties. |
| 1406. Bribery to procure office. | 1425. Penalty for defeating delivery of certificates. |
| 1407. Penalty for accepting bribes. | 1426. Negligent or corrupt conduct of officers. |
| 1408. Informer free from arrest. | 1427 thru 1430. Penalty for violating election laws. |
| 1409 thru 1411. Aiding prisoner to escape. | 1431. Perjury by officers of the reserve militia. |
| 1413. Voting more than once at elections. | |
| 1414 thru 1416. Bribery at elections. | |
| 1417. Candidates to make pledge. | |
| 1418. Drinking within one mile of voting precinct prohibited. | |
| 1419. Abusing voters. | |

§ 1397. Perjury and subornation of perjury.—Whoever, either by the subornation, unlawful procurement, sinister persuasion or means of any other person, or by his own act, consent or agreement, shall wilfully and corruptly commit any manner of wilful perjury, by his deposition in any of the courts of this State, or being examined ad perpetuam rei memoriam, and being thereof duly convicted, shall be fined in the sum of one hundred dollars, and shall suffer imprisonment by the space of six months, and the oath of such person shall not be received in any court of record within this State.

1932 Code, § 1397; Cr. C. '22, § 332; Cr. C. '12, § 340; Cr. C. '02, § 253; G. S. 2531; R. S. 217; 5 Eliz., c. 9; 1712 (2) 487.

The defendant's mental condition is a material fact in prosecution under this section.—State v. Gaymon, 44 S. C. 333, 22 S. E. 305, 51 Am. St. Rep. 861, 31 L. R. A. 489, 63 L. R. A. 809.

Perjury consists in false swearing without any regard to the form of the oath. Patrick v. Smoke, 3 Strob. 147, 152, 85 Am. Dec. 489, 25 A. L. R. (N. S.) 659, Ann. Cas. 14B, 595.

But perjury cannot be committed in giving evidence in a cause in which the court has no jurisdiction. State v. Jenkins, 26 S. C. 121, 1 S. E. 437.

Nor before arbitrators not having power to administer an oath. State v. McCroskey, 3 McC. 308, 85 Am. Dec. 490, 54 L. R. A. 520.

Nor on oath for naturalization. State v. Helle, 2 Hill 290, 85 Am. Dec. 491, 39 L. R. A. (N. S.) 97.

The false swearing must be wilful and corrupt. State v. Cockran, 1 Bail. 50, 85 Am. Dec. 489, 25 L. R. A. (N. S.) 654.

And must relate to some fact material to the issue. State v. Hattaway, 2 N. & McC. 118, 10 Am. Dec. 580, 85 Am. Dec. 493; State v. Kennerly, 10 Rich. 152.

Testimony showing location of defendant, when it affects the issue, is material. State v. Byrd, 28 S. C. 18, 4 S. E. 793, 13 Am. St. Rep. 660, 124 Am. St. Rep. 666.

And the judgment will be arrested when the words stated do not from the face of the indictment appear to be material. State v. Hayward, 1 N. & McC. 546, 85 Am. Dec. 490, 54 L. R. A. 514, 15 A. L. R. 639.

But the indictment need not allege that the matter sworn to was material to the issue. State v. Byrd, 28 S. C. 18, 4 S. E. 793, 13 Am. St. Rep. 660, 124 Am. St.

Rep. 666.

False representation is perjury, if made to mitigate a sentence. *State v. Keenan*, 8 Rich. 456, 85 Am. Dec. 493.

It is sufficient for the indictment to allege that defendant was duly sworn. *State v. Farrow*, 10 Rich. 165, 85 Am. Dec. 495, 124 Am. St. Rep. 662.

An indictment which charges that the oath was taken on the Gospels will not be sustained by proof that the oath was taken with uplifted hand. *State v. Porter*, 2 Hill 611, 85 Am. Dec. 496.

Where the indictment sufficiently charges a common law perjury, its conclusion against this section may be regarded as surplusage. *State v. Kennerly*, 10 Rich. 152.

And it is not defective in failing to allege that the proceeding before magistrate was commenced by information under oath. *State v. Byrd*, 28 S. C. 18, 4 S. E. 793, 13 Am. St. Rep. 660, 124 Am. St. Rep. 666.

Two witnesses are not necessary to

disprove facts sworn to; but where there is only one, independent evidence ought to be adduced. *State v. Hayward*, 1 N. & McC. 546, 85 Am. Dec. 490, 54 L. R. A. 514, 15 A. L. R. 639.

The same amount of testimony is required to prove the facts sworn to as to prove the falsity of the oath. *State v. Howard*, 4 McC. 159.

One who has been charged with crime by the oath of defendant is competent witness. *State v. McKennan*, Harp. 302, 85 Am. Dec. 498.

And the prosecutor is a competent witness unless he has an immediate interest in the record. *State v. Farrow*, 10 Rich. 165, 85 Am. Dec. 495, 124 Am. St. Rep. 662.

Where the verdict finds guilty of perjury before two persons, and the indictment charges it before one of them, the variance is fatal. *State v. Mayson*, 3 Brev. 284. See §§ 490-494, as to variances, and the notes thereto.

§ 1398. Subornation or perjury in civil actions.—Whoever shall unlawfully and corruptly procure any witness or witnesses by letters, rewards, promises, or by any other sinister and unlawful means whatsoever, to commit any wilful and corrupt perjury, in any matter or cause whatsoever, in suit and variance, by any writ, action, complaint, or information, in any wise touching or concerning any lands, tenements, or hereditaments, goods, chattels, debts, or damages, in any of the courts of this State, or shall unlawfully and corruptly procure or suborn any witness or witnesses, which shall be sworn to testify in perpetuum rei memoriam, shall be fined in the sum of two hundred dollars, and shall be imprisoned for the space of six months, unless such fine shall be sooner paid, and thenceforth shall not be received as a witness in any court of record within this State.

1932 Code, § 1398; Cr. C. '22, § 333; Cr. C. '12, § 341; Cr. C. '02, § 254; G. S. 2532; R. S. 218; 1712 (2) 487.

An attorney-at-law may be disbarred for subornation of perjury. *State v. Holding*, 1 McC. 379, 95 Am. Dec. 337, 2

Am. St. Rep. 848, 45 Am. St. Rep. 77.

As to removal or suspension of attorneys, see § 322, and note thereto.

§ 1399. Disposition of fines.—The one moiety of the fine imposed by the preceding sections of this chapter shall be for the State, and the other moiety to such person as shall be grieved, hindered, or molested by reason of the offense or offenses before mentioned, that will sue for the same by action in any court of competent jurisdiction.

1932 Code, § 1399; Cr. C. '22, § 334; Cr. C. '12, § 342; Cr. C. '02, § 255; G. S. 2533; R. S. 219; 5 Eliz., c. 9; 1712 (2) 488.

§ 1400. False swearing before persons authorized to administer oaths.—Whoever shall, wilfully and knowingly, swear falsely in taking any oath required by law, and administered by any person directed or permitted by law to administer such oath, shall be deemed guilty of perjury, and, on conviction, incur the pains and penalties of that offense.

1932 Code, § 1400; Cr. C. '22, § 335; Cr. C. '12, § 343; Cr. C. '02, § 256; G. S. 2534; R. S. 220; 1833 (2) 485.

Defendant is liable if he swears to false statement in indictment.—In order to support conviction, under this section it is only necessary to prove that defendant, under oath, swore to statement of facts alleged in the indictment, and that the statement sworn to was a false representation. *State v. Bolyan*, 143 S. C. 63, 141 S. E. 165.

Thus, such offense may be assigned for making false affidavit before one officer, charging another with a misdemeanor. *State v. Cockran*, 1 Bail. 50, 85 Am. Dec. 489, 25 L. R. A. (N. S.) 654.

But officer must have been qualified to administer oath.—One cannot be tried for perjury, for taking an oath falsely before an officer not qualified to administer it. *State v. Hayward*, 1 N. & McC. 546, 85 Am. Dec. 490, 54 L. R. A. 514, 15 A. L. R. 639.

A deputy clerk, who was merely a de-facto clerk because legal requirements for

her reappointment had not been complied with, was without legal authority to administer an oath upon which statutory offense of false swearing could be based. *State v. Brandon*, 186 S. C. 448; 197 S. E. 113.

It is not necessary that matter be material to the issue.—It is not necessary to constitute the crime of perjury under this section that the matter falsely sworn to should be material to the issue. It is sufficient if the oath required by law, was administered by one authorized to do so, and was wilfully and knowingly false. *State v. Byrd*, 28 S. C. 18, 4 S. E. 793, 13 Am. St. Rep. 660, 124 Am. St. Rep. 666.

It cannot be assigned as perjury, on application for naturalization, to make a false affidavit as to previous residence. *State v. Helle*, 2 Hill 290, 85 Am. Dec. 491, 39 L. R. A. (N. S.) 97.

§ 1401. Additional punishment for perjury.—Besides the punishment already to be inflicted by law for so great crimes, it shall and may be lawful for the court or judge before whom any person shall be convicted of wilful and corrupt perjury, or subornation of perjury, to order and send such person to the state penitentiary, there to be kept to hard labor for any term or time not exceeding the term of seven years.

1932 Code, § 1401; Cr. C. '22, § 336; Cr. C. '12, § 344; Cr. C. '02, § 257; G. S. 2535; R. S. 221; 1736 (3) 470.

§ 1402. Giving or offering bribes to officers.—Whoever corruptly gives, offers, or promises to any executive, legislative, or judicial officer, after his election or appointment, either before or after he is qualified or has taken his seat, any gift or gratuity whatever, with intent to influence his act or vote, opinion, decision, or judgment on any matter, question, cause, or proceeding, which may be pending or may by law come or be brought before him in his official capacity, shall be punished by imprisonment in the state penitentiary at hard labor not exceeding five years, or by fine not exceeding three thousand dollars, and imprisonment in jail not exceeding one year.

1932 Code, § 1402; Cr. C. '22, § 337; Cr. C. '12, § 348; Cr. C. '02, § 261; G. S. 2536; R. S. 225; 1869 (14) 308.

See generally *State v. Meehare*, 160 S. C. 111, 158 S. E. 151.

§ 1403. Acceptance of bribes by officers.—Every executive, legislative, or judicial officer, who corruptly accepts a gift or gratuity, or a promise to make a gift or to do an act beneficial to such an officer, under an agreement, or with an understanding that his vote, opinion, or judgment shall be given in any particular manner, or on any particular side of any question, cause, or proceeding, which is or may be by law brought before him in his official capacity, or that, in such capacity, he shall make any particular nomination or appointment, shall forfeit his office, be forever disqualified to hold any public office, trust, or appointment under the laws of this State, and be punished by imprisonment in the state penitentiary

at hard labor not exceeding ten years, or by fine not exceeding five thousand dollars, and by imprisonment in jail not exceeding two years.

1932 Code, § 1403; Cr. C. '22, § 338; Cr. C. '12, § 349; Cr. C. '02, § 262; G. S. 2537; R. S. 226; 1869 (14) 308.

An indictment against a member of congress is not arrested by the privileges secured to Representatives by the Constitution of the United States. *State v. Smalls*, 11 S. C. 262, 58 Am. Dec. 244, 97 Am. Dec. 715, 53 L. R. A. 573, L. R. A. 1916A, 835.

Indictment may join acceptance of gift and promise to make one. — *State v. Smalls*, 11 S. C. 262, 58 Am. Dec. 244, 97 Am. Dec. 715, 53 L. R. A. 573, L. R. A. 1916A, 835.

And may charge acceptance of bribe on question before defendant as State Senator.—An indictment is not defective for repugnancy, because it charges the corrupt acceptance of a bribe to vote for a question which was, and might be, by law, brought before the defendant as State Senator. *State v. Smalls*, 11 S. C. 262, 58 Am. Dec. 244, 97 Am. Dec. 715, 53 L. R. A. 573, L. R. A. 1916A, 835.

When charging a bribe to vote for a certain resolution, it is sufficient to designate it by its title only. *State v. Smalls*, 11 S. C. 262, 58 Am. Dec. 244, 97 Am. Dec. 715, 53 L. R. A. 573, L. R. A. 1916A, 835.

The journals of the Senate are the highest legal proof of the pendency of a matter before that body at a particular time. *State v. Smalls*, 11 S. C. 262, 58 Am. Dec. 244, 97 Am. Dec. 715, 53 L. R. A. 573, L. R. A. 1916A, 835.

Books of bank are admissible to prove bribe.—Where an accomplice testified that the bribe was by bank check, it is competent to prove by the books of the same bank a credit to defendant for like amount two days after the bribery. *State v. Smalls*, 11 S. C. 262, 58 Am. Dec. 244, 97 Am. Dec. 715, 53 L. R. A. 573, L. R. A. 1916A, 835.

§ 1404. Corrupting jurors, etc.—Whoever corrupts, or attempts to corrupt, any juror, arbitrator, umpire, or referee, by giving, offering, or promising any gift or gratuity whatever with intent to bias the opinion or influence the decision of such juror, arbitrator, umpire, or referee, in relation to any cause or matter pending in the court, or before an inquest, or for the decision of which such arbitrator, umpire, or referee has been chosen or appointed, shall be punished by imprisonment in the state penitentiary at hard labor not exceeding five years, or by fine not exceeding one thousand dollars, and imprisonment in jail not exceeding one year.

1932 Code, § 1404; Cr. C. '22, § 339; Cr. C. '12, § 350; Cr. C. '02, § 263; G. S. 2538; R. S. 227; 1869 (14) 309.

An attempt to improperly influence a juror by mere personal influence is punishable as a contempt, since it is not within this section. *In re Moore*, 79 S. C. 399, 60 S. E. 947, 46 L. R. A. (N. S.) 519.

For some purposes, the actual taking of the oath may be essential to constitute a "juror"; but, as soon as a citizen is designated by law as one chosen to sit as a juror, he falls within the letter and spirit of this section punishing at-

tempting to corrupt any juror; and the fact that a juror appears on oral notice, without more formal summons, cannot avail an accused who has attempted to influence such juror before he was sworn. *State v. Maddox*, 80 S. C. 452, 61 S. E. 964.

See generally, *State v. Blackwell*, 10 S. C. 35, 117 Am. St. Rep. 959, 46 L. R. A. (N. S.) 522, L. R. A. 1917C, 858, 2 A. L. R. 223.

§ 1405. Acceptance of bribes by jurors, etc.—If any person summoned as a juror, or chosen or appointed as an arbitrator, umpire, or referee, corruptly receives any gift or gratuity whatever from a party to a suit, cause, or proceeding, for the trial or decision of which such juror has been summoned, or for the hearing or determination of which such arbitrator, umpire, or referee has been chosen or appointed, he shall be punished by imprisonment in the state penitentiary at hard labor not exceeding five years, or by fine not exceeding one thousand dollars, and imprisonment

in jail not exceeding one year.

1932 Code, § 1405; Cr. C. '22, § 340; Cr. C. '12, § 351; Cr. C. '02, § 264; G. S. 2639; R. S. 228; 1869 (14) 309.

§ 1406. Bribery to procure office.—If any person shall, directly or indirectly, offer to give, or engage to pay any sum of money or other valuable consideration to another, in order to induce such other person to procure for him, by his interest, influence, or any other means whatsoever, any office or place of trust within this State, whether said office is to be obtained through any general, special, or primary election, or from any elective tribunal, or shall offer, give, promise or bestow any reward by meat, drink, or otherwise, for the aforesaid purpose, and be thereof convicted, he shall forfeit the sum of not less than one nor more than five hundred dollars, and suffer imprisonment for a term not exceeding six months.

1932 Code, § 1406; Cr. C. '22, § 341; Cr. C. '12, § 352; Cr. C. '02, § 265; G. S. 2540; R. S. 229; 1824 (6) 244; 1905 (24) 940.

§ 1407. Penalty for accepting bribes.—If any person shall receive of another any sum of money, or reward of meat, drink, or other valuable consideration, for procuring, or assisting to procure, any office or place of trust in this State, whether said office is to be obtained through any general, special or primary election, or from any elective tribunal, for any other person whatever and be convicted thereof, he shall forfeit the sum of not more than one hundred dollars, and suffer imprisonment at the discretion of the court having cognizance of the same; and if such offender be in any office, he shall, on conviction, be disabled from holding the same.

1932 Code, § 1407; Cr. C. '22, § 342; Cr. C. '12, § 353; Cr. C. '02, § 266; G. S. 2541; R. S. 230; 1824 (6) 244.

§ 1408. Informer free from arrest.—If either of the parties offending as aforesaid shall give information, upon oath, against the other offending party, and shall duly prosecute such information, such informer shall be free from the penalties aforesaid.

1932 Code, § 1408; Cr. C. '22, § 343; Cr. C. '12, § 354; Cr. C. '02, § 267; G. S. 2542; R. S. 231; 1824 (6) 244.

§ 1409. Aiding escapes from prison and rescuing prisoners.—Whoever conveys into a jail, house of correction, state penitentiary, house of reformation, or other like place of confinement, any disguise, instrument, tool, weapon, or other thing adapted or useful to aid a prisoner in making his escape, with intent to facilitate the escape of any prisoner there lawfully committed or detained, or by any means whatever aids or assists such prisoner in his endeavor to escape therefrom, whether such escape is affected or attempted or not, and whoever forcibly rescues any prisoner held in custody upon any conviction or charge of offense, shall be punished by imprisonment in the state penitentiary, at hard labor, not exceeding seven years; or, if the person whose escape or rescue was effected or intended was charged with an offense not capital, nor punishable by imprisonment, then by imprisonment in the state penitentiary, at hard labor, not exceeding two years, or by fine not exceeding five hundred dollars.

1932 Code, § 1409; Cr. C. '22, § 344; Cr. C. '12, § 355; Cr. C. '02, § 268; G. S. 2543; R. S. 232; 1824 (6) 244.

See generally. *State v. Ballew*, 83 S. C. 1916A, 1201, 18 Ann. Cas. 569, Ann. Cas. 82, 63 S. E. 688, 64 S. E. 1019, L. R. A. 12A, 224.

§ 1410. Aiding escape from officers.—Whoever aids or assists a prisoner in escaping, or attempting to escape, from an officer or person who has the lawful custody of such prisoner, shall be punished by imprisonment in the state penitentiary, at hard labor, not exceeding two years, or by fine not exceeding five hundred dollars.

1932 Code, § 1410; Cr. C. '22, § 345; Cr. C. '12, § 356; Cr. C. '02, § 269; G. S. 2544; R. S. 233; 1824 (6) 244.

§ 1411. Jailer or other officer wilfully suffering escapes.—If a jailer or other officer wilfully suffers a prisoner in his custody, upon conviction or on any criminal charge to escape, he shall suffer the like punishment and penalties as the prisoner suffered to escape was sentenced to, or would be liable to suffer upon conviction of the crime or offense wherein he stood charged.

1932 Code, § 1411; Cr. C. '22, § 346; Cr. C. '12, § 357; Cr. C. '02, § 270; G. S. 2545; R. S. 234; 1824 (6) 244.

Under this section an indictment lies against a magistrate, who admits to bail one who is charged with murder. *State v. Arthur*, 1 McM. 456, Ann. Cas. 13C, 695.

It is sufficient to set out in the indictment that the prisoner did escape, in any words that express it. *State v. Maberry*, 3 Strob. 144, 40 Am. St. Rep. 713, Ann.

Cas. 12C, 757, Ann. Cas. 13C, 695.

An indictment is not objectionable, because a constable, who has not been formally appointed and qualified, is charged with negligence as a lawful constable. *State v. Maberry*, 3 Strob. 144, 40 Am. St. Rep. 713, Ann. Cas. 12C, 757, Ann. Cas. 13C, 695.

§ 1413. Voting more than once at elections.—If any person qualified by the Constitution and laws of this State to vote at any election for the members of Congress of the United States, members of the Legislature of this State, sheriff, clerk, judge of probate, or any other county officer, mayor and aldermen of any city, intendant and wardens of any incorporated town, officers of the militia or volunteer organizations of the State, or at any other election (whether general, special or primary) held within this State, shall vote more than once at such election, for the same office, such person so voting more than once, shall be fined and imprisoned, at the discretion of the judge before whom the case shall be tried.

1932 Code, § 1413; Cr. C. '22, § 348; Cr. C. '12, § 359; Cr. C. '02, § 272; G. S. 2547; R. S. 236; 1858 (12) 731; 1905 (24) 940.

§ 1414. Bribery at elections.—If at any election hereafter held within this State, whether general, special or primary, for members of the Congress of the United States, members of the Legislature of this State, sheriff, clerk, judge of probate, or other county officer, mayor and aldermen of any city, intendant and wardens of any incorporated town, officers of the militia or volunteer organizations of the State, or at any other election held within this State, any person shall, by the payment, delivery or promise of money, or other article of value, procure another to vote for or against any particular candidate or measure, the person so promising and the person so voting, shall each be guilty of a misdemeanor, and, upon conviction thereof, shall, for the first offense, be fined in any sum not less than one hundred dollars nor more than five hundred dollars, and impris-

oned for any period of time not less than one month nor more than six months; and, for the second offense, shall be fined in any sum not less than five hundred dollars, nor more than five thousand dollars, and imprisoned for any period of time not less than three months nor more than twelve months.

1932 Code, § 1414; Cr. C. '22, § 349; Cr. C. '12, § 360; Cr. C. '02, § 273; G. S. 2548; R. S. 237; 1858 (12) 731; 1905 (24) 940.

§ 1415. Offering to procure voters by bribery.—If at any election, as in section 1413, any person shall offer or propose to procure another, by the payment, delivery or promise of money, or other article of value, to vote for or against any particular candidate or measure, or shall offer or propose, for the consideration of money or other article of value paid, delivered or promised, to vote for or against any particular candidate or measure, such person so offering to procure or vote shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined and imprisoned, at the discretion of the court.

1932 Code, § 1415; Cr. C. '22, § 350; Cr. C. '12, § 361; Cr. C. '02, § 274; G. S. 2549; 1858; (12) 731; 1905 (24) 942.

§ 1416. Misdemeanor to obtain votes by bribe or threat.—At or before every political primary election held by any political party, organization or association, for the purpose of choosing candidates for office, or the election of delegates to conventions, in this State, any person who shall, by threats or any other form of intimidation, or by the payment, delivery, or promise of money, or other article of value, procure or offer, promise to endeavor to procure, another to vote for or against any particular candidate in such election, or who shall, for such consideration, offer to so vote, shall be guilty of a misdemeanor.

1932 Code, § 1416; Cr. C. '22, § 351; Cr. C. '12, § 362; 1905 (24) 949.

§ 1417. Candidates to make pledge — form — failure nullifies election — violation a misdemeanor.—Every candidate offering for election, under the provisions of section 1416 shall make the following pledge and file the same with the clerk of court of common pleas for the county in which he is a candidate, unless he should be a candidate in more than one county, in which case he shall file same with the secretary of state, before he shall enter upon his campaign, to wit: I, the undersigned_____, of the county of_____, and state of South Carolina, candidate for the office of_____, hereby pledge that I will not give nor spend money, or use intoxicating liquors for the purpose of obtaining or influencing votes, and that I shall, at the conclusion of the campaign and before the primary election, render to the clerk of court (or secretary of state as hereinbefore provided), under oath, and itemized statement of all moneys spent or provided by me during the campaign for campaign purposes up to that time, and I further pledge that I will, immediately after the primary election or elections that I am a candidate in, render an itemized statement, under oath, showing all further moneys spent or provided by me in said election: *provided*, that a failure to comply with this provision shall render such election null and void, in so far as the candidate who fails to file the statement herein required, but shall not

affect the validity of the election of any candidate complying with this section: *and provided, further*, that such itemized statement and pledge shall be open to public inspection at all times. Any violation of the provisions of sections 1416 or 1417 shall be a misdemeanor, and any person, upon conviction thereof, shall be fined not less than one hundred dollars nor more than five hundred dollars, or be imprisoned at hard labor for not less than one month nor more than six months, or both fine and imprisonment, in the discretion of the court.

1932 Code, § 1417; Cr. C. '22, § 352; Cr. C. '12, § 363; 1905 (24) 949.

§ 1418. Drinking within one mile of voting precinct unlawful.—It shall be unlawful hereafter for any person to sell, barter or give away or treat any voter to any malt or intoxicating liquor within one mile of any voting precinct during any primary or other election day, under a penalty, upon conviction thereof, of not more than one hundred (\$100) dollars, nor more than thirty (30) days imprisonment with labor.

1932 Code, § 1418; Cr. C. '22, § 353; Cr. C. '12, § 366; 1904 (24) 417.

§ 1419. Abusing voters, etc.—If any person shall, at any of the elections in any city, town, ward, or polling precinct, threaten, mistreat, or abuse any voter, with a view to control or intimidate him in the free exercise of his right of suffrage, such offender shall suffer fine and imprisonment, at the discretion of the court.

1932 Code, § 1419; Cr. C. '22, § 354; Cr. C. '12, § 367; Cr. C. '02, § 275; G. S. 2550; R. S. 239; 1850 (12) 72.

§ 1420. Place of trial—informer's share, etc.—All offenses against the provisions of sections 1406, 1407, 1408 and 1419, shall be heard, tried and determined before the court of general sessions, and the pecuniary penalties accruing thereby shall go, one-third to the informer, and the remainder to the State.

1932 Code, § 1420; Cr. C. '22, § 355; Cr. C. '12, § 368; Cr. C. '02, § 276; G. S. 2551; R. S. 240; 1858 (12) 731.

§ 1421. Assault, etc., on account of political opinions.—Whoever shall assault or intimidate any citizen because of political opinions of the exercise of political rights and privileges guaranteed to every citizen of the United States by the Constitution and laws thereof, or by the Constitution and laws of this State, or, for such reason discharge such citizen from employment or occupation, or eject such citizen from rented house or land or other property, such person shall be deemed guilty of a misdemeanor, and on conviction thereof, be fined not less than fifty nor more than one thousand dollars, or be imprisoned not less than three months or more than one year, or both, at the discretion of the court.

1932 Code, § 1421; Cr. C. '22, § 356; Cr. C. '12, § 369; Cr. C. '02, § 277; G. S. 2552; R. S. 241; 1871 (14) 560.

§ 1422. Impersonation of voter—arrest.

(1) **Impersonation in primary, general or special election.**—It shall be unlawful for any person to impersonate or attempt to impersonate another person for the purpose of voting in any primary election of this State, whether municipal or State, and any general and special election, whether

municipal or state: *provided*, that if any manager of election of this State report to the sheriff or other peace officer that such a person has violated this section, such peace officer shall arrest said person and have a proper warrant sworn out.

(2) **Copies of section to be posted in certain cities.** — The executive committee of any party primary and the commissioners of the election in cities of forty thousand inhabitants or more, shall post or cause to be posted, a copy of this section printed on cardboard in as large type as a board twelve by twelve inches will carry, in each and every polling precinct in the municipality holding such primary election or other election.

(3) **Counties to receive forfeited bonds.**—When any person is arrested and charged with violation of this section by any municipal authorities and admitted to bail by said municipal authorities, and the said person forfeits his bond, the said municipal authorities shall be responsible to the county authorities for the forfeited bond and shall, within ten days from the said date of the violation on the part of the person so forfeited, pay the said bond over to the clerk of the court of the said county where the municipality is situated and where the bail has been forfeited.

(4) **Penalty of officers refusing to make arrest.**—Any sheriff or police officer refusing to make an arrest when demand is made to the proper authorities for any violation of this section shall be subject to prosecution in the court of general sessions for malfeasance of office.

(5) **Penalty for violation — scale of recognizances.** — Any person violating the provisions of this section shall, upon conviction, be imprisoned at hard labor for a period of not less than three months or more than twelve months, or by a fine of not less than three hundred (\$300.00) dollars, or more than twelve hundred (\$1,200.00) dollars, or both, at the discretion of the court, and when such person is placed under bond, such bond shall be in a sum not less than six hundred (\$600.00) dollars, or more than twelve hundred (\$1,200.00) dollars.

1932 Code, § 1422; 1923 (33) 30.

§ 1423. Perjury to swear falsely, etc., by voters—fraudulent actions in party primaries.—Any voter who shall swear falsely at any primary election, in taking the prescribed oath, or shall personate another person and take the oath in his name, in order to vote, shall be guilty of perjury, and be punished, upon conviction, as for perjury. And any person who shall fraudulently procure the registration of a name or names on the party registration lists, or rolls, in violation of the party rules or otherwise; or who shall fraudulently offer or attempt to vote such name or names; or who shall fraudulently offer or attempt to vote in violation of the party rules and regulations; or under any false pretense as to any circumstances affecting his qualifications to vote; or who shall fraudulently aid, counsel or abet another in so doing, either as to said fraudulent registration or said fraudulent offer or attempt to vote, shall be deemed guilty of a misdemeanor, and upon conviction, shall be punished by a fine of not less than one hundred (\$100) dollars, nor more than five hundred (\$500) dollars, or be imprisoned for a period of not less than thirty (30) nor more than ninety (90) days, or both, at the discretion of the court.

1932 Code, § 1423; Cr. C. '22, § 357; Cr. C. '12, § 370; 1903 (24) 113.

§ 1424. Punishment of managers at primary election for violating duties, etc.—Any manager at any primary election in this State, who shall be guilty of wilfully violating any of the duties devolved upon such position, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not to exceed one hundred dollars, or imprisonment not to exceed six months; and any manager who shall be guilty of fraud or corruption in the management of such election, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined in a sum not to exceed five hundred dollars, or imprisonment for a term not to exceed twelve months, or both, in the discretion of the court.

1932 Code, § 1424; Cr. C. '22, § 358; Cr. C. '12, § 371; Cr. C. '02, § 279; R. S. 243; 1888 (20) 10.

§ 1425. Penalty on messengers and others for defeating due delivery of certificates.—If any of the messengers shall be guilty of destroying the certificates entrusted to their care, or wilfully doing any act that shall defeat the due delivery of them, he shall be punished by imprisonment in the penitentiary, at hard labor, for a term not less than two nor exceeding four years; and if any person shall be found guilty of taking away from any of the said messengers, either by force or in any other manner, any such certificates entrusted to his care, or wilfully doing any act that shall defeat the due delivery thereof, he shall be punished by imprisonment in the penitentiary, at hard labor, for not less than two nor exceeding four years.

1932 Code, 1425; Cr. C. '22, § 359; Cr. C. '12, § 373; Cr. C. '02, § 281; G. S. 150; R. S. 245; 1888 (20) 10.

§ 1426. Punishment for neglect or corrupt conduct on part of officers or messengers.—If any officer or messenger, on whom any duty is enjoined in this chapter, shall be guilty of any wilful neglect of such duty, or of any corrupt conduct in the execution of the same, and be thereof convicted, he shall be deemed guilty of a misdemeanor, punishable by fine not exceeding five hundred dollars, or imprisonment not exceeding one year.

1932 Code, § 1426; Cr. C. '22, § 360; Cr. C. '12, § 374; Cr. C. '02, § 282; G. S. 151; R. S. 246; 1888 (20) 10.

§ 1427. Punishment for violating election laws.—Every person who shall vote at any general, special, or municipal election, who is not entitled to vote and every person who shall by force, intimidation, deception, fraud, bribery, or undue influence, obtain, procure, or control the vote of any elector to be cast for any candidate or measure other than as intended or desired by such elector, or who shall violate any of the foregoing provisions in regard to elections, shall be punished by a fine of not less than one hundred nor more than one thousand dollars, or by imprisonment in jail not less than three months nor more than twelve months, or both, within the discretion of the court.

1932 Code, § 1427; Cr. C. '22, § 361; Cr. C. '12, § 375; Cr. C. '02, § 283; G. S. 162; R. S. 247; 1888 (20) 10.

§ 1428. Wilful neglect of duty or corrupt conduct a misdemeanor.—If any of the commissioners or managers of election, or any member of the State or county board of canvassers, or any member of the board of regis-

tration or supervisor of registration, or any officers on whom any duty is imposed by the election or registration laws, shall be guilty of any wilful neglect of the same, or of any corrupt conduct in executing the same, and be thereof convicted, he shall be deemed guilty of a misdemeanor, punishable by fine not exceeding five hundred dollars, or imprisonment at hard labor not exceeding one year.

1932 Code, § 1428; Cr. C. '22, § 362; Cr. C. '12, § 376; Cr. C. '02, § 284; 1896 (22) 223.

See generally, *State v. State Board*, 86 S. C. 451, 461, 68 S. E. 676.

§ 1429. Improperly furnishing registration certificates a misdemeanor.

—Any member of the boards of registration, or any supervisor of registration, who shall prepare and furnish to voters, or permit to be prepared and furnished to voters, registration certificates at other times than the times at which the books of registration are to be opened according to law for that purpose, and shall be convicted thereof, shall be deemed guilty of a misdemeanor, and fined not more than five hundred dollars, or imprisonment at hard labor not more than one year.

1932 Code, § 1429; Cr. C. '22, § 363; Cr. C. '12, § 377; Cr. C. '02, § 285; 1896 (22) 223.

§ 1430. Receiving a fraudulent certificate a misdemeanor.—Any elector knowingly receiving a registration certificate issued in violation of the registration law of this State, or making use of the same, on conviction thereof, shall be deemed guilty of a misdemeanor, and fined not exceeding the sum of two hundred dollars, or imprisoned at hard labor not more than three months.

1932 Code, § 1430; Cr. C. '22, § 364; Cr. C. '12, § 378; Cr. C. '02, § 286; 1896 (22) 223.

§ 1431. Oath administered by officers of reserve militia—false swearing perjury.—Officers are authorized and empowered to administer oaths and affirmations in all matters pertaining to or concerning the South Carolina reserve militia. Any person who shall falsely swear or affirm to any oath or affirmation before any such officer shall be guilty of perjury, and upon trial and conviction thereof shall be sentenced for such offense as now provided by law for the crime of perjury.

1932 Code, § 1431; Cr. C. '22, § 370; 1918 (30) 874.

CHAPTER 73

Offenses against Morality and Decency

1432 and 1433. Abducting maid.

1434. Bigamy.

1435 thru 1437. Adultery or fornication.

1438. Miscegenation.

1439. Buggery.

1440. Incest.

1441. Seduction under marriage promise.

1442. Indecent exposure.

1443. Indecent publication.

1444. Indecent pictures.

1445. Cockfighting.

1446. Custody of white child by negro.

§ 1432. Abducting a maid under sixteen years of age.—Whoever, above the age of fourteen years, shall unlawfully take or convey, or cause to be taken or conveyed, any maid or woman-child unmarried, being within the age of sixteen years, out of or from the possession and against the will

of the father or mother of such child, or out of or from the possession and against the will of such person or persons as then shall happen to have, by any lawful ways or means, the order, keeping, education, or governance of any such maiden or woman-child, shall, on conviction, suffer imprisonment for the space of two years, or else shall pay such fine as shall be adjudged by the court.

1932 Code, § 1432; Cr. C. '22, § 372; Cr. C. '12, § 379; Cr. C. '02, § 287; G. S. 2585; R. S. 248; 4 and 5 P. & M., c. 8; 1712 (2) 485.

Consent of girl is immaterial.—In prosecution under this section for the abduction of a girl about 15 years of age, it is immaterial that girl consented to accompany defendants, or that she voluntarily left home, if she was conveyed away against the will of her parents for the purpose of prostitution. *State v. Morton*, 144 S. C. 116, 142 S. E. 245.

The indictment must state that the defendant is above the age of fourteen years and that the person taken away was a maid or woman-child. *State v. O'Bannon*, 1 Bail. 144.

But it may join two counts, one under this section, and one under the following section. *State v. Tidwell*, 5 Strob. 1, 58 Am. Dec. 248.

§ 1433. Abducting, deflowering or contracting matrimony with woman under sixteen years.—Whoever shall so take away, or cause to be taken away, as aforesaid, and deflower any such maid or woman-child, as aforesaid or shall against the will, or unknowing of or to the father of any such maid or woman-child, if the father be in life, or against the will or unknowing of the mother of any such maid or woman-child (having the custody or governance of such child, if the father be dead), by secret letters, messages, or otherwise, contract matrimony with any such maid or woman-child, shall on conviction, suffer imprisonment for five years, or else shall pay such fine as shall be adjudged by the court; one moiety of which fine shall be for the State, and the other moiety to the parties grieved.

1932 Code, § 1433; Cr. C. '22, § 373; Cr. C. '12, § 380; Cr. C. '02, § 288; G. S. 2586. R. S. 249; 4 and 5 P. & M., c. 8; 1712 (2) 485.

This section is applied as a wise and salutary law for the protection of inexperienced females of all conditions. *State v. Findlay*, 2 Bay 418.

A count under this section may be joined with a count under the preceding section. *State v. Tidwell*, 5 Strob. 1, 58

Am. Dec. 248.

In general under such indictment of two counts, the greater degree of guilt is fixed in this section, as well upon him who marries the woman-child, as upon him who aided. *State v. Tidwell*, 5 Strob. 1, 58 Am. Dec. 248.

§ 1434. Bigamy.—Whoever, being married, and whose husband or wife has not remained continually for seven years beyond the sea, or continually absented himself or herself, the one from the other, for the space of seven years together, the one of them not knowing the other to be living within that time, or who were not married before the age of consent, or where neither husband nor wife is under sentence of imprisonment for life, or whose marriage has not been annulled by decree of a competent tribunal having jurisdiction both of the cause and the parties, shall marry another person, the former husband or wife being alive, shall, on conviction, be punished by imprisonment in the penitentiary for not more than five years nor less than six months, or by imprisonment in the jail for six months, and by a fine of not less than five hundred dollars.

1932 Code, § 1434; Cr. C. '22, § 374; Cr. C. '12, § 381; Cr. C. '02, § 289; G. S. 2587; R. S. 250; 1 J. 1, c. 11, 1712 (2) 508; 1874 (15) 603.

Prior marriage as the foundation of crime of bigamy, under this section, must be such as is recognized in the law. *State v. Sellers*, 140 S. C. 66, 134 S. E. 873.

Where defendant's first marriage was void because contracted with one who had previously entered into a marriage voidable for want of age, but never in fact annulled, it was insufficient to support a charge of bigamy. *State v. Sellers*, 140 S. C. 66, 134 S. E. 873.

Declarations of the prisoner that he had married the first wife, and proof of long cohabitation, are sufficient to prove the first marriage. *State v. Britton*, 4 McC. 256, 36 Am. Dec. 747, 93 Am. Dec. 255, 36 Am. Rep. 24, 47 Am. St. Rep. 230, 68 L. R. A. 43; *State v. Hilton*, 3 Rich. 434, 36 Am. Dec. 747, 45 Am. Dec. 783, 36 Am. Rep. 24, 47 Am. St. Rep. 229, 68 L. R. A. 43, L. R. A. 1915E, 53.

In a prosecution under this section there is no presumption that a former marriage solemnized in due form was illegal at time of performance. *Hallums v. Hallums*, 74 S. C. 407, 54 S. E. 613, 16 L. R. A. (N. S.) 104.

A first marriage that is voidable, but not void, is sufficient foundation for crime of bigamy. *State v. Sellers*, 140 S. C. 66, 134 S. E. 873.

The confessions of a paramour are inadmissible to secure a conviction under this section. *State v. Mims*, 39 S. C. 557, 17 S. E. 850, 100 Am. St. Rep. 352.

This section applies against a nephew who lawfully marries his aunt and while she is alive marries again. *State v. Barefoot*, 2 Rich. 209, 126 Am. St. Rep. 202.

See generally, *State v. Whaley*, 10 S. C. 500, 14 L. R. A. 365, L. R. A. 1915E, 107.

§ 1435. Adultery or fornication.—Any man or woman who shall be guilty of the crime of adultery or fornication, shall be liable to indictment, and, on conviction, shall be severally punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or imprisonment for not less than six months nor more than one year, or by both fine and imprisonment, at the discretion of the court.

1932 Code, § 1435; Cr. C. '22, § 375; Cr. C. '12, § 382; Cr. C. '02, § 290; G. S. 2588; R. S. 251; 1880 (17) 328.

Editor's note.—Adultery was not indictable at common law, and was not an indictable offense in this State in 1831. *State v. Brunson*, 2 Bail. 149, L. R. A. 1916C, 653.

The jurisdiction under this section depends on place where the crime is committed. *State v. Williams*, 84 S. C. 21, 65 S. E. 982, L. R. A. 1916F, 373.

Parties may be indicted separately.—Under this section and § 1437, defining

"fornication" as "intercourse with each other," and providing that any person guilty of it shall be liable to indictment, either party to the crime may be separately indicted. *State v. Sauls*, 70 S. C. 393, 50 S. E. 17, 139 Am. St. Rep. 367, Ann. Cas. 16A, 322.

See generally, as to proof of marriage in prosecution for adultery. *State v. Still*, 68 S. C. 37, 46 S. E. 524, 102 Am. St. Rep. 657, Ann. Cas. 12A, 287.

§ 1436. Adultery defined.—Adultery is the living together and carnal intercourse with each other, or habitual carnal intercourse with each other without living together, of a man and woman, when either is lawfully married to some other person.

1932 Code, § 1436; Cr. C. '22, § 376; Cr. C. '12, § 383; Cr. C. '02, § 291; G. S. 2589; R. S. 252; 1880 (17) 328.

The omission of the words "without living together" does not vitiate an indictment under this section. *State v. Carroll*, 30 S. C. 85, 8 S. E. 433, 14 Am. St. Rep. 883, 18 L. R. A. (N. S.) 581, 795, 25 L. R. A. (N. S.) 548 Ann. Cas. 15D, 376.

Proper to charge that intercourse must be "Habitual."—On the trial of an indictment under this section, the court may properly charge that to constitute the offense the carnal intercourse must be habitual,—that is, frequent, occa-

sional acts will not be sufficient,"—leaving to the jury how frequently it must be committed to make it "habitual." *State v. Carroll*, 30 S. C. 85, 8 S. E. 433, 14 Am. St. Rep. 883, 18 L. R. A. (N. S.) 581, 795, 25 L. R. A. (N. S.) 548, Ann. Cas. 15D, 376.

A void foreign divorce is no defense in a prosecution under this section. *State v. Westmoreland*, 76 S. C. 145, 56 S. E. 673, 8 L. R. A. (N. S.) 842, 17 L. R. A. (N. S.) 802, 23 L. R. A. (N. S.) 1254.

§ 1437. Fornication defined.—Fornication is the living together and carnal intercourse with each other, or habitual carnal intercourse with each other without living together, of a man and woman, both being unmarried.

1932 Code, § 1437; Cr. C. '22, § 277; Cr. C. '12, § 384; Cr. C. '02, § 292; G. S. 2590; R. S. 253; 1880 (17) 328.

See generally, as to prosecution under municipal ordinances for keeping bawdy houses, *State v. Sanders*, 68 S. C. 192, 47 S. E. 55, 31 L. R. A. (N. S.) 708; *Union v. Hampton*, 83 S. C. 46, 64 S. E. 1017, 38 L. R. A. (N. S.) 197.

§ 1438. Miscegenation—punishment for—penalty for performing ceremony.—It shall be unlawful for any white man to intermarry with any woman of either the Indian or negro races, or any mulatto, mestizo, or half-breed, or for any white woman to intermarry with any person other than a white man, or for any mulatto, half-breed, Indian, negro or mestizo to intermarry with a white woman; and any such marriage, or attempted marriage, shall be utterly null and void and of none effect; and any person who shall violate this section, or any one of the provisions thereof, shall be guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine of not less than five hundred dollars, or imprisonment for not less than twelve months, or both, in the discretion of the court. Any clergyman, minister of the gospel, magistrate, or other person authorized by law to perform the marriage ceremony, who shall knowingly and wilfully unite in the bonds of matrimony any persons of different races, as above prohibited, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be liable to the same penalty or penalties as provided in this section.

1932 Code, § 1438; Cr. C. '22, § 378; Cr. C. '12, § 385; Cr. C. '02, § 293; R. S. 517; G. S. 2032, 2033, 2034; 1879 (17) 3; Const., Art. 2, § 6.

§ 1439. Buggery.—Whoever shall commit the abominable crime of buggery, whether with mankind or with beast, shall, on conviction, be deemed guilty of felony, and shall be imprisoned in the penitentiary for five years, and shall pay a fine of not less than five hundred dollars, or both, at the discretion of the court.

1932 Code, § 1439; Cr. C. '22, § 380; Cr. C. '12, § 387; Cr. C. '02, § 294; G. S. 2591; R. S. 254; 25 H. 8, c. 1 (2) 465.

§ 1440. Incest—prohibited degrees—punishment.—Any persons who shall have carnal intercourse with each other within the following degrees of relationship, to wit: A man with his mother, grandmother, daughter, granddaughter, stepmother, sister, grandfather's wife, son's wife, grandson's wife, wife's mother, wife's grandmother, wife's daughter, wife's granddaughter, brother's daughter, sister's daughter, father's sister, or mother's sister; a woman with her father, grandfather, son, grandson, stepfather, brother, grandmother's husband, daughter's husband, granddaughter's husband, husband's father, husband's grandfather, husband's son, husband's grandson, brother's son, sister's son, father's brother, or mother's brother, shall be deemed guilty of incest, and shall be punished by a fine of not less than five hundred dollars, or imprisonment not less than one year in the penitentiary, or both such fine and imprisonment.

1932 Code, § 1440; Cr. C. '22, § 381; Cr. C. '12, § 388; Cr. C. '02, § 295; R. S. 258; 1884 (19) 801.

This section does not apply where defendants were married before enactment of section.—Where defendant in 1882 married the daughter of his half-sister when incest was not a crime, and such marriage was not void, but voidable, his cohabitation with her after this section was enacted, making incest a crime, could not be punished as incest, for as to

him the statute would be *ex post facto*. *State v. Smith*, 101 S. C. 293, 85 S. E. 958, L. R. A. 1916C, 728, Ann. Cas. 17C, 149.

The state may show that crime was committed seven years before the date alleged in the indictment. *State v. Reynolds*, 48 S. C. 384, 26 S. E. 769, 106 Am. St. Rep. 765, 2 L. R. A. (N. S.) 862.

§ 1441. Seduction under promise of marriage.—Any male person above the age of sixteen years who shall, by any means of deception and promise of marriage, seduce any unmarried woman in this State, shall upon conviction, be deemed guilty of a misdemeanor, and shall be fined or imprisoned, at the discretion of the court; but no conviction shall be had under this section on the uncorroborated testimony of the woman upon whom the seduction is charged; and no conviction shall be had if on trial it is proved that such woman was at the time of the alleged offense, lewd and unchaste: *provided*, that if the defendant in any action brought hereunder shall contract marriage with such woman, either before or after the conviction, further proceedings hereunder shall be stayed.

1932 Code, § 1441; Cr. C. '22, § 382; Cr. C. '12, § 389; 1905 (24) 937.

A sentence of three years' imprisonment for seduction of an innocent and chaste country girl is not a cruel and unusual punishment. *State v. Teal*, 108 S. C. 455, 95 S. E. 69, L. R. A. 1918C, 556, 1 A. L. R. 623, 26 A. L. R. 400.

Court may suspend sentence on condition defendant contribute to support of child.—Under § 1039, providing that circuit judges shall have the power and authority, in their discretion, to suspend sentences imposed by them, upon such terms and upon such conditions as in their judgment may be fit and proper, the court has the power to suspend part of a sentence of imprisonment in a seduction case on condition that defendant pay a specified amount toward the support of the child of the seduced girl. *State v. Teal*, 108 S. C. 455, 95 S. E. 69, L. R. A. 1918C, 556, 1 A. L. R. 623, 26 A. L. R. 400.

Conditional promise of marriage will not support conviction.—Where a girl consents to sexual intercourse on the condition that the man will marry her if she becomes pregnant, the promise will not support a prosecution for seduction. *State v. Teal*, 108 S. C. 455, 95 S. E. 69, L. R. A. 1918C, 556, 1 A. L. R. 623, 26 A. L. R. 400.

But date need not have been set.—*State v. Teal*, 108 S. C. 455, 95 S. E. 69, L. R. A. 1918C, 556, 1 A. L. R. 623, 26 A. L. R. 400.

Prosecutrix presumed chaste.—The chastity of prosecutrix is presumed in a prosecution for seduction, and such presumption will support conviction, unless defendant proves that she was lewd and unchaste. *State v. Heavener*, 146 S. C. 138, 143 S. E. 674; *State v. Turner*, 82 S.

C. 278, 279, 64 S. E. 424, 43 L. R. A. (N. S.) 482, 17 Ann. Cas. 88.

Subsequent conduct of prosecutrix immaterial.—Where a chaste girl had intercourse under a promise of marriage, the seduction was complete, and it is no defense that she abandoned herself freely, lewdly, and habitually to the will and lust of her seducer after she found she had been betrayed. *State v. Teal*, 108 S. C. 455, 95 S. E. 69, L. R. A. 1918C, 556, 1 A. L. R. 623, 26 A. L. R. 400.

This section providing that any male person over 16, who shall, by any means of deception and promise of marriage, seduce any unmarried woman shall be deemed guilty, must be construed as if it read "any means of deception by promise of marriage." *State v. Heath*, 133 S. C. 147, 130 S. E. 513.

Sexual intercourse which comes about by the artifice of the defendant upon his promise to marry a woman constitutes seduction. *State v. Teal*, 108 S. C. 455, 95 S. E. 69, L. R. A. 1918C, 556, 1 A. L. R. 623, 26 A. L. R. 400.

"To corroborate" as used in this section means to strengthen or add weight or credibility to a thing. *State v. Griffin*, 106 S. C. 283, 91 S. E. 318, Ann. Cas. 18E, 469.

In a prosecution for seduction under promise to marry, the testimony of the mother in regard to statements by defendant before and after the events to the effect that he would marry the girl, are sufficient to corroborate the testimony of the girl. *State v. Griffin*, 106 S. C. 283, 91 S. E. 318, Ann. Cas. 18 E., 469.

Question of existence of corroborative testimony is for the court.—In a seduction trial, an instruction: "The ques-

tion of whether or not there is any corroborative testimony is a question that is addressed to the court. If there is no corroborative testimony, then the case would never get to you; it would be my duty to withhold it from you. If the case gets to you, it is for you to say whether from all of the testimony the state has established its case. If there had been no corroborative testimony, the case would never have gotten to you"—was not erroneous as instructing as to the weight of corroborating evidence. *State v. Livingston*, 105 S. C. 251, 89 S. E. 550, Ann. Cas. 18E. 469.

And submission of evidence to jury implies existence of such evidence.—Where the court submitted a seduction case to the jury and there was corroborating evidence, it would be idle to reverse because the court did not expressly hold that there was corroborating evidence, as the submission of the issue to the jury was an implied holding that there was corroborating evidence. *State v. Teal*, 108 S. C. 455, 95 S. E. 69, L. R. A. 1918 C. 556, 1 A. L. R. 623, 26 A. L. R. 400.

Child of alleged seduction may be exhibited to jury as corroborative testimony.—The exhibition to the jury of the child of the alleged seduction is relevant and competent, not merely to corroborate prosecutrix's testimony that she was seduced by some one, but for purpose of showing child's resemblance to defendant, thereby corroborating her testimony that defendant seduced her. *State v. Heavener*, 146 S. C. 138, 143 S. E. 674; *State v. Teal*, 108 S. C. 455, 95 S. E. 69, L. R. A. 1918C. 556, 1 A. L. R. 623, 26 A. L. R. 400.

The objection, in a seduction trial, that evidence deduced from resemblance of immature child to defendant is too vague, uncertain, and fanciful to be submitted to jury, goes to the weight, rather than the relevancy, thereof. *State v. Heavener*, 146 S. C. 138, 143 S. E. 674.

A confession, birth of a child, and defendant's letters are proper evidence to corroborate prosecutrix in a seduction case. *State v. Teal*, 108 S. C. 455, 95 S. E. 69, L. R. A. 1918C. 556, 1 A. L. R. 623, 26 A. L. R. 400.

Yielding upon previous promise supports conviction.—To authorize conviction for seduction under this section defendant's promise to marry need not have been immediate inducement to coition, but yielding upon faith of previous promise is sufficient. *State v. Smith*, 147 S. C. 485, 145 S. E. 287.

Marriage under saving clause is valid.—A marriage resulting under the proviso of this section penalizing seduction under promise of marriage, but permitting seducer to escape the penalty of his wrong by marrying his victim, is valid. *State v. English*, 101 S. C. 304, 85 S. E. 721, L. R. A. 1915F. 977, Ann. Cas. 16A, 857.

But an unaccepted offer of marriage does not come within the saving clause. *State v. Whitaker*, 103 S. C. 210, 87 S. E. 1001, Ann. Cas. 18E. 467.

And such marriage is not a defense in prosecution for desertion.—That a marriage was contracted under the saving clause of this section is no defense to a prosecution of the husband under § 1123 for desertion. *State v. English*, 101 S. C. 304, 85 S. E. 721, L. R. A. 1915F. 977, Ann. Cas. 16A, 857.

§ 1442. Felony to expose person indecently.—Any person who shall be guilty of wilful and malicious indecent exposure of his person on any street or highway, or in any place of resort, shall be guilty of a felony, and, on conviction, shall be punished by fine or imprisonment, or both, in the discretion of the court.

1932 Code, § 1442; Cr. C. '22, § 383; Cr. C. '12, § 390; 1906 (25) 84.

§ 1443. Penalty for publishing, etc., obscene books, papers, etc.—Whoever knowingly imports, prints, publishes, sells or distributes any book, pamphlet, ballad, printed paper or other thing containing obscene, indecent or improper print, picture, figure or description manifestly tending to the corruption of the morals of youth, or introduces into a family, school, or place of education, or brings, procures, receives, or has in his possession, any such book, pamphlet, printed paper, picture, or ballad, or other thing, either for the purpose of sale, exhibition, to aid in a circulation, or with intent to introduce the same into a family, school, or place of education, shall be punished by imprisonment not exceeding two years, or by a fine not exceeding one thousand dollars, or both, at the discretion of the court.

1932 Code, § 1443; Cr. C. '22, § 384; Cr. C. '12, § 391; Cr. C. '02, § 296; R. S. 255; 1885 (19) 334.

§ 1444. Exhibiting indecent pictures a misdemeanor.—Whoever posts or exhibits in any public place any advertisement, show bill, or other printed or written picture of an indecent or obscene character, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by imprisonment not exceeding two years, or by a fine not exceeding one thousand dollars, or both, in the discretion of the court.

1932 Code, § 1444; Cr. C. '22, § 385; Cr. C. '12, § 392; Cr. C. '02, § 297; R. S. 256; 1885 (19) 334.

§ 1445. Cockfighting a misdemeanor.—It shall be a misdemeanor for any person to engage in or be present at cockfighting in this State, and any person found guilty shall be fined not exceeding one hundred dollars, or imprisonment not exceeding thirty days.

1932 Code, § 1445; Cr. C. '22, § 386; Cr. C. '12, § 393; Cr. C. '02, § 298; R. S. 257; 1887 (19) 801; 1917 (30) 47.

§ 1446. Misdemeanor to give negro permanent custody of white child.—It shall be unlawful for any parent, relative, or other white person in this State, having the control or custody of any white child, by right of guardianship, natural or acquired, or otherwise, to dispose of, give or surrender such white child permanently into the custody, control, maintenance, or support, of a negro. Any person violating the provisions of this section shall be deemed guilty of a misdemeanor, and, on conviction, shall be fined or imprisoned, in the discretion of the presiding judge: *provided*, the provisions of this section shall not be construed so as to prevent the offices of a negro in the family of any white person as a nurse.

1932 Code, § 1446; Cr. C. '22, § 387; Cr. C. '12, § 395; 1910 (26) 702.

CHAPTER 74

Offenses against Public Health

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| 1465. Unlawful to supply minors with tobacco and cigarettes. | ton County. |
| 1488. Unlawful to maintain dry wells in certain towns. | 1504. Unlawful to discharge acid in streams. |
| 1490. Obstruction of drains in Charles- | 1505. Unlawful to hold marathōn dance contest. |

§ 1465. Supplying minors with tobacco or cigarettes forbidden—disposition of fine.—It shall not be lawful for any person or persons, either by himself or themselves, to sell, furnish, give, or provide any minor or minors, under the age of eighteen years, with cigarettes, tobacco, or cigarette paper, or any substitute therefor. Any person or persons violating the provisions of this section, either in person, by agent, or in any other way, shall be held and deemed guilty of a misdemeanor, and upon indictment and conviction therefor, shall be punished by a fine not exceeding one hundred dollars nor less than twenty-five dollars, or by imprisonment for a term of not more than one year nor less than two months, or both, in the discretion of the court; one-half of the fine imposed to be paid to the informer of

the offense, and the other half to be paid to the treasurer of the county in which such conviction shall be had.

1932 Code, § 1465; Cr. C. '22, § 410; Cr. C. '12, § 420; Cr. C. '02, § 320; R. S. 267; 1889 (20) 321.

§ 1488. Misdemeanor to maintain dry wells in towns of over 500.—It shall be a misdemeanor for any person to keep or maintain or use a dry well or other wells or privy vaults into which sewerage matter is discharged or received in any city, town or village having a population of not less than 500, whether incorporated or unincorporated, where such city, town, or village has no public general supply of water for personal and domestic uses. Any person who now has or maintains any such well for the discharge or reception of sewerage matter shall, upon fifteen days' notice from any magistrate that complaint thereof has been made, close up such well and discontinue its use entirely. Any person found guilty of violating this section shall be fined not exceeding one hundred dollars, or imprisonment not exceeding thirty days: *provided*, that the county of Dorchester shall be exempted from the operations of this section: *provided*, further, that the town council of any incorporated town in Dorchester County shall have the power and authority under their corporate seal to ordain and establish all such rules and by-laws and ordinances respecting the use of wells for sewerage purposes in said town as they may deem expedient and proper.

1932 Code, § 1488; Cr. C. '22, § 432; Cr. C. '12, § 442; 1908 (25) 1117; 1910 (26) 630.

§ 1490. Obstruction of, or injury to, drains in Charleston County.—Any and all persons who shall injure, obstruct or otherwise interfere with any of the drainage canals, drains, ditches, trunks, culverts or other works for drainage purposes, opened or maintained by the sanitary and drainage commission of Charleston County, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not more than one hundred dollars, or be sentenced to work at hard labor on the chaingang of said county for not more than thirty days.

1932 Code, § 1490; Cr. C. '22, § 435; Cr. C. '12, § 445; Cr. C. '02, § 334; 1901 (23) 809; 1907 (25) 527.

§ 1504. Discharging into streams or air distillations of a corrosive nature in counties with cities of 65,000 or over.—In counties which have cities of sixty-five thousand (65,000) inhabitants or over it shall be unlawful for any manufacturer of acids or other distillations of a corrosive nature, or of acrid odor, offensive or dangerous to human or plant life, to discharge in any of the streams of this State, or into the air, any fumes generated in the manufacture of such acids or other similar substances, without first treating said fumes so as to render them innocuous, inoffensive, and harmless to human or plant life. A violation of this section shall constitute a misdemeanor and shall be punished, upon conviction, in the discretion of the court. In all cases of civil action in which the violation of any of the provisions of this section shall be pleaded, the limit of liability of the defendant shall be actual damages sustained by the plaintiff.

1932 Code, § 1504; 1929 (36) 184.

§ 1505. Promote, conduct, advertise or participate in marathon dance, walkathon or similar physical endurance contests unlawful.—It shall be unlawful for any person, firm, association or corporation to promote, advertise or conduct any marathon dance contests, walkathon contests and/or similar endurance contests by whatever name called of walking, dancing or running, and it shall be unlawful for any person to participate in any marathon dance contest, walkathon contest and/or similar physical endurance contest by walking, dancing or running, continuing, or intended to continue, for a period of more than eight consecutive hours, whether or not an admission is charged and/or a prize awarded, and it shall be unlawful for any person to participate in more than one such contest or performance within any period of forty-eight hours.

Any person violating this section shall be guilty of a misdemeanor and punishable in the discretion of the court: *provided*, that each day's continuance of any such contest and/or each day's participation in any such contest or advertisement of the same shall constitute a separate offense.

1935 (39) 149.

CHAPTER 76

Offenses by Certain Officers

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| 1508. Making contracts in excess of or diverting funds. | 1540. Homestead laws. |
| 1509. Municipal officer misapplying proceeds of special tax. | 1550, 1551, 1553, 1554. Magistrates and constables. |
| 1510. Embezzlement of public funds. | 1562. Acting as auditor or treasurer without authority. |
| 1511. Diversion of bond funds of Charleston County. | 1563. Poll tax. |
| 1512, 1513. Assuming office before qualifying. | 1566. Report of polls by auditor. |
| 1515. Removal of county officers. | 1567. Certificate of debt. |
| 1516. Officers contracting with municipality. | 1568. Trustee wrongfully holding over office. |
| 1517. False certification of mileage. | 1569. Failure to keep general cash account. |
| 1518. Accepting rebates. | 1573. Fraud of jury commissioners. |
| 1519. Clerk of court or magistrate failing to pay over fines. | 1574. Certain sales and purchases by county commissioner. |
| 1520. Clerk's custody of books, etc. | 1575. Fire inspector. |
| 1521. Reports by clerk of court. | 1576. Officers in certain cities. |
| 1522. Acceptance of inducement not to serve process. | 1577. Deposit of official funds. |
| 1523. Peace officer charging for arrest, etc. | 1578. Credit for good behavior of convicts. |
| 1524. Turning over moneys to successor. | 1579. Fines in Barnwell County. |
| 1525. Misconduct of officer. | 1580. Fines in Greenwood County. |
| 1526. Allowing records to be taken out. | 1581. Fees of rural policemen. |
| 1527. Neglect of duty by clerk of court. | 1588. Neglect of overseer to perform duty. |
| 1528, 1529, 1531. Official misconduct. | 1592. Disbursing officers exceeding appropriations. |
| 1537, 1539. Duties of sheriff. | |

§ 1508. Contracts in excess of sum limited—diverting public funds.—It shall be unlawful for any public officer, state or county, authorized to so contract, to enter into or contract, for any purpose whatsoever, in a sum in excess of the tax levied, or the amount appropriated, for the accomplishment of such purpose; or to divert or appropriate the funds arising from

any tax levied and collected for any one fiscal year to the payment of any indebtedness contracted or incurred for any previous year; and on violating the provisions of this section, he shall be deemed guilty of a felony, and, upon conviction thereof, shall be punished by a fine not exceeding five thousand dollars and not less than five hundred dollars, and by imprisonment at hard labor in the state penitentiary for a period not exceeding five years nor less than one year, or either or both, in the discretion of the court.

1932 Code, § 1508; Cr. C. '22, § 457; Cr. C. '12, § 532; Cr. C. '02, § 377; G. S. 458, 459, 460; R. S. 299; 1874 (15) 692; 1906 (25) 206.

See § 1592 also.

§ 1509. Municipal officers cannot apply proceeds of tax specially levied for other purposes.—Whenever a municipal corporation shall levy and collect a tax for any specific purpose, it shall be unlawful for the officers or agents of any such municipal corporations to apply any of the proceeds of such tax levy to any other purpose than that for which it was collected, until the same shall have been discharged or fulfilled or abandoned. Any municipal officer or agent violating the provisions of this section shall be fined in a sum of not less than five hundred dollars, or imprisoned not less than six months, or both in the discretion of the judge.

1932 Code, § 1509; Cr. C. '22, § 458; Cr. C. '12, § 533; 1909 (26) 124.

§ 1510. Embezzlement of public funds a felony.—All officers and other persons charged with the safe keeping, transfer and disbursements of any public funds, who shall embezzle the same, shall be deemed guilty of felony, and, upon conviction thereof, shall be punished by fine and imprisonment, in the discretion of the court; said fine and imprisonment to be proportioned to the amount of the embezzlement; and the party convicted of such felony shall be disqualified from ever holding any office of honor or emolument in this State: *provided, however*, that the General Assembly, by a two-thirds vote, may remove the disability upon payment in full of the principal and interest of the sum embezzled.

In trials under this section, upon production of evidence tending to prove that any such officer or other person has received public funds and failed to account therefor as required by law, there shall arise a presumption that the funds received and unaccounted for have been fraudulently appropriated by such officer or person, and the burden at such stage of the case shall rest upon such officer or person to show otherwise.

1932 Code, § 1510; Cr. C. '22, § 459; Cr. C. '12, § 534; Cr. C. '02, § 378; 1898 (22) 810; 1934 (38) 1197.

This section as amended by act Feb. 5, 1934, is constitutional. *State v. Brown*, 178 S. C. 294; 182 S. E. 838.

Embezzlement is purely a statutory offense and was unknown to the common law. *State v. Gregory*, 191 S. C. 212, 4 S. E. (2d) 1.

State must establish conversion by defendant either actual or constructive.—In prosecution under this section for embezzlement, state is required to establish conversion on part of defendant, though it may be either actual or con-

structive. *State v. Alexander*, 140 S. C. 325, 138 S. E. 835.

Which is any exercise of ownership inconsistent with owner's right.—Fraudulent conversion essential to offense of embezzlement, under this section, may be effected by any exercise of the right of ownership inconsistent with the owner's rights and with the nature and purpose of a trust. *State v. Alexander*, 140 S. C. 325, 138 S. E. 835.

Treasurer of commissioners of public

works of city who misappropriated city's funds and altered records to conceal misappropriation guilty of embezzlement, notwithstanding treasurer formed intention of misappropriating funds prior to time he secured money he converted, *State v. Bikle*, 180 S. C., 400; 185 S. E., 753.

Under this section, time is not an element of the offense of embezzlement; hence state may prove offense alleged generally, at any time prior to finding of indictment. *State v. Alexander*, 140 S. C. 325, 138 S. E. 835; *State v. Gregory*, 191 S. C. 212, 4 S. E. (2d) 1.

And could unite separate acts of embezzlement on different occasions in one indictment. *State v. Gregory*, 191 S. C. 212, 4 S. E. (2d) 1.

A charge on weight to be given annual settlements by defendant being charge on facts is erroneous.—In a prosecution for embezzlement by county treasurer, under this section, a requested charge on the weight to be given to annual settlements by defendant was properly denied, as a charge on facts. *State v. Alexander*, 140 S. C. 325, 138 S. E.

835.

Relation between amount embezzled and sentence.—Provisions herein that fine and imprisonment of party convicted of embezzlement of public funds should be proportioned to amount of embezzlement means substantial sentence for substantial embezzlement should be imposed, and not that there should be mathematical relation between amount embezzled and the sentence. *State v. Bikle*, 180 S. C. 400, 185 S. E. 753.

Jury on conviction, should ascertain and declare in their verdict amount of embezzlement, so court can adjudge amount of fine and term of imprisonment. *State v. Johnson*, 186 S. C. 202; 195 S. E. 329.

Evidence.—In prosecution of deputy delinquent tax collector for embezzlement of public funds, admission of evidence in connection with testimony of various persons, who stated that they had made payment of their taxes to the defendant, was proper. *State v. Johnson*, 186 S. C. 202; 195 S. E. 329.

See generally, *State v. Gregory*, 191 S. C. 212, 4 S. E. (2d) 1.

§ 1511. Diversion of certain bond funds of Charleston County.—The diversion of any of the proceeds of bonds issued by the city of Charleston under acts 1927, page 759, or acts 1925, page 659, from the purposes for which deposited with the city treasurer shall be a misdemeanor for which the mayor and the city treasurer shall be liable, and which shall be punishable upon conviction by imprisonment for not less than one year nor more than five years, and a fine of not less than \$1,000.00 nor more than \$5,000.00, both or either, in the discretion of the court, and the diversion of all or any part of any sinking fund established for the payment of the principal and interest of any such bonds shall likewise be a misdemeanor for which the mayor and the city treasurer shall be liable, and which shall be punishable upon conviction by imprisonment for not less than one year nor more than five years, and a fine of not less than one thousand (\$1,000.00) dollars nor more than five thousand (\$5,000.00) dollars, both or either, in the discretion of the court.

1932 Code, § 1511; 1927 (35) 759, § 6; 1925 (34) 659.

§ 1512. Assumption of office before qualifying and being commissioned.—It shall be unlawful for any person to assume the duties of any public office until he has taken the oath provided by the Constitution, and been regularly commissioned by the Governor. The term "public officers" shall be construed to mean all officers of the State that have heretofore been commissioned, the trustees of the various colleges of the State, members of various state boards, and other persons whose duties are defined by law.

1932 Code, § 1512; Cr. C. '22, § 460; Cr. C. '12, § 535; 1901 (23) 754.

Superintendent of poorhouse farm is an officer under this section. *Sanders v. Belue*, 78 S. C. 171, 58 S. E. 762, L. R. A.

1915E, 582, Ann. Cas. 12C, 375, Ann. Cas. 14B, 525.

§ 1513. Assumption of office before giving bond.—It shall be unlawful for any person to assume or attempt to assume the duties of any office for which a bond is required, without having given the bond required; and any person assuming or attempting to assume the duties of any office as aforesaid, shall be guilty of a misdemeanor, and shall be subject to a fine of five hundred dollars, or imprisonment for not less than three months, in the discretion of the court.

1932 Code, § 1513; Cr. C. '22, § 461; Cr. C. '12, § 536; Cr. C. '02, § 379; 1901 (23) 750.

It seems that constables commissioned by the Governor under the Carey-Cothran Act are not required to give bond and so would not be subject to this section, though constables chosen by qualified

electors or appointed by magistrates would be. See *State v. Messervy*, 86 S. C. 503, 68 S. E. 766, 140 Am. St. Rep. 176, 203, L. R. A. 1918B, 1126.

§ 1515. County officers guilty of misconduct, etc.—how removed.—Any county officer who is guilty of misconduct or persistent neglect of duty in office, or any person who persists in holding any county office to which he has been appointed or elected, the duties of which he has not the capacity to properly discharge, shall, upon indictment and true bill after warrant, or after presentment of a grand jury and indictment and true bill thereon, be tried as for misdemeanor in office, and, upon conviction the office shall be declared vacant and the sentence shall be removal of defendant from office, and vacancy shall be filled as when a vacancy occurs by death or resignation.

1932 Code, § 1515; Cr. C. '22, § 463; Cr. C. '12, § 538; Cr. C. '02, § 381; 1897 (22) 423.

Section supersedes governor's common law power of removal.—It seems this section supersedes any common law power of removal at the will of the executive, if without this section such power would have existed. See *McDowell v. Burnett*, 92 S. C. 469, 75 S. E. 873, Ann. Cas. 14B, 525.

And the section applies only to officers elected by the people or originally appointed for the full term. *State v. Saunders*, 118 S. C. 498, 110 S. E. 808.

But not to officers appointed by Governor to fill vacancies.—In the light of § 3094, this section is not applicable to county officers appointed by the Governor to fill vacancies, which officers may be removed by him for cause. *State v. Saunders*, 118 S. C. 498, 110 S. E. 808.

As to the provisions relating to the Governor's powers of appointing and removing county officers, see § 3094 and note thereto.

§ 1516. No municipal officer may contract with municipality—violation a misdemeanor. — No municipal officer shall take a contract to perform work or furnish material for the municipal corporation of which he is an officer, and no such officer shall receive any compensation on any contract for said purpose: *provided*, that in cities of over thirty thousand inhabitants, such contracts may be allowed by the unanimous vote of the city council upon each specific contract, such vote to be taken by yeas and nays, and entered upon the council's journal. Any person violating the provisions of this section shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by fine or imprisonment, in the discretion of the court before whom such conviction is had.

1932 Code, § 1516; Cr. C. '22, § 464; Cr. C. '12, § 304; Cr. C. '02, § 224; 1900 (23) 455.

§ 1517. Misdemeanor for officers to give false certificates to witnesses or jurors of mileage traveled.—Any officer whose duty it is to certify to the mileage of any juror, witness or other person required to attend court or

to travel to perform any legal duty, who shall knowingly allow any claim for mileage otherwise than is herein prescribed, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished by fine or imprisonment, or both, in the discretion of the court, and shall, whether indicted criminally or not, be liable to a civil action to pay as a penalty for the benefit of the county, a sum equal to ten times the amount which the county may lose by reason of any payment for mileage, in excess of that allowed by law.

1932 Code, 1517; Cr. C. '22, § 465; Cr. C. '12, § 302; Cr. C. '02, § 222; 1897 (22) 732.

§ 1518. Acceptance of rebates prohibited—exception.—No person holding an office or position of trust or profit in this State, or in the public institutions thereof, shall accept rebates or extra compensation, in addition to that provided by law.

Any person violating the provisions of this section shall be fined in a sum not less than one hundred dollars nor more than five hundred dollars, or be imprisoned for not less than three months nor more than five years.

This section shall not apply to officers accepting rebates, not for their individual use, but for the benefit and in behalf of the State.

1932 Code, § 1518; Cr. C. '22, § 466; Cr. C. '12, § 539; Cr. C. '02, § 382; 1899 (23) 96.

§ 1519. Clerk of court or magistrate failing to pay over fines, etc.—Any clerk of the circuit court of general sessions, county sheriff, or magistrate, who shall neglect or refuse to immediately pay over, as required, any and all fines and penalties collected by them in any criminal cause or proceeding, shall, on conviction thereof, be subject to a fine of not less than one hundred nor more than one thousand dollars, and imprisonment not less than three nor more than six months, and shall be dismissed from office, and disqualified from holding any office of trust and profit under this State.

1932 Code, § 1519; Cr. C. '22, § 467; Cr. C. '12, § 540; Cr. C. '02, § 383; G. S. 2553; R. S. 300; 1871 (14) 656.

Section is constitutional.—This section though omitting the element of intention to defraud is apparently not unconstitutional as violating the constitutional provision preventing imprisonment for debt except in cases of fraud. See *State v. Moore*, 128 S. C. 192, 122 S. E. 672.

Local officers may be removed without impeachment.—This section is one of a number that recognizes a line of cleav-

age of the subject of removal from office of local officers and of all officers having jurisdiction over the entire state; and it seems that officers whose authority is limited to a single election or judicial district may be removed without impeachment. See *McDowell v. Burnett*, 92 S. C. 469, 75 S. E. 873, Ann. Cas. 14B, 525.

§ 1520. Clerks responsible for books, papers, etc.—failure to transfer to successor.—Every clerk shall be held responsible for the books, papers and furniture in his office; and upon his retiring from office, or death, he or his representative shall be bound to transfer the same to his successor, immediately after such successor has entered upon the duties of his office, under a penalty of one thousand dollars and imprisonment not exceeding one year.

1932 Code, § 1520; Cr. C. '22, § 468; Cr. C. '12, § 541; Cr. C. '02, § 384; G. S. 757; R. S. 301; 1839 (11) 114.

§ 1521. Clerks to report to auditors and treasurer.—Every clerk of the court is required, on the first Wednesday in each month, or within ten days

thereafter, to make in writing, to the auditor and treasurer of his county, a full and accurate statement of all moneys collected on account of licenses, fines, penalties and forfeitures during the past month, on pain of indictment, and, in case of conviction, of being fined not more than one hundred dollars, or imprisoned not more than two months, or both, at the discretion of the court.

1932 Code, § 1521; Cr. C. '22, § 469; Cr. C. '12, § 542; Cr. C. '02, § 385; R. S. 302; G. S. 759; 1878 (16) 763.

§ 1522. Sheriff or other officer taking reward for not performing duties.—

If a sheriff, deputy sheriff, constable, or other officer authorized to serve legal process receives from the defendant, or any other person, any money or other valuable thing as a consideration, reward or inducement for omitting or delaying to arrest a defendant, or to carry him before a magistrate, or for delaying to take a person to prison, or for postponing the sale of property under an execution, or for omitting or delaying to perform any duty pertaining to his office, he shall be punished by a fine not exceeding three hundred dollars.

1932 Code, § 1522; Cr. C. '22, § 470; Cr. C. '12, § 543; Cr. C. '02, § 386; G. S. 2554; R. S. 303; 1869 (14) 308.

§ 1523. Sheriff or other officers charging in criminal matters.—It shall be a misdemeanor for any sheriff, or other peace officer in South Carolina to make any charge for the arrest, detention, conveying, or delivering of any person charged with the commission of crime in this State, except the mileage and necessary expenses as now provided by law. Any sheriff or other officer who shall violate the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than twenty-five (\$25.00) dollars nor more than two hundred (\$200.00) dollars, or imprisoned not less than thirty (30) days and not more than six (6) months, or both fined and imprisoned at the discretion of the court.

1932 Code, § 1523; 1931 (37) 76.

See § 3718, 3870, and 4950.

§ 1524. Public officers must turn over moneys in their hands to successors—probate judge responsible for books, etc.—

It shall be the duty of every sheriff, judge of probate, clerk of the court of common pleas, county treasurer, and any other State or county officer entrusted with funds by virtue of his office, upon retiring from office to turn over to his successor all moneys received by him as such officer, and remaining in his hands as such officer, within thirty days from the time when his successor shall have entered upon the duties of his office, in the same manner as he is required by law to turn over the furniture, books and papers; and the successor shall receive and be responsible for the moneys so turned over to him, in the same manner as he is liable for other moneys received by him officially; and any public officer neglecting or refusing obedience to the requisition herein contained shall be held guilty of a misdemeanor and, upon conviction, shall be liable to a fine of one thousand dollars and imprisonment not exceeding twelve months, besides his liability on his official bond, at the suit of any person aggrieved by such neglect.

Every judge of probate shall be responsible for the books and papers, and also for the furniture in his office; and upon his retiring from office, or upon his death, he or his representatives shall be bound to transfer the same to his successor immediately after such successor shall have entered upon the duties of his office, under a penalty of one thousand dollars, to be recovered by indictment, and of imprisonment not exceeding one year.

1932 Code, § 1524; Cr. C. '22, § 471; Cr. C. '12, § 544; Cr. C. '02, § 387; G. S. 457, 779; R. S. 304; 1874 (15) 674; 1885 (19) 158.

Section applied to moneys which ought to be in outgoing officer's hands.

—This section applies not only to money actually in the hands of an officer at the end of his term, but money which ought to be in his hands as such officer. *State v. Assmann*, 46 S. C. 554, 24 S. E. 673.

And no demand for moneys is necessary before conviction.—Under this section, it is not necessary to prove a demand on the outgoing officer by his successor for such moneys before a conviction can be had. *State v. Assmann*, 46 S. C. 554, 24 S. E. 673.

Motive and intent of offense is immaterial.—The offense under this section consists in the omission to perform an official duty, and the motive and intent with which such offense is committed is immaterial. *State v. Assmann*, 46 S. C. 554, 24 S. E. 673. See also, *State v. Moore*, 128 S. C. 192, 122 S. E. 672, 673.

An indictment charging that clerk "Failed" to turn over moneys is sufficient.—An indictment which charges that a clerk of the court for a certain county "failed" to turn over to his successor money received by him as clerk,

is sufficient under this section. *State v. Assmann*, 46 S. C. 554, 24 S. E. 673.

While it is preferable to follow the words of the statute, equivalent words are sufficient to support the indictment thereunder. *Id.*

And it need not allege that clerk failed to turn over all moneys in his hands.—An indictment under this section charging a clerk of the court with neglecting to turn over to his successor in office a certain sum of money received by defendant from a particular estate, is sufficient, without alleging neglect to turn over all moneys in his hands as clerk. *State v. Assmann*, 46 S. C. 554, 24 S. E. 673.

Officer holding over without qualification is liable.—A county treasurer who held over for another term without qualification held office until qualification of his successor and was within this section, making it a crime to fail to pay over moneys to successor. *State v. Mason*, 118 S. C. 171, 110 S. E. 128.

Section embraces superintendent of penitentiary.—*State v. Neal*, 59 S. C. 259, 37 S. E. 826.

§ 1525. Certain officers guilty of misconduct to be indicted.—Any public officer hereafter to be elected or appointed, whose authority is limited to a single election or judicial district, who shall be guilty of any official misconduct, habitual negligence, habitual drunkenness, corruption, fraud or oppression, shall be liable to indictment and, upon conviction thereof, shall be fined not exceeding one thousand dollars and imprisoned not exceeding one year.

1932 Code, § 1525; Cr. C. '22, § 472; Cr. C. '12, § 545; Cr. C. '02, § 388; R. S. 305; 1829 (6) 391.

Trustee of school board is indictable under this section.—A trustee of a school board, which charged him with certain duties incumbent upon the board, is a public officer, under this section, and as such is indictable as for violating the law and not simply for failure to perform duties imposed on him by the board. *State v. Elliott*, 94 S. C. 35, 77 S. E. 728.

The board of trustees must necessarily perform its duties through its several members; and when a trustee is assigned to do work which the statute imposes on the board, he is in the discharge of

a duty imposed upon him by the statutes. *Id.*

A count in an indictment, which sets up several vouchers that defendant falsely made up and procured payment on, only charges the one offense of official misconduct based on specific transactions, and is not multifarious. *State v. Sharpe*, 132 S. C. 236, 128 S. E. 722.

A repugnancy exists between this section and § 1527.—A repugnancy appears between this section and § 1527, and a person violating one of these sections cannot be indicted under the other. *State v. Green*, 52 S. C. 520, 30 S. E.

683, Ann. Cas. 13D, 511.

This section provides for violations of the law that are principally of an active character, and the punishment is greater than in § 1527. *State v. Green*, 52 S. C. 520, 30 S. E. 683, Ann. Cas. 13D, 511. See also, *State v. Tarrant*, 24 S. C. 593, 103 Am. St. Rep. 906, Ann. Cas. 13E, 23, 10 A. L. R. 118.

The words "official misconduct" in this section must be construed so as not to embrace those cases provided for in § 1527. *State v. Green*, 52 S. C. 520, 30 S. E. 683, Ann. Cas. 13D, 511.

The penalties imposed by this section and § 1527, post, differ essentially. As they cannot be treated as cumulative, the punishment prescribed by § 1527 must displace that prescribed by this section, as it regards all offenses embraced within § 1527. *State v. Hall*, 5 S. C. 120, cited in *State v. Green*, 52 S. C. 520, 30 S. E. 683, Ann. Cas. 13D, 511.

As to the provisions for punishment for neglect of duty by clerk, etc., see § 1527, post, and note thereto.

An officer whose term has expired or who has resigned or been removed may be indicted under this section. *State v. Sellers*, 7 Rich. 368, 370.

General official misconduct is punishable only under this section. *State v. Hall*, 5 S. C. 120.

Furnishing prisoners with spirituous liquors by jailor is official misconduct. *State v. Sellers*, 7 Rich. 368.

False voucher of treasurer is an official fraud. *State v. Cardoza*, 11 S. C. 195, 232, 51 Am. Dec. 94, 27 L. R. A. 787, 52 L. R. A. 839, 53 L. R. A. 538, L. R. A. 1916A, 835.

Approval of improper claims by county supervisor.—An indictment of a county supervisor, alleging that he approved claims for work that was not performed and for material that was not furnished

when he had knowledge of such facts, or should have known them, states acts of official misconduct. *State v. Jaques*, 65 S. C. 178, 43 S. E. 515.

Failure of supervisor to let contract to lowest bidder.—Allegations, in an indictment of a county supervisor for misconduct, that he did not let the contracts for repairs of bridges to the lowest bidder, do not state an act of official misconduct, it not being required by statute. *State v. Jaques*, 65 S. C. 178, 43 S. E. 515.

A former standing of § 3821 provided that one of the commissioners should be present and act with the county supervisor in awarding contracts for road and bridge repair when contract price exceeded \$10. Under this standing, a reward of a contract exceeding \$10 by the supervisor in the absence of a commissioner, was official misconduct on the part of the supervisor, making him liable under this section. See *State v. Jaques*, 65 S. C. 178, 43 S. E. 515.

Governor may suspend but not remove magistrate before conviction. — See this catchline in note to § 3723.

The power of removal from office by the Governor is not an incident to his office, but exists only when conferred by the Constitution or statutes, or is implied from the conferring of the power of appointment. *State v. Rhame*, 92 S. C. 455, 75 S. E. 881, Ann. Cas. 14B, 519, Ann. Cas. 16E, 219.

As to the provisions for removal of an officer for incapacity, misconduct, or neglect of duty, see Const. 1895, art. 3, § 27, and note thereto. See also § 3707 and note thereto.

As to the Governor's power of removal when the grounds are insufficient for impeachment, see Const. 1895, art. 15, § 4 and note thereto.

§ 1526. Misdemeanor to allow records to be taken, etc.—If any clerk of any court of record, judge of probate, master, register of mesne conveyances, or sheriff shall allow any record, or any part thereof, to be taken or removed from their respective offices by any person or persons whomsoever, he shall be deemed guilty of a misdemeanor, and upon conviction thereof he shall be punished by a fine of fifty dollars for the first offense, and for the second and any subsequent offense by a fine of one hundred dollars: *provided*, that nothing herein contained shall be held to apply to the attendance of any of the said officers with any of the records of their respective offices in any court or courts when the actual production of such record is required by the proper process of such court for the purpose of evidence in any trial or trials then proceeding therein: *provided*, also, that the provisions of this section shall not apply to the taking or removal of any books or records where the same is done under any order of a circuit judge for the better preservation or protection of the same.

Any person who shall take any record from the office of the clerk of

the court, judge of probate, or master in equity without consent of the officer having control of the same shall be guilty of a misdemeanor, and liable to the same penalty as is provided in this section.

1932 Code, § 1526; Cr. C. '22, § 473; Cr. C. '12, § 547; Cr. C. '02, § 390; G. S. 2557; R. S. 307; 1882 (17) 871; 1885 (19) 415.

Under this section a court has no power to order records removed outside the limits of the State, even if so inclined. *Ex parte Lockhart*, 50 S. C. 156, 27 S. E. 620.

§ 1527. Neglect of duty by clerk, etc.—how punished.—Any clerk of the court of common pleas and general sessions, or sheriff, or judge of probate, or register of mesne conveyances, in this State, who shall wilfully fail or neglect to discharge all the duties and perform all the services which are required of him by law, in addition to his liability to the party aggrieved, shall be liable to be indicted as for a misdemeanor, and upon conviction thereof shall be fined, at the discretion of the court, not exceeding five hundred dollars.

1932 Code, § 1527; Cr. C. '22, § 474; Cr. C. '12, § 548; Cr. C. '02, § 391; G. S. 2558; R. S. 308; 1837 (6) 577.

An indictment charging failure and neglect to perform official duty comes under this section.—An indictment charging that defendant, "being the judge of probate, and by virtue of said office, public guardian, and having in charge certain estates, * * * did fail or neglect to make his annual report to the Court of Common Pleas * * * of all his acts and doings as such public guardian," was founded upon this section and not § 1525. *State v. Green*, 52 S. C. 520, 30 S. E. 683, Ann. Cas. 13D, 511.

In order to constitute an offense under this section it is necessary that the failure or neglect be willful. *State v. Green*, 52 S. C. 520, 30 S. E. 683, Ann. Cas. 13D, 511.

Constitutional and judicial officer not entitled to impeachment before indictment.—A constitutional and judicial officer who violates the law and trust of office confided to his care is not entitled to be impeached and removed from office before an indictment is brought

against him. *State v. Green*, 52 S. C. 520, 30 S. E. 683, Ann. Cas. 13D, 511.

Offense set out here is of a passive nature.—This section makes it unlawful for the officers therein mentioned willfully to fail or neglect to discharge the duties of their respective offices, such failure or neglect being only passive in nature. *State v. Green*, 52 S. C. 520, 30 S. E. 683, Ann. Cas. 13D, 511.

As to the provisions for the indictment of certain officers guilty of misconduct of an active nature, see § 1525, ante, and note thereto.

This section is construed with § 1524. *State v. Hall*, 5 S. C. 120.

Neglect of official duty imposed by law within this section exclusively.—An indictment which in effect and substance charges neglect of any official duty imposed by law on the officers named is founded upon this section, and not upon § 1524. *State v. Hall*, 5 S. C. 120.

§ 1528. Officers reported by circuit solicitor to be indicted.—If any of the said officers shall be reported by a circuit solicitor as having wilfully failed or neglected to discharge any of the duties, or to perform any of the services appertaining to his office which are required of him by law, it shall be the duty of the court to order a bill of indictment to be preferred against such delinquent officer.

1932 Code, § 1528; Cr. C. '22, § 475; Cr. C. '12, § 549; Cr. C. '02, § 392; G. S. 2559; R. S. 309; 1837 (6) 577.

§ 1529. Circuit solicitors—if disabled by intoxication, how punished.—Any circuit solicitor who shall, while in the public discharge of the duties of his office, be drunk or intoxicated, or in any extent disabled by reason of the use of intoxicating liquors, from the proper discharge of his duties, shall be held

guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than one hundred or more than one thousand dollars, and imprisoned not less than one month or more than one year, in the discretion of the court, and be dismissed from his office. And whenever it shall be brought to the attention of the attorney general that any circuit solicitor has been charged with the offense mentioned in this section, it shall be his duty to prepare a bill of indictment against such officer and prosecute the same in the county where the offense was committed; and if said officer is duly convicted, he shall cause to be forwarded to the Governor of the State a record of such conviction, upon the receipt of which the Governor shall forthwith declare the said office to be vacant and order an election to fill the same.

1932 Code, § 1529; Cr. C. '22, § 476; Cr. C. '12, 550; Cr. C. '02, § 393; G. S. 2560; R. S. 310; 1873 (15) 486.

Local officers may be removed without impeachment.—See this catchline in case of McDowell v. Burnett, 92 S. C. 469, 75 S. E. 873, Ann. Cas. 14B, 525. note to § 1519, wherein is treated the

§ 1531. Liability of sheriff for failure to pay over money.—If any sheriff shall be attached for contempt for failing to execute or to return final process in any civil suit, or for not paying over to the party entitled, money which has come into his hands as sheriff, and shall remain in contempt for the space of thirty days after such attachment ordered, every such sheriff shall be deemed guilty of official misconduct, and shall be liable to be proceeded against by indictment and, on conviction, be liable to a fine of not exceeding one thousand dollars, and imprisonment not exceeding one year, and be removed from office: *provided*, that nothing herein contained shall be construed to deprive any such sheriff of his right to appeal from any order against him for a contempt, nor shall the provisions of this section be taken to apply during the pendency of such appeal, nor until the same has been finally dismissed.

1932 Code, § 1531; Cr. C. '22, § 478; Cr. C. '12, § 552; Cr. C. '02, § 395; G. S. 674; R. S. 312; 1844 (11) 296.

Local officers may be removed without impeachment.—See this catchline in note to § 1519.

§ 1537. Forfeiture and fine for default in returning warrants, etc., of magistrate.—If the sheriff shall neglect or delay to return any warrant or other process pertaining to the court of general sessions, issued by a magistrate ten days before the meeting of the court, he shall forfeit his fees and be subject to a fine of five dollars for every such default, if upon a rule to show cause, he shall fail to excuse himself to the satisfaction of the court.

1932 Code, § 1537; Cr. C. '22, § 484; Cr. C. '12, § 557; Cr. C. '02, § 400; G. S. 693; R. S. 317; 1836 (6) 552.

§ 1539. Sheriffs furnish statement monthly to auditor and treasurer.—All sheriffs are required, on the first Tuesday in every month, or within ten days afterwards, to make in writing to the auditor and treasurer of the several counties a full and accurate statement of all moneys collected by them on account of licenses, fines, penalties, or forfeitures during the past month; and in default thereof, upon conviction, shall be liable to a fine not exceeding one hundred dollars, or imprisonment in the county jail not ex-

ceeding two months, or both, at the discretion of the court.

1932 Code, § 1539; Cr. C. '22, § 486; Cr. C. '12, § 559; Cr. C. '02, § 402; G. S. 700; R. S. 319; 1878 (16) 753.

§ 1540. Penalties violate homestead laws by officers.—No sheriff, constable, or other officer whose duty it is to enforce execution, shall proceed in any other manner than is prescribed in the homestead laws of this State to enforce any execution in his hands; and should any officer sell any real estate, or sell or remove any personal property, in violation of the homestead laws of this State, and of the Constitution of the state of South Carolina, he shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall, for the first offense, be fined in a sum not less than five hundred dollars nor more than one thousand dollars, and upon conviction of the second offense his office shall be deemed vacant.

1932 Code, § 1540; Cr. C. '22, § 487; Cr. C. '12, § 560; Cr. C. '02, § 403; G. S. 2003; R. S. 320; 1880 (17) 516.

Local officers may be removed without impeachment.—See this catchline in note to § 1519.

§ 1550. Penalty for magistrate or constable neglecting to enforce vagrant laws.—If any magistrate shall fail or neglect to execute any of the duties required of him by the vagrant laws of the State, he shall be liable to pay a penalty of fifty dollars; and any constable neglecting or failing in his duty aforesaid shall be liable to pay twenty-five dollars, to be recovered by information before any court of competent jurisdiction; one moiety to go to the informer and the other to the use of the county.

1932 Code, § 1550; Cr. C. '22, § 497; Cr. C. '12, § 570; Cr. C. '02, § 413; G. S. 1608; R. S. 328; 1787 (5) 43.

§ 1551. Penalty for failing to execute process of magistrate's court.—Every constable appointed by a magistrate shall be bound to execute, when required, every lawful order, judgment and determination of the magistrate and of any magistrate's court; and for disobedience herein he shall be liable to be indicted and punished as for a high misdemeanor.

1932 Code, § 1551; Cr. C. '22, § 499; Cr. C. '12, § 571; Cr. C. '02, § 414; G. S. 868; R. S. 329; 1835 (11) 81.

§ 1553. Constable may be removed from office on conviction.—Upon the conviction of any constable by indictment, the judge before whom the case may be tried shall have power, by order, to declare the convict to be removed from office, whereupon his office shall be deemed vacant.

1932 Code, § 1553; Cr. C. '22, § 501; Cr. C. '12, § 573; Cr. C. '02, § 416; G. S. 870; R. S. 331; 1835 (11) 81.

Local officers may be removed without impeachment.—See this catchline in note to § 1519.

§ 1554. Magistrate default in returning warrants, etc.—In all cases in which magistrates shall fail to lodge in the offices of the clerks of the court of their respective counties recognizances taken before them for the appearance of witnesses, defendants, or prosecutors before the court of general sessions for such county, or information or other papers before them, and returnable to such court, at least ten days before the meeting

of said court, and such default shall arise from the neglect or improper delay of the constable or other officer charged with the execution of any warrant or other process pertaining to the court of general sessions, such constable shall be subject to a fine of five dollars for every such default, if, upon a rule to show cause, he shall fail to excuse himself to the satisfaction of the court.

1932 Code, § 1554; Cr. C. '22, § 502; Cr. C. '12, § 574; Cr. C. '02, § 417; G. S. 2565; R. S. 340; 1878 (16) 584.

§ 1562. Acceptance or exercise of office of auditor or treasurer without authority—books, etc., not turned over to successor.—If any person shall, contrary to the statutes of this State regulating the appointment of the county auditor and county treasurer, accept the office of county auditor or treasurer, or shall hold or exercise, or attempt to hold or exercise, any such office, or fail, when application is made to him by his successor, to turn over all books, papers and property of all kinds whatsoever pertaining to said office; or if any county treasurer, county auditor, or member of any county board of equalization, shall neglect, refuse or evade the performance of the duties imposed upon him by law regulating the assessment and collection of taxes; or if any county auditor shall neglect or refuse to comply with the requirements of the law in the making up of his duplicate, or shall fail to file with the comptroller general the abstracts, vouchers and settlement sheets within the time required by law; if any county treasurer, after being notified of his removal or suspension from office, shall fail to settle with the county auditor and the comptroller general and pay over all State and county moneys in his hands to the officers entitled by law to receive the same, within ten days after being so notified, he shall be deemed, and is hereby declared to be guilty of a misdemeanor, and, upon trial and conviction thereof, he shall be punished therefor by fine not exceeding five thousand dollars, or by imprisonment not exceeding five years, or both said punishments, in the discretion of the court.

1932 Code, § 1562; Cr. C. '22, § 510; Cr. C. '12, § 579; Cr. C. '02, § 422; G. S. 223; R. S. 335; 1882 (17) 1008.

§ 1563. Treasurer to keep amount of poll tax.—The several county treasurers shall retain all the poll tax collected in their respective counties; and it is hereby made the duty of the said county treasurer, in collecting the poll tax, to keep an account of the exact amount of said tax collected in each school district in his county; and the city of Charleston, for the purpose of this section, shall be deemed a school district, and the county treasurer shall pay over to the city board of school commissioners the amount of poll tax collected in said city; and the poll tax collected therein shall be expended for school purposes in the school district from which it was collected; and any violation of this section by the county treasurer shall constitute, and is hereby declared, a misdemeanor, and on conviction thereof, the said county treasurer shall pay a fine of not less than five hundred dollars nor more than five thousand dollars, to be used for school purposes in the county suffering from such violation, or imprisonment in the discretion of the court.

1932 Code, § 1563; Cr. C. '22, § 511; Cr. C. '12, § 580; Cr. C. '02, § 423; G. S. 1021; R. S. 336; 1878 (16) 582.

§ 1566. Auditor to report polls, etc.—It shall be the duty of each auditor to state, in a separate column, the school district in which the taxpayer resides. At the expiration of the time prescribed by law to receive returns he shall make out and forward to the board of trustees of each school district within his county a correct list of the polls returned from their respective districts. When the school trustees have reported to him the names of all persons who have failed or neglected to make returns, it shall be his duty to enter upon his books the names of all persons thus reported to him, and he shall enter the names of said persons upon the tax duplicate furnished the county treasurer. And any auditor failing to comply with either or all of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction before a court of competent jurisdiction, shall be fined in a sum of not more than one hundred dollars, or be imprisoned for a term not exceeding thirty days.

1932 Code, § 1566; Cr. C. '22, § 514; Cr. C. '12, § 583; Cr. C. '02, § 426; R. S. 339; 1890 (20) 718; 1891 (20) 1049; 1892 (21) 18.

§ 1567. Officers not to issue certificate of debt.—It shall not be lawful for any State or county officer to issue any certificate of indebtedness: *provided*, that this shall not apply to issuing of tickets to jurors or witnesses for their attendance upon the circuit courts.

1932 Code, § 1567; Cr. C. '22, § 515; Cr. C. '12, § 584; Cr. C. '02, § 427; G. S. 2565; R. S. 340; 1878 (16) 584.

§ 1568. Exercising office of trustee after removal.—If a trustee of any school district shall attempt to act or discharge the duties of either of said offices after he has been removed, or after his successor shall have qualified, he shall be deemed guilty of a misdemeanor, and, after conviction, be punished by a fine of not less than one hundred and one dollars, or imprisonment for not less than thirty days, or both, at the discretion of the court.

1932 Code, § 1568; Cr. C. '22, § 516; Cr. C. '12, § 585; Cr. C. '02, § 428; G. S. 1024; R. S. 341; 1878 (16) 584.

§ 1569. Failure of school commissioner or county treasurer to keep "general cash account."—The failure of any school commissioner or any county treasurer of this State, to keep a book of entry, in which shall be kept an account known as "general cash account," as required by law, shall be deemed a misdemeanor, and, on conviction thereof, he shall be subject to a fine of not less than two hundred dollars, or imprisonment in the county jail for a period of not less than six months.

1932 Code, § 1569; Cr. C. '22, § 517; Cr. C. '12, § 586; Cr. C. '02, 429; G. S. 342; 1892 (21) 81.

§ 1573. Jury commissioners guilty of fraud.—If any member of the board of jury commissioners shall be guilty of fraud, either by practicing on the jury box previously to a draft, or in drawing a juror, or in returning into the jury box the name of any juror which had been lawfully drawn out, and drawing or substituting another in his stead, or in any other way in the drawing of jurors, he shall be punished by a fine not exceeding five hundred dollars, or be imprisoned not exceeding two years in the state penitentiary.

1932 Code, § 1573; Cr. C. '22, § 521; Cr. C. '12, § 590; Cr. C. '02, § 433; G. S. 2238; R. S. 346; 1871 (14) 694.

§ 1574. Supervisor or county commissioner selling to county or purchasing from corporation in which he owns stock.—It shall be unlawful for any supervisor or any member of any board of county commissioners, during his term of office, to sell for public use to his county any lumber, stock, tools, materials or supplies of any description whatsoever, or to purchase from any corporation in which he holds stock.

Any person violating this section shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than fifty dollars nor more than two hundred dollars, or imprisoned for a term of not less than thirty days nor more than six months on the public works of the county.

1932 Code, § 1574; Cr. C. '22, § 522; Cr. C. '12, § 591; 1906 (25) 113.

§ 1575. Failure of fire inspector to do duty a misdemeanor.—If the inspector shall fail to perform the duties required of him by law, or shall give a certificate of inspection without first making the inspection required by law, or shall improperly give a certificate of inspection, he shall be guilty of a misdemeanor, and, upon conviction, shall be fined not exceeding fifty dollars, or may be discharged from office.

1932 Code, § 1575; Cr. C. '22, § 525; 1920 (31) 910.

§ 1576. Municipal officers in cities over 5,000 abuse office, etc.—For any wilful violation or neglect of duty, malpractice, abuse or oppression, the mayor or aldermen in cities of over five thousand inhabitants so offending shall be liable to punishment by fine not exceeding one hundred dollars, or imprisonment not exceeding thirty days, besides being liable for damages to any person injured by such neglect, malpractice, abuse or oppression.

1932 Code, § 1576; Cr. C. '22, § 527; Cr. C. '12, § 596; Cr. C. '02, § 434; 1901 (23) 657.

§ 1577. Deposit of official funds by state, county and municipal officers regulated.—All state, county and municipal officers depositing funds at interest in any bank or other depository shall account to the State, county or municipality, as the case may be, for all interest collected upon such deposits.

Any violation of this section is declared a misdemeanor, punishable by fine or imprisonment, in the discretion of the court.

1932 Code, § 1577; Cr. C. '22, § 530; 1915 (29) 56.

§ 1578. Credit give convicts for good behavior.—Any person, now or hereafter serving a sentence imposed by any court of competent jurisdiction, life sentence excepted, either in the state penitentiary or any county jail, or upon the public works of any county, shall be entitled to have one-fifth of such sentence deducted at the end thereof for good behavior, and in case any such person has not theretofore been adjudged guilty of any crime against the laws of this State, or of any other State in this union, or of the United States, in lieu of a credit of one-fifth of such sentence, he shall be entitled to have a credit of thirty (30%) per cent of such sentence deducted at the end thereof for good behavior.

Any officer having charge of such convict, who shall refuse to allow such deduction in time of serving sentence, shall be guilty of a misdemeanor and shall, upon conviction, suffer imprisonment for not less than thirty days, or pay a fine of not less than one hundred dollars: *provided*, further, that the provisions of this section shall also apply to persons whose sentences have been commuted, and in computing the time to be credited on the sentence as commuted, the basis shall be on the record of the prisoner from the date of commutation.

This act (328 of 1935) shall be retroactive in computing credit to be given for good behavior or conduct.

1932 Code, § 1578; Cr. C. '22, § 531; 1914 (28) 617; 1935 (39) 467; 1938 (40) 1833.

§ 1579. Payment of fines in Barnwell County—acceptance of a fine by any officer other than the clerk of court a misdemeanor.—It shall be a misdemeanor for any officer of Barnwell County, except the clerk of court of general sessions, or his deputy, to accept payment of a fine or any part thereof, either as agent of the party paying the same or otherwise, and all fines shall be paid direct to the said clerk of court: *provided*, that prior to the commencement of actual service of sentence and prior to service of notice of appeal from judgment or sentence of a magistrate, such magistrate may accept payment of fines imposed in his court.

1932 Code, § 1579; Cr. C. '22, § 532; 1916 (29) 965.

§ 1580. In Greenwood County fine in certain cases to be paid to magistrates who are to issue discharges.—It shall be unlawful in Greenwood County for the county supervisor, sheriff or other officer in charge of the county chaingang or county jail, to release any convict who has been sentenced to the county chaingang or the county jail with the alternative of a fine and has begun the service of said sentence on the said chaingang or in the said jail, upon the payment of the fine imposed unless the said fine be paid to the committing magistrate and a discharge of said convict be issued by said magistrate: *provided*, that in cases arising in the court of general sessions the fine shall be paid to and the discharge issued by the clerk of court.

1932 Code, § 1580; Cr. C. '22, § 533; 1916 (29) 745.

§ 1581. Rural policeman not to collect fees in certain cases.—It shall be unlawful for any rural policeman in this State to accept or receive any fee or reward for making any collection of any debt, or foreclosing any chattel mortgage, bill of sale or any other lien, or for compromising criminal cases. Any rural policeman within this State who shall violate the provisions of this section shall be subject to a fine of not less than \$25 nor more than \$100, or imprisonment for a period of not less than 20 days nor more than 30 days, and shall have his commission revoked by the officer issuing same: *provided*, nothing shall prohibit any rural policeman from collecting delinquent taxes.

1932 Code, § 1581; Cr. C. '22, § 534; 1916 (29) 656.

§ 1588. Penalty for refusal or neglect of overseer to perform duties.—Each and every overseer who shall neglect or refuse to perform the several duties enjoined on him by law, or who shall, under any pretense whatever,

give or sign any receipt or certificate purporting to be a receipt or certificate for labor in work performed, or money paid, unless the labor shall have been performed or money paid prior to giving or signing of such receipt or certificate, shall forfeit for every such offense not less than ten dollars nor more than fifty dollars, to be recovered by an action before any magistrate of the county having jurisdiction; and it is hereby made the duty of the township board of commissioners to prosecute all offenses against the provisions of this section: *provided*, that if any overseer conceives himself aggrieved by the judgment of such magistrate, he may, on giving sufficient security, in double the sum of the judgment found against the party offending, to said magistrate for the payment of the cost, appeal to the court of common pleas, which shall make such order therein as to it may appear just and reasonable.

1932 Code, § 1588; Cr. C. '22, § 543; Cr. C. '12, § 646; 1896 (22) 234; 1902 (23) 1006.

§ 1592. Unlawful for disbursing officers to exceed or transfer appropriations—violation misfeasance—suspension by governor.—It shall be unlawful for any officer, clerk, or other person charged with disbursements of funds appropriated by the Legislature of South Carolina, either county funds or state funds, to exceed the amounts and purposes stated in said appropriations, or to change or shift appropriations from one item to another: *provided*, that transfers may be authorized by the General Assembly in any county supply act or the annual appropriation act for the State. Any officer, clerk, or other person violating the provisions of this section shall be deemed guilty of malfeasance in office, and the Governor may, upon his attention being brought to same, at once suspend said officer and shall investigate the conduct of same, and, if found guilty, he shall be suspended by the Governor, and in addition to such suspension, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined or imprisoned within the discretion of the court.

1932 Code, § 1592; Cr. C. '22, § 557; 1921 (32) 117.

See § 1508 also.

"Funds appropriated by Legislature" mean "public or trust funds" within constitutional provision relating to suspension of officers having custody of public or trust funds. *Dacus v. Johnston*, 180 S. C. 329, 185 S. E. 491.

This section does not give governor power of indefinitely suspending officers

without hearing. *Dacus v. Johnston*, 180 S. C., 329; 185 S. E., 491.

State highway commissioners not "officers" within this statute, since funds of highway commission appropriated by Legislature could be disbursed only by state treasurer on comptroller general's warrant. *Ibid*.

CHAPTER 77

Transportation of, and Cruelty to, Animals

1593 thru 1595. Cruelty to animals.

1596. Overloading and confinement of animals on railroad cars.

1597. Hauling of cattle at night in Berkeley County.

1598. Arrest.

1599. Search warrant.

1600. Definitions.

1601. Persons accused of cruelty to animals to be arrested.

1602. Fines, etc., a lien.

1603. Authority of S. P. C. A.

1603-1. When operate on tails of certain animals.

§ 1593. Cruelty to animals.—Whoever shall wilfully abuse or cruelly treat any horse, mule, or draught animal or beast of burden, shall, upon conviction thereof before any court of competent jurisdiction, suffer imprisonment for fifteen days, or pay a fine of fifteen dollars.

1932 Code, § 1593; Cr. C. '22, § 558; Cr. C. '12, § 909; Cr. C. '02, § 623; G. S. 2525; R. S. 505; 1878 (16) 492.

§ 1594. Ill-treatment of animals.—Whoever overloads, overdrives, overworks, tortures, torments, needlessly mutilates, cruelly kills, illtreats, or whoever deprives of necessary sustenance or shelter, or whoever inflicts unnecessary pain or suffering upon any animal, or whoever causes the same to be done, whether such person be the owner thereof or have the charge or custody of the same, shall, for every such offense, be guilty of a misdemeanor, and be punished by imprisonment in jail not exceeding thirty (30) days, or by a fine not exceeding one hundred dollars.

1932 Code, § 1594; Cr. C. '22, § 559; Cr. C. '12, § 910; Cr. C. '02, § 625; G. S. 1703; R. S. 507; 1881 (17) 573; 1883 (18) 388.

§ 1595. Cruel work, abandonment, etc., misdemeanor.—Every owner, possessor, or person having the charge or custody of any animal, who cruelly drives or works the same when unfit for labor, or cruelly abandons the same, or who carries the same, or causes the same to be carried, in or upon any vehicle, or otherwise, in an unnecessarily cruel or inhuman manner, or knowingly or wilfully authorizes, or permits the same to be subjected to unnecessary torture, suffering, or cruelty of any kind, shall, for every such offense, be guilty of a misdemeanor, and shall be punished for every such offense in the manner prescribed in section 1594.

1932 Code, § 1595; Cr. C. '22, § 560; Cr. C. '12, § 911; Cr. C. '02, § 626; G. S. 1704; R. S. 508; 1881 (17) 573.

The owner of an animal may be convicted, under this section, for cruelty to it on evidence that it was worked when

unfit for labor, with his knowledge and consent. *State v. Browning*, 70 S. C. 466, 50 S. E. 185.

§ 1596. Overloading and confinement of animals on railroad cars.—No railroad company, in the carrying or transportation of animals, shall overload the cars, nor permit the animals to be confined in cars for a longer period than thirty-six consecutive hours, without unloading the same for rest, water, and feeding, for a period of at least five consecutive hours, unless prevented from so unloading by storm or other accidental causes beyond the control of such railroad company. In estimating such confinement, the time during which the animals have been confined without such rest on connecting roads from which they are received shall be in-

cluded; it being the intent of §§ 1594 thru 1596 and 1598 thru 1602 to prohibit their continuous confinement beyond the period of thirty-six hours, except upon contingencies hereinbefore stated. Animals so unloaded shall be properly fed, watered and sheltered during such rest by the owner or person having the custody thereof, or in case of his default in so doing, then by the railroad company transporting the same, at the expense of the owner or person in custody thereof; and the said company shall, in such case, have a lien upon such animals for food, care, and custody furnished, and shall not be liable for any detention of such animals authorized by §§ 1594 thru 1596 and 1598 thru 1602. Any company, owner, or custodian of such animals who shall fail to comply with the provisions of this section, shall, for each and every such offense, be liable for and forfeit and pay a penalty of not less than fifty nor more than five hundred dollars, in any court of competent jurisdiction: *provided, however*, that when animals shall be carried in cars in which they can and do have proper food, water, space and opportunity for rest, the foregoing provisions in regard to their being unloaded shall not apply.

1932 Code, § 1596; Cr. C. '22, § 561; Cr. C. '12, § 912; Cr. C. '02, § 627; G. S. 1705; R. S. 509; 1881 (17) 573; 1923 (33) 118; 1924 (33) 949.

§ 1597. Loading or hauling of cattle at night by truck, Berkeley County.—

It shall be unlawful for any person to load or haul by truck any cattle in Berkeley County between the hours of sunset and sunrise, unless such person shall have first applied to the magistrate of the district in which it is desired to load such cattle to be hauled, and obtained a written permit to do so, which permit shall show the name of the permittee, the name of the person from whom the cattle have been purchased, or otherwise acquired, and a description of such cattle, including marks and brands. All such persons loading or hauling cattle under such permits shall keep the permits on their person during such time, and upon signal to stop by any officer, county or state, shall stop and upon request shall exhibit such permit. Loading and/or transporting any cattle in violation of the provisions of this section is declared to be a misdemeanor and punishable by a fine of not more than one hundred (\$100.00) dollars, or by a sentence on the public works of the county not exceeding thirty (30) days.

1932 Code, § 1597; 1930 (36) 1274, 1308.

§ 1598. Arrest for violation made with or without warrant.—

Any person violating the laws in relation to cruelty to animals may be arrested and held, without warrant, in the same manner as in the case of persons found breaking the peace; and the person making the arrest, with or without warrant, shall use reasonable diligence to give notice thereof to the owner of the animals found in the charge or custody of the person arrested, and shall properly care and provide for such animals until the owner thereof shall take charge of the same: *provided*, the owner shall take charge of the same within fifteen days from the date of such notice. And the person making such arrest shall have a lien on said animals for the expense of such care and provision.

1932 Code, § 1598; Cr. C. '22, § 562; Cr. C. '12, § 913; Cr. C. '02, § 628; G. S. 1706; R. S. 510; 1881 (17) 574.

§ 1599. When search warrant may be issued.—When complaint is made on oath or affirmation, to any magistrate authorized to issue warrants in criminal cases, that the complainant believes, and has reasonable cause to believe, that the laws in relation to cruelty to animals have been or are being violated in any particular building or place, such magistrate, if satisfied that there is reasonable cause for such belief, shall issue a search warrant authorizing any sheriff, deputy sheriff, deputy state constable, constable, or police officer, to search such building, or place; but no such search shall be made after sunset, unless specially authorized by the magistrate, upon satisfactory cause shown.

1932 Code, § 1599; Cr. C. '22, § 563; Cr. C. '12, § 914; Cr. C. '02, § 629; G. S. 1707; R. S. 511; 1881 (17) 574.

§ 1600. Meaning of "animal" and "owners."—In §§ 1594 thru 1596 and 1598 thru 1602 the words "animal" or "animals" shall be held to include all brute creatures; and the words "owner," "person" and "whoever" shall be held to include corporations as well as individuals; and the knowledge and acts of agents of, and persons employed by, corporations in regard to animals transported, owned or employed by or in the custody of such corporations shall be held to be the acts and knowledge of such corporation.

1932 Code, § 1600; Cr. C. '22, § 564; Cr. C. '12, § 915; Cr. C. '02, § 630; G. S. 1708; R. S. 512.

§ 1601. Officers to arrest persons accused of cruelty to animals.—It shall be the duty of all sheriffs, deputy sheriffs, deputy state constables, constables and police officers, and one deputy for each township, who shall be appointed by the sheriff of each county, to prosecute all violations of the provisions of §§ 1594 thru 1596 and 1598 thru 1602 which shall come to their notice or knowledge, and the township deputy shall have the ill-treated or injured animal in evidence at the prosecution, when brought by him, and he shall have authority to bring, or cause to be brought, such animal or animals; and all fines collected upon complaint or information for violation of this chapter, shall inure and be paid over, one-half to the South Carolina Society for the Prevention of Cruelty to Animals, in aid of the benevolent objects for which it was incorporated, and in case such prosecution is brought by the township deputy, one-half of the fund collected shall be paid to him, and the other one-half to the county for general county expenses, except in towns or cities where there is a society for the prevention of cruelty to animals, when one-half goes to the said society as before provided.

1932 Code, § 1601; Cr. C. '22, § 565; Cr. C. '12 § 916; Cr. C. '02, § 631; G. S. 1709; R. S. 513; 1905 (24) 952.

§ 1602. Fines, penalties, costs, a lien.—All penalties, fines and costs incurred by reason of violations of sections 1594 to 1596 and 1598, shall constitute and be a lien upon such animal or animals so cruelly used.

1932 Code, § 1602; Cr. C. '22, § 566; Cr. C. '12, § 917; Cr. C. '02, § 632; G. S. 1710; R. S. 574; 1881 (17) 575.

§ 1603. Authority of society for prevention of cruelty to animals to destroy animals.—A person, being the owner or possessor, or having charge or custody, of a maimed, diseased, disabled or infirm animal, in any town

or city of this State, who abandons such animal or leaves it to die in a street, road, highway or public place, more than three hours after he receives notice that it is left disabled, is guilty of a misdemeanor, and shall be punished by a fine not exceeding one hundred dollars, or imprisonment not exceeding thirty days. Any agent or officer of the South Carolina Society for the Prevention of Cruelty to Animals, and of any society duly incorporated for that purpose, may lawfully destroy, or cause to be destroyed, any animal found abandoned and not properly cared for, appearing according to the judgment of two reputable citizens called by him to view the same in his presence, to be glandered, injured or diseased past recovery for any useful purpose. When any person arrested is, at the time of such arrest, in charge of any animal or any vehicle drawn by or containing any animal, any agent of said society may take charge of such animal and of such vehicle and its contents, and deposit the same in a safe place of custody, or deliver the same into the possession of the police or sheriff of the county or place wherein such arrest was made, who shall thereupon assume the custody thereof; and all necessary expenses incurred in taking charge of such property shall be a lien thereon.

1932 Code, § 1603; Cr. C. '22, § 567; Cr. C. '12, § 918; Cr. C. '02, § 633; 1899 (23) 99; 1907 (25) 484.

§ 1603-1. Not operate upon tails of horses, asses or mules, except for life or health.—Any person, firm or corporation who cuts the tissue, tissues, muscle or muscles of the tail of any horse, ass or mule, mare or gelding, or otherwise operates upon it in any manner for the purpose or with the effect of altering the natural carriage of the tail, except where such cutting or operation is necessary for the health or life of said animal, as certified to in writing by a licensed veterinarian; and any person, firm or corporation who causes, procures or knowingly permits, such cutting or operation to be done, and any person who assists in or is voluntarily present at such cutting or operation, shall be guilty of a misdemeanor. Any person, firm or corporation convicted of violating any of the provisions of this section shall be fined not less than fifty nor more than one hundred dollars, or imprisoned not less than fifteen nor more than thirty days.

1936 (39) 1649.

CHAPTER 78

Bridges, Ferries, Highways and Rules of the Road

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| 1604. Sudden obstruction of highway. | 1616. Use of highways. |
| 1605. Lights on toll bridges. | 1617. Dim lights when approaching another vehicle. |
| 1606. Transportation of passengers near ferry. | 1618. Equipment for private passenger motor vehicles. |
| 1607. Delaying passengers at ferries. | 1619. Inspect certain equipment of private passenger motor vehicles. |
| 1608. Proprietors of bridge subject to indictment. | 1622. Width of motor vehicle used transport passengers. |
| 1609. Failure to post rates. | 1623. Equipment, size and width of certain motor vehicles. |
| 1610. Obstruction of fords. | 1625, 1659, 1674. Obstructing highways and roads. |
| 1611. Defacing mile post. | |
| 1612. Altering guide post. | |
| 1614. Travel to right of center. | |
| 1615. Bridges on highways. | |

1626 thru 1626-4. School buses.
 1627. Cut-outs and spot lights.
 1628. Careless driving and riding.
 1629. Motor vehicles passing animals.
 1630. Penalties.
 1631. Safety glass.
 1632. Driver's mirror.
 1633 thru 1635. Duty of automobilist approaching horse.
 1637. Operation of motor vehicles by minors.
 1638. Duty of driver striking person or vehicle.
 1639. Peace officers receive no portion of fines.
 1640 thru 1643. Gates on roads.
 1644. Damage to roads.
 1645. Damage to roads in Charleston County.
 1647. Injury to bridges.
 1648. Obstructing ditches and drains.
 1649 thru 1651. Protection of trees, etc., highway.
 1652. Obstructing roads.
 1653. Interference with roads in Charleston, Lancaster and Beaufort Counties.
 1654. Drainage of highways in Newberry County.
 1655. Improper use of highway tools.

1656. Refusal to perform road duty.
 1657. Liability of highway officials in Williamsburg and York.
 1658. Ditches across highways in Clarendon County.
 1660. Removal of trees near roads in Lancaster County.
 1661. Drainage into roads in Pickens County.
 1662. Obstructing roads in Saluda County by flooding, etc.
 1663 and 1664. Placing in highways substances injurious to tires.
 1665. Hauling logs, barrels, etc.
 1666 thru 1672. Hauling timber in certain counties.
 1673. Neglect to work roads in Lexington County.
 1675 and 1676. Neglect of duty by road officers in Newberry County.
 1678. Obstructing drains.
 1682. Ferry flats in Georgetown County.
 1683 and 1684. Regulations as to ferries.
 1686. License plates
 1687. Failure to perform road duty.
 1688 thru 1690. Operation motor vehicles and aeroplanes on shore of sea.

§ 1604. Highway suddenly obstructed.—When any highway shall be suddenly obstructed by storm or otherwise, so as to require immediate labor to remove said obstruction, if any person liable to work on highways, after being summoned for the purpose of removing such obstruction by the order of the overseer, shall neglect to turn out and assist in opening and repairing such highways, he shall be deemed guilty of a misdemeanor, and, upon conviction thereof in any magistrate's court, shall be fined three dollars per day, said fine to be collected and expended in the repair of highways where and when necessary in his district.

1932 Code, § 1604; Cr. C. '22, § 568; Cr. C. '12, § 597; Cr. C. '02, § 435; G. S. 1086; R. S. 347.

§ 1605. Penalty for not furnishing toll bridges with lights.—Every toll bridge within this State shall be furnished at night, by the owners of the franchise or the keepers of the said bridges, respectively, with sufficient light or lights to enable persons traveling over the same to see their way and to avoid danger.

Any person violating the provisions of this section shall be deemed guilty of a misdemeanor.

1932 Code, § 1605; Cr. C. '22, § 569; Cr. C. '12, § 599; Cr. C. '02, § 437; G. S. 1111; R. S. 349; 1881 (17) 579.

§ 1606. Persons not to transport passengers within mile of established ferry.—If any person or persons living within the space of one mile of any established ferry in any part of this State shall, for any fee, toll or reward whatsoever, transport any person, goods or cattle from one side only to the

other of that river where any such established ferry shall be kept, the person taking any such fee, toll or reward shall forfeit and pay to the proprietor of the ferry next adjacent to the place where such fare was taken up, treble the value of the fee, toll or reward given, paid or promised, to be recovered by warrant, under the hand and seal of one magistrate, or be imprisoned in the county jail for a period of not exceeding thirty days, any law, usage or custom to the contrary notwithstanding: *provided*, always, that in case any passengers shall be detained more than half an hour at any such ferry, then any persons living near such ferries may be at liberty to transport them, anything herein to the contrary notwithstanding.

1932 Code, § 1606; Cr. C. '22, § 570; Cr. C. '12, § 614; Cr. C. '02, § 440; G. S. 1124; R. S. 351; 1741 (11) 123; 1875 (15) 898.

§ 1607. Misdemeanor to delay passenger one hour at ferries.—All managers and keepers of public ferries shall afford applicants immediate passage across the ferry at all hours, day and night, at the usual fees and charges. Every ferryman or ferry keeper of any public ferry, who, by absence from the ferry, or by negligence, cause the detention and delay, at the ferry, of any bona fide applicant for passage at such ferry for the space of one hour or more, shall, upon conviction, be deemed guilty of a misdemeanor, and shall, upon conviction, be fined five dollars, or imprisoned thirty days, for each offense: *provided*, this section shall not apply to steam or free ferries.

1932 Code, § 1607; Cr. C. '22, § 571; Cr. C. '12, § 616; 1904 (24) 444.

§ 1608. Proprietors of bridges liable to indictment for not keeping up their work—penalties recovered—how to be applied.—The proprietor or proprietors of every bridge or turnpike road now constructed, or hereafter to be constructed by the authority of the legislature, shall be liable to indictment at common law for not keeping their respective works in such condition as to answer the ends of their creation. All the penalties which may be recovered for offenses against owners of bridges or turnpikes shall be paid one-half to the informer and the other half to the corporation or individual or individuals owning the works respecting which the said offenses shall have been committed.

1932 Code, § 1608; Cr. C. '22, § 572; Cr. C. '12, § 618; Cr. C. '02, § 443; G. S. 1131, 1132; R. S. 354; 1827 (6) 315.

The common law is applicable to a prosecution of a bridge company under this section, for failure to keep its bridge in proper condition. *State v. Charleston Bridge Co.*, 113 S. C. 116, 101 S. E. 657, 660.

As to common law in force in state, see S. C. Const. 1895, Art. 17, § 10, and note thereto.

Section requires bridge to be kept in condition to meet traffic now to be expected. *State v. Charleston Bridge Co.*, 113 S. C. 116, 101 S. E. 657.

A sentence, awarded in a prosecution of a bridge company under this section for failure to keep the bridge in repair, cannot be sustained where the bridge company was the owner of the bridge, as

it could not commit an offense against itself. *State v. Charleston Bridge Co.*, 113 S. C. 116, 101 S. E. 657, 661.

As to specific section providing for sentence where no punishment provided, see § 1038, and note thereto.

Sentence will not be interfered with where conformable to common usage. —The Supreme Court will not interfere with a circuit court sentence, imposed upon a conviction under this section, unless it is made to appear that the fine is such as to shock the conscience of the court, or virtually amount to confiscation of the defendant's property. *State v. Charleston Bridge Co.*, 113 S. C. 116, 101 S. E. 657.

§ 1609. Fine for neglect of posting rates of charges, etc.—Managers and attendants of all public ferries and bridges having the privilege by law to charge toll for the passage of persons, animals, vehicles or other goods, shall cause the rates chargeable for such passage to be posted in legible letters or characters in some conspicuous place, stating the amount to be paid, so as to be read for information without inconvenience, at the approach to such ferry or bridge. Any neglect of the duties prescribed in this section, or any toll exacted at higher rates than may be allowed by law, shall, upon conviction of the parties so neglecting before any magistrate, be punishable by a fine of not less than ten nor more than fifty dollars, which fine shall be paid to the treasurer of the county for the use of the county where such ferry or bridge may be situated.

1932 Code, § 1609; Cr. C. '22, § 573; Cr. C. '12, § 619; Cr. C. '02, § 444; G. S. 1136; R. S. 355; 1783 (9) 274; 1814 (9) 478; 1822 (9) 520; 1823 (9) 528; 1869 (14) 206.

§ 1610. Fords not to be obstructed.—No keeper of any ferry or toll bridge, or other person, shall, upon any pretense whatsoever, stop up or obstruct any fording or crossing place on any river or creek within this State, with a view to compel any person or persons to cross over any ferry or toll bridge, under the penalty of two dollars and fifty cents, to be recovered before the nearest magistrate, or in default of the payment thereof, to be imprisoned not more than ten days nor less than one day for every person or persons so prevented from passing over such fording or crossing place.

1932 Code, § 1610; Cr. C. '22, § 574; Cr. C. '12, § 620; Cr. C. '02, § 445; G. S. 1138; R. S. 356; 1791 (9) 336.

§ 1611. Penalty for injuring mile post.—Any person or persons who shall cut down, burn or deface any mile post or stone, erected by the county commissioners or county supervisor of any county, he, she, or they, upon conviction thereof, shall forfeit and pay the sum of ten dollars, to be recovered by indictment or information before any court of competent jurisdiction.

1932 Code, § 1611; Cr. C. '22, § 575; Cr. C. '12, § 621; Cr. C. '02, § 446; G. S. 1065; R. S. 357; 1871 (14) 666.

§ 1612. Wilfully demolishing or altering guide posts.—If any person shall wilfully demolish, throw down, alter, or deface any guide board, every person so offending shall, upon conviction thereof before any magistrate of the proper county, be fined in a sum not exceeding ten dollars and the cost of suit, or be sentenced to labor on the public works of the county for a term of not more than thirty days, and the money, when collected, shall be by the magistrate collecting the same paid over to the county treasurer.

1932 Code, § 1612; Cr. C. '22, § 576; Cr. C. '12, § 622; Cr. C. '02, § 447; 1896 (22) 233.

§ 1614. Animals travel on right of the center of highways.—Every animal traveling, or passing on or over, any turnpike road, public highway, causeway or bridge, now constructed, or hereafter to be constructed, laid out or opened according to law, shall keep entirely on the right of the center of the said road, public highway, causeway, or bridge, so as not to obstruct the passage of any other person, carriage, animal, or thing, on the other

side of the center thereof. And every person who shall drive, lead, or, having charge thereof, shall permit any animal to travel on such road, public highway, causeway or bridge contrary to this provision, shall, on conviction thereof before any court of competent jurisdiction, pay a fine not exceeding ten dollars nor less than two dollars, or in default of the payment thereof, be imprisoned not more than ten days nor less than one day, and be further liable for all damages occasioned thereby.

1932 Code, § 1614; Cr. C. '22, § 579; Cr. C. '12, § 617; Cr. C. '02, § 442; G. S. 1130; R. S. 353; 1899 (23) 101; 1937 (40) 222.

Vehicles drive on right half of roadway—see § 1616 (6). Pedestrians walking on highways—see § 1616 (28).

Note: This section in the 1932 Code read: "Every person, carriage, animal, or other thing, traveling," etc.

Traveler required to stay to right only when cars approaching.—This section does not require a traveler to stay to the right of the center at all times, but of the center when a traveler is approaching from the opposite direction. *Walker v. Lee*, 115 S. C. 495, 106 S. S. 682, 683; *De Lorme v. Stauss*, 127 S. C. 459, 121 S. E. 370, 372; *Bowers v. Carolina Public Service Co.*, 148 S. C. 161, 145 S. E. 790, 794.

Turn to right.—In view of this statute, instruction that is driver's duty "to turn

to right" in meeting another vehicle was not error. *Foster v. Tate*, 164 S. C. 432, 162 S. E. 456.

And car parked on left not indicative of contributory negligence when struck by car traveling in same direction.—Plaintiff could not be held guilty of contributory negligence where his car was struck while stopped on the left of the center of the road, by defendant's automobile going in the same direction. *Smoak v. Martin*, 108 S. C. 472, 94 S. E. 869.

Violation of this statute constitutes negligence per se, and proof thereof constitutes prima facie case in favor of one injured by such negligence. *Wells v. Steinek*, 176 S. E. 42 (Georgia case in which automobile collision occurred in South Carolina).

§ 1615. Bridges on state highways.

(1) **Width of bridges.**—It shall be unlawful for any person, board, commission or other group of individuals charged with the duty of building bridges on the public highways of this State, to construct any bridge of insufficient width to allow the free passage of at least two vehicles at one time, and it shall also be unlawful to construct any such bridge without providing for and maintaining a clearly defined center line on same, sufficiently clear and distinct to be plainly, discernible at all times.

(2) **Width permit vehicles cross on each side of center.**—On all such bridges there shall be provided ample width on each side of said line for the passage of one vehicle.

(3) **Section applicable only to state highway.**—The provisions of this section shall apply only to the state highway system of roads.

1932 Code, § 1615; 1928 (35) 1203; 1937 (40) 222.

Vehicles drive on right half of roadway—see § 1616 (6). Pedestrians walking on highways—see § 1616 (28).

§ 1616. Use of highways by drivers and pedestrians—traffic on highways—certain crimes in use and operation of vehicles defined—driving practices—report accidents—enforcement—penalties.

(1) **Definitions.**—For the purpose of this section, the following words, phrases, and terms are hereby defined as follows:

Vehicle—every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, except devices moved by

human power or used exclusively upon stationary rails or tracks.

Motor vehicle—every vehicle which is self-propelled and not operated or driven on fixed rails or tracks.

Motorcycle—every motor vehicle having a saddle for the use of the rider and designed to travel on not more than three wheels in contact with the ground but excluding a tractor.

Authorized emergency vehicle—vehicles of the fire department (fire patrol), police vehicles, and such ambulances, and emergency vehicles of municipal departments or public service corporations, as are designated or authorized by the department or the chief of police of an incorporated municipality.

Department—the South Carolina state highway department.

Local authorities—every county, municipal and local board or body having jurisdiction over, and responsible for the maintenance of, any highway or street other than state highways.

Police officer—every officer authorized to direct or regulate traffic or to make arrests for violations of vehicular and traffic laws.

Person—every individual, partnership, association, trust and corporation, and the receivers, assignees or agents of any of them.

Pedestrian—any person afoot.

Driver—every person who drives or is in actual physical control of a vehicle.

Owner—a person who holds the legal title of a vehicle or in the event a vehicle is the subject of an agreement for the conditional sale or lease thereof with the right of purchase upon performance of the conditions stated in the agreement and with an immediate right of possession vested in the conditional vendee or lessee, or in the event a mortgagor of a vehicle is entitled to possession, then such conditional vendee or lessee or mortgagor shall be deemed the owner for the purpose of this section.

Highway—any public road, street, avenue, alley or boulevard, bridge, viaduct or trestle and the approaches thereto, within the limits of the State of South Carolina.

Private road or driveway—every way or place in private ownership and used for vehicular travel by the owner and those having express or implied permission from the owner but not by other persons.

Roadway—that portion of a highway improved, designed, or ordinarily used for vehicular travel.

Sidewalks—that portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines intended for the use of pedestrians.

Laned highway—a highway the roadway of which is divided into three or more clearly marked lanes for vehicular traffic.

Through highway—every highway or portion thereof at the entrances to which vehicular traffic from intersecting highways is required by law to stop before entering or crossing the same and when stop signs are erected as provided in this section.

Intersection—the area embraced within the prolongation or connection of the lateral curb lines, or, if none, then the lateral boundary lines of the roadways of two highways which join one another at, or approximately at, right angles, or the area within which vehicles traveling upon different

highways joining at any other angle may come in conflict.

Crosswalk—that portion of a roadway ordinarily included within the prolongation or connection of the lateral lines of sidewalks at intersections, or any portion of a roadway distinctly indicated for pedestrian crossing by lines or other markings on the surface.

Safety zone—the area or space officially set apart within a roadway for the exclusive use of pedestrians and which is protected or is so marked or indicated by adequate signs as to be plainly visible at all times while set apart as a safety zone.

Business district—the territory contiguous to and including a highway when 50 percent or more of the frontage thereon for a distance of 300 feet or more is occupied by buildings in use for business.

Residence district—the territory contiguous to and including a highway not comprising a business district when the property on such highway for a distance of 300 feet or more is in the main improved with residences.

Official traffic control devices—all signs, signals, markings, and devices not inconsistent with this section placed or erected by authority of a public body or official having jurisdiction, for the purpose of regulating, warning, or guiding traffic.

Traffic—pedestrians, ridden or herded animals, vehicles, street cars, and other conveyances either singly or together while using any highway for purposes of travel.

Right-of-way—the privilege of the immediate use of the highway.

(2) **Speed restrictions.**—(a) No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing.

(b) Where no special hazard exists the following speeds for passenger vehicles shall be lawful and any speed to excess of said limits shall be unlawful:

1. Twenty-five miles per hour in any business district;
2. Thirty-five miles per hour in any residence district;
3. Fifty-five miles per hour under other conditions.

(c) Where no special hazard exists the following speeds for motor trucks and motor truck tractors shall be lawful but any speed in excess of said limitations shall be unlawful:

1. Twenty miles per hour in any business district;
2. Thirty miles per hour in any residence district;
3. Forty miles per hour under other conditions.

(d) The fact that the speed of a vehicle is lower than the foregoing limits shall not relieve the driver from the duty to decrease speed when approaching and crossing an intersection, when approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding roadway, or when special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions, and speed shall be decreased as may be necessary to avoid colliding with any person, vehicle, or other conveyance on or entering the highway in compliance with legal requirements and the duty of all persons to use due care.

(e) Whenever the department shall determine upon the basis of an engineering and traffic investigation that any speed hereinbefore set forth is greater than is reasonable or safe under the conditions found to exist at

any intersection or other place or upon any part of a highway, the department shall determine and declare a reasonable and safe speed limit thereat which shall be effective when appropriate signs giving notice thereof are erected at such intersection or other place or part of the highway.

(f) The foregoing provisions of this subsection shall not be construed to relieve the plaintiff in any civil action from the burden of proving negligence upon the part of the defendant as the proximate cause of an accident.

(3) Local authorities may alter speed limits.—Whenever local authorities within their respective jurisdiction determine upon the basis of an engineering and traffic investigation that the speed permitted under this section at any intersection, except state highways or streets used as such, is greater than is reasonable or safe under the conditions found to exist at such intersection, such authority shall determine and declare a reasonable and safe speed limit thereat, which shall be effective when appropriate signs giving notice thereof are erected at such intersections or upon the approach thereto.

See § 1623 (37).

(4) Minimum speed.—No person shall drive a motor vehicle at such a slow speed as to impede or block the normal and reasonable movement of traffic except when reduced speed is necessary for safe operation or in compliance with law. Police officers are hereby authorized to enforce this provision by directions to drivers, and in the event of apparent wilful disobedience to this provision, and refusal to comply with direction of an officer in accordance herewith the continued slow operation by a driver shall be unlawful.

(5) When speed restrictions not applicable.—The speed limitations set forth in this section shall not apply to authorized emergency vehicles when responding to emergency calls and the drivers thereof sound audible signal by bell, siren, or exhaust whistle capable of emitting sound audible under normal conditions from a distance of not less than 500 feet. This provision shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons using the highway, nor shall it protect the driver of any such vehicle from the consequence of a reckless disregard of the safety of others.

(6) Drive on right side—exceptions.—Upon all roadways of sufficient width a vehicle shall be driven upon the right half of the roadway, except as follows:

1. When overtaking and passing another vehicle proceeding in the same direction under the laws governing such movement;

2. When the right half of a roadway is closed to traffic while under construction or repair;

3. Upon a roadway divided into three lanes for traffic under the rules applicable thereon;

4. Upon a roadway designated and sign posted for one way traffic.

(7) Passing in opposite directions.—Drivers of vehicles proceeding in opposite directions shall pass each other to the right and upon roadways having width for not more than one line of traffic in each direction each driver shall give to the other at least one-half of the main traveled portion of the roadway as nearly as possible.

(8) Overtaking a vehicle.—(a) The following shall govern the overtaking and passing of vehicles proceeding in the same direction:

1. The driver of a vehicle overtaking another vehicle proceeding in the same direction shall pass to the left thereof at a safe distance and shall not again drive to the right side of the roadway until safely clear of the overtaken vehicle.

2. Except when overtaking and passing on the right, is permitted, the driver of an overtaken vehicle shall give way to the right in favor of the overtaking vehicle on audible signal and shall not increase the speed of his vehicle until completely passed by the overtaking vehicle.

b. Overtaking a vehicle on the right is permitted under the following conditions:

1. The driver of a vehicle may overtake and pass upon the right of another vehicle which is making or about to make a left turn.

2. The driver of a vehicle may overtake and, allowing sufficient clearance, pass another vehicle proceeding in the same direction either upon the left or upon the right on a roadway with unobstructed hard surface of sufficient width for four or more lines of moving traffic when such movement can be made in safety. No person shall drive off the hard surface or upon the shoulder of the roadway in overtaking or passing on the right.

(9) Limitations on overtaking on the left—driving to left side of roadway.—(a) No vehicle shall be driven to the left side of the center of the roadway in overtaking and passing another vehicle proceeding in the same direction unless such left side is clearly visible and is free of oncoming traffic for a sufficient distance ahead to permit such overtaking and passing to be completely made without interfering with the safe operation of any vehicle approaching from the opposite direction or any vehicle overtaken. In every event the overtaking vehicle must return to the right hand side of the roadway before coming within 100 feet of any vehicle approaching from the opposite direction.

(b) No vehicle shall be driven to the left side of the roadway under the following conditions:

1. When approaching the crest of a grade or upon a curve in the highway where the driver's view along the highway is obstructed;

2. When approaching within 100 feet of any bridge, viaduct, or tunnel of a width of 18 feet or less, or when approaching within 100 feet of or traversing any intersection of state highways or railroad grade crossing;

3. Where official signs are in place directing that traffic keep to the right.

(10) One-way roadways and rotary traffic islands.—(a) Upon a roadway designated and sign posted for one-way traffic a vehicle shall be driven only in the direction designated.

(b) A vehicle passing around a rotary traffic island shall be driven only to the right of such island.

(11) Roadways laned.—Whenever any roadway has been divided into three or more clearly marked lanes for traffic the following shall apply:

(a) A vehicle shall be driven as nearly as practical entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety.

(b) Upon a roadway which is divided into 3 lanes a vehicle shall not be driven in the center lane except when overtaking and passing another

vehicle where the roadway is clearly visible and such center lane is clear of traffic within a safe distance, or in preparation for a left turn or where such center lane is at the time allocated exclusively to traffic moving in the direction the vehicle is proceeding and is sign posted to give notice of such allocation.

(c) Official signs may be erected directing slow moving traffic to use a designated lane or allocating specified lanes to traffic moving in the same direction and drivers of vehicles shall obey the directions of every such sign.

(12) Following too closely.—(a) The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicle and the traffic upon and the condition of the highway.

(b) The driver of any motor truck or motor truck drawing another vehicle when traveling upon a roadway outside of a business or residence district shall not follow within 150 feet of another motor truck or motor truck drawing another vehicle, and the driver of any motor truck traveling in convoy of two or more such motor trucks shall not follow within 500 feet of any other motor truck in the said convoy. This requirement shall not be construed to prevent overtaking and passing nor shall the same apply upon any lane specially designated for use by motor trucks.

(13) Turning at intersections.—The driver of a vehicle intending to turn at an intersection shall do so as follows:

(a) Both the approach for a right turn and a right turn shall be made as close as practical to the right hand curb or edge of the roadway.

(b) Approach for a left turn shall be made in that portion of the right half of the roadway nearest the center line thereof and after entering the intersection the left turn shall be made so as to leave the intersection to the right of the center line of the roadway being entered.

(c) Approach for a left turn from a two-way highway into a one-way highway shall be made in that portion of the right half of the roadway nearest the center line thereof and by passing to the right of such center line where it enters the intersection. A left turn from a one-way highway into a two-way highway shall be made by passing to the right of the center line of the highway entered upon leaving the intersection.

(d) Except state highways or streets used as such, local authorities in their respective jurisdictions may cause markers, buttons, or signs to be placed within or adjacent to intersections and thereby require and direct that a different course from that specified in this subsection be traveled by vehicles turning at an intersection, and when markers, buttons, or signs are so placed no driver of a vehicle shall turn a vehicle at an intersection other than as directed and required by such markers, buttons, or signs.

(14) Turning—when prohibited.—No vehicle shall be turned so as to proceed in the opposite direction upon any curve, or upon the approach to, or near the crest of a grade, where such vehicle cannot be seen by the driver of any other vehicle approaching from either direction within 500 feet.

(15) Starting parked vehicle.—No person shall start a vehicle which is stopped, standing, or parked unless and until such movement can be made with reasonable safety.

(16) When signal required.—(a) No person shall turn a vehicle from a di-

rect course upon a highway unless and until such movement can be made with reasonable safety and then only after giving a clearly audible signal by sounding the horn if any pedestrian may be affected by such movement or after giving an appropriate signal in the manner hereinafter provided in the event any other vehicle may be affected by such movement.

(b) A signal of intention to turn right or left shall be given continuously during not less than the last 100 feet traveled by the vehicle before turning.

(c) No person shall stop or suddenly decrease the speed of a vehicle without first giving an appropriate signal in the manner provided herein to the driver of any vehicle immediately to the rear when there is opportunity to give such signal.

(17) **Signals by hand and arm or signal device.**—The signals herein required shall be given either by means of the hand and arm or by a signal lamp or signal device of a type approved by the department, but when a vehicle is so constructed or loaded that a hand and arm signal would not be visible both to the front and rear of such vehicle then said signals must be given by such a lamp or device.

(18) **Methods of giving signals.**—All signals herein required given by hand and arm shall be given from the left side of the vehicle in the following manner and such signals shall indicate as follows:

1. Left turn.—Hand and arm extended horizontally.
2. Right turn.—Hand and arm extended upward or moved with a sweeping motion from the rear to the front.
3. Stop or decrease of speed.—Hand and arm extended downward.

(19) **Approaching or entering intersection.**—(a) The driver of a vehicle approaching an intersection shall yield the right-of-way to a vehicle which has entered the intersection from a different highway.

(b) When two vehicles enter an intersection from different highways at the same time the driver of the vehicle on the left shall yield the right-of-way to the vehicle on the right.

(c) The foregoing are modified through highways and otherwise as hereinafter provided.

(20) **Vehicle turning left at intersection.**—The driver of a vehicle within an intersection intending to turn to the left shall yield the right-of-way to any vehicle approaching from the opposite direction which is within the intersection or so close thereto as to constitute an immediate hazard, but such driver, having so yielded and having given a signal when and as required by this section, may make such left turn and the drivers of all other vehicles approaching the intersection from said opposite direction shall yield the right-of-way to the vehicle making the left turn.

(21) **Entering a stop intersection.**—(a) The driver of a vehicle shall stop as required by this section at the entrance to a through highway and shall yield the right-of-way to other vehicles which have entered the intersection from such through highway or which are approaching so closely on such through highway as to constitute an immediate hazard, but the driver having so yielded may proceed and the drivers of all other vehicles approaching the intersection on said through highway shall yield the right-of-way to the vehicle so proceeding into or across the through highway.

(b) The driver of a vehicle shall likewise stop in obedience to a stop

sign as required herein at an intersection where a stop sign is erected at one or more entrances thereto although not a part of a through highway and shall proceed cautiously, yielding to vehicles not so obliged to stop which are within the intersection or approaching so closely as to constitute an immediate hazard, but may then proceed.

(22) Entering from private road.—The driver of a vehicle about to enter or cross a highway from a private road or driveway shall yield the right-of-way to all vehicles approaching on said highway.

(23) Approach of authorized emergency vehicles.—Upon the immediate approach of an authorized emergency vehicle, when the driver is giving audible signal by siren, exhaust, whistle, or bell, the driver of every other vehicle shall yield the right-of-way and shall immediately drive to a position parallel to, and as close as possible to, the right hand edge or curb of the highway clear of any intersection and shall stop and remain in such position until the authorized emergency vehicle has passed, except when otherwise directed by a police officer. This subsection shall not operate to relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons using the highways.

(24) Special stops required.—The state highway department may designate one highway at a highway intersection as the through highway through that intersection and may and shall place and erect stop signs on the other highways entering the intersection.

(25) Compulsory reporting of accidents.—The driver of a vehicle involved in an accident resulting in injury to or death of any person or total property damage to an apparent extent of \$50.00 or more shall, where the accident occurs on or near a highway, within 24 hours after such accident, forward a written report of such accident to the state highway department. Where the department shall deem the report insufficient, it may require the driver to make and forward supplemental reports and may also require witnesses of such accidents to render reports of said accidents to the department. Whenever the driver of a vehicle is physically incapable of making a required accident report and there was, at the time of the accident, another occupant in the vehicle capable of making a report, such occupant shall make or cause to be made said report. The department is hereby authorized to furnish upon request forms suitable for such reports. All required accident reports and supplements thereto and the contents thereof shall be for the confidential use of the department and shall not be admissible in evidence for any purpose at any hearing or trial, civil or criminal, and no court shall have the right to order or require the production of such accident reports and supplements thereto or the contents thereof for any purpose at any such hearing or trial, civil or criminal.

(26) Stopping, standing, or parking.—(a) Upon any highway outside of a business or residence district no person shall stop, park, or leave standing any vehicle whether attended or unattended, upon the paved or improved or main traveled part of the highway when it is practical to stop, park, or so leave such vehicle off such part of said highway, but in every event a clear and unobstructed width of at least 20 feet of such part of the highway opposite such standing vehicle shall be left for the free passage of other vehicles and a clear view of such stopped vehicle be available from a distance of 200 feet in each direction upon such highway. This provision

shall not apply to the driver of any vehicle which is disabled while on the paved or improved or main traveled portion of a highway in such manner and to such extent that it is impossible to avoid stopping and temporarily leaving such disabled vehicle in such position.

(b) Whenever any motor truck, trailer or semi-trailer and its lighting equipment are disabled during the period when lighted lamps are required on vehicles and such motor truck cannot immediately be removed from the main traveled portion of a highway outside of a business or residence district, the driver or other person in charge of such vehicle shall cause flares, lanterns, or other signals to be lighted and placed upon the highway, one at a distance of approximately 100 feet in advance of such vehicle, one at a distance of approximately 100 feet to the rear of the vehicle and the third upon the roadway side of the vehicle; *provided*, that if the vehicle is transporting flammables three red reflectors may be so placed in lieu of such other signals and no open burning flare shall be placed adjacent to any such vehicle transporting flammables. The flares, lanterns or other signals herein required shall be capable of producing warning lights visible from a distance of at least 500 feet and operative for a continuous period of at least eight hours without attendance.

(c) Every motor truck or other wrecker service motor vehicle while engaged in repairing or removing any wrecked, abandoned, or disabled motor vehicle, on any highway outside of a business or residence district shall place and cause to be displayed at all times signs not less than 3 feet square with letters not less than 8 inches in height of a stroke of not less than $\frac{3}{4}$ inch in width with the words "Stop—Wreck 200 feet ahead," the said signs to be placed on the highway 200 feet in advance and to the rear of such motor truck, or other wrecker service motor vehicle. When the signs herein required are used between the hours of one-half hour after sunset and one-half hour before sunrise, the said signs shall be illuminated by flares, lanterns, or otherwise, so as to be visible from a distance of at least 500 feet.

(d) Whenever any police officer finds a vehicle standing upon a highway in violation of this section, such officer is hereby authorized to move such vehicle, or require the driver or other person in charge of the vehicle to move the same to a position off the paved or improved or main traveled part of such highway.

(e) Whenever any police officer finds a vehicle unattended upon any highway bridge or causeway or in any tunnel where such vehicle constitutes an obstruction to traffic, such officer is hereby authorized to provide for the removal of such vehicle to the nearest garage or other place of safety.

See § 1623 (38).

(27) When stopping, standing or parking prohibited.—No person shall stop, stand or park a vehicle, except when necessary to avoid conflict with other traffic or in compliance with the directions of a police officer or traffic control device, in any of the following places:

1. On a sidewalk;
2. In front of a public or private driveway;
3. Within an intersection;

4. On a crosswalk;
5. Within 30 feet upon the approach to any flashing beacon, stop sign, or traffic-control signal located at the side of a roadway;
6. Within 50 feet of the nearest rail of a railroad crossing;
7. Alongside or opposite any street excavation or obstruction when such stopping, standing, or parking would obstruct traffic;
8. Upon any bridge or other elevated structure upon a highway or within a highway tunnel;
9. At any place where official signs prohibit stopping.

(28) Pedestrians—hitch-hiking prohibited.—Every person walking on or along any highway not provided with sidewalks shall walk on the left side of such highway, facing vehicles approaching from the opposite direction. All pedestrians shall be subject to traffic control signals at highway intersections. Every pedestrian crossing a highway, except where traffic control signals are provided, shall yield the right-of-way to all vehicles upon the highway. No person shall stand or walk on any highway for the purpose of soliciting a ride from the driver of any private vehicle.

(29) Reckless homicide.—(a) When the death of any person ensues within one year as a proximate result of injury received by the driving of any vehicle in reckless disregard of the safety of others, the person so operating such vehicle shall be guilty of reckless homicide.

(b) The department shall revoke for a period of five years the driver's license of any person convicted of reckless homicide.

(c) This subsection shall not affect, impair, or repeal § 1107.

(30) Intoxicating liquor or narcotic drugs.—(a) It is unlawful for any person who is an habitual user of narcotic drugs or any person who is under the influence of intoxicating liquor or narcotic drugs to drive any vehicle within this State.

(b) The department shall suspend the driver's license of any person convicted under this subsection for a period of six months for the first conviction; a period of one year for the second conviction; and two years for the third and each subsequent conviction.

(c) The department shall on or before the tenth day of each month release to the public the names and addresses of all persons convicted under this subsection during the preceding month, and it is hereby authorized and directed that the person or persons, firms or corporations so publishing the names of such persons convicted under this subsection shall not be deemed guilty of libel in the courts of this State; and no person convicted under this subsection shall have right of action in the courts of the State for libel suits against any person, firm or corporations so publishing the name of said person convicted under this subsection.

(31) Reckless driving.—Any person who drives any vehicle in such a manner as to indicate either a wilful or a wanton disregard for the safety of persons or property is guilty of reckless driving.

(32) Rules and regulations.—The department is hereby authorized and empowered to promulgate rules and regulations for the administration and enforcement of this section and all such rules and regulations shall have the full force and effect of law.

(33) Violations—penalties.—Any person violating any provision of subsections 2 to 27, inclusive, of this section shall be deemed guilty of a mis-

demeanor and upon conviction shall be fined not less than five (\$5.00) dollars nor more than one hundred (\$100.00) dollars, or imprisonment for not more than thirty (30) days. Any person violating the provisions of subsection 28 of this section shall be deemed guilty of a misdemeanor and upon conviction shall be fined not less than two (\$2.00) dollars nor more than one hundred (\$100.00) dollars, or imprisonment for not more than thirty (30) days. Any person convicted of reckless homicide under the provisions of subsection 29 of this section shall be punished by a fine of not less than one thousand (\$1,000.00) dollars nor more than five thousand (\$5,000.00) dollars, or imprisonment for not more than five (5) years, or both. Any person violating any provision of subsection 30 of this section shall upon conviction be punished in accordance with the following:

(a) By a fine of not less than fifty (\$50.00) dollars nor more than one hundred (\$100.00) dollars, or imprisonment for not less than ten (10) days nor more than thirty (30) days, for the first offense. (b) By a fine of not less than one thousand (\$1,000.00) dollars, or imprisonment for one (1) year, or both, for the second offense. (c) By a fine of not less than two thousand (\$2,000.00) dollars, or imprisonment for three (3) years, or both, for the third offense. (d) By a fine of not less than three thousand (\$3,000.00) dollars, or imprisonment for four (4) years, or both, for the fourth offense. Any person violating the provisions of subsection 31 of this section shall upon conviction be punished by a fine of not less than ten (\$10.00) dollars nor more than one hundred (\$100.00) dollars, or imprisonment for not more than thirty (30) days.

(34) Invalidity.—If any subsection or provision of this section shall be held invalid by a court of competent jurisdiction, such invalidity shall not effect, impair or invalidate any remaining subsections or provisions of this section.

1937 (40) 222, 595.

§ 1617. Driver of private passenger motor vehicle dim lights when approaching oncoming motor vehicle.—Whenever the driver of a private passenger motor vehicle approaches an oncoming motor vehicle within five hundred (500) feet, such driver shall dim the lights of the motor vehicle so that the glaring rays are not directly into the eyes of the oncoming driver, and in no case shall the light be aimed higher than the center of the lamp from which it comes at a distance of twenty-five (25) feet ahead, and in no case higher than a level of forty-two (42) inches above the level upon which the vehicle stands at a distance of seventy-five (75) feet ahead. *Provided*, however, this does not apply to a private passenger motor vehicle that does not have facilities for dimming of lights.

Any person convicted of violating the provision of this section shall be punished by a fine of not more than ten (\$10.00) dollars or imprisonment for not more than thirty (30) days.

1941 (42) 308.

§ 1618. Private passenger motor vehicles have brakes, horn and lights.—Every four wheeled private passenger motor vehicle while in use on a public highway shall be provided with good and efficient brakes and also with suitable horn or other signal, and be so constructed as to exhibit during the period from one-half an hour after sunset until one-half an hour before

sunrise two white lights visible within a reasonable distance in the direction towards which the vehicle is proceeding, and with a red light on the rear of said vehicle visible for a reasonable distance to persons traveling behind such motor vehicles, and a two-wheeled private passenger motor vehicle while in use on a public highway shall be equipped as is hereinbefore set forth for a four-wheel private passenger motor vehicle with the exception that it shall only be necessary for such two-wheeled motor vehicles between the period from one-half an hour after sunset until one-half an hour before sunrise to exhibit one white light instead of two visible within a reasonable distance in the direction towards which the vehicle is proceeding: *provided*, that in case of heavy fog all such lights on all such motor vehicles shall be displayed in the daytime before sunset and after sunrise.

1932 Code, § 1630; 1928 (35) 1315; 1938 (40) 1719.

See subsections 2, 27, § 1623, for equipment for motor vehicles other than private passenger motor vehicles.

§ 1619. Inspect brakes, horns, lighting equipment, and steering mechanism of private passenger motor vehicles.

(1) Highway department make inspection twice annually—issue and revoke certificates—display of certificates—reciprocity—operation of motor vehicles not passing inspection.

(a) The highway department is hereby authorized and directed to set up stationary and portable vehicle inspection stations for the inspection of brakes, horns, lighting equipment and steering mechanism of private passenger motor vehicles. The said department shall, at least twice each fiscal year, by public announcement, designate places and periods where all owners of private passenger motor vehicles shall submit such vehicles for inspection and obtain for each such vehicle a certificate of inspection and approval issued by an official inspection station. The certificate of inspection shall be displayed in the lower right hand corner of the windshield of vehicles with windshields, and on other vehicles at such places as may be designated by the department.

(b) Certificates of approval and inspection issued by other States may be accepted and recognized in lieu of the required South Carolina certificates.

(c) The department may suspend registration of any vehicle which has been determined unsafe, or does not have the equipment required by law, by an inspection station until the vehicle shall have passed the required inspection. Any vehicle not passing the required inspection shall be marked by a visible sticker, and the said vehicle shall not be operated on any highway except as may be necessary to move such vehicle from the inspection station to a garage or the residence or the place of business of its owner, and to be returned to an inspection station after the said vehicle has been placed in repair and adjustment and otherwise equipped as required by law.

(d) No person shall display or permit to be displayed upon any vehicle any certificate of inspection and approval knowing the same to be fictitious or to have been issued for another vehicle or issued without an inspection by an official station having been made.

(e) Any officer or agent of the department authorized to administer or enforce the motor vehicle laws of the State may upon reasonable cause require the driver of a vehicle to stop and submit such vehicle and its equipment to an inspection and such test with reference thereto as may be appropriate. In the event such vehicle is found to be in an unsafe condition or the required equipment is not present, or is not in proper repair or adjustment, the officer shall have the authority to revoke any certificate of inspection and approval as may have previously been issued for the said vehicle and the said vehicle shall not thereafter be operated, except as provided for in subdivision (c) of this subsection, until a new certificate of inspection and approval shall have been issued for the said vehicle.

(2) **Rules and regulations—location of inspection stations.**—The state highway department is hereby authorized and empowered to promulgate rules and regulations for the administration and enforcement of this section. *Provided, however,* that the state highway department is hereby required to set up its inspection stations in the vicinity of any city or town having a population of one thousand (1,000) or more.

(3) **Administration—enforcement—expenses.**—The state highway department is hereby authorized and directed to administer and enforce the provisions of this section, and all costs or expenses shall be paid from the state highway fund.

(4) **Penalties.**—Any person, firm, association or corporation violating any provision of this section shall be deemed guilty of a misdemeanor and upon conviction shall be fined not less than one (\$1.00) dollar nor more than one hundred (\$100.00) dollars or imprisonment for not more than thirty (30) days.

1939 (41) 431.

§ 1622. Width of motor vehicles use transport passengers.—No person shall operate on or upon or along any public highway any motor vehicle designed and used for passenger transportation the total outside width of which, including any part of the body, shall exceed ninety-six (96) inches. The operation of any passenger motor vehicle upon any public highway of a greater width than provided hereinabove shall constitute a misdemeanor, and any person found guilty of violating the provisions of this section shall upon conviction be fined not less than ten (\$10.00) dollars and not more than one hundred (\$100.00) dollars, or imprisoned for not more than fifteen days in the discretion of the court.

1936 (39)1635.

See § 1623 (28).

§ 1623. Equipment, size and weight limitations of motor vehicles except private passenger motor vehicles and equipment of other vehicles on the highways of this State—liability in certain cases of illegal operations—use of highways.

Article I—Definitions

(1) **Definitions.**—For the purpose of this section, the following words, phrases, and terms are hereby defined as follows:

(a) **Vehicle**—every device in, upon, or by which any person or property

is or may be transported or drawn upon a highway, except devices moved by human power or used exclusively upon stationary rails or tracks.

(b) Motor vehicles—every vehicle which is self propelled and not operated or driven on fixed rails or tracks.

(c) Motorcycle—every motor vehicle having a saddle for the use of the rider and designed to travel on not more than three wheels in contact with the ground but excluding a tractor.

(d) Motor truck—any motor-propelled vehicle designed or used for carrying materials, freight or merchandise and not operated or driven on fixed rails or tracks; but it shall not include self-propelled trucks designed primarily for passenger transportation, though equipped with frames, racks or bodies having a load capacity not exceeding 1,500 pounds.

(e) Truck tractor—every motor vehicle designed and used primarily for drawing other vehicles and not so constructed as to carry a load other than a part of the weight of the vehicle and load so drawn.

(f) Farm tractor—every motor vehicle designed and used primarily as a farm implement for drawing plows, mowing machines, and other implements of husbandry.

(g) Road tractor—every motor vehicle designed and used for drawing other vehicles and not so constructed as to carry any load thereon either independently or any part of the weight of a vehicle or load so drawn.

(h) Trailer—every vehicle without motive power designed for carrying persons or property and for being drawn by a motor vehicle and so constructed that no part of its weight rests upon the towing vehicle.

(i) Semi-trailer—every vehicle without motive power designed for carrying persons or property and for being drawn by a motor vehicle and so constructed that some part of its weight and that of its load rest upon or is carried by another vehicle.

(j) Authorized emergency vehicle—vehicles of the fire department (fire patrol), police vehicles, and such ambulance, and emergency vehicles of municipal departments or public service corporations, as are designated or authorized by the department or the chief of police of an incorporated municipality.

(k) Pneumatic tire—every tire in which compressed air is designed to support the load.

(l) Solid tire—every tire of rubber or other resilient material which does not depend upon compressed air for the support of the load.

(m) Metal tire—every tire the surface of which in contact with the highway is wholly or partly of metal or other hard non-resilient material.

(n) Department—the South Carolina state highway department.

(o) Local authorities—every county, municipal and local board or body having jurisdiction over, and responsibility for the maintenance of, any highway or street other than state highways.

(p) Person—every individual, partnership, association, trust and corporation, and the receivers, assignees or agents of any of them.

(q) Highway—any public road, street, avenue, alley or boulevard, bridge, viaduct or trestle and the approaches thereto, within the limits of the State of South Carolina.

(r) Explosives—any chemical compound or mechanical mixture that is commonly used or intended for the purpose of producing an explosion and

which contains any oxidizing and combustive units or other ingredients in such proportions, quantities or packing that an ignition by fire, by friction, by concussion, by percussion, or by detonation of any part of the compound mixture may cause such a sudden generation of highly heated gases that the resultant gaseous pressures are capable of producing destructible effects on contiguous objects or by destroying life or limb.

(s) **Flammable liquid**—any liquid which has a flash point 70 F., or less, as determined by a tagliabue or equivalent closed cup test device.

(t) **Driver**—every person who drives or is in actual physical control of a vehicle.

(u) **Owner**—a person who holds the legal title of a vehicle or in the event a vehicle is the subject of an agreement for the conditional sale or lease thereof with the right of purchase upon performance of the conditions stated in the agreement and with an immediate right of possession vested in the conditional vendee or lessee, or in the event a mortgagor of a vehicle is entitled to possession, then such conditional vendee or lessee or mortgagor shall be deemed the owner for the purpose of this section.

(v) **Gross-weight**—the weight of the vehicle including the load carried thereon.

Article II—Equipment

(2) **Scope and effect of regulations.**—(a) It shall be unlawful for any person to drive or move or for the owner to cause or knowingly permit to be driven or moved on any highway any vehicle or combination of vehicles which is in such unsafe condition as to endanger any person, or which does not contain those parts or is not at all times equipped with such lamps and other equipment in proper condition and adjustment as required in this section.

(b) The provisions of this section with respect to equipment on vehicles shall not apply to implements of husbandry, road machinery, or farm tractors, except as herein made applicable.

(3) **When lighted lamps are required.**—(a) Every vehicle upon a highway within this State at any time from a half hour after sunset to a half hour before sunrise and at any other time when there is not sufficient light to render clearly discernible persons and vehicles and other objects on the highways at a distance of 500 feet ahead shall display lighted lamps and illuminating devices as hereinafter required.

(b) Whenever requirement is hereinafter declared as to the distances from which certain lamps and devices shall render objects visible or within which such lamps or devices shall be visible, said provisions shall apply during the times stated in subdivisions (a) of this subsection upon a straight level unlighted highway under normal atmospheric conditions unless a different time or condition is expressly stated.

(4) **Head lamps on motor vehicles.**—(a) Every motor vehicle other than a motorcycle shall be equipped with at least two head lamps with at least one on each side of the front of the motor vehicle, which head lamps shall comply with the requirements and limitations set forth in this section.

(b) Every motorcycle shall be equipped with at least one and not more than two head lamps which shall comply with the requirements and limitations of this section.

(5) Rear lamps and reflectors.—(a) Every motor vehicle, including trailers and semi-trailers, shall be equipped with a lighted rear lamp, exhibiting a red light plainly visible from a distance of 500 feet to the rear.

(b) Either such rear lamp or a separate lamp shall be so constructed and placed as to illuminate with a white light the rear registration license plate and render it clearly legible from a distance of 50 feet to the rear. When the rear license plate is illuminated by an electric lamp other than the required rear lamp, said two lamps shall be turned on or off only by the same control switch at all times whenever head lamps are lighted.

(c) Every new motor vehicle, trailer, or semi-trailer hereafter sold or built and every commercial vehicle hereafter operated on a highway shall also carry at the rear, either as a part of the rear lamp or separately, a red reflector meeting the requirements of this section.

(d) Whenever a red reflector is required or permitted to be used in substitution of lamps upon a vehicle under any of the provisions of this section, such reflector shall be mounted upon the vehicle at a height not to exceed 42 inches nor less than 24 inches above the ground upon which the vehicle stands, and every such reflector shall be so designed and maintained as to be visible at night from all distances within 500 feet to 50 feet from such vehicle when directly in front of a motor vehicle displaying lawfully lighted head lamps.

(6) Clearance lamps.—(a) Every motor vehicle having a width at any part in excess of 80 inches shall be equipped with four clearance lamps located on the extreme sides of such vehicle, two located at the front and displaying an amber light visible from a distance of 500 feet to the front of the vehicle and the other two located at the rear of the vehicle and displaying a red light visible from a distance of 500 feet to the rear of the vehicle, which said rear clearance lamps shall be in addition to the red rear lamp hereinafter required.

(b) Every vehicle or combination of such vehicles having a length in excess of 30 feet or a width in excess of 80 inches shall be equipped with lamps on the front displaying 3 amber lights and lamps on the rear displaying 3 red lights and the lights in each such group shall be evenly spaced not less than 6 nor more than 12 inches apart along a horizontal line near the top of the vehicle and said lights shall be visible from distances of 500 feet to the front and rear, respectively, of the vehicle.

(7) Lamp or flag on projecting load.—Whenever the load upon any vehicle extends to the rear 4 feet or more beyond the bed or body of such vehicle there shall be displayed at the extreme rear end of the load, at the times specified in subsection 3 of this article a red light plainly visible from a distance of at least 500 feet to the sides and rear. The red light required under this section shall be in addition to the red rear light required upon every vehicle. At any other time there shall be displayed at the extreme rear end of such load a red flag or cloth not less than 16 inches square.

(8) Lamps on bicycles.—Every bicycle shall be equipped with a lamp on the front exhibiting a white light visible from a distance of 500 feet to the front and with a lamp on the rear exhibiting a red light visible from a distance of at least 500 feet to the rear; except that a red reflector meeting the requirements of this section may be used in lieu of a rear light.

(9) Lamps on other vehicles and equipment.—All vehicles, including ani-

mal-drawn vehicles and including implements of husbandry, road machinery or farm tractors and other vehicles not hereinbefore specifically required to be equipped with lamps, shall at the times specified in subsection 3 of this article be equipped with at least one lighted lamp or lantern exhibiting a white light visible from a distance of 500 feet to the front of such vehicle and with a lamp or lantern or reflector exhibiting a red light visible from a distance of 500 feet to the rear.

(10) Spot lamps and auxiliary driving lamps.—(a) Any motor vehicle may be equipped with not to exceed one spot lamp and every lighted spot lamp shall be so aimed and used upon approaching another vehicle that no part of the high-intensity portion of the beam will be directed to the left of the prolongation of the extreme left side of the vehicle nor more than 100 feet ahead of the vehicle.

(b) Any motor vehicle may be equipped with not to exceed three auxiliary driving lamps mounted on the front at a height not less than 12 inches nor more than 42 inches above the level surface upon which the vehicle stands, and every such auxiliary driving lamp or lamps shall meet the requirements and limitations set forth in this section.

(11) Signal lamps and signal devices.—(a) Any motor vehicle may be equipped and when a signal lamp or device is required under this section shall be equipped, with a signal lamp or signal device which is so constructed and located on the vehicle as to give a signal of intention to stop which shall be red or yellow in color and signals of intention to turn to the right or left, all of which signals shall be plainly visible and understandable in normal sunlight and at night from a distance of 100 feet to the front or rear, but shall not project a glaring or dazzling light; except that a stop signal need be visible only from the rear.

(b) All mechanical signal devices shall be self-illuminated when in use at the times specified in subsection 3 of this article.

(12) Additional lighting equipment.—(a) Any motor vehicle may be equipped with not more than two side cowl or fender lamps which shall emit an amber or white light without glare.

(b) Any motor vehicle may be equipped with not more than one running board courtesy lamp on each side thereof which shall emit a white or amber light without glare.

(c) Any motor vehicle may be equipped with a back-up lamp either separately or in combination with another lamp; except that no such back-up lamp shall be a continuously lighted one when the motor vehicle is in forward motion.

(d) No person shall operate any vehicle upon a highway unless the same shall be fully equipped and supplied with flares, lights, and other devices as may be required for use by law.

(13) Multiple-beam road lighting equipment.—Except as hereinafter provided, the headlamps, or the auxiliary driving lamps, or combinations thereof, on motor vehicles shall be so arranged that the driver may select at will between distributions of light projected to different elevations, subject to the following requirements and limitations:

(a) There shall be an uppermost distribution of light, or composite beam, so aimed and of such intensity as to reveal persons and vehicles at a distance of at least 350 feet ahead for all conditions of loading. The maximum

intensity of this uppermost distribution of light or composite beam 1 degree of arc or more above the horizontal level of the lamps when the vehicle is not loaded shall not exceed 8,000 apparent candle power, and at no other point of the distribution of light or composite beam shall there be an intensity of more than 75,000 apparent candle power.

(b) There shall be a lowermost distribution of light, or composite beam, so aimed that:

1. When the vehicle is not loaded, none of the high intensity portion of the light which is directed to the left of the prolongation of the extreme left side of the vehicle shall, at a distance of 25 feet ahead, project higher than a level of 10 inches below the level of the center of the lamp, from which it comes.

2. When the vehicle is not loaded, none of the high intensity portion of the light which is directed to the right of the prolongation of the extreme left side of the vehicle shall, at a distance of 25 feet ahead, project higher than a level of 5 inches below the level of the center of the lamp from which it comes.

3. In no event shall any of the high intensity of such lowermost distribution of light or composite beam project higher than a level of 42 inches above the level on which the vehicle stands at a distance of 75 feet ahead.

(c) Where one intermediate beam is provided, the beam on the left side of the road shall be in conformity with (b) (1) of this subsection.

(d) All road lighting beams shall be so aimed and of sufficient intensity to reveal a person or vehicle at a distance of at least 200 feet ahead.

(14) Use of multiple-beam road lighting equipment.—Whenever the driver of a vehicle approaches an oncoming vehicle within 500 feet, such driver shall use a distribution of light if so equipped or composite beam so aimed that the glaring rays are not projected into the eyes of the oncoming driver, and in no case shall the high-intensity portion which is projected to the left of the prolongation of the extreme left side of the vehicle be aimed higher than the center of the lamp from which it comes at a distance of 25 feet ahead, and in no case higher than a level of 42 inches above the level upon which the vehicle stands at a distance of 75 feet ahead.

(15) Single-beam road lighting equipment.—Headlamps arranged to provide a single distribution of light not supplemented by auxiliary driving lamps shall be permitted on motor vehicles manufactured and sold prior to one year after April 29, 1938, in lieu of multiple-beam road lighting equipment herein specified if the single distribution of light complies with the following requirements and limitations:

(a) The headlamps shall be so aimed that when the vehicle is not loaded none of the high intensity portion of the light shall at a distance of 25 feet ahead project higher than a level of 5 inches below the level of the center of the lamp from which it comes, and in no case higher than 42 inches above the level on which the vehicle stands at a distance of 75 feet ahead.

(b) The intensity shall be sufficient to reveal persons and vehicles at a distance of at least 200 feet.

(16) Alternate road lighting equipment.—Any motor vehicle may be operated under the conditions specified in subsection 3 of this article when equipped with two lighted lamps upon the front thereof capable of revealing persons and objects 75 feet ahead in lieu of lamps required in said

subsections 13 and 15; provided, that at no time shall such motor vehicle be operated at a speed in excess of 20 miles per hour.

(17) Number of driving lamps required or permitted.—(a) At all times specified in subsection 3 of this article, at least two lighted lamps shall be displayed, one on each side of the front of every motor vehicle except when such vehicle is parked subject to the regulations governing lights on parked vehicles.

(b) Whenever a motor vehicle equipped with head lamps as herein required is also equipped with any auxiliary lamps or a spot lamp or any other lamp on the front thereof projecting a beam of an intensity greater than 300 candle power not more than a total of four of any such lamps on the front of a vehicle shall be lighted at any one time upon a highway.

(18) Special restrictions on lamps.—(a) No person shall drive or move any vehicle or equipment upon any highway with any lamp or device thereon displaying a red light visible from directly in front thereof. This subsection shall not apply to police, fire or authorized emergency vehicles.

(b) Flashing lights are hereby prohibited on motor vehicles except as a means of indicating a right or left turn.

(19) Brakes — equipment required. — (a) Every motor vehicle, other than a motorcycle, when operated upon a highway shall be equipped with brakes adequate to control the movement of and to stop and hold such vehicle, including two separate means of applying the brakes, each of which means shall be effective to apply the brakes to at least two wheels. If these two separate means of applying the brakes are connected in any way, they shall be so constructed that failure of any one part of the operating mechanism shall not leave the motor vehicle without brakes on at least two wheels.

(b) Every motorcycle and bicycle with motor attached, when operated upon a highway shall be equipped with at least one brake, which may be operated by hand or foot.

(c) Every trailer or semi-trailer of a gross weight of 3,000 pounds or more when operated upon a highway shall be equipped with brakes adequate to control the movement of and to stop and to hold such vehicle and so designed as to be applied by the driver of the towing vehicle from its cab and said brakes shall be so designed and connected that in case of an accidental break-away of the towed vehicle the brakes shall be automatically applied.

(d) Every new motor vehicle, trailer, or semi-trailer manufactured or sold in this State and operated upon the highways shall be equipped with service brakes upon all wheels of every such vehicle, except any motorcycle, and except that any semi-trailer of less than 1,500 pounds gross weight need not be equipped with brakes.

(e) The service brakes upon any motor vehicle or combination of vehicles shall be adequate to stop such vehicle or vehicles when traveling 20 miles per hour within a distance of 30 feet when upon dry pavement or other hard surface type free from loose material where the grade does not exceed 1 per cent. Under those conditions the hand brake shall be adequate to stop such vehicle or vehicles within a distance of 55 feet and said hand brake shall be adequate to hold such vehicle or vehicles stationary on any grade upon which operated and in any event on grades up to 8%; and the

service brakes upon a motor vehicle equipped with two-wheel brakes only, and when permitted hereunder, shall be adequate to stop the vehicle within a distance of 40 feet and the hand brake adequate to stop the vehicle within a distance of 55 feet.

(f) All braking distances specified in this subsection shall apply to all vehicles mentioned, whether such vehicles are not loaded or are loaded to the maximum capacity authorized by law.

(g) All brakes shall be maintained in good working order and shall be so adjusted as to operate as equally as practicable with respect to the wheels on opposite sides of the vehicle.

(20) Horns, mufflers, and warning devices.—(a) Every motor vehicle operated upon a highway shall be equipped with a horn in good working order and capable of emitting sound audible under normal conditions from a distance of not less than 200 feet, but no horn or other warning shall emit an unreasonably loud or harsh sound or whistle. The driver of a motor vehicle shall when reasonably necessary to insure safe operation give audible warning with his horn, but shall not otherwise use such horn when upon a highway.

(b) No vehicle shall be equipped with nor shall any person use upon a vehicle any siren, whistle, or bell, except as otherwise permitted in this subsection. It is permissible but not required that any commercial vehicle be equipped with a theft alarm signal device which is so arranged that it cannot be used by the driver as an ordinary warning signal. Any authorized emergency vehicle may be equipped with a siren, whistle, or bell, capable of emitting sound audible under normal conditions from a distance of not less than 500 feet, but such siren shall not be used except when such vehicle is operated in response to an emergency call or in the immediate pursuit of an actual or suspected violator of the law, in which said latter events the driver of such vehicle shall sound said siren when necessary to warn pedestrians and drivers of the approach thereof.

(c) Every motor vehicle shall at all times be equipped with a muffler in good working order and in constant operation to prevent excessive or unusual noise and annoying smoke, and no person shall use a muffler cutout, upon a motor vehicle on a highway.

(21) Windshields.—(a) No person shall drive any motor vehicle with any sign, poster or other nontransparent material upon the front windshield, sidewings, side or rear windows of such vehicles other than a certificate or other paper required to be so displayed by law.

(b) The windshield on every motor vehicle shall be equipped with a device for cleaning rain, snow or other moisture from the windshield, which device shall be so constructed as to be controlled by the driver of the vehicle.

(22) Tire equipment.—(a) Every motor vehicle, trailer or semi-trailer, hereafter operated upon the highways shall be equipped with tires of sufficient size and in sufficient number to distribute the wheel loads on the road surface so as to avoid damage to the highway.

(b) In the case of solid rubber tires or cushion rubber tires, the width shall be at least sufficient so that the gross weight upon the road surface per inch of tire width shall not exceed 300 pounds. Every solid rubber tire or cushion tire shall have rubber on its entire traction surface at least 1

inch thick above the edge of the flange of the entire periphery.

(d) No person shall operate or move on any highway any motor vehicle, trailer, or semi-trailer having any metal tire in contact with the roadway.

(e) No tire on a vehicle moved on a highway shall have on its periphery any block, stud, flange, cleat, or spike or any other protuberances of any material other than rubber, or other resilient material, which projects beyond the tread of the traction surface of the tire, except that it shall be permissible to use farm machinery with tires having protuberances which will not injure the highway, and except also that it shall be permissible to use tire chains of reasonable proportions upon any vehicle when required for safety because of snow, ice, or other conditions tending to cause a vehicle to skid.

(23) Transporting explosives.—Any vehicle used for transporting any explosives as a cargo or part of a cargo upon the highway shall be marked or placarded on each side and the rear with the word “Explosives” in letters not less than 8 inches high, or there shall be displayed on the rear of such vehicle a red flag not less than 24 inches square marked with the word “Danger” in white letters 6 inches high. Every said vehicle shall be equipped with not less than two fire extinguishers, filled and ready for immediate use, and placed at a convenient point on the vehicle so used. The department is hereby authorized to promulgate such additional rules and regulations governing the transportation of explosives and other dangerous articles by vehicles upon the highways as it shall deem advisable for the protection of the public, and all such rules and regulations shall have the full force and effect of law.

(24) Trailers and semi-trailer hitches.—No trailer or semi-trailer regardless of weight shall be attached to the bumper of the towing vehicle. An adequate hitch shall be used, preferably of the ball and socket type. This hitch shall be firmly attached to the frame or to a solid connection to the frame.

(25) Health and sanitation equipment.—No motor vehicle, trailer or semi-trailer shall be equipped with an open toilet or other device that may be a hazard from a health and sanitation standpoint.

(26) Gasoline tank.—The carrying of large quantities of gasoline in auxiliary tanks connected with motors or easily connected by opening valves or other devices is hereby declared dangerous and against the health and safety of the people of the State. It shall be unlawful for any motor truck of whatsoever kind to operate on the highways of the State when equipped with auxiliary gasoline fuel tanks, and only regular standard fuel tanks as made by auto manufacturers shall be used by motor vehicles on the said highways. No motor truck shall be operated on the highways of this State with a gasoline tank of larger capacity than thirty (30) gallons and no auxiliary tank of whatsoever kind and description shall be used: *provided*, that that the state highway department is hereby authorized to issue permits providing for the use of auxiliary tanks of a capacity of not exceeding seventy-five (75) gallons upon such terms and conditions as the said department may deem safe and proper.

(27) Inspection of vehicles.—(a) The department is hereby authorized to set up such stationary and portable motor vehicle inspection stations for the inspection of all safety equipment and devices of all motor vehicles, trail-

ers and semi-trailers for compliance with this section. The said department shall at least twice each fiscal year, by public announcement, designate places and periods where all owners of motor vehicles, trailers and semi-trailers shall submit all such vehicles for inspection and obtain for each such vehicle a certificate of inspection and approval issued by an official inspection station. The certificate of inspection shall be displayed in the lower right hand corner of the windshields of vehicles with windshields, and other vehicles at such places as may be designated by the department.

(b) Certificates of approval and inspection issued by other States may be accepted and recognized in lieu of the required South Carolina certificates.

(c) The department may suspend registration of any vehicle which has been determined unsafe, or does not have the equipment required by law, by an inspection station until the vehicle shall have passed the required inspection. Any vehicle not passing the required inspection will be marked by a visible sticker and the said vehicle shall not be operated on any highway except as may be necessary to move such vehicle from inspection station to a garage or to the resident or place of business of its owner, and to be returned to an inspection station after the said vehicle has been placed in repair and adjustment and otherwise equipped as required by law.

(d) No person shall display or permit to be displayed upon any vehicle any certificate of inspection and approval knowing the same to be fictitious or issued for another vehicle or issued without an inspection by an official station having been made.

(e) Any officer or agent of the department authorized to administer or enforce the motor vehicle laws of the State may upon reasonable cause require the driver of a vehicle to stop and submit such vehicle and its equipment to an inspection and such test with reference thereto as may be appropriate. In the event such vehicle is found to be in an unsafe condition or the required equipment is not present, or is not in proper repair or adjustment, the officer shall have the authority to revoke any certificate of inspection and approval as may have previously been issued for the said vehicle and the said vehicle shall not thereafter be operated, except as provided for in subdivision "c" of this subsection, until a new certificate of inspection and approval shall have been issued for the said vehicle.

(f) This subsection shall not apply to private passenger motor vehicles, private passenger trailers, or private passenger semi-trailers.

Article III—Vehicle-Size, Weight and Load

(28) Width of vehicles.—The total outside width of any vehicle or the load thereon shall not exceed ninety-six inches, except as otherwise provided in this article.

(29) Projecting loads on passenger vehicles.—No passenger vehicle shall be operated on any highway with any load carried thereon extending beyond the line of the fenders on the left side of such vehicle nor extending more than 6 inches beyond the line of the fenders on the right side of such vehicle.

(30) Height and length of vehicles.—(a) No vehicle unladen or with load shall exceed a height of 12 feet 6 inches.

(b) No vehicle shall exceed a length of 35 feet extreme overall dimensions, inclusive of front and rear bumpers.

(c) No combination of vehicles coupled together shall consist of more than two units and no such combination of vehicles shall exceed a total length of 45 feet.

(d) The load upon any vehicle operated alone, or the load upon the front vehicle of a combination of vehicles, shall not extend more than 3 feet beyond the front wheels of such vehicle or the front bumper of such vehicle if it is equipped with such a bumper.

(e) The length limitations imposed by this subsection shall not apply to vehicles operated in the day time when transporting poles, pipes, machinery, or other objects of a structural nature which cannot readily be dismembered, nor to such vehicles transporting such objects operated at night time by a public utility when required for emergency repair of public service facilities or properties or when operated under special permit as hereinafter provided for, but in respect to such night transportation every such vehicle and the load thereon shall be equipped with a sufficient number of clearance lamps on both sides and marker lamps upon the extreme ends of any projecting load to clearly mark the dimensions of such load.

(31) Spilling loads prohibited.—No vehicle shall be driven or moved on any highway unless such vehicle is so constructed or loaded as to prevent any of its load from dropping, sifting, leaking or otherwise escaping therefrom.

(32) Trailers and towed vehicles.—(a) When one vehicle is towing another the drawbar or other connection shall be of sufficient strength to pull all weight towed thereby and said drawbar or other connection shall not exceed 15 feet from one vehicle to the other except the connection between any two vehicles transporting poles, pipe, machinery or other objects of structural nature which cannot readily be dismembered.

(b) When one vehicle is towing another and the connection consists of a chain, rope, or cable, there shall be displayed upon such connection a white flag or cloth not less than 12 inches square.

(33) Wheel and axle loads.—(a) The gross weight upon any wheel of a vehicle shall not exceed the following:

1. When the wheel is equipped with a high pressure pneumatic, solid rubber or cushion tire, 8,000 pounds.

2. When the wheel is equipped with a low pressure pneumatic tire, 9,000 pounds.

(b) The gross weight upon any one axle of a vehicle shall not exceed the following:

1. When the wheels attached to the axle are equipped with high pressure pneumatic, solid rubber or cushion tires, 16,000 pounds.

2. When the wheels attached to the axle are equipped with low pressure pneumatic tires, 18,000 pounds.

(c) For the purpose of this subsection an axle load shall be defined as the total load on all wheels whose centers are included within two parallel transverse vertical planes not more than 40 inches apart.

(d) For the purpose of this subsection every pneumatic tire designed for use and used when inflated with air to less than 100 pounds pressure shall be deemed a low-pressure pneumatic tire and every pneumatic tire in-

flated to 100 pounds pressure or more shall be deemed a high pressure pneumatic tire.

(34) Gross weights of vehicles and loads.—(a) No vehicle or combination of vehicles shall be moved or operated on any highway when the gross weight thereof exceeds the following:

1. The gross weight upon any one axle of a vehicle shall not exceed the limits prescribed in subsection 33 of this article.
2. Subject to the limitations prescribed in subsection 33 of this article the gross weight of any vehicle shall not exceed 25,000 pounds.
3. Subject to the limitations prescribed in subsection 33 of this article the gross weight of any combination of vehicles shall not exceed 40,000 pounds.
4. The provisions of this or any other law to the contrary notwithstanding, it is hereby authorized and directed that in no case shall the gross weight in pounds of any vehicle or combination of vehicles exceed the product of the distance, in feet, between the front axle and the rear axle plus 40 feet, and a coefficient of 700.

(b) The department, upon registering any vehicle, under the laws of this State, which is designed and used primarily for the transportation of property or for the transportation of 10 or more persons, may require such information and may make such investigation or test as necessary to enable it to determine whether such vehicle may safely be operated upon the highways in accordance with all the provisions of this section. The department is hereby authorized to register every such vehicle for a permissible gross weight not exceeding the limitations set forth in this section. Every such vehicle shall meet the following requirements:

1. It shall be equipped with brakes as required by this section.
2. Every motor vehicle operated outside of business and residence districts shall have motive power sufficient to propel the vehicle or vehicles so operated on an ascending grade of 5% at a speed not less than 20 miles per hour.

(c) It shall be unlawful for any person to operate any vehicle or combination of vehicles of a gross weight in excess of that for which registered by the department or in excess of the limitations set forth in this section. In no case shall the department license or register a towed vehicle to carry a load, exclusive of the weight of such towed vehicle, greater than one and one-half times the licensed or registered capacity of the towing vehicle.

(35) Weighing vehicles and loads.—(a) Any officer or agent of the department having reason to believe that the weight of a vehicle and load is unlawful is authorized to require the driver to stop and submit to a weighing of the same either by means of portable or stationary scales and may require that such vehicle be driven to the nearest public scales.

(b) Whenever an officer upon weighing a vehicle and load, determines that the weight is unlawful, such officer may require the driver to stop the vehicle in a suitable place and remain standing until such portion of the load is removed as may be necessary to reduce the gross weight of such vehicle to such limit as permitted under this section. All material so unloaded shall be cared for by the owner or operator of such vehicle at the risk of such owner or operator.

(36) Permits for excess size and weight. — (a) The department

with respect to highways under its jurisdiction and local authorities with respect to highways under their jurisdiction may, in their discretion, upon application in writing and good cause being shown therefor, issue a special permit in writing authorizing the applicant to operate or move a vehicle or combination of vehicles of a size or weight of vehicle or load exceeding the maximum specified in this section or otherwise not in conformity with the provisions of this section upon any highway under the jurisdiction of the party granting such permit and for the maintenance of which said party is responsible.

(b) The application for any such permit shall specifically describe the vehicle or vehicles and load to be operated or moved and the particular highways for which permit to operate is requested.

(c) The department or local authority is authorized to issue or withhold such permit at its discretion; or, if such permit is issued, to limit or prescribe conditions of operation of such vehicle or vehicles, and may require such undertaking or other security as may be deemed necessary to compensate for any injury to any roadway or road structure.

(d) Every such permit shall be carried in the vehicle or combination of vehicles to which it refers and shall be open to inspection by any police officer or authorized agent of any authority granting such permit, and no person shall violate any of the terms or conditions of such special permit.

(37) Reduced load and speed limits.—Anything in this section to the contrary notwithstanding the department with respect to state highways and local authorities with respect to highways under their jurisdiction, may prescribe, by notice hereinafter provided for, loads and weights and speed limits lower than the limits prescribed in this and other laws, whenever in its or their judgment any road or part thereof, or any bridge or culvert, shall by reason of its design, deterioration, rain or other climatic or natural causes, be liable to be damaged or destroyed by motor vehicles, trailers or semi-trailers, if the gross weight and/or the speed limit thereof shall exceed the limits prescribed in said notice, and said department or local authorities may, by like notice, regulate or prohibit, in whole or in part, the operation of motor vehicles, trailers or semi-trailers on highways under its or their jurisdiction, or specified parts thereof, for limited periods or specified days, or parts of days, whenever in its or their judgment, such regulation or prohibition is necessary to provide for the public safety and convenience on said highways, or parts thereof, by reason of traffic density or intensive use thereof by the traveling public. The notice or the substance thereof, shall be posted at conspicuous places at termini of and all intermediate crossroads and road junctions with the section of highway to which said notice shall apply. After any such notice shall have been posted, the operation of any motor vehicle or combination contrary to its provisions shall constitute a violation of this section: *provided*, that no limitation shall be established by any county, municipal or other local authorities pursuant to the provisions of this subsection that would interfere with or interrupt traffic as authorized hereunder over state highways, including officially established detours for such highways, including cases where such traffic passes over roads, streets, or thoroughfares within the sole jurisdiction of such county, municipal or other local authorities, un-

less such limitations and further restrictions shall have first been approved by the state highway department. *Provided further*, that with respect to county roads, except such as are in use as state highway detours, the respective county road authorities shall have full power and authority to further limit the weights of vehicles upon bridges and culverts upon such public notice as they deem sufficient and existing laws applicable thereto shall not be affected by the terms of this section.

(38) Stopping and parking.—When stopped or parked for any purpose on or along any highway having a curb any or every truck, truck tractor, trailer, or semi-trailer shall be stopped or parked so that all wheels on the right side of each such vehicle shall be within eighteen inches of the curb and where such highway does not have a curb such vehicle shall stop or park so that all wheels shall be off or clear of the paved or hard surface roadway.

(39) Liability.—(a) Any person driving any vehicle, object, or contrivance upon any highway or highway structure shall be liable for all damages which said highway or structure may sustain as a result of any illegal operating, driving, or moving of such vehicles, object, or contrivance, or as a result of operating, driving or moving any vehicle, object, or contrivance weighing in excess of the maximum weight as provided in this section but authorized by a special permit issued as provided in this article.

(b) Whenever such driver is not the owner of such vehicle, object or contrivance but is so operating, driving, or moving the same with the express or implied permission of said owner, then said owner and driver shall be jointly and severally liable for any such damage.

(c) Such damage may be recovered in a civil action brought by the authorities in control of such highway or highway structure.

(40) Liability insurance and property damage insurance.—The owner or owners of all motor vehicles transporting goods of any kind for hire on the roads of South Carolina are hereby required, as a condition precedent for using the highways of this State to carry with some reputable insurance company liability insurance and property damage insurance in such sum as the public service commission may determine. The owner or owners of said motor vehicles operating for hire on the roads of South Carolina shall be required to attach inside of the cab of said vehicle in a conspicuous place an identification card showing the name of the insurance carrier and the amount of insurance provided, and no truck operating for hire shall be permitted on the roads of this State without the identification card attached inside of the cab. Any person, firm or corporation violating the terms of this provision shall be fined in an amount of not less than one hundred (\$100.00) dollars or not more than five hundred (\$500.00) dollars for the first offense and an amount of not less than five hundred (\$500.00) dollars or not more than two thousand (\$2,000.00) dollars for each subsequent offense, or shall suffer imprisonment of a term of not less than thirty (30) days or not more than one (1) year for the first offense and for not less than six (6) months or not more than three (3) years for each subsequent offense. This provision shall not repeal any law now existing relating to the subject matter of this subsection and shall be construed as being cumulative thereto.

See § 8530-2 herewith.

(41) **Truck and load weighing 20,000 pounds or more meeting vehicle passing from opposite direction.**—Upon meeting another vehicle passing from an opposite direction any truck and load weighing 20,000 pounds or more, being driven on the highways of South Carolina under the provisions of this section shall slow down to a speed of not exceeding twenty (20) miles per hour; shall drive to the extreme right of the road and, failing so to do, the driver thereof shall be guilty of a misdemeanor and punishable by a fine of not exceeding one hundred (\$100.00) dollars or thirty (30) days imprisonment and such violation of the said law shall be negligence per se.

Article IV—General Provisions

(42) **Enforcement.**—The state highway department is hereby authorized and directed to administer and enforce the provisions of this section with respect to state highways, and law enforcement officers generally shall also enforce this section within their respective jurisdictions.

(43) **Exemptions.**—The provisions of this section governing size, weight, and load shall not apply to fire apparatus; nor to vehicles owned by any agency of, the United States, the State of South Carolina, or any county or city or incorporated town therein; nor to trucks, guns, trailers, prime movers, tractors, or other military impedimenta of the national guard or the army of the United States; nor to road machinery and implements of husbandry temporarily moved upon the highway so as not to damage the highway nor unduly interfere with highway traffic.

(44) **Violations a misdemeanor—penalty.**—Any person violating any provision of article II of this section shall be deemed guilty of a misdemeanor and, upon conviction, shall be fined not less than five (\$5.00) dollars nor more than one hundred (\$100.00) dollars or imprisonment for not more than thirty (30) days; and any person violating any provision of article III of this section shall be deemed guilty of a misdemeanor and, upon conviction, shall be fined not less than twenty-five (\$25.00) dollars nor more than one hundred (\$100.00) dollars or imprisonment for not more than thirty (30) days.

(45) **Invalidity.**—If any article, subsection or provision of this section shall be held invalid by a court of competent jurisdiction, such invalidity held shall not affect, impair or invalidate any remaining articles, subsections, or provisions of this section.

(46) **Statute not applicable to private passenger motor vehicles.**—This section shall not apply to private passenger motor vehicles.

1938 (40) 1719; 1939 (41) 523.

§ 1625. **Offenses in regard to state highways—obstruction of drainage—placing objects injurious to vehicles—cutting trenches, etc., without a permit.**—It shall be unlawful for any person to wilfully obstruct ditches and drainage openings along said roads, to place obstructions upon said roads, or to throw or place on said roads any objects likely to cut or otherwise injure vehicles using same. It shall also be unlawful for any person, firm or corporation to cut trenches, lay pipes or tracks through, under, over or on said highways and bridges without first obtaining a permit from the state highway engineer; or to operate motor vehicles with chains upon or around the wheels, contrary to such regulations for the use of chains which may

be adopted and promulgated by the state highway commission. It shall also be unlawful to operate upon any of the public highways of this State any two-wheeled timber carts, with tongue or small wheel attached thereto, which comes in contact with the road, and it shall also be unlawful to operate any vehicle over said roads for the purpose of carrying timber or other loads, by which timber or any other character of load is allowed to strike or drag on the surface of the road: *provided, further*, that this proviso shall not apply to four-wheeled lumber carts where the load is so suspended as not to come in contact with the road. Any violation of the provisions of this section shall be deemed a misdemeanor and punished by the fine of not less than ten (\$10.00) dollars nor more than twenty-five (\$25.00) dollars or imprisonment for not more than fifteen (15) days for each offense.

1932 Code, § 1625; Cr. C. '22, § 634; 1920 (31) 1072; 1924 (33) 1182; 1930 (36) 1192.

See §§ 1659 and 1674 also.

See § 1623 (39) for liability for damage to highways.

§ 1626. School buses stop at railroad crossings—negligence of driver.—

(1) All motor driven vehicles used for the transportation of children to and from school, are hereby required to stop before crossing any railroad track: *provided*, that members of boards of trustees of any school or school district are hereby forbidden to employ any member of their respective board, or any relation within the second degree, as a driver of any school truck or trucks: *provided, further*, that publicly owned trucks, being used, or to be used, for the transportation of school children shall not be used for private purposes, but only in the service of the transportation of school children between their homes and the school which the said school children attend: *provided, further*, that in Colleton County, the county board of education for Colleton County shall permit the county farm agent and the county home demonstration agent to use the school buses of Colleton County for the transportation of Colleton County clubs of farm women and Colleton County 4-H club boys and girls to and from official club activities entirely within the State of South Carolina and farm men and women on farm tours in South Carolina, whenever such proposed trips will not interfere with the official transportation of school children. *Provided*, however, that the county board of education shall be reimbursed by the county farm agent and/or the county home demonstration agent for the use of said buses at the rate of twelve (12c) cents per mile for any such use. The flat rate of compensation of twelve (12c) cents per mile, above provided for, shall embrace and cover the expenses of gasoline, oil, repairs and the pay of the driver who shall be a regular school bus driver. The expenses incurred on any such trip or excursion, as provided for above, shall be borne ratably by the persons for whose benefit it is made.

(2) The negligence or carelessness of the driver shall not be imputed to the passengers on said motor driven vehicle.

(3) Any persons violating the provisions of paragraph one (1) of this section shall be fined not less than twenty (\$20.00) dollars, nor more than one hundred (\$100.00) dollars, or be imprisoned not less than ten (10) days nor more than thirty (30) days, within the discretion of the court.

1932 Code, § 1626; 1928 (35) 1320; 1938 (40) 1599.

For other provisions relating to school buses and drivers see §§ 1626-1, 1626-2 and 1626-3.

Although, under statute, negligence of bus driver is not imputed to passengers,

driver is bound by doctrine as to his own contributory negligence if he is a party in interest. *Fisher v. J. H. Sheridan Co.*, 182 S. C. 316; 189 S. E. 356.

§ 1626-1. Motor vehicles stop before passing school bus taking on or discharging school children.—All motor vehicles traveling upon the public highways of this State are required to come to a full and complete stop before passing any school bus which has stopped for the purpose of taking on and discharging school children and shall remain stopped until said children are taken on or discharged and until such school bus has moved on. Any driver of any motor driven vehicle failing to comply with the terms of this act shall be deemed guilty of a misdemeanor and fined not to exceed twenty (\$20.00) dollars or sentenced not to exceed twenty (20) days upon the public works of the county.

1934 (38) 1380.

Automobile passing school bus must stop regardless of which way it is traveling, word "passing" meaning "going by" regardless of whether automobile and bus are traveling in same direction. *Fisher v. J. H. Sheridan Co.*, 182 S. C. 316, 189 S. E. 356.

See generally. *Fisher v. J. H. Sheridan Co.*, 182 S. C. 316, 189 S. E. 356.

§ 1626-2. School bus operators be of same race as children they transport—liability of contractors for violation.—It shall be unlawful for any person to operate a school bus, while engaged in the transportation of pupils to or from the public schools in this State, unless he be of the same race as the pupils transported by him. Any violation of the provisions of this section is declared to be a misdemeanor and shall be punishable by a fine of not exceeding one hundred (\$100.00) dollars, or by imprisonment of not exceeding thirty (30) days, in the discretion of the court. Any person who holds a contract for the operation of any school bus and permits the violation of the provisions of this section, in respect to the bus that he is under contract to operate, shall forfeit all rights under his contract and the same shall be declared at an end.

1935 (39) 251.

§ 1626-3. School buses—equipment—use—operation—inspection—duties and powers of drivers.

(1) **School bus defined—definition.**—When used in this section "school bus" shall be construed to mean every motor vehicle owned by a public or governmental agency and operated for the transportation of children to or from school or privately owned and operated for compensation for the transportation of children to or from school.

(2) **Color—words paint on—dual wheels.**—Each and every school bus while being used in the transportation of school pupils, shall be substantially painted an orange color and shall display on the extreme rear end and sides of such bus body painted in black letters not less than eight (8) inches in height and five (5) inches in width with a stroke of not less than (1) inch in thickness or width the following words and letters and no others: "SCHOOL BUS—STOP—S. C. LAW." *Provided*, passenger cars used for transportation of members of the owner's family and incidentally oth-

ers for hire may not be required to carry the lettering provided for by this subsection. County boards of education may at their discretion require that all replacement or new buses placed in service in their respective counties shall be equipped with dual wheels.

(3) Windshield wiper—brakes—lights—rear view mirrors.—Each and every school bus shall be equipped with a power driven windshield wiper, adequate brakes and efficient lights which shall at all times when in use be in good working order; also with a rear view mirror or mirrors of such dimensions as will enable the driver, from the driver's seat, to see reflected in the same not only the occupants of the said vehicle but also the road to the left and to the rear of the said bus for a proper distance to adequately observe traffic in his rear.

(4) Driver supervise bus while operating.—The driver of every school bus while the same is being operated as such shall have general supervision of the same and it shall be the duty of said driver not to permit or allow any person in the school bus to occupy such a position as will interfere with the vision of the driver either to the front, either side or rear of the said vehicle while the same is in motion.

(5) Gasoline tank.—The gasoline tank of every school bus shall be filled, vented and located entirely out side of that part of the school bus utilized for carrying passengers.

(6) Seating space—aisle—seats—pupils riding in. — Sufficient seating space shall be provided so far as practicable for each and every passenger transported inside the bus; no aisle in the school bus shall be less than twelve inches in width; and all seats shall be securely fastened to the floor or body of the vehicle. All pupils must be within the body of the school bus at all times while the bus is in motion. They shall not be permitted to ride on the running boards or in any other place outside of the bus nor shall they be permitted to ride with heads or arms protruding through open windows.

(7) Entrance—exit.—Every school bus shall be provided with a front entrance-exit on the right side of the vehicle and a rear emergency exit or door conspicuously marked, on the inside "emergency door" and equipped with a fastening device capable of being quickly released in emergency, but entirely safe from accidental opening upon the application of any pressure from within the said bus. Except in event of an emergency no person shall be allowed to enter or leave the bus by any other than the front entrance-exit.

(8) Use of bus owned by school district.—No school bus owned by any school district shall be used other than for the transportation of pupils to or from school, except upon written permission of the board of trustees of the school district or such person as may be designated by them.

(9) Driver not leave while engine running.—No driver or operator shall leave the school bus while the engine is running.

(10) Stop receive or discharge passenger.—Each school bus must come to a complete stop with clutch disengaged before any passenger is permitted to alight or enter.

(11) Filling gasoline tank.—No gasoline tank on or in any vehicle used as a school bus shall be filled while the engine is running, or except in emergency, when there are pupils in the bus.

(12) **Stop before crossing railroad track.**—The operator of any school bus shall, before crossing at grade any track or tracks of any railroad, bring his vehicle to a full and complete stop within not less than (10) feet nor more than fifty (50) feet from the nearest rail of the track nearest to the front of such vehicle and shall after such stop ascertain if it is safe to proceed before crossing such track or tracks.

(13) **Not use alcoholic liquors or smoke tobacco in—conduct of children.**—The driver must be an experienced driver, of good moral habits, and neither he nor any pupil or any other person shall use alcoholic liquors or smoke any cigar, cigarette, pipe, tobacco or other substance in such vehicle during the time he is operating the same as a school bus. The driver shall be held responsible for the conduct of the children while riding in the bus and shall report to the governing head of the school to or from which the pupils are transported when the conduct of the pupils is beyond his control.

(14) **Drivers—pass examination—suspend.**—The highway department shall have the right to promulgate rules and regulations and/or provide a special examination for school bus drivers and no one shall be permitted to operate a school bus who cannot satisfactorily pass such examination. The privilege to operate a school bus may be suspended by the highway department in the case of any operator who is found operating a bus in a dangerous manner or violates the provisions of this section in such manner that the safety principles in this section are violated or any operator who may be found guilty of the use of intoxicants or who by his speech or conduct shall set an unwholesome example to the pupils.

(15) **Inspect.**—All school buses shall be subject to inspection at any time or place by officers of the state highway patrol or inspection forces. No school bus shall continue in operation in the transportation of pupils when found to be unsafe until unsafe conditions disclosed by such inspection shall have been corrected.

(16) **Color and construction provisions not applicable to certain buses.**—The provisions as to color and construction herein contained shall not apply to buses now in operation, but shall apply to all replacements thereof and to buses repainted after the enactment of this section.

(17) **Invalidity.**—If any subsection, word, phrase, clause, or provision of this section shall be deemed unconstitutional, such unconstitutionality shall not effect, impair or invalidate any of the remaining subsections, words, phrases, clauses, or provisions.

(18) **Penalties.**—The doing of anything prohibited by this section or failing to do anything required by this section shall constitute an offense and be unlawful and constitute a violation of this section. All violations of this section shall be deemed a misdemeanor and punishable by a fine of not less than five dollars or more than one hundred dollars or imprisonment in the county jail for not less than five nor more than thirty days.

1937 (40) 367.

§ 1626-4. Use school buses no longer used for school purposes only after removing marks of identification.—All school buses in this State, when no longer used for school purposes, and sold to any person for private or public use, must have all marks of identification, showing that these buses

were used by schools and school districts, removed before private or public use may be made of them. Any person violating the provisions of this section shall be subject to a fine not exceeding \$25.00, or imprisonment upon the public works of the county in which the offense is committed, for a period of not more than thirty (30) days.

1937 (40) 122.

§ 1627. Use of cut-outs and spotlights on private passenger motor vehicles.

—It shall be unlawful for any person driving any private passenger motor driven vehicle upon the public highways within this State to use cut-outs and spotlights thereon when driven upon any such highway: *provided*, spotlights may be used if the same shall be extinguished by the person using the same when within two hundred yards of an approaching vehicle. Any violation of the provisions of this section shall subject the offender, upon conviction, to a fine of not exceeding one hundred dollars or imprisonment of not exceeding thirty days. All fines and forfeitures collected under the provisions of this section shall be paid into the county treasury to be expended upon the highways of the county.

1932 Code, § 1627; 1922 (32) 973; 1937 (40) 222.

For cut-outs and spotlights for vehicles see § 1623 (10), (20).
 hicles other than private passenger ve-

§ 1628. Careless riding and driving of horses or mules or bicycles on public roads.

—It shall be unlawful for any person to ride or drive any horse or mule or bicycle upon any street or alley in any city or town or any public highway of this State, in a wilfully careless or reckless manner. Any person convicted of violation of this section shall be punished by a fine not exceeding one hundred dollars, or by imprisonment not exceeding thirty days.

1932 Code, § 1628; Cr. C. '22, § 580; Cr. C. '12, § 612; Cr. C. '02, § 439; 1901 (23) 747; 1937 (40) 222.

See § 1616 (31) for reckless driving by operators of motor vehicles.

In motorist's action for injuries sustained in collision with trucks which were stalled after dark on much-traveled, icy highway around curve below crest of hill, blocking entire highway,

charge with respect to the effect of this statute, when considered with charge as a whole was not reversible error. *Montgomery v. National Convoy & Trucking Co., et al.*, 186 S. C. 167, 195 S. E. 247.

§ 1629. Passing animals by motor vehicles.

—Whenever a person operating a motor vehicle shall meet on public highways any other person riding or driving a horse or horses or other draft animals, the person operating such motor vehicle shall reasonably turn the same to the right of the center of such highway, so as to pass without interference. Any person operating a motor vehicle shall, on overtaking any such horse, draft animal, pass on the left side thereof, and the rider, driver of such horse, draft animal, shall, as soon as practicable, turn to the right, so as to allow free passage on the left.

1932 Code, § 1629; Cr. C. '22, § 584; Cr. C. '12, § 605; 1905 (24) 965; 1937 (40) 222.

See § 1616 (6), (7), (8), for operation of motor vehicles on right side of highway, passing or overtaking vehicles.

The term "highways," as used in this

section, include the streets of the city of Columbia. Burns v. Kendall, 96 S. C. 385, 80 S. E. 621, 622.

§ 1630. Violation of sections 1629, 1618 and 1633 a misdemeanor.—Whoever shall violate the provisions of sections 1629, 1618, and 1633 shall be deemed guilty of a misdemeanor, and, upon conviction, be fined not less than ten dollars nor more than one hundred dollars, or imprisonment for not more than thirty days.

1932 Code, 1631; Cr. C. '22, § 586; Cr. C. '12, § 610; 1905 (24) 965.

§ 1631. Operate motor vehicles manufactured or assembled on or after January 1, 1937, without safety glass unlawful.—Except as hereinafter otherwise provided, it shall be unlawful to operate on any public highway or street in this State, any motor vehicle which is registered in the State of South Carolina and which shall have been manufactured or assembled on or after January 1, 1937, unless such motor vehicle be equipped with safety glass wherever glass is used in partitions, doors, windows or windshields. The term "safety glass" as used herein shall be construed as meaning glass so treated or combined with other materials as to reduce, in comparison with ordinary sheet glass or plate glass, the likelihood of injury to persons by objects from external sources or by glass when the glass is cracked or broken. The division of motor vehicles shall approve and maintain a list of the approved types of glass, conforming to the specifications and requirements for safety glass as set forth in this section and in accordance with the standards recognized by the United States bureau of standards, and shall not issue a license for any motor vehicle subject to the provisions of this section, unless such motor vehicle be equipped as herein provided with such approved types of glass. The division of motor vehicles shall require dealers to certify in bills of sale and owners in certificate of title the type of glass used in partitions, doors, windows and windshields of each car sold and whether it was manufactured or assembled after April 6, 1936. The operator, owner or custodian of any motor vehicle which is operating in violation of the provisions of this section shall be deemed guilty of a misdemeanor and shall be punished by a fine of ten (\$10.00) dollars or ten (10) days in jail or both.

1936 (39) 1399.

§ 1632. Motor vehicle designed transport property have outside driver's mirror.—It shall be unlawful to operate upon any of the highways of this State any motor vehicle designed particularly for transportation of property, unless the same be provided with a mirror so fixed in front of and to the left of the seat of the operator as to enable him to observe the road and traffic in the immediate rear of his vehicle. Any violation of the provisions of this section is declared to be a misdemeanor and upon conviction therefor the offender shall be subject to a fine of not less than five (\$5.00) dollars nor more than fifty (\$50.00) dollars, or to a term of imprisonment of no less than five (5) days nor more than fifteen (15) days.

1936 (39) 1712.

Violation is simple negligence per se.—In action for death of motorist who was killed when defendant's truck driver attempted a left turn onto side road and collided with motorist who was passing truck, violation of statute requiring truck

to be equipped with a rear-view mirror constituted simple negligence per se of defendant and was some evidence to be considered on the issue of gross negligence. *Dobson v. Henrietta Mills*, 187 S. C. 281, 197 S. E. 313.

§ 1633. Duty of person operating motor vehicle on approaching a horse.—Upon approaching a person walking in the roadway of a public highway or a horse or other draft animal, being ridden or driven thereon, a person operating a motor vehicle shall give warning of its approach by signaling with a horn, bell or otherwise not calculated to frighten such animals, and use every reasonable precaution to insure the safety of such person or animals, and, in the case of horses or other draft animals, to prevent frightening the same, and at once reduce the speed at which such vehicle is being operated and hold same under control, and if such horses or other draft animals appear frightened, to reduce the speed to not more than one-half the speed permitted by section 582, Criminal Code, 1922, and bring same to stop if apparently necessary for the safety of such person or animal, having due regard to safety of passengers in such motor vehicle. 1932 Code, § 1633; Cr. C. '22, § 583; Cr. C. '12, § 603; 1905 (24) 965.

Section 582, Criminal Code, 1922, was repealed by act of 587 of 1932.

§ 1634. Operator of motor vehicle to stop for horses or other draft animal to pass.—A person operating a motor vehicle shall, at request or upon signal by putting up the hand, from a person riding or driving a restive horse or horses, or other draft animals, bring such motor vehicle immediately to a stop, if necessary, having due regard for safety of persons, vehicles and animals, and if traveling in opposite direction, remain stationary so long as may be reasonable to allow such horses or animals to pass. And if traveling in the same direction, the person or persons operating the motor vehicle shall not pass any person or persons in charge of an animal or animals, if requested by such person or persons in charge of such animal or animals not to do so, until such person or persons have gotten to a place where they could drive such animal or animals out of the road, or when passage could be safely effected, or when such person or persons without just cause and excuse intentionally obstruct the passage of any motor vehicle: *provided*, that in case such horse or animal appear badly frightened, or he is requested to do so, the person operating such vehicle shall cause the motor of such vehicle to cease running so long as shall be reasonably necessary to prevent accident and insure the safety of persons, vehicles and animals.

1932 Code, § 1634; Cr. C. '22, § 587; Cr. C. '12, § 604; 1905 (24) 965; 1906 (25) 79.

The true rule is that the driver must exercise the care which ordinary prudence requires under the circumstances; and this does not impose the absolute

duty to stop on discovery that a horse is frightened, but to stop if ordinary prudence requires it. *Gue v. Wilson*, 87 S. C. 144, 69 S. E. 99.

§ 1635. Penalty as to persons operating motor vehicle.—Any person, or persons, violating any of the provisions of section 1634 shall, for each offense, be deemed guilty of misdemeanor, and, upon conviction thereof by any court of competent jurisdiction, be liable to a fine of not less than

twenty dollars nor more than one hundred dollars, or imprisonment at hard labor for a term not exceeding thirty days.

1932 Code, § 1635; Cr. C. '22, § 588; Cr. C. '12, § 609; 1906 (25) 79.

§ 1637. Unlawful to allow minor under fourteen years of age to operate motor vehicle on highways.—It shall be unlawful for the owner of any motor vehicle to allow any minor under the age of fourteen (14) years to drive or operate such motor vehicle upon the public highways of the State. It shall be unlawful for any minor under the age of fourteen years to drive or operate any motor vehicle upon the public highways of the State, whether or not the same be with the consent of their parents or guardians. Any person or persons allowing or consenting to a minor under fourteen (14) years driving or operating his or their motor vehicle shall be guilty of a misdemeanor, and, upon conviction, shall be fined in a sum not exceeding one hundred (\$100.00) dollars, or be imprisoned for a period not exceeding thirty (30) days. Any minor under the age of fourteen (14) years who violates the provisions of this section shall be deemed guilty of a misdemeanor, and, upon conviction, shall be liable to the same penalty as is above provided.

1932 Code, § 1637; Cr. C. '22, § 590; 1920 (31) 895; 1933 (38) 214.

§ 1638. Driver of motor vehicle striking any person or vehicle to stop and render assistance.—Every person driving a motor vehicle which strikes or hits any person or another vehicle shall stop such motor vehicle at once and render such assistance as he or she can, and shall, upon request, give his or her name and post office address and the license of his motor vehicle. Any person violating the provisions of this section shall be guilty of a misdemeanor, and, upon conviction, shall be fined not more than five hundred dollars or imprisoned not more than one year or both.

1932 Code, § 1638; Cr. C. '22, § 591; 1920 (31) 752.

In action for actual and punitive damages sustained when servant of corporation for which defendants were trustees in liquidation negligently and willfully drove corporation's truck into rear of plaintiff's automobile, evidence as to conduct of servant immediately before

and after alleged collision was relevant, and evidence as to any violation of "hit and run" statute was relevant on question whether truck was being operated in a willful and wanton manner. *Hallman v. Cushman et al.*, 196 S. C. 402, 13 S. E. (2d) 498.

§ 1639. Peace officers receive no portion of fines imposed for violating motor vehicle laws.—No municipal policemen, rural policemen, magistrates' constables, sheriffs, deputy sheriffs and highway patrolmen or any other peace officer shall receive as compensation any portion of any fine imposed for the violation of the motor vehicle license law or laws relating to motor vehicle traffic in this State. All such fines shall be paid over by the magistrate, or person collecting same, to the county treasurer of the county in which such fines are collected. Any person violating the terms hereof shall be deemed guilty of a misdemeanor, and, upon conviction, subject to a fine of not less than fifty (\$50.00) dollars nor more than one hundred (\$100.00) dollars or imprisonment for not less than twenty days nor more than thirty days.

1934 (38) 1200.

§ 1640. Gates on roads—requisite width—condition—hitching post.—It shall be lawful for any citizen of this State over whose land any road may pass, other than a public highway, to erect gates thereon, and the person owning or erecting such gates shall be liable to be indicted for a nuisance if they fail to keep them as herein provided; that is to say, the owner or keeper of any gate which obstructs a highway, either public or private, shall have such gate constructed so as to afford a roadway between the posts of at least nine feet, and shall keep the said gate in such repair and condition as to be easily opened and shut, and that the latch or fastening will adjust itself on being closed; and, further, that the said keeper shall erect or cause to be erected, a convenient distance from such gate, a suitable hitching post for the convenience of those traveling in vehicles. The owner or keeper of such gate, who shall fail to comply with the requirements of this section, shall upon conviction, for each offense, pay a fine of not less than twenty-five dollars, or be imprisoned in the county jail for a term not exceeding thirty days.

1932 Code, § 1640; Cr. C. '22, § 592; Cr. C. '12, § 624; Cr. C. '02, § 449; G. S. 1067; R. S. 359; 1885 (19) 59.

A neighborhood road or path is with- Jefcoat, 11 Rich. 529, 100 Am. Dec. 116,
in the provisions of this section. State v. 95 Am. St. Rep. 321.

§ 1641. Penalty for interfering with gates.—In case any person or persons shall interfere with, injure, destroy or wilfully leave open any such gates, such person or persons shall be liable to indictment as for a misdemeanor.

1932 Code, § 1641; Cr. C. '22, § 593; Cr. C. '12, § 625; Cr. C. '02, § 450; G. S. 1068; R. S. 360; 1855 (12) 408.

§ 1642. Erection of gates on highways.—County boards of commissioners of the several counties in this State are hereby authorized, on application to them for the purpose, to allow the erection of gates upon the highways of the State, wherever in their judgment the same may be expedient and not detrimental to the public interest, subjecting the person or persons owning or erecting such gates, nevertheless, to the pain and penalties prescribed in section 1640.

1932 Code, § 1642; Cr. C. '22, § 594; Cr. C. '12, § 626; Cr. C. '02, § 451; G. S. 1072; R. S. 361; 1878 (16) 361; 1893 (21) 481.

§ 1643. Regulation respecting gates.—If any person shall wilfully cut or destroy any gate which may be put up by the authority of the commissioners in pursuance of the last preceding section whilst the same is kept in good order, such person shall pay a penalty of twenty dollars, to be recovered by an action at the suit of the county before a magistrate. And if any person shall wilfully leave open any gate as aforesaid, such person shall be liable to pay a like penalty, to be recovered as aforesaid.

1932 Code, § 1643; Cr. C. '22, § 595; Cr. C. '12, § 627; Cr. C. '02, § 452; G. S. 1073; 1821 (9) 509.

§ 1644. Penalty for damaging roads.—If any person shall wilfully destroy, injure, or in any manner hurt, damage, impair or obstruct any of the public highways, or any part thereof, or any bridge, culvert, drain, ditch, causeway, embankment, wall, toll gate, toll house, or other erection belonging thereto, or any part thereof, the person so offending shall, upon conviction

thereof, be imprisoned not more than six months, or pay a fine not exceeding five hundred dollars, or both, at the discretion of the court, and shall be further liable to pay all the expenses of repairing the same.

1932 Code, § 1644; Cr. C. '22, § 596; Cr. C. '12, § 628; Cr. C. '02, § 453; G. S. 1074; R. S. 362; 1788 (9) 311; 1824 (9) 545; 1885 (19) 307.

See §§ 1623 (39) also.

See § 1652 and note as to temporary obstruction.

Question as to purpose of obstruction of highway is one for jury.—Whether logs are placed in highway to protect the

land of defendant or to obstruct the highway is for the jury, and if so placed as to obstruct the road by design, defendant is guilty. State v. Havird, 88 S. C. 228, 70 S. E. 721.

§ 1645. Damage to roads in Charleston County.—It shall be unlawful for any person, persons, firm, firms, corporation or corporations to injure, damage or destroy any road or roads in Charleston County which have been surfaced with concrete, asphalt, sand, clay, gravel, washer gravel or other surfacing material, whether done by motor vehicle, farm implement or otherwise. Violation of this section shall be deemed a misdemeanor, punishable by a fine of not exceeding one hundred (\$100.00) dollars or imprisonment in the county jail not exceeding thirty (30) days or both of them.

1932 Code, § 1645; 1929 (36) 133.

§ 1647. Injury to bridges, etc.—Whoever shall wantonly or wilfully injure or destroy any bridge or bridges built by authority of the commissioners of any two counties over any river or creek lying between such counties, on indictment and conviction of the same at the court of general sessions in the county where the offense was committed, shall be subject to such fine and imprisonment as the said court shall direct: *provided*, that nothing herein contained shall extend, or be construed to extend, to any of the toll bridges already established by law or that may be hereafter established. Any person or persons who shall wilfully or maliciously injure or destroy, by floating rafts or in any manner, any bridge on any public roads in this State, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined in a sum not less than fifty nor more than five hundred dollars, or be imprisoned not less than thirty nor more than ninety days, in the discretion of the court: *provided*, that nothing herein contained shall affect the right of action for damages in a civil suit against the person or persons so injuring or destroying any such bridge.

1932 Code, § 1647; Cr. C. '22, § 597; Cr. C. '12, § 629; Cr. C. '02, § 454; G. S. 2509, 2510, 2511; R. S. 363; 1825 (9) 570; 1881 (17) 570.

§ 1648. Obstructing ditches and drains.—Whoever shall obstruct or cause to be obstructed, any ditch or drain on the side of any road which has been, or may hereafter be, constructed under the authority and at the expense of the State, or any ditch or drain made as aforesaid, to drain water from any part of the said roads, or any of them, by throwing into the said ditches or drains any earth, logs, trees, brushes or other things whatsoever, and shall not immediately remove the same, when required, shall be deemed guilty of a nuisance, and, on conviction thereof, shall be fined in a sum not exceeding ten dollars nor less than two dollars, and shall be further liable for the expense of removing the same.

1932 Code, § 1648; Cr. C. '22, § 598; Cr. C. '12, § 630; Cr. C. '02, § 454; 1826 (9) 570.

§ 1649. Protection of plants, shrubs and trees along highway.

(1) **Marking of beautified sections of highway.**—Whenever the lands adjoining any public road or highway in this State shall be beautified by the planting or maintaining of flowers or ornamental trees or shrubs on the lands adjoining the same by any agreement of the land owners adjoining said road or by their permission, such stretch of road shall be marked at either end by the road authorities of such county or counties wherein it lies by some suitable sign showing that the stretch of road between such signs has been beautified.

(2) **Unlawful to injure, etc., plants along such highway.**—When any stretch of road shall have been so designated and marked by the road authorities of any county or counties it shall be unlawful for any person to dig, pull up, gather, remove, cut, maim, break or injure in any way, including, any injury done by fires intentionally set, any wild, cultivated or ornamental plants, shrubs and trees situated on or along any such marked stretch of any public road or highway, or any public or privately owned land lying along such road: *provided*, that the provisions of this section shall not apply where the acts hereby prohibited are done by or under the instructions of the proper authorities lawfully in charge of such public roads, highways or lands or by or with the permission of the owner of any privately owned lands: *provided, however*, that the provisions of this section shall only apply to the hard-surface roads of this State, except in Charleston County.

(3) **Penalty.**—Any person violating the provisions of this section shall be deemed guilty of a misdemeanor and be punished by a fine of not exceeding one hundred (\$100.00) dollars or imprisonment not exceeding thirty (30) days or both.

(4) **Right to recover damages not affected.**—Nothing herein contained shall affect the right of any person interested to recover damages in a suit, action or proceeding for the commission of any of the acts and deeds hereby prohibited.

1932 Code, § 1649; 1924 (33) 1054.

§ 1650. Cutting down shade trees on public roads.—Whoever shall wilfully or wantonly cut down or kill any tree growing within ten feet of any road which shall be laid out, altered or mended by authority of the county board of commissioners or the county supervisor of any county, and which shall, by direction of the highway surveyor in charge of such road, have been left standing as convenient for shade to the said road, for each tree so cut down or killed shall be fined twenty-five dollars by any court of competent jurisdiction.

1932 Code, § 1650; Cr. C. '22, § 599; Cr. C. '12, § 633; Cr. C. '02, § 457; G. S. 2512; R. S. 364; 1788 (9) 312.

§ 1651. Unlawful to cut certain trees along highways in Beaufort County.

—Whoever shall cut down, mutilate or kill any growing tree, growing within ten feet of any public road or highway which shall be laid out, altered or mended by authority of the county board of commissioners, or the county supervisor, of Beaufort County, without the consent in writing of the county supervisor, upon conviction thereof, shall pay a fine of not less than twenty-five dollars nor more than one hundred dollars, or be im-

prisoned for not longer than thirty days: *provided*, that the county supervisor shall not give such consent in writing without a majority vote of the county commissioners.

1932 Code, § 1651; Cr. C. '22, § 600; Cr. C. '12, § 634; 1910 (26) 701.

§ 1652. Penalties obstruct roads.—If any person shall cause any obstruction to be placed in any part of the said highways or on any bridge or causeway thereof, so as to obstruct or render dangerous or difficult the passage of carriages, or other traveling thereon, and shall not immediately remove the same when required, he shall be deemed guilty of a nuisance, and, on conviction thereof before a magistrate, shall be fined in a sum not exceeding ten dollars nor less than two dollars, and shall be further liable for the expense of removing the said nuisance.

1932 Code, § 1652; Cr. C. '22, § 601; Cr. C. '12, § 635; Cr. C. '02, § 458; G. S. 1075; R. S. 365; 1824 (9) 545.

Section applicable only to obstruction of "public roads".—This section is applicable only to the obstruction of public highways, that is, those highways that are under the jurisdiction of the state or county authorities, such as are laid out or improved at public expense. *State v. Mellette*, 106 S. C. 224, 91 S. E. 4.

And boundary of highway is a question of fact.—The question of where the line of the highway runs is, at the most, a question of fact upon which the court can express no opinion. *Steverson v. Orangeburg County*, 128 S. C. 335, 121 S. E. 789, 790.

In the dissenting opinion in *Steverson v. Orangeburg County*, 128 S. C. 335, 121 S. E. 789, 790, it was held that a culvert placed at the intersection of a highway and a neighborhood road was not a part of the highway.

But section does not ordinarily apply to neighborhood roads.—This section is applicable to that class of highways, commonly called neighborhood roads, which are public highways only in the sense that the public have acquired the legal right to use them. *State v. Mellette*, 106 S. C. 224, 91 S. E. 4, 5; *State v. Harden*, 11 S. C. 360, 1 Am. St. Rep. 843, 107 Am. St. Rep. 246.

But it applies to neighborhood roads, which the public have acquired the right to use by prescription. *State v. Tyler*, 54 S. C. 294, 32 S. E. 422; *State v. Floyd*, 39 S. C. 23, 17 S. E. 505; *State v. Sartor*, 2 Strob. 60; *State v. Toale*, 74 S. C. 425, 54 S. E. 608; *State v. Knotts*, 70 S. C. 400, 50 S. E. 9; *Earle v. Poat*, 63 S. C. 439, 41 S. E. 525; *State v. Washington*, 80 S. C. 376, 61 S. E. 896.

And adverse use to establish prescriptive right. *State v. Rodman*, 86 S. C. 154, 68 S. E. 343, 7 A. L. R. 1536.

And the actual opening of road by county commissioners may be shown by any witness who knows the fact. *State v. Kendall*, 54 S. C. 192, 32 S. E. 300.

And the proceedings of the commis-

sioners in opening the road may be collaterally attacked for jurisdictional defects, but not for mere irregularities. *State v. Kendall*, 54 S. C. 192, 32 S. E. 300.

For testimony as to plat showing survey of road, see *State v. Crocker*, 49 S. C. 242, 243, 27 S. E. 49.

Section is applicable only to temporary obstructions.—An indictment for obstructing a highway by building a house thereon cannot be based on this section as this section applies only to temporary obstructions. *State v. Wolfe*, 61 S. C. 25, 39 S. E. 179, 180.

Indictment is the proper remedy for obstructing highways. *Commissioners v. Taylor*, 2 Bay 282, 1 Am. Dec. 647, 33 Am. Dec. 714, 14 Am. St. Rep. 282, 57 Am. St. Rep. 745, 18 L. R. A. 146, 26 L. R. A. 463, 18 A. L. R. 540.

And court of sessions has concurrent jurisdiction with magistrate's court.—The court of sessions has concurrent jurisdiction with the magistrate court of one indicted for willfully obstructing and closing the public road by erecting a house thereon. *State v. Wolfe*, 61 S. C. 25, 39 S. E. 179, 180.

But magistrate's court does not have jurisdiction as to obstruction where penalty not limited.—A magistrate's court has no jurisdiction as to an obstruction of a highway or neighborhood road, an indictable offense under the common law, where the penalty therefor has not been limited. *State v. Mellette*, 106 S. C. 224, 91 S. E. 4, 5.

As to jurisdiction of magistrate's courts in criminal cases, see Const. of 1895, Art. 5, § 21, and note thereto.

The mere obstructing of a highway is in itself a public nuisance. *State v. Harden*, 11 S. C. 360, 366, 1 Am. St. Rep. 843, 107 Am. St. Rep. 246.

See generally, as to what roads the section applies. *State v. Gregg*, 2 Hill 387; *State v. Mobley*, 1 McM. 44, 47, 39 L. R. A. 656; *State v. Caldwell*, 2 Speer 163; *State v. Randall*, 1 Strob. 110, 47 Am.

Dec. 548, 81 Am. Dec. 588; State v. Am. Dec. 119, 26 L. R. A. 460, 1 A. L. R. Thompson, 2 Strob. 12, 16, 47 Am. Dec. 891; State v. Duncan, 1 McC. 404, 39 L. 588, 50 Am. Dec. 649, 58 Am. Dec. 248, 67 R. A. 656, 42 L. R. A. 320.
Am. Dec. 203, 42 L. R. A. 321; State v. **As to what are public roads**, see Kirby Sartor, 2 Strob. 60, 64; State v. Huffman, v. Southern Ry., 63 S. C. 494, 41 S. E. 2 Rich. 617, 619; State v. Lythgoe, 6 Rich. 765.
112; State v. Pettis, 7 Rich. 390, 392, 100

§ 1653. Unlawful to plow or interfere with roads, Charleston, Lancaster and Beaufort Counties.—It shall be unlawful for any person or persons to place any dirt, trash, stone, glass, brick, brush, mud, or other matter or substance in any of the public roads of Charleston, Lancaster, and Beaufort Counties, or to interfere in any manner with any of the ditches or drains of said roads, or to plow in or into said roads, ditches or drains. Any person violating any of the provisions of this section, shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than five dollars nor more than one hundred dollars, or by imprisonment at hard labor for not more than thirty days.

1932 Code, § 1653; Cr. C. '22, § 602; Cr. C. '12, § 636; 1910 (26) 785; 1909 (25) 145.

§ 1654. Highways to be drained in Newberry County—misdemeanor to obstruct.—It shall be the duty of the supervisor and county commissioners in Newberry County, or any person having charge of road improvement in said county, to give each highway a proper and sufficient drainage, and any person who shall obstruct any ditch or culvert in Newberry County, and thereby prevent the proper drainage of any highway, by plowing into the same, or by any manner of obstruction, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than five dollars nor more than twenty dollars for each offense, or imprisoned for not less than ten days nor more than twenty days; and it is hereby made the special duty of the supervisor to strictly enforce this section.

1932 Code, § 1654; Cr. C. '22, § 603; Cr. C. '12, § 637; 1909 (26) 133.

§ 1655. Penalty for improper use of tools.—Any person using the plows, scrapers, or other tools furnished for use on the bridges or highways by the county board of commissioners, for other purposes than the purpose for which the same were furnished, shall be fined not more than fifty dollars nor less than five dollars, or imprisonment not less than ten nor more than thirty days.

1932 Code, § 1655; Cr. C. '22, § 604; Cr. C. '12, § 643; 1902 (23) 1006.

§ 1656. Refusal to perform road duty in certain towns and cities.—Any person liable to perform road duty on the streets or public ways of any town or city of over one thousand inhabitants, failing or refusing to perform such work, or to compound as provided by the ordinance of said town or city, upon conviction thereof before the mayor or acting mayor, intendant or acting intendant (who may bring such persons before him by warrant), shall be fined not exceeding ten dollars, or be imprisoned in the city, town or county jail for a period not exceeding thirty days.

1932 Code, § 1656; Cr. C. '22, § 605; Cr. C. '12, § 649; 1908 (25) 1023.

§ 1657. Misdemeanor for road engineer to receive work not in accordance with contract.—Should the road engineer or the supervisor of Williams-

burg and York Counties receive any bridge or section of road let out by contract, unless the same shall have been completed according to the plans and specifications thereof, in every particular and detail, he shall be subject to indictment for a misdemeanor, and, upon conviction, shall be punished in the discretion of the court.

1932 Code, § 1657; Cr. C. '22, § 606; Cr. C. '12, § 656; 1908 (25) 1098, 1175.

§ 1658. No ditches to be cut across any highway in Clarendon County.—

It shall be unlawful for any person or persons to cut any ditches across any of the public highways of Clarendon County without first having obtained a written permit from the county board of commissioners, who shall require the person or persons applying for such permit to put in the ditch or ditches they may cut across the public highways terra cotta piping sufficiently large to provide ample water passage. Any person or persons violating this section shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine not exceeding twenty-five dollars, or imprisonment not exceeding thirty days upon the public works of said county.

1932 Code, § 1658; Cr. C. '22, § 607; Cr. C. '12, § 658; 1907 (25) 657.

§ 1659. Obstruction of highways prohibited—misdemeanor.

(1) **Dirt, trash, stones, etc., in road.**—It shall be unlawful for any person or persons to place any dirt, trash, stone, glass, brick, brush, mud or other matter or substance in any of the public roads of this State calculated to injure such roads or to interfere in any manner with any of the ditches or drains of said roads, or to plow in or into said roads, ditches or drains: *provided*, this section shall not apply to persons engaged in working said roads or highways under authority of law. Any person violating any of the provisions of this section shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than ten dollars nor more than one hundred dollars, or by imprisonment at hard labor for not more than thirty days. It shall be the especial duty of all county boards of commissioners, township commissioners or other officers charged with similar duties to see to the enforcement of the provisions of this section: *provided*, that the provisions of this section shall not apply to Greenwood, Saluda, Spartanburg, Laurens, Berkeley, Pickens, Greenville, Kershaw, Chesterfield, Bamberg and Cherokee Counties.

(2) **Cumulative.**—This section shall not be deemed or construed to repeal any statutes of this State relating to the obstruction of public highways nor any remedy provided therefor.

1932 Code, § 1659; Cr. C. '22, § 608; 1915 (29) 217.

See §§ 1625 and 1674 also.

§ 1660. Owners of lands remove trees near roads—Lancaster County.—

Every owner of land within one hundred feet of any public road in Lancaster County, and paralleling the same, is hereby required to remove any and all trees therefrom, except fruit trees, within six months after notice in writing by the county commissioners of said county.

Any refusal to comply with the provisions of this section shall subject the offender to a fine of not more than one hundred dollars or imprisonment for not more than thirty days.

1932 Code, § 1660; Cr. C. '22, § 609; 1920 (31) 724.

§ 1661. Drainage of lands into roads prohibited, Pickens County.—It shall be unlawful in Pickens County for any owner of lands along any public road or highway in said county to make or erect any terrace, ditch or sluice upon such lands in such manner as to drain the water therefrom upon and into such road or highway. Any such person convicted of the violation of the provisions of this section shall suffer imprisonment for not more than thirty days, or pay a fine of not more than one hundred dollars.

1932 Code, § 1661; Cr. C. '22, § 610; 1919 (31) 61.

§ 1662. Closing of public roads in Saluda County by flooding, etc., with water or erection of dam, etc.—From and after the passage of this section, it shall be unlawful for any person, firm, or corporation in the State of South Carolina, to cover, submerge, or close any public road or bridge in the county system of public roads in Saluda County, which are maintained by the county, by the erection of any dam, canal, or waterway, or by creating any artificial lake or reservoir, without first entering into an agreement with the board of county commissioners or other governing body within the county where such roads proposed to be closed are and fixing by agreement with the county board of commissioners or other governing body of Saluda County, the terms and conditions upon which such roads may be submerged or closed, and fixing the value to the county of such roads as may be closed, or entering into contract whereby such persons, firm, or corporation as may desire to close any such road or roads, to relocate such roads or substitute new roads for the public travel in such places as may be determined necessary by the county board of commissioners or other governing body of Saluda County at the expense of such person, firm, or corporation who may require the closing of said road; and any person, firm, or corporation impounding any water so as to submerge or close any county public road within Saluda County, without obtaining the permission of the county board of commissioners or other governing body of Saluda County, or without entering into agreement with the county authorities for the replacement of such roads or the substituting of other roads in their stead, shall, in addition to the liability for damages suffered by the county for the closing of such roads, be subject to a fine of not less than five hundred (\$500.00) dollars for each and every road closed or rendered useless for public travel by reason of such impounded water; and the proper county officials of Saluda County in which roads have been closed or inundated by water as aforesaid, shall have the right and power to institute such suit as may be necessary to enforce the payment of such damages as may have been suffered by the county, as well as to enforce the payment of the penalty or fine herein provided for.

1932 Code, § 1662; 1931 (27) 394.

§ 1663. Negligent or wilful placing in highways of substances injurious to automobile tires unlawful.—Whosoever shall carelessly, negligently or wilfully place or cause to be placed upon any public highway any glass, nails, tacks or other metal substance calculated to puncture or otherwise injure automobile tires passing over the same, shall be guilty of a misdemeanor, and, upon conviction, subject to a fine of not more than one hundred dollars, or imprisonment for not more than thirty days.

1932 Code, § 1663; Cr. C. '22, § 611; 1918 (30) 765.

§ 1664. Placing glass, nails, etc., on highways prohibited—disposition of fines.—It shall be a misdemeanor for any person to place, throw or leave any broken glass, glass bottles, scrap iron, tin cans or pointed nails within any highway in the State of South Carolina, and any person violating the terms of this section shall be fined not less than ten dollars nor more than fifty dollars, or be imprisoned not less than ten days nor more than thirty days. Said fines to go to the public school funds of the county in which the offense was committed.

1932 Code, § 1664; Cr. C. '22, § 612; 1920 (31) 748.

See § 1623 (31).

§ 1665. Hauling of logs, etc., over public highway prohibited unless fastened with chains.—It shall be unlawful for any person, firm or corporation, their agents or employees, to haul round logs, lumber, crossties, and barrels over or upon any of the public highways in this State unless the said logs, lumber, crossties, and barrels shall be securely fastened, with chains, on such vehicle, and the links of said chain, or chains, shall not be of less dimension than one-half ($\frac{1}{2}$) inch in diameter. Any person violating the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction shall be fined a sum not exceeding one hundred (\$100.00) dollars, or imprisoned not exceeding thirty (30) days.

1932 Code, § 1665; 1930 (36) 1325.

See § 1623 (31).

§ 1666. Hauling timber, etc., in Clarendon and Aiken Counties regulated.—It shall be unlawful for any person, firm or corporation, or their or its agents, employees or servants to haul, convey or transport any logs, timber or lumber on or over any of the public roads or highways of Clarendon and Aiken Counties with any vehicle having less than four (4) wheels, or to haul, convey or transport any logs, timber or lumber on or over any of the public roads or highways of said county in any manner whereby any part of the load comes in contact with the surface of the road or highway: *provided*, that the county board of commissioners, in their discretion, except in Clarendon County, may permit for a definite period of time, the transportation of logs, timber or lumber otherwise than herein provided; the parties so transporting such logs, timber or lumber being required to file a good and sufficient bond in an amount sufficient to cover the maximum possible damage to the roads, bridges and highways over which such transportation is allowed or permitted and conditioned to restore the said roads, bridges and highways to their original condition. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punishable by a fine of not less than five (\$5.00) dollars nor more than one hundred (\$100.00) dollars, or by imprisonment for not more than thirty (30) days.

1932 Code, § 1666; Cr. C. '22, § 613; 1921 (32) 140; 1922 (32) 820.

§ 1667. Hauling timber, etc., over highways, Dillon, Lee, Orangeburg and Barnwell Counties.—It shall be unlawful for any person or persons, engaged in the sawmill, lumber, timber or logging business, to haul, convey or transport any logs, timber or lumber on or over any of the public roads or highways of Dillon and Lee and Orangeburg and Barnwell Counties,

with any vehicle having less than four wheels, or to haul, convey or transport any logs, timber or lumber on or over any of the public roads or highways of said counties in any manner, except as hereinafter provided: *provided*, that the county board of commissioners, in their discretion, may permit, for a definite period of time, the transportation of logs, timber or lumber otherwise than herein provided; the party so transporting such logs, timber or lumber shall be required to file a good and sufficient bond in an amount sufficient to cover the maximum possible damage to the roads, bridges and highways over which such transportation is allowed or permitted, and conditioned to restore the said roads, bridges and highways to their original condition. Any person violating any of the provisions of this section shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than five dollars, nor more than one hundred dollars, or by imprisonment for not more than thirty days.

1932 Code, § 1667; Cr. C. '22, § 614; 1916 (29) 1109; 1917 (30) 333; 1918 (30) 713.

Failure to secure permit.—In action against county for driver's negligent death, where the complaint does not show that deceased had secured permit to haul logs it was held that in demurring the defendant could not assume that deceased had no permit, and that the

failure to secure a permit, if one had not been secured, would not itself bar the action, but it would be a question for the jury and not for the court. *Ready v. Barnwell County*, 167 S. C. 62, 165 S. E. 676.

§ 1668. Hauling timber, etc., Charleston, Horry, Jasper, Florence, and Georgetown Counties.—It shall be unlawful for any person or persons to haul, convey or transport any logs, timber or lumber on or over any of the public roads or highways of Charleston County, Horry County, Jasper County, and Florence and Georgetown County, with any vehicle having less than four wheels, or to haul, convey or transport any logs, timber or lumber on or over any of the public roads or highways of said counties in any manner whereby any part of the load comes in contact with the surface of the road or highway: *provided*, that the county board of commissioners, in their discretion, may permit for a definite period of time the transportation of logs, timber or lumber otherwise than herein provided; the party so transporting such logs, timber or lumber shall be required to file a good and sufficient bond in an amount sufficient to cover the maximum possible damage to the roads, bridges and highways over which such transportation is allowed or permitted, and conditioned to restore the said roads, bridges and highways to their original condition. Any person violating any of the provisions of this section shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than five dollars nor more than one hundred dollars, or by imprisonment for not more than thirty days.

1932 Code, § 1668; Cr. C. '22, § 615; 1913 (28) 185; 1917 (30) 612; 1918 (30) 735; 1919 (31) 214; 1923 (33) 126.

§ 1669. Hauling of logs or timber on highways, Marion County.—Any person, firm or corporation that shall operate on any of the highways of Marion County any cart, wagon or other vehicle or device for the hauling of logs or timber along said highways, without first obtaining from the board of county commissioners a permit so to do, shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine not exceeding one hundred (\$100.00) dollars, or by imprisonment not exceeding thirty

days; and each and every hauling shall constitute a separate offense. The board of county commissioners of Marion County is authorized and directed to issue a permit to any person, firm or corporation applying therefor to haul logs or timber along said highways, if the board, in the exercise of its discretion, shall determine that such highways will not be unduly injured thereby: *provided*, that each and every permit issued shall be subject to revocation or suspension at any time by the county commissioners when, in the discretion of the board, the operation of any such vehicle or device shall unduly injure any of the highways of the county.

1932 Code, § 1669; 1923 (33) 126.

§ 1670. Unlawful to use certain timber carts, Beaufort County.—It shall be unlawful for any person, firm or corporation to operate or use, or cause to be operated or used, or assist in operating or using, any timber cart or vehicle upon the highways or public roads of Beaufort County if, in the opinion of the county board of commissioners, said timber carts or vehicles are detrimental to said highways and public roads, unless such person, firm or corporation shall have first paid into the treasury of Beaufort County a sum not in excess of fifteen dollars, to be determined by said board, for each timber cart or vehicle so used or operated, to pay for the damage done highways and public roads by reason of their use or operation, which said sums shall be expended in repairing and keeping in condition said highways and public roads: *provided*, that a reasonable notice shall first be given the persons, firms or corporations, as aforesaid, of the action of the said board; and any person, firm or corporation, convicted of violating the provisions of this section, shall be fined not more than one hundred dollars, or be imprisoned more than thirty days.

1932 Code, § 1670; Cr. C. '22, § 616; Cr. C. '12, § 613; 1910 (26) 726.

§ 1671. License for timber carts and vehicles, Berkeley County.—An annual license tax of ten (\$10.00) dollars is hereby imposed on all timber carts in use upon the public highways of Berkeley County habitually hauling timber and lumber for profit: *provided*, that no license tax be imposed on any timber cart or log wagon when being used by individuals in moving timber upon their own lands for the improvement of same, or removing timber from fields. It shall be unlawful for any person, firm or corporation to habitually haul timber or lumber within the county of Berkeley by any vehicle of any description which shall be pulled by two (2) or more mules, horses or oxen engaged in such business for profit, without first having obtained a license therefor from the clerk of court of the said county, which license shall be the sum of twenty-five (\$25.00) dollars per annum for each wagon or other vehicle as above described and so used in Berkeley County. Any violation of this section shall be punishable by a fine of not exceeding one hundred dollars or imprisonment not exceeding thirty days.

1932 Code, § 1671; Cr. C. '22, § 617; 1917 (30) 381.

§ 1672. Operation of timber carts, Bamberg County—license.—

(1) It shall be unlawful for any person to operate, or cause to be operated, upon the public highways of Bamberg County any vehicles commonly known as "timber carts" and used for the purposes of transporting logs and timber, except upon the conditions hereinafter prescribed.

(2) Before operating, or causing to be operated, upon the public highways of Bamberg County any such timber cart, which has four wheels or more, the owner thereof shall make application to the county board of commissioners for said county for a license to operate such vehicle and, upon the payment of the sum of fifteen (\$15.00) dollars for each vehicle to be licensed, the said board shall issue to such applicant a certificate of registration and license authorizing the operation of such timber cart upon the highways of Bamberg County for the period of one year from date of issue; and each vehicle so licensed shall be assigned a distinctive number under which it shall be operated, and at all times such numbers shall be in evidence on such timber cart and plainly written on a plate to be prescribed by said board.

(3) Said county board may, in its discretion, issue a permit to any person, authorizing the operation of any such vehicle or timber cart, which has less than four wheels, upon such highways as may be designated and for such period as the board may name: *provided*, that such person shall first enter into a good and sufficient bond to the county of Bamberg, in such sum as the board shall require, conditioned to keep in good repair all such highways as are designated in such permit and restore the same to their original condition at the expiration of said period, said bond to be approved by said board and filed with the clerk of court of said county of Bamberg.

(4) Any person who shall operate, or cause to be operated, upon the public highways of Bamberg County any such vehicle prohibited under the provisions of this section, without first procuring the license or permit in the manner herein prescribed, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined in a sum not exceeding fifty (\$50.00) dollars or sentenced to serve a term of labor on the public works of Bamberg County for a period not exceeding thirty days: *provided*, that the provisions of this section shall not be construed to prohibit any person from operating any form of vehicle upon private roads, or from crossing any public highway.

(5) All funds coming into the hands of said county board under the provisions of this section and all fines collected by reason of violations hereof shall be paid to the treasurer of Bamberg County and by him credited to the general road fund of said county.

(6) Said county board shall prescribe and adopt such forms as will meet the requirements of this section the issuance of said licenses and permits; and said board shall also prescribe such books as may be necessary in which shall be kept a complete record of all licenses so issued, and the same shall be subject to public inspection at all times.

1932 Code, § 1672; Cr. C. '22, § 618; 1917 (30) 251.

§ 1673. Penalty neglect work roads—Lexington County.—If the commissioners of any county neglect to have repaired any of the highways, and bridges which by law are required to be kept in repair, they shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in a sum of not less than one hundred or more than five hundred dollars, in the discretion of the court. If any overseer appointed by the supervisor or board of county commissioners of Lexington County shall fail, refuse or neglect to perform the duties required by the supervisor or

board of county commissioners, or should fail, refuse or neglect to perform any duty required or imposed by law, he shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined not more than one hundred dollars, or imprisoned for not more than thirty days.

1932 Code, § 1673; Cr. C. '22, § 620; Cr. C. '12, § 598; Cr. C. '02, § 436; G. S. 1088; R. S. 348; 1874 (15) 784; 1910 (26) 722.

§ 1674. Obstruction of roads by railroad cars, locomotives, etc.—If any person or persons, corporations, or any conductor of any train of railroad cars, or any other agent or servant of any railroad company, shall obstruct unnecessarily any public road or highway by permitting any railroad car or cars or locomotive to be or remain upon or across any street, public road or highway for a longer period than five minutes, after notice to remove said cars has been given to conductor, engineer, agent or other such person in charge of said train, or shall permit any timber, wood, or other obstruction to remain upon or across any such street, road or highway to the hindrance or inconvenience of travelers, or any person or persons passing along or upon such street, road or highway, every person or corporation so offending shall forfeit and pay for every such offense any sum not exceeding twenty nor less than five dollars, and shall be liable for all damages arising to any highway, to be recovered by an action at the suit of the county or township board of commissioners in which such offense shall have been committed, or any person suing for the same, before any magistrate within the county where such offense shall have been committed, or by indictment in the court of general sessions or suit in the court of common pleas; and all fines so accruing under the provisions of this section, when collected, shall be paid over by the magistrate to the county treasurer for the district in which such offense was committed; and every twenty-four hours such corporation, person or persons, as aforesaid, after being notified, shall suffer such obstructions, to the hindrance or inconvenience of travelers or any person going along or upon such road or highway, shall be deemed an additional offense against the provisions of this section.

1932 Code, § 1674; Cr. C. '22, § 621; Cr. C. 12, § 648; 1902 (23) 1007.

See §§ 1625 and 1659 also.

§ 1675. Neglect of duty by road officers, Newberry County—prosecution of overseers.—In the county of Newberry any overseer who shall fail or neglect to summon the hands liable to road duty and require them to labor upon the highways as aforesaid, when ordered and directed to so do by the county board of commissioners, shall be guilty of a misdemeanor, and, upon conviction thereof, shall pay a fine of twenty-five dollars, or be imprisoned on the county chaingang for a period of twenty days. It shall be the duty of the said county board of commissioners to prosecute each of the said overseers failing and neglecting to carry out the order and direction of the said board as aforesaid. In the event of the failure of the said county board of commissioners to so prosecute each of the overseers failing and neglecting to carry out the order of the said board within thirty days after being informed of the failure and neglect of such overseer, each of the said board so failing and neglecting to so prosecute such delinquent overseer within the time aforesaid shall be guilty of a misdemeanor, and, upon conviction

thereof, subject to pay a fine of fifty dollars, or be imprisoned on the county chaingang for a period of twenty days.

1932 Code, § 1675; Cr. C. '22, § 622; Cr. C. '12, § 654; Cr. C. '02, § 469; 1901 (23) 643; 1902 (23) 1018.

§ 1676. Neglect of duty a misdemeanor, Newberry County.—It shall be the duty of the supervisor and the county commissioners of Newberry County to enforce the provisions of all sections of the civil code which are of force in Newberry County for the improvement of roads, bridges and ferries, and for any neglect or refusal, they shall be deemed guilty of a misdemeanor, and shall be punished by a fine of not less than five dollars nor more than twenty dollars for each neglect or refusal to perform such duty.

1932 Code, § 1676; Cr. C. '22, § 623; Cr. C. '12, § 655; 1909 (25) 134.

§ 1678. Obstructing drains made by road overseer, etc.—The drains and ditches made by the road overseer, under the provisions of section 5813, shall be kept open by such overseer and shall not be obstructed by the owner or occupant of such lands, or any other person or persons having the same in charge, under the penalty of forfeiting a sum not exceeding ten dollars, or imprisonment for not more than thirty days for each and every offense. Any person interfering with any road overseer or his assistants, in the performance of their duty, shall be guilty of a misdemeanor, and punished, on conviction, by fine of five dollars, or imprisonment for ten days for each offense.

1932 Code, § 1678; Cr. C. '22, § 625; Cr. C. '12, § 645; Cr. C. '02, § 462; 1900 (23) 289.

§ 1682. Provide ferry flats with oars, Georgetown County—safeguards for vehicles.—Each and every ferry owner or keeper or operator in the county of Georgetown shall provide and carry on his ferry flat or flats at least two oars sufficient to propel the said flat in case same is needed, and when receiving vehicles at the landing to have and place across the end of said flat sufficient chain or other safeguard.

Any owner, keeper or operator who violates this section shall be deemed guilty of a misdemeanor, and on conviction shall be fined not less than ten dollars or more than fifty dollars, or imprisoned for not less than ten days or more than thirty days for each offense: *provided*, that one-half of said fine shall go to the informer.

1932 Code, § 1682; 1924 (33) 951.

§ 1683. Keepers of ferries to keep river banks in order.—It shall be the duty of every person keeping a ferry to keep in good order the banks of the river or creek at such ferry. And in case of neglect, he shall be subject to a fine of three dollars for each and every day of such neglect; the same to be recovered before any magistrate having competent jurisdiction.

1932 Code, § 1683; Cr. C. '22, § 629; Civ. C. '12, § 2164; Civ. C. '02, § 1434; G. S. 1121; R. S. 1239; 1809 (9) 443.

§ 1684. Aprons to be attached to ferry flats.—Each and every ferry owner or keeper in this State shall provide and keep attached to each end of his ferry flat or flats a good and sufficient apron, or, not having such aprons,

shall keep, at each and every landing place, a good and sufficient abutment or inclined plane for the same; and for default or neglect in so doing he shall be fined in a sum not exceeding ten dollars for every three days' continuance of such default, to be recovered in any court having competent jurisdiction of the same; one-half thereof to the use of the State, and the other half to the informer.

1932 Code, § 1684; Cr. C. '22, § 630; Civ. C. '12, § 2165; Civ. C. '02, § 1435; G. S. 1122; R. S. 1240; 1824 (9) 544.

§ 1686. Operating motor vehicle with improper license plate.

(1) **License displayed must have been issued for particular vehicle.**—It shall be unlawful for any person to run, drive or operate any motor vehicle on or along or across any public road, street or highway of the State of South Carolina displaying thereon a motor vehicle license plate which was issued for some other motor vehicle; and it shall be unlawful for any person or persons to give, sell, lend, steal or borrow any motor vehicle license plate issued for a particular motor vehicle for the purpose of using said license plate upon any other motor vehicle.

(2) **Fraudulent defacement of plate—repossession of plate defaced or misused.**—It shall be unlawful for any person with intent to defraud or alter or deface or cause to be altered or defaced, in any manner, any license plate issued by the state highway department during the current year for which such license plate has been issued. Any duly authorized agent of the state highway department shall have the power to take up, repossess or recover any license plate where the same is being improperly used, or any such license plate has been altered or defaced, and the state highway department shall have the power to revoke such registration.

(3) **Violation a misdemeanor.**—Any person or persons violating the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than twenty-five (\$25.00) dollars nor more than fifty (\$50.00) dollars, or imprisonment for not less than fifteen days nor more than thirty days.

1932 Code, § 1686; 1928 (35) 1212.

§ 1687. Penalty for failure to perform road duty—neglect of road duty.

—Every person liable to road duty, who shall have been duly warned before the day fixed in his notice for such working, stating the hour and place of working, shall be subject to the direction of the overseer in charge. Any person who shall fail to pay the commutation road tax provided by law, and being so warned by the road overseer to perform said duty, shall refuse or neglect, having had at least twelve hours' notice, to attend by himself or substitute to the acceptance of the overseer, or, having attended, shall refuse to obey the direction of the overseer, or shall spend the time in idleness or any inattention to the duties assigned him, shall be guilty of a misdemeanor, and, on conviction thereof, shall (except as otherwise provided by law), be fined not more than ten dollars nor less than five dollars and costs, or be sentenced to county chaingang not more than thirty days nor less than five days.

1932 Code, § 1688; Cr. C. '22, § 632; Cr. C. '12, § 639; 1902 (23) 1004.

§ 1688. Operation of motor vehicles on shore of sea.

(1) **Use of shore of sea.**—The shore of the sea in the State of South Carolina being the property of the State, its use by any person, firm or corporation is hereby limited and restricted in accordance with the terms and provisions of this section. The traffic on the said shore of the sea being predominantly pedestrian, the use, driving or operating of motor vehicles on or along such shore is hereby prohibited except under the terms and conditions specified in this section.

(2) **Sheriffs regulate—penalties—counties exempted.**—The sheriff of any county in which a part of the shore of the sea is situate and lying is hereby authorized and empowered to promulgate rules and regulations, which shall have the force and effect of law, fixing the speed at which a motor vehicle may be operated on or along the beach or strand. Any person operating a motor vehicle in violation of these rules and regulations shall be deemed guilty of a misdemeanor and upon conviction shall be subject to a fine of not less than ten (\$10.00) dollars nor more than one hundred (\$100.00) dollars or imprisonment for not more than (30) days: *provided*, that the terms of this section shall not apply to the counties of Beaufort, Georgetown, Colleton and Charleston.

(3) **"Shore" defined.**—The term "shore" as used in this section shall include all of that area adjacent to the sea and commonly known as the beach or strand.

(4) **Enforcement.**—Any peace officer or any highway patrolman is hereby authorized and empowered to enforce the provisions of this section.

1939 (41) 478; 1940 (41) 1634.

§ 1689. Not operate motor vehicles on front beach at Pawley's Island.—It shall be unlawful for any person to operate a motor vehicle on the front beach at Pawley's Island between low and high water mark at any season of the year. Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction shall be subject to a fine of not exceeding twenty-five (\$25.00) dollars or imprisonment not exceeding ten (10) days for each and every offense.

1936 (39) 1682.

§ 1690. Not operate motor vehicles and aircraft on portion of front beach of Isle of Palms during certain months.—It shall be unlawful for any person, firm or corporation, or any agent, servant or employee of any person, firm or corporation to drive, operate or permit to be driven or operated on that portion of the front beach of the Isle of Palms in Charleston County, South Carolina, hereinafter described, during the months of May, June, July, August and September of each and every year, any motor vehicle, including aircraft. The portion of the front beach of the Isle of Palms in Charleston County, South Carolina, upon which it shall be unlawful to drive, operate or permit to be driven or operated, a motor vehicle, as hereinbefore set forth during the months of May, June, July, August and September in each year is described as follows: all that portion of the front beach of the said Isle of Palms beginning at a point one thousand (1,000) yards east of the eastern boundary line of the pavillion and hotel now erected on the said island, and extending from the said point to the western end of the said island. If permission be obtained in writing in advance from

the Charleston County police commission, it shall be lawful to drive and operate motor driven vehicles, or aircraft, within the prohibited area during the prohibited period, on any holiday, festival day, or other special occasion, as a part or incident to any carnival, festival, or celebration of any kind being held on the Isle of Palms: *provided*, that whenever such permission shall have been granted it shall be the duty of the Charleston County police commission to furnish adequate police protection for the public during the time for which said permission is granted. In order to assist the authorities charged with the enforcement of this section it shall be lawful for the owner of the property adjoining the point of beginning of the restricted area hereinabove described on the said front beach of the Isle of Palms to erect and maintain on, upon, and across the said beach at the said point of beginning, a single board fence, said fence not to be erected prior to the first day of May in each year, and to be removed not later than the last day of September of each year, the said fence on its eastern side to be equipped with reflectors of a design approved by the sanitary and drainage commission of Charleston County, the owner of the property at the point of beginning of the restricted area not to be responsible for any injury or damage to any person or property coming into collision with the said fence, provided at the time of the said collision the said fence is equipped with reflectors of a design approved by the said sanitary and drainage commission of Charleston County. Any person, firm or corporation who violates any provision of this section shall be guilty of a misdemeanor, and upon conviction thereof, shall be fined not more than fifty (\$50.00) dollars, or imprisoned for not more than ten (10) days.

1937 (40) 124.

CHAPTER 79

Offenses by and against Railroad Companies, their Agents and Employees

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| 1692. Collect surcharge for intrastate pullman car transportation. | 1705. Disorderly conduct on trains. |
| 1693. Negligence by employees. | 1706. Drink liquor publicly on passenger trains. |
| 1694, 1695. Injure or open baggage or express. | 1707. Evade toll or fare. |
| 1696. Trainmen use electric hand lanterns move certain trains. | 1710. Sale of duplicate switch keys. |
| 1699. Collect cross bridges. | 1712, 1713, 1714. Violate act of Congress regulate commerce. |

§ 1692. Unlawful to collect surcharge for intrastate pullman car transportation.—It shall be unlawful for any railroad or pullman car company doing business in South Carolina to collect from any person within the boundaries of South Carolina any surtax or surcharge for pullman car transportation from one point to any other point within the bounds of the State of South Carolina; but that nothing in this section shall be construed to affect in any way the charge which any railroad or pullman car company require for transportation or interstate travel.

1932 Code, § 8296; 1924 (33) 945.

§ 1693. Negligence by employees.—Any engineer, conductor, or other agent or employee of any railroad company in this State, who shall wilfully

neglect to observe, or shall wilfully violate, any rule or regulation of the company to which such engineer or conductor may belong, whereby any person or persons shall sustain, or be in danger of sustaining, any bodily injury, such engineer or conductor, or other agent or employee, shall be liable to be indicted for every such offense, and, upon conviction thereof, be fined two hundred dollars and imprisonment not exceeding one year, at the discretion of the judge before whom such case may be tried: *provided, however*, that nothing herein contained shall be so construed as to relieve such engineer or conductor from responsibility, in cases where the life of any person is destroyed under the law as it now exists.

1932 Code, § 1691; Cr. C. '22, § 637; Cr. C. '12, § 662; Cr. C. '02, § 474; R. S. 371.

§ 1694. Misdemeanor wilfully to open or injure baggage or express package.—It shall be unlawful for any agent, servant, baggage master, or other person in the service or employment of any railroad, express company or steamboat lines, to carelessly or negligently or wilfully open, break into or injure any package, parcel or baggage while in the custody or under the control of any such common carrier. Any person violating the provisions of this section shall be deemed guilty of a misdemeanor, and punished by fine or imprisonment, or both, in the discretion of the court.

1932 Code, § 1694; Cr. C. '22, § 640; Cr. C. '12, § 665; 1909 (26) 161.

§ 1695. Injury to baggage.—Any baggage master, or other person, whose duty it is to handle, remove, or take care of the baggage of passengers, who shall wilfully or recklessly injure or destroy any trunk, valise, box, package, or parcel, while loading, transporting, unloading, delivering, or storing the same, shall be punished by a fine not exceeding fifty dollars, or imprisonment not exceeding thirty days.

1932 Code, § 1695; Cr. C. '22, § 641; Cr. C. '12, § 666; Cr. C. '02, § 475; G. S. 1450; R. S. 372.

§ 1696. Trainmen use electric hand lanterns switch and move trains in intra-state commerce—railroad carriers furnish—not use oil lanterns.—All railroad carriers shall equip trainmen in their employ engaged in switching and train movements in intra-state commerce in this State with electric hand lanterns, of a type approved by the South Carolina public service commission, containing at least one extra bulb capable of being immediately lighted in case of failure of the main bulb, and the use of any railroad carrier of oil lanterns in connection with such movements is hereby prohibited. Any railroad carrier violating any of the provisions of this section shall be punished by a fine not less than twenty-five (\$25.00) dollars nor more than one hundred (\$100.00) dollars, and each day during which any flagrant violation shall continue shall be and constitute a separate offense.

1938 (40) 1621.

§ 1699. Unlawful for railroads to collect for crossing bridges.—It shall be unlawful for any agent or conductor of any railroad to charge or collect any extra compensation from any passenger for crossing any bridge on any river which may be wholly or partly within this State. Any person violating this section shall, upon conviction, be deemed guilty of a misdemeanor, and subject to a fine not to exceed one hundred dollars, or to im-

prisonment not to exceed thirty days.

1932 Code, § 1699; Cr. C. '22, § 645; Cr. C. '12, § 670; 1906 (25) 44.

§ 1705. Disorderly conduct on trains a misdemeanor—such person to be ejected.—Any one who shall in any way be guilty of riotous or disorderly conduct, or who shall conduct himself or herself in any way to the annoyance of the traveling public, on the train, coach or car of any common carrier, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished by a fine not exceeding one hundred dollars, or imprisoned for not more than thirty days. Any one conducting himself or herself in the manner herein described shall be subject to be ejected from said coach, train, or car. Any one so ejected shall have no cause of action for such ejection.

1932 Code, § 1705; Cr. C. '22, § 651; Cr. C. '12, § 676; 1910 (26) 702.

§ 1706. Not to publicly drink liquors in passenger car.—Any person or persons who shall publicly engage in the drinking of intoxicating liquors in the presence of passengers on any passenger car in the State, shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than ten dollars and not to exceed fifty dollars, or imprisoned not to exceed thirty days; but this section shall not apply to any dining or buffet car.

1932 Code, § 1706; Cr. C. '22, § 652; Cr. C. '12, § 677; 1908 (25) 1102.

§ 1707. Penalty for fraudulently evading toll or fare.—Whoever fraudulently evades or attempts to evade the payment of any toll or fare, lawfully established, for the carrying of passengers, by giving a false answer to the collector of the fare, by traveling beyond the point to which fare has been paid, or otherwise attempting to ride without paying said toll or fare, or by riding without permission on trains that do not carry passengers, or by concealing themselves upon or about any train, with intent to evade the payment of lawful toll or fare, shall be guilty of a misdemeanor, and, upon conviction thereof, shall pay a fine of not more than fifty dollars, or be sentenced to imprisonment or labor on the chain-gang for not more than thirty days. *Provided*, that in all cases of trespass where the alleged violation of law is based upon riding upon a train or car of a common carrier without permission or authority, in no case shall the punishment for such trespass be greater than imprisonment for five (5) days in the county jail, or the payment of a fine not exceeding five (\$5.00) dollars. In no case shall any defendant convicted of any such trespass be sentenced to service upon any chain-gang in this state.

1932 Code, § 1707; Cr. C. '22, § 653; Cr. C. '12, § 678; Cr. C. '02, § 483; G. S. 1517; R. S. 1732; 1898 (22) 776; 1932 (37) 1437.

§ 1710. Sale, purchase, etc., of duplicate railroad switch keys unlawful—exception.—It shall be unlawful for any person, firm or corporation to make, buy, sell or give away to any other person, or persons any duplicate key to any lock belonging to or in use by any railroad company in this State on its switches or switch tracks except upon the written order of that officer of said railroad company whose duty it is to distribute and issue switch lock keys to the employees of such railroad company. Any person, persons, firm or corporation violating either, any or all of the provisions of this section shall be deemed guilty of a misdemeanor and for each and

every offense shall be subject to a fine not exceeding one hundred (\$100.00) dollars or imprisonment not exceeding thirty days.

1932 Code, § 1710; 1924 (23) 1185.

§ 1712. Unlawful for railroads or their agents to violate act of Congress to regulate commerce.—It shall be unlawful for any railroad corporation doing business in this State, or any officer, agent or employee thereof, to do herein any act which constitutes a violation of the act of Congress entitled “An Act to Regulate Commerce,” or the acts amendatory thereof, or any order of the interstate commerce commission issued thereunder. Any corporation aforesaid violating this section shall be guilty of a high misdemeanor and liable to indictment therefor in any county where said offense is committed, and, on conviction, shall be fined not less than one thousand dollars or more than five thousand dollars for each such offense. And the doing of such act or acts in addition shall constitute a ground for the forfeiture of the charter and franchise of any such corporation in this State, and for the withdrawal and forfeiture of any franchise or license or right to operate railroads herein enjoyed or exercised herein by grant, contract, statute or comity by any such corporation chartered elsewhere; and any person or corporation, public or private, injured by any such act of such railroad company, may maintain quo warranto in the circuit court of the residence, or, if nonresident, of the principal office of such corporation, to enforce such forfeiture, which said court is hereby given jurisdiction so to decree. Conviction and punishment for a misdemeanor under this section shall not prevent proceedings also for forfeiture and judgment.

Any officer, agent or employee doing or engaged in any such act shall be also guilty of a misdemeanor, and, on conviction, shall be punished by a fine not to exceed one thousand (\$1,000) dollars and imprisonment not to exceed twelve months, or either or both of these penalties.

1932 Code, § 1712; Cr. C. '22, § 657; Cr. C. '12, § 682; Cr. C. '02, § 485; 1897 (22) 448.

§ 1713. Unlawful to take part in violation.—Every person taking part in the said violation in any way, even in carrying out the orders of superior officers, or in collecting the proceeds of any illegal charge, shall be equally guilty of a violation of section 1712; and the offense shall be equally held to have been committed in the county where said act is finally carried out, or where any illegal charge is collected, as well as where the act or charge is ordered or agreed upon, or any step taken in execution thereof.

1932 Code, § 1713; Cr. C. '22, § 658; Cr. C. '12, § 683; Cr. C. '02, § 486; 1897 (22) 448.

§ 1714. Each act a separate offense—command of superior officer no defense.—Each act done in violation of said section 1712 to regulate commerce, its amendments, or of any orders of said commission, or of each separate failure to obey the same, or discrimination, or preference, or overcharge to each separate person or corporation, shall constitute, both as to the railroad company offending or said officers, agents or employees, separate offenses hereunder, and render the corporation or person offending liable to successive indictment and punishment therefor.

No command of a superior officer shall constitute any defense or excuse for a violation of section 1712 by an inferior.

1932 Code, § 1714; Cr. C. '22, § 659; Cr. C. '12, § 684; Cr. C. '02, § 488; 1897 (22) 448.

CHAPTER 80

Offenses Relating to Assessment and Collection of Taxes

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| 1718. Auditor may compel oath. | 1723. Removal of personalty to evade taxes. |
| 1719. Refusing to appear before auditor. | 1724. Evasion of dog tax. |
| 1720. Nonpayment of poll tax. | 1725. Failure to pay special road tax in certain counties. |
| 1721. Refusal of railroad official to answer questions. | |
| 1722. Perjury before tax commission. | |

§ 1718. Auditor may compel oath.—Any person claiming not to have any property shall, upon the demand of the auditor, make oath to the fact that he has no property; and if he refuse to make such oath he shall be deemed guilty of a misdemeanor, and, upon complaint of such auditor to the court of general sessions of the county, and upon conviction thereof, shall be arrested and confined in the jail of the county until he answers such questions, under oath, as may be propounded to him by such auditor, and pays the costs of the proceedings.

1932 Code, § 1718; Cr. C. '22, § 664; Cr. C. '12, § 687; Cr. C. '02, § 490; G. S. 212; R. S. 375; 1882 (17) 1004.

§ 1719. Penalty for refusing to appear before auditor.—If any person notified, either as a party or witness, to appear before the county auditor at a time fixed in said notice to be examined by said auditor, under oath, touching the personal property and the value of such property, and everything which may tend to evince the true amount of such property returned for taxation, shall refuse or neglect to appear as notified, or shall refuse to be sworn, or refuse to answer any question put to him by said auditor touching the matter under examination as aforesaid, he shall be deemed guilty of a misdemeanor and be liable to indictment therefor in the court of general sessions. Upon conviction thereof, or of any said refusals, or of such neglect, he shall be fined in any sum not exceeding one hundred dollars and costs of prosecution, and be confined in county jail of said county until answer shall be made to all questions which may be propounded to him by said auditor and such fine and costs paid; and when such fine is collected it shall be paid into the county treasury to the credit of the county. In every such case the county auditor shall report the facts to the solicitor of the circuit, who shall forthwith prepare an indictment thereon and submit the same to the grand jury.

1932 Code, § 1719; Cr. C. '22, § 665; Cr. C. '12, § 688; Cr. C. '02, § 491; G. S. 240; R. S. 376; 1882 (17) 1004.

§ 1720. Nonpayment of poll tax.—Any person failing or refusing to pay his poll tax within the time prescribed by law, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding ten dollars, together with costs of said suit, or by imprisonment at hard labor on the public works of the county not more than twenty days: *provided*, that the county shall not pay the costs or fees of any constable or sheriff for the execution of any warrant or other process issued in any case by virtue of the provisions of this section, unless the defendant in such case shall be arrested and convicted.

1932 Code, § 1720; Cr. C. '22, § 666; Cr. C. '12, § 689; Cr. C. '02, § 492; R. S. 377; 1892 (21) 43; 1899 (23) 120; 1901 (23) 780; 1908 (25) 1245.

Voluntary payment of delinquent poll taxes with penalties may be accepted.

—The fact that this section makes default in payment of poll taxes a misdemeanor, will not prevent the collecting officer from accepting voluntary payment of delinquent poll taxes with penalties. *State v. Folk*, 45 S. C. 491, 23 S. E. 628, 629.

And when collected the funds belong to the school fund.—Under the constitutional provision disposing of the proceeds of poll taxes for the benefit of the public schools, delinquent poll taxes with penalties paid to the county treasurer before prosecution was begun under this section, belong to the school fund. *State v. Folk*, 45 S. C. 491, 23 S. E. 628, 629.

Warrant issued under this section is a criminal process.—A warrant issued

under this section is not a process for the collection of taxes, but a criminal process, and the sheriff is entitled to his fees though the warrant is returned non est inventus, and though the act under which the warrant was issued had expired by its own limitation. *Rogers v. Marlborough County*, 32 S. C. 555, 11 S. E. 383.

And sheriff is entitled to fees for serving such warrants.—The statute providing that, where judgment is entered or execution issued in the courts of general sessions for fines, fees, or costs, nulla bona costs shall not be paid to the sheriff or clerk, does not apply to sheriff's fees for attempting to serve warrants issued by a trial justice, under this section. *Rogers v. Marlborough County*, 32 S. C. 555, 11 S. E. 383.

§ 1721. Railroad officer, agent or receiver refusing to answer questions by comptroller general.—If any officer, receiver or agent of any railroad company having any portion of its tracks in this State shall refuse or neglect to appear before the comptroller general, or the person appointed by him, or to answer any question put to him or them, as provided for in section 2660, or submit the books and papers aforesaid for examination, in manner provided in said section, he shall be deemed guilty of a misdemeanor, and, upon indictment and conviction therefor in the court of general sessions for any county (which court shall have complete and full jurisdiction in all such cases), shall be fined in any sum not exceeding five thousand dollars and costs of prosecution, and confined in the jail of said county until he answers all questions which may be put to him by the comptroller general until said fine and costs be paid.

1932 Code, § 1721; Cr. C. '22, § 667; Cr. C. '12, § 690; Cr. C. '02, § 493; R. S. 378; 1882 (17) 902.

§ 1722. Perjury to testify falsely before tax commission.—Any person who shall testify falsely in any matter under consideration by the tax commission shall be guilty of, and punished for, perjury.

1932 Code, § 1722; Cr. C. '22, § 668; 1915 (29) 125.

§ 1723. Removal of personalty from county and disposal to avoid payment of taxes, a misdemeanor.—Any person, firm or corporation, whose merchandise or other personal property has been assessed for taxation, shall with fraudulent intent, to evade the payment of taxes, remove said personal property from the county in which same has been assessed for taxation and sell or dispose of the same shall be guilty of a misdemeanor. The removal and sale of all or a major portion of said property beyond the borders of the county in which the said property has been assessed for taxation, shall be a prima facie evidence of intent to defraud and a violation of the provisions of this section. Any person, firm or corporation found guilty of violating the provisions of this section shall be punished by fine of not exceeding one thousand (\$1,000.00) dollars or twelve (12) months' imprisonment or both fine and imprisonment within the discretion of the court: *provided*, should the taxes due on said personal property together with all penalties and cost be paid within ten (10) days from the arrest

of the person, firm or corporation so offending, then prosecution under this section shall be discontinued.

1932 Code, § 1723; 1924 (33) 1170.

§ 1724. Owning or harboring of dog, without return of tax a misdemeanor—disposition of fine.—Any person owning, harboring or maintaining a dog failing or refusing to return the tax provided in the Civil Code, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than five (\$5.00) dollars nor more than twenty (\$20.00) dollars, one-half of which shall go to the person reporting said failure to pay said tax, and one-half to the public school fund in which said derelict occurs.

1932 Code, § 1724; Cr. C. '22, § 674; 1920 (31) 1082; 1922 (32) 997; 1924 (33) 1087.

§ 1725. Penalties failure pay special road tax in certain counties.—Any failure on the part of any one liable therefor to pay the special road or commutation road taxes as required by law, in Abbeville, Berkeley, or Dorchester Counties, shall be a misdemeanor and shall be punished in Abbeville county by a fine of not less than five dollars nor more than fifty dollars, or by imprisonment for not more than thirty days; in Berkeley County by a fine of not less than five dollars nor more than twenty dollars, or imprisonment for not more than thirty days; in Dorchester County, by a fine of not less than five nor more than fifty dollars, or by imprisonment for not more than thirty days.

1932 Code, § 1725; Cr. C. '22, § 676; Cr. C. '12, § 640; 1933 (38) 70.

See § 5863.

CHAPTER 81

Bastardy and Vagrancy

1726. Liability of reputed father.

1727. Refusal of mother to declare father.

1728. Resistance of warrant.

1729. Jury trial on denial by reputed father.

1730. Liability in case of twins.

1731. Vagrancy.

§ 1726. Reputed father of bastard to maintain child—to give bond, etc.—If any woman be delivered of a bastard child or children, and shall, at any time after the birth thereof, give information to some magistrate of the county in which she resides, or may be so delivered, and will declare, on oath, who is the father of her child or children, it shall be the duty of such magistrate to issue a warrant to apprehend and bring before him, or some other magistrate, the person so accused, who shall be obliged to enter into a recognizance with two good and sufficient sureties, in the penal sum of not less than three hundred dollars, nor more than twelve hundred dollars, in the discretion of the court, conditioned for the annual payment of one-twelfth part of the penal sum of said bond, for the maintenance of the child until the age of twelve years, and so to save harmless the said county.

1932 Code, § 1726; Cr. C. '22, § 707; Cr. C. '12, § 691; Cr. C. '02, § 494; G. S. 1579; R. S. 379; 1795 (5) 270; 1839 (11) 24; 1924 (23) 937.

Under this section the child of a married woman may be a bastard. State v. Shumpert, 1 S. C. 85, 87, 72 Am. Dec.

649, Ann. Cas. 12A, 889, Ann. Cas. 16A, 1188.

And a conviction may be had on the

uncorroborated testimony of the mother. State v. Meares, 60 S. C. 527, 39 S. E. 245, 1 A. L. R. 636.

And the father may be required to give recognizance to pay an annual sum.—Where the proceeding began before the child attained the age of twelve years, the father, upon conviction, may be required to enter recognizance to pay twenty-five dollars a year, commencing from the birth of the child. State v. Sar-ratt, 14 Rich. 29.

A voluntary bond for maintenance of bastard is good at common law. Commissioner v. Gilbert, 2 Strob. 152, 154.

The question to be tried under this section is whether defendant is the father of the child, or not. State v. Adams, 1 Brev. 279, 56 Am. Dec. 216, 35 L. R. A. 562, L. R. A. 1916D, 661.

So that it is not necessary to allege child is likely to be a burden on the

county. State v. McDonald, 2 McC. 299.

Magistrate may bind over to Circuit Court one shown to be probably guilty, where he denies the paternity and refuses to enter into recognizance. State v. Edens, 88 S. C. 302, 70 S. E. 609.

See generally, as to jurisdiction, State v. Glenn, 14 S. C. 118; State v. Edens, 88 S. C. 302, 70 S. E. 609; as to presumption of legitimacy, Kennington v. Catoe, 68 S. C. 470, 47 S. E. 719, 126 Am. St. Rep. 263, Ann. Cas. 12D, 251; as to insufficient indictment, State v. Caspary, 11 Rich. 356, 56 Am. Dec. 214; as to evidence of attempt to compromise, etc., State v. Rucker, 86 S. C. 66, 68 S. E. 133; as to recognizance, State v. Harmon, 3 Hill 275.

Applied in State v. Brewer, 38 S. C. 263, 16 S. E. 1001, 37 Am. St. Rep. 752, 19 L. R. A. 362, 34 L. R. A. 669.

§ 1727. Women refusing to declare father of bastard to be committed to jail or give security.—When any woman, who is charged with having had a bastard child or children, shall be brought before a magistrate and shall not voluntarily give such information, such magistrate may on information thereof, and that such child is likely to become a burden to the county, issue his warrant against such mother, requiring her to be brought before him, or the next magistrate, and declare who is the father, and, on her refusal so to declare, the magistrate aforesaid shall commit her to jail until she shall declare the same, or shall give security that the said bastard child shall not become chargeable to the county wherein she resides.

1932 Code, § 1727; Cr. C. '22, § 708; Cr. C. '12, § 692; Cr. C. '02, § 495; G. S. 1580; R. S. 380; 1839 (11) 24.

It is not necessary to a conviction for bastardy, where the information is given, not by the mother, but by a third person,

that it should appear that the child is likely to become a burden to the county. State v. Crawford, 10 Rich. 361.

§ 1728. Resistance of warrant ground for indictment.—Should the person accused evade or resist the warrant so issued, it shall be the duty of the constable to return the same to the clerk of the court as other sessions papers, with a special note thereof, by way of return, on oath, whereupon a bill of indictment may be given out, and, if found, a bench warrant may issue, and, in case the accused shall be arrested on any warrant issued and shall refuse to enter into such recognizance, he shall be committed to prison, there to remain until he shall enter into such recognizance.

1932 Code, § 1728; Cr. C. '22, § 709; Cr. C. '12, § 693; Cr. C. '02, § 496; G. S. 1581; R. S. 381; 1839 (11) 24.

§ 1729. Issue for jury on denial by reputed father—security, etc., on conviction.—Should such person be unable to comply with the requisitions hereinbefore mentioned, or should he deny that he is the father of the said child or children, a jury shall be charged, in the court of sessions, to try the question whether the accused is or is not the father of such child or children; and on his acquittal he shall be discharged; or, if convicted, he shall be required to give the security or recognizance hereinbefore required; and on default thereof, shall be liable to execution, as are defendants

convicted of misdemeanors: *provided*, that on the annual payment of such sum of money as the court may direct, not to exceed the maximum amount provided for in section 1726, the execution, except as to costs, shall be stayed until another installment falls due.

1932 Code, § 1729; Cr. C. '22, § 710; Cr. C. '12, § 694; Cr. C. '02, § 497; G. S. 1582; R. S. 382; 1847 (11) 436; 1936 (39) 1336.

See generally, *State v. Glenn*, 14 S. C. Am. Dec. 215; *State v. Brewer*, 38 S. C. 118, 134; *State v. Quick*, 25 S. C. 110; 263, 16 S. E. 1001, 37 Am. St. Rep. 752, *State v. Derrick*, 1 McM. 338, 339, 56 19 L. R. A. 362, 34 L. R. A. 669.

§ 1730. In case of twins, recognizance to be for support of both, etc.—If the birth be of twins, the recognizance or judgment shall be conditioned for the support of both the bastards, and for the payment of double the amounts required in the case of a single child.

1932 Code, § 1730; Cr. C. '22, § 711; Cr. C. '12, § 695; Cr. C. '02, § 498; G. S. 1583; R. S. 383; 1795 (5) 270.

Indictment must identify each child separately.—Indicement for twin bastards should describe each child by name and complexion, hair and sex, or by some means of separate identity. *State v. Derrick*, 1 McM. 338, 339, 56 Am. Dec. 215. **So also must the recognizance.** — *State v. Derrick*, 1 McM. 338, 339, 56 Am. Dec. 215.

§ 1731. Who to be deemed vagrants.—All persons wandering from place to place, without any known residence, or residing in any city, county or town, who have no visible or known means of gaining a fair, honest and reputable livelihood; all suspicious persons going about the country, swapping and bartering horses (without producing a certificate of his or their good character signed by a magistrate of the county from which said person last came); likewise all persons who acquire a livelihood by gambling or horse racing, without any other visible means of gaining a livelihood; all keepers of gaming tables, faro banks, or other banks whatsoever used for gaming known under any other denomination; also, all persons who lead idle and disorderly lives; all who knowingly harbor horse thieves and felons, and those who are known to be of that character and description; likewise all persons not following some handicraft, trade or profession, or not having some known or visible means of livelihood, who shall be able to work, and occupying or being in possession of some piece of land, shall not cultivate such a quantity thereof as shall be deemed by the magistrate to be necessary for the maintenance of himself and his family; also, all persons representing publicly for gain or reward, without being fully licensed, any play, comedy, tragedy, interlude or farce, or other entertainment of the stage, or any part thereof; all fortune tellers for fee or reward, and all sturdy beggars, are, and shall be, deemed vagrants, and, upon conviction thereof before a court of magistrate, shall be fined in a sum not exceeding one hundred dollars or thirty days imprisonment.

1932 Code, § 1731; Cr. C. '22, § 712; Cr. C. '12, § 696; Cr. C. '02, § 499; G. S. 1604; R. S. 384; 1787 (5) 41; 1839 (11) 24; 1893 (21) 521.

See generally, *State v. Maxcy*, 1 McM. 501, 137 Am. St. Rep. 967; *State v. Abercrombie*, 156 S. C. 375, 153 S. E. 344.

CHAPTER 82

Desecration of the Sabbath and of Religious Worship

- 1732, 1735, 1735-1, 1735-2. Working on Sunday.
 1733. Public sports.
 1734. Dance halls.
 1736. Disturbance of religious worship.
 1737. Miscellaneous misdemeanors.
 1737-1. Sunday motion pictures, etc. permitted in certain counties.

§ 1732. Penalty for working on Sunday.—No tradesman, artificer, workman, laborer, or other person whatsoever, shall do or exercise any worldly labor, business, or work of their ordinary callings upon the Lord's Day (commonly called the Sabbath), or any part thereof (work of necessity or charity only excepted); and every person being of the age of fifteen years or upwards, offending in the premises, shall, for every such offense, forfeit the sum of one dollar.

1932 Code, § 1732; Cr. C. '22, § 713; Cr. C. '12, § 698; Cr. C. '02, § 500; G. S. 1631; R. S. 385; 1691 (2) 69; 1712 (2) 396.

This section is constitutional. *Xepapas v. Richardson*, 149 S. C. 52, 146 S. E. 686. It does not violate either state or federal Constitution. *Palmetto Golf Club v. Robinson*, 143 S. C. 347, 141 S. E. 610.

This section is not invasion of Const. S. C. of 1895, art. 1, § 5, or Const. U. S. Amend. 14, because not applying to corporations. *Xepapas v. Richardson*, 149 S. C. 52, 146 S. E. 686.

So that equity cannot enjoin its enforcement.—Since this section is a valid enactment, equity could not grant injunction restraining sheriff and constable from attempting to enforce its provisions so as to prevent sale of gasoline and motor oils on Sunday. *Charleston Oil Co. v. Poulnot*, 143 S. C. 283, 141 S. E. 454, 455, 60 A. L. R. 750.

This section being constitutional, its enforcement cannot be enjoined under exception to rule that equity will not restrain criminal prosecution, in absence of pending equity suit between same parties to try same right in issue. *Palmetto Golf Club v. Robinson*, 143 S. C. 347, 141 S. E. 610.

While section does not apply to corporations it applies to officers and agents thereof.—This section does not apply to corporations, but it does apply to officers, agents, servants and employees thereof. *Palmetto Golf Club v. Robinson*, 143 S. C. 347, 141 S. E. 610, 611.

As to liability of corporations or their agents, under this section, see § 1735.

And there can be only one entire offense on same day.—Under this section, there can be but one entire offense on the same day, and the number of separate acts done does not increase the number of offenses. *State v. James*, 81 S. C. 197, 62 S. E. 214, 128 Am. St. Rep. 902, 131 Am. St. Rep. 816, 18 L. R. A. (N. S.) 617, 16 Ann. Cas. 277.

The guilt or innocence under section depending on circumstances of each case.—Guilt or innocence of any person

charged with a violation of this section depends on facts and circumstances of each case, since works of necessity or charity are excepted therefrom. *Charleston Oil Co. v. Poulnot*, 143 S. C. 283, 141 S. E. 454, 455, 60 A. L. R. 750.

Thus a telegraphic message may be work of necessity.—If this section be held to prohibit an operator or messenger from delivering ordinary social and business telegraphic messages on Sunday, it would have no application to a message which falls within the excepted classes as a work of necessity or charity, where it relates to sickness and approaching death of a relative. *Smith v. Western Union Tel.*, 72 S. C. 116, 51 S. E. 537, Ann. Cas. 12C, 587.

But golf as business violates this section.—One over 15 years of age, who engages in game of golf as professional or instructor as his worldly labor, or in the work of caddie for compensation, or owns, keeps, or maintains any golf links or course as his business, on Sunday, violates this section. *Palmetto Golf Club v. Robinson*, 143 S. C. 347, 141 S. E. 610.

So also does delivery of ice or cold meat.—The continuance on Sunday of ordinary sales or deliveries of ice or fresh meat is not a "work of necessity" in a town within the exception of the Sunday law. *State v. James*, 81 S. C. 197, 62 S. E. 214, 128 Am. St. Rep. 902, 131 Am. St. Rep. 816, 18 L. R. A. (N. S.) 617, 16 Ann. Cas. 277.

Or sale of gasoline.—Sale of gasoline is not a work of necessity within the provisions of this section. *Charleston Oil Co. v. Poulnot*, 143 S. E. 283, 141 S. E. 454, 60 A. L. R. 750.

Where the act adopted by the General Assembly permitting sale of gasoline and motor oils on Sunday was vetoed by the Governor, the failure of the General Assembly to pass the proposed legislation over the Governor's veto should be regarded as evidence that the General As-

sembly intended that Sunday statutes should remain in full force. *Charleston Oil Co. v. Poulnot*, 143 S. C. 283, 141 S. E. 454, 455, 60 A. L. R. 750.

The burden of showing that sale of gasoline or motor oil is work of necessity or charity rests on the seller. *Charleston Oil Co. v. Poulnot*, 143 S. C. 283, 141 S. E. 454, 60 A. L. R. 750.

But publication of legal notice in Sunday paper does not invalidate it.—The violation of this section does not render the required publication of a legal notice made in a newspaper issued on the Sab-

bath illegal and invalid. *Eason v. Witcofskey*, 29 S. C. 239, 7 S. E. 291, Ann. Cas. 16B, 19, 13 A. L. R. 670.

Motor company could not set up as defense to action by one injured in automobile collision through negligence of company's agent that business in which agent was engaged at time of collision was unlawful under Sunday law. *Rosamond v. Lucas-Kidd Motor Co., Inc.*, 182 S. C. 332; 189 S. E. 641.

See generally, *Cain v. Daly*, 74 S. C. 480, 55 S. E. 110.

§ 1733. Public sports prohibited on the Lord's Day.—No public sports or pastimes, as bear-baiting, bull-bating, football playing, horse-racing, interludes or common plays, or other games, exercises, sports or pastimes, such as hunting, shooting, chasing game, or fishing, shall be used on the Lord's Day by any person or persons whatsoever; and every person or persons offending in any of the premises shall, upon conviction, be deemed guilty of a misdemeanor, and be subject to a fine not to exceed fifty dollars, or imprisonment not to exceed thirty days.

1932 Code, § 1733; Cr. C. '22, § 715; Cr. C. '12, § 700; Cr. C. '02, § 502; G. S. 1633; R. S. 387; 1896 (22) 331.

This section is constitutional.—This section does not violate either state or federal constitution. *Palmetto Golf Club v. Robinson*, 143 S. C. 347, 141 S. E. 610.

And its enforcement cannot be enjoined.—This section being constitutional, its enforcement cannot be enjoined under exception to rule that equity will not restrain criminal prosecution, in absence of pending equity suit between same parties to try same right in issue. *Palmetto Golf Club v. Robinson*, 143 S.

C. 347, 141 S. E. 610.

But it does not apply to golf as a game or exercise.—This section does not prohibit playing of golf on Sunday as a game, exercise, sport or pastime. *Palmetto Golf Club v. Robinson*, 143 S. C. 347, 141 S. E. 610.

And while not applicable to corporations, it applies to officers and agents thereof.—*Palmetto Golf Club v. Robinson*, 143 S. C. 347, 141 S. E. 610.

§ 1734. Operation of public dance halls on Sunday.—Hereafter, it shall be unlawful for any person, firm or corporation to keep open or admit persons to any public dancing hall owned or operated by them, or to allow any person to continue thereat or therein between the hours of twelve o'clock (midnight) of Saturday and twelve o'clock (midnight) of Sunday, and all such places shall be and remain closed to the public between said hours. The violation of the provisions of this section shall subject the offender to a fine of not less than ten nor more than fifty dollars for the first offense, and for the second offense not less than fifty dollars nor more than one hundred dollars, or imprisonment for thirty days.

1932 Code, § 1734; 1923 (33) 203.

§ 1735. Certain labor on Sunday prohibited.—In addition to the penalties prescribed against tradesmen, artificers, workmen and laborers who shall do or exercise any worldly labor, business or work of their ordinary calling upon the Lord's Day (commonly called the Sabbath) or Sunday, or any part thereof, any corporation, company, firm or person who shall order, require or direct any work to be done in any machine shop or shops on Sunday, except in cases of emergency, shall, upon conviction, be deemed guilty of a misdemeanor, and shall be fined in a sum not less than one

hundred dollars and not more than five hundred dollars for each offense.
1932 Code, § 1735; Cr. C. '22, § 716; Cr. C. '12, § 701; Cr. C. '02, § 503; 1899 (23) 100.

Section subjects officers and agents of corporations to prosecution under § 1732.

—While corporations cannot be indicted and punished under § 1732, their officers, agents, and servants who violate the statute are subject to prosecution thereunder. *Charleston Oil Co. v. Poulnot*, 143 S. C. 283, 141 S. E. 454, 455, 60 A. L. R. 750.

Since enactment of this section was

legislative recognition that § 1732 did not contemplate punishment of corporations for violation of Sunday laws, and since the law as declared in § 1732 applied only to persons from the age of 15 years and upwards, corporations could not be penalized, under such section for working or selling goods on Sunday. *Charleston Oil Co. v. Poulnot*, 143 S. C. 283, 141 S. E. 454, 455, 60 A. L. R. 750.

§ 1735-1. Not employ regular employees or permit regular employees work in or about textile manufacturing, finishing, dyeing, printing and processing plant on Sunday—exception—pay when work.—It shall be unlawful for any person, firm, association or corporation owning or controlling or operating any textile manufacturing, finishing, dyeing, printing and processing plant within the State of South Carolina, to request or require or permit any regular employee to do or exercise or perform any of the usual or ordinary worldly labor or work in, of, about or connected with such employee's regular occupation or calling or any part thereof, in or about such textile manufacturing, finishing, dyeing, printing and processing plant on the Sabbath Day, commonly called Sunday, work of absolute necessity or emergency alone excepted, and then only upon condition that such employee be paid on the basis of one and one-half the amount of the usual average day wage or salary earned by such employee during other days of the week: provided, that this section shall not be construed to apply to watchmen, firemen, and other maintenance and custodial employees. The term "regular employee" shall be construed to mean any person who usually or ordinarily works as much as twenty hours per week or more, in such textile manufacturing, finishing, dyeing, printing and processing plant, and whether employed and paid by the job or by the piece or by the hour or on a salary basis. Any person, firm, association or corporation violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than one hundred (\$100.00) dollars nor more than one thousand (\$1,000.00) dollars. The purpose and intent of this section is that it shall be in addition to and not construed as a repeal of other existing law providing for the observance of the Sabbath Day or Sunday.

1937 (40) 528; 1939 (41) 313.

See *Cooksey v. Beaumont Mfg. Co.*, 194 S. C. 395, 9 S. E. (2d) 790, for case decided before act was amended in 1939 by adding: "Provided, that this act shall

not be construed to apply to watchmen, firemen, and other maintenance and custodial employees."

§ 1735-2. Employment of children or women in mercantile or manufacturing establishments on Sunday prohibited.—It shall be unlawful for any owner, person, firm or corporation, to employ, require, or permit the employment of women or children to work or labor in any mercantile establishment, or manufacturing establishment, on the Sabbath day, commonly called Sunday. The term "mercantile establishment" shall be construed to mean any place where goods or wares are offered or exposed for sale, except cafeterias and restaurants. The term "manufacturing establishment"

shall be construed to mean any plant or place of business engaged in manufacturing. The commissioner of agriculture, and factory inspectors, are hereby charged with the enforcement of this section, as well as all other laws now in force relating to labor. And the said commissioner, and/or his duly authorized agents, or inspectors, shall have free access to any place where women or children are employed for the purpose of enforcing compliance with the provisions of this section; and any person, firm or corporation, who hinders or obstructs said commissioner, and/or his duly authorized agents, or inspectors, in the performance of their duties, shall be deemed guilty of violating this section. Any owner of a mercantile or manufacturing establishment, person, firm or corporation, violating any of the provisions hereof shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than twenty-five (\$25.00) dollars, nor more than one hundred (\$100.00) dollars, or imprisonment, not to exceed thirty (30) days, for each and every offense.

1934 (38) 1454; 1941 (42) 119.

§ 1736. Disturbance of religious worship—sale of liquors—profane language.—Any person who shall wilfully and maliciously disturb or interrupt any meeting, society, assembly or congregation convened for the purpose of religious worship, or shall enter such meeting while in a state of intoxication, or shall use or sell spirituous liquors, or use blasphemous, profane or obscene language at or near the place of meeting, shall be deemed guilty of a misdemeanor, and shall, on conviction, be sentenced to pay a fine of not less than twenty or more than one hundred dollars, or be imprisoned for a term not exceeding one year or less than thirty days, or both or either, at the discretion of the court.

1932 Code, § 1736; Cr. C. '22, § 718; Cr. C. '12, § 703; Cr. C. '02, § 505; G. S. 1635; R. S. 390; 1873 (15) 352; 1894 (21) 824; 1897 (22) 409.

Section embraces disturbing religious assemblage of Jews, even by one of the members of their church. *State v. Carvallo*, MS. Dec. 1819.

A camp meeting of a denomination of Christians is such religious meeting; and one who sells liquor at or near them is subject to the punishment prescribed herein. *State v. Hall*, 2 Bail. 151.

A riot forty feet from church is punishable under the section. *State v. Jones*, 77 S. C. 385, 58 S. E. 8, Ann. Cas. 14B, 742, 12 A. L. R. 653.

And so is a disturbance after dismissal of congregation.—Evidence that after congregation had been dismissed by pastor, and while the congregation or a

part of it was in the churchyard, defendants created a disturbance on church grounds by the firing of shots and by loud talking and cursing, frightening and causing congregation to run and scatter in various directions, did not justify direction of verdict for defendant in a prosecution for disturbance of religious worship under this section, it being unnecessary that such disturbance take place before congregation was dismissed. *State v. Matheny* 122 S. C. 459, 101 S. E. 661.

See generally. *Graham v. Bell*, 1 N. & McC. 278, 9 Am. Dec. 687, 12 Am. Dec. 265, 26 Am. St. Rep. 152.

§ 1737. Penalties for certain misdemeanors.—Any person, upon conviction of any one of the following named misdemeanors, shall be subject and liable for each offense to a fine not to exceed one hundred dollars or to imprisonment for a term not exceeding thirty days, to wit: carrying concealed about the person any deadly weapon, such as are enumerated in section 1256; disturbing a religious meeting in any way, or otherwise violating the provision of section 1736, when no weapons were actually used and no wounds inflicted; all riots, routs or affrays where no weapons were actually used and no wounds inflicted; malicious mischief and malicious trespass

as contemplated in sections 1183 and 1184, when the damage to such property does not exceed twenty dollars; disposing of property under lien, or obtaining property under false pretense, when the value of such property so disposed of, stolen or obtained, respectively, does not exceed twenty dollars.

1932 Code, § 1737; Cr. C. '22, § 719; Cr. C. '12, § 23; Cr. C. '02, § 15; R. S. 14; 1892 (21) 93; 1893 (21) 411; 1894 (21) 824.

§ 1737-1. Exhibit publicly during Sunday motion pictures, athletic sports and musical concerts in counties with army forts, naval or marine bases—hours—duration.—For a period of two years after May 23, 1941, it shall be lawful to exhibit publicly motion pictures, athletic sports and musical concerts and to engage therein from and after two p. m. on Sunday in counties wherein the United States government has established and maintains permanent or temporary army forts, naval or marine bases; *provided*, that the exhibition of such motion pictures and engagements in athletic sports is lawful on other week days. *Provided, however*, that the theatre operator shall first obtain from the town or city council a special permit to run his theatre on Sunday. The terms of this section shall in no way conflict with any Sunday evening church service.

1941 (42) 306.

CHAPTER 83

Gambling

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| 1738. Gaming and betting. | of wagers. |
| 1739. Keeping gaming tables. | 1746. Swindling. |
| 1740. Betting on elections. | 1747. Destruction of gambling devices. |
| 1741. Forfeiture of wagers. | 1748. Keeping gaming tables open on Sabbath. |
| 1742 and 1743. Security for good behavior. | 1749. Betting at race tracks. |
| 1744. Punishment — exoneration for turning state's evidence. | 1749-1. Punch boards for gaming unlawful. |
| 1745. Challenging or fighting on account | |

§ 1738. Penalty for playing at certain games and betting.—If any person or persons shall play, at any tavern, inn, store for the retailing of spirituous liquors, or in any house used as a place of gaming, or in any barn, kitchen, stable or other outhouse, or in any street, highway, open wood, race field or open place, at any game or games, with cards or dice, or at any gaming table, commonly called A, B, C, or E, O, or any gaming table known or distinguished by any other letters, or by any figures or roley-poley table, or at rouge et noir, or at any faro bank, or at any other table or bank of the same, or the like kind, under any denomination whatsoever (except the game of billiards, bowls, backgammon, chess, draughts, or whist, when there is no betting on the said game of billiards, bowls, backgammon, chess, draughts, or whist), or shall bet on the sides of hands of such as do game, upon being convicted thereof, before any magistrate, shall be imprisoned for a period of not over thirty days, or shall suffer a fine of not over one hundred dollars; and every person so keeping such tavern, inn, retail store, public place or house used as a place for gaming, or such other house, shall, upon being convicted thereof, upon indictment, be imprisoned for a period not exceed-

ing twelve months, and forfeit a sum not exceeding two thousand dollars, for each and every offense.

1932 Code, § 1738; Cr. C. '22, § 720; Cr. C. '12, § 704; Cr. C. '02, § 506; G. S. 1715; R. S. 391; 1802 (5) 432; 1816 (6) 27; 1909 (26) 66.

This section does not prevent a municipality from making further regulations against gambling. *Greenville v. Kemmis*, 58 S. C. 427, 431, 36 S. E. 727, 78 Am. St. Rep. 272, 50 L. R. A. 725, 62 L. R. A. 973. See, also, *Anderson v. Seligman*, 85 S. C. 16, 67 S. E. 13.

It is doubtful whether this section is only confined to gambling in a public place. *Greenville v. Kemmis*, 58 S. C. 427, 431, 36 S. E. 727, 78 Am. St. Rep. 272, 50 L. R. A. 725, 62 L. R. A. 973.

Game called "thimble" or "thimble and balls" is within section.—*State v. Red*, 7 Rich. 8, 33 Am. Dec. 136, 121 Am. St. Rep. 700.

So also betting on horse-racing is embraced in such games. *Atchison v. Gee*, 4 McC. 211.

But it is not error to charge that playing dice for amusement is not a crime.—On a prosecution under this section for betting on a game of dice in a public place, a charge that it is no crime for persons to play at dice for amusement, but to allow money to be staked on the game is gambling, is proper. *State v. Robinson*, 40 S. C. 553, 18 S. E. 891.

A distillery is an out-house within section. *State v. Faulkener*, 2 McC. 438, Ann. Cas. 12D, 1195, 20 A. L. R. 242.

As to gambling in dwelling, see *State v. Brice*, 2 Brev. 66.

In an indictment under this section it is not necessary to negative games, not only not forbidden, but expressly allowed. *State v. Yoe*, 76 S. C. 46, 56 S. E. 542.

Witness unable to testify otherwise to the facts may testify to them as he sees them made in an affidavit by him at the time of the gaming. *State v. Rawls*, 2 N. & McC. 331, 98 Am. Dec. 621, 622.

See generally, as to evidence of keeping a gaming house, *State v. Lane*, 82 S. C. 144, 63 S. E. 612, 613; as to what should at that time be proved to subject party to pecuniary penalty under statute, *State v. Dent*, 1 Rich. 469; *State v. Waters*, 1 Strob. 59, 13 A. L. R. 1446; as to indictment which charges gaming and keeping public place and house used as a place for gaming, *State v. Howe*, 1 Rich. 260; as to erasure in indictment, *State v. Yoe*, 80 S. C. 381, 382, 61 S. E. 880.

§ 1739. Penalty for keeping, etc., gaming tables, etc.—Any person or persons who shall set up, keep, or use any gaming table, commonly called, A, B, C, or E, O, or any gaming table known or distinguished by any other letters, or by any figures, or roley-poley table, or table to play at rouge et noir, or any faro bank, or any other gaming table or bank of the like kind, or of any other kind, for the purpose of gaming (except the games of billiards, bowls, chess, draughts, and backgammon), upon being convicted thereof, upon indictment, shall forfeit a sum not exceeding five hundred dollars, and not less than two hundred dollars.

1932 Code, § 1739; Cr. C. '22, § 721; Cr. C. '12, § 705; Cr. C. '02, § 507; G. S. 1716; R. S. 392; 1816 (6) 27.

The acts denounced under this section are not confined to those done in some public place. *Greenville v. Kemmis*, 58 S. C. 427, 36 S. E. 727, 78 Am. St. Rep. 272, 50 L. R. A. 725, 62 L. R. A. 973.

This section does certainly denounce betting or the throwing of dice as an offense. *State v. Robinson*, 40 S. C. 553, 18 S. E. 891.

An indictment charging offenses under this and preceding section in one count is bad.—An indictment which in one count charges the offense of gaming under the preceding section and the offense stated in this section, is bad; they are two separate and distinct offenses. *State v. Howe*, 1 Rich. 260.

§ 1740. Penalty for betting on elections.—Any person who shall make any bet or wager of money, or wager of any other thing of value, or shall have any share or part in any bet or wager of money, or wager of any other thing of value, upon any election in this State, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined in a sum not exceeding five hundred dollars and be imprisoned not exceeding one month.

1932 Code, §§ 1412, 1740; Cr. C. '22, §§ 347, 722; Cr. C. '12, §§ 358, 706; Cr. C. '02, §§ 271, 508; G. S. 1717, 2546; R. S. 235, 393; 1850 (12) 72; 1909 (26) 67.

§ 1741. Wagers to be forfeited.—All and every sum or sums of money staked, betted, or pending on the event of any such game or games, as aforesaid, are hereby declared to be forfeited.

1932 Code, § 1741; Cr. C. '22, § 723; Cr. C. '12, § 707; Cr. C. '02, § 509; G. S. 1718; R. S. 394; 1816 (6) 28; 1909 (26) 67.

§ 1742. Gamblers to give security for good behavior, or be committed.—

It shall and may be lawful for any two or more magistrates in any county or city whatsoever, to cause to come or to be brought before them every person within their respective limits, whom they shall have just cause to suspect to have no visible estate, profession, or calling to maintain themselves by, but do, for the most part, support themselves by gaming; and if such person or persons shall not make it appear to such magistrate that the principal part of his or their expenses is not maintained by gaming, then such magistrates shall require of him or them sufficient securities for his or their good behavior for the space of twelve months, and, in default of his or their finding such securities, shall commit him or them to the common jail, there to remain until he or they shall find such securities, as aforesaid.

1932 Code, § 1742; Cr. C. '22, § 724; Cr. C. '12, § 709; Cr. C. '02, § 511; G. S. 1720; R. S. 396; 9 Ann., c. 14; 1712 (2) 567.

§ 1743. A wager of five dollars to forfeit recognizance.—If such person or persons so finding securities as aforesaid, shall, during the time for which he or they shall be so bound to good behavior, at any one time or sitting, play or bet for any sum or sums of money, or other thing, exceeding in the whole the sum or value of five dollars, such playing shall be deemed and taken to be a breach of his or their behavior, and a forfeiture of the recognizance given for the same.

1932 Code, § 1743; Cr. C. '22, § 725; Cr. C. '12, § 710; Cr. C. '02, § 512; G. S. 1726; R. S. 397; 1712 (2) 567.

§ 1744. Imprisonment in case of conviction—exoneration for becoming state's evidence.—Upon conviction of every person under the provisions of any of the foregoing sections of this chapter, the court before whom such conviction shall take place is hereby required to commit such offender to the common jail of the county where such conviction shall happen, for a period not exceeding the time for which said offender has been sentenced, unless such offender shall sooner pay the fine or fines herein imposed, together with the cost of prosecution: *provided, however,* that all persons who might be subject or liable to the fines and penalties imposed herein, either for gaming at or keeping a gaming table or tables, shall, upon being permitted by the circuit solicitor to become evidence in behalf of the State, be freed and exonerated from the same.

1932 Code, § 1744; Cr. C. '22, § 726; Cr. C. '12, § 711; 1909 (26) 67.

§ 1745. Criminal to challenge or fight on account of wagers.—In case any person or persons whatsoever shall assault and beat, or shall challenge or provoke to fight, any other person or persons whatsoever upon account of any money won by gaming, playing or betting at any of the games afore-

said, such person or persons assaulting and beating, or challenging or provoking to fight, such other person or persons upon the account aforesaid shall, being thereof convicted, upon an indictment or information, to be exhibited against him or them for that purpose, suffer imprisonment in the common jail of the county where such conviction shall be had, for the term of two years.

1932 Code, § 1745; Cr. C. '22, § 727; Cr. C. '12, § 712; Cr. C. '02, § 514; G. S. 1729; R. S. 390; 9 Ann., c. 14; (2) 567, § 8.

§ 1746. Swindling.—Whoever shall inveigle or entice, by any arts or devices, any person to play at cards, dice, or any other game, or bear a share or part in the stakes, wagers, or adventures, or bet on the sides or hands of such as do or shall play as aforesaid, or shall sell, barter, or expose to sale any kind of property which has been before sold, bartered, or exchanged by the person so selling, bartering, or exchanging, or by any one for the benefit or advantage of the person so selling, bartering, or exchanging, in any house or other place within this State, or shall be a party thereto, or shall overreach, cheat, or defraud by any other cunning, swindling arts and devices, so that the ignorant and unwary, who are deluded thereby, lose their money or other property, every such person exercising such infamous practices shall, on conviction thereof in any court of competent jurisdiction, be deemed guilty of a misdemeanor, and shall be fined at the discretion of the court, and, besides, shall refund to the party aggrieved double the sum he was so defrauded of; and if the same be not immediately paid, with costs, every such person shall be committed to the common jail or house of correction, if there be any, of the county where such person shall be convicted, there to continue for any time not exceeding six months, unless such fine, with costs, be sooner paid and discharged.

1932 Code, § 1746; Cr. C. '22, § 728; Cr. C. '12, § 713; Cr. C. '02, § 515; G. S. 2508; R. S. 400; 1791 (5) 177.

Selling a blind horse as a sound horse is not indictable under this section. *State v. DeLyon*, 1 Bay 353.

Nor is selling a promissory note, knowing it to have been paid, but representing that it was still unpaid. *State v. Middleton*, Dud. 275, 283.

See generally, as to obtaining property from ignorant person under threat of prosecution, *State v. Vaughan*, 1 Bay 282, 283, 70 Am. Dec. 183; as to using paper as bank bill, *State v. Grooms*, 5 Strob. 158. See also, *State v. Wilson*, 2 Mill 135.

§ 1747. Officers to destroy gambling devices after confiscation.—All officers of the law in whose care, possession or keeping may be placed any gambling or gaming machine or device of any kind whatsoever, or any gambling or gaming punch board of any kind or description whatsoever, which has been confiscated in violation of any criminal law or laws of this State shall immediately after conviction of the violator of the law destroy the same.

1932 Code, § 1747; 1923 (33) 123.

§ 1748. Fine for keeping gaming tables open on the Sabbath.—Whoever shall keep, or suffer to be kept any gaming table, or permit any game or games to be played in his, her, or their house, on the Sabbath day, such person or persons, on conviction thereof before any court having jurisdiction, shall be fined in the sum of fifty dollars, to be sued for on behalf of, and to be recovered for, the use of the State.

1932 Code, § 1748; Cr. C. '22, § 729; Cr. C. '12, § 714; Cr. C. '02, § 516; G. S. 2592; R. S. 402; 1790 (5) 350.

§ 1749. Betting, pool-selling, book-making, etc., prohibited—nuisance.—

(1) Any person within this State, who engages in betting at any race track, pool-selling, or book-making, with or without writing, at any time or place; or any person who keeps or occupies any room, shed, tenement, booth, or building, float or vessel, or any part thereof, or who occupies any place or stand of any kind, upon any public or private grounds, within this State, with books, papers, apparatus, or paraphernalia, for the purpose of recording or registering bets or wagers, or of selling pools, and any person who records or registers bets or wagers, or sells pools or makes books, with or without writing upon the result of any trial or contest of skill, speed or power of endurance, of man or beast; or upon the result of any political nomination, appointment of election; or upon the result of any lot, chance, casualty, unknown or contingent event whatsoever; or any person who receives, registers, records or forwards, or purports or pretends to receive, register, record or forward, in any manner whatsoever, any money, thing or consideration of value, bet or wagered, or offered for the purpose of being bet or wagered, by or for any other person, or sells pools, upon any such result; or any person who, being the owner, lessee or occupant of any room, shed, tenement, tent, booth, or building, float or vessel, or part thereof, or of any grounds within this State, knowingly permits same to be used or occupied for any of these purposes, or therein keeps, exhibits or employs any device or apparatus for the purpose of recording or registering such bets or wagers, or the selling of such pools, or becomes the custodian or depository for gain, hire or reward, of any money, property or thing of value, staked, wagered or pledged, or to be wagered or pledged upon any such result; or any person who aids, assists or abets in any manner in any of the said acts, which are hereby forbidden, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished by a fine not exceeding one thousand (\$1,000.00) dollars, or imprisonment not exceeding six (6) months, or both fine and imprisonment, in the discretion of the court.

(2) The violation of any of the provisions of the foregoing subsection shall be deemed a common nuisance: *provided*, that wherever the offense is specified in section 1738, the punishment there provided shall be imposed, it being the intention to leave the jurisdiction of such gambling as is there specifically prohibited in the courts now having jurisdiction of the same.

1932 Code, § 1749; Cr. C. '22, § 730; 1912 (27) 713.

§ 1749-1. Punch boards for gaming, unlawful.—It shall be unlawful for any person, firm or corporation to use or offer for use any punch boards or other kinds of boards with numbers concealed thereon for the purpose of gaming or chance in this State. Any person, firm or corporation violating this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than \$10.00 nor more than \$25.00, or imprisoned not less than five days nor more than thirty days, or both, at the discretion of the court: *provided*, that for the second or third offense hereunder the fine shall not be less than \$25.00 nor more than \$100.00, or imprison-

ment on the public works of the county for a period not exceeding three months.

1932 Code, § 1749-A; Cr. C. '22, § 731; 1918 (30) 728.

See §§ 1301, 1301-1.

CHAPTER 84

Fish and Game

ARTICLE 1. General Provisions, § 1750.

ARTICLE 2. Protection of Fish, Oysters, etc., § 1767.

ARTICLE 3. Protection of Game, § 1777.

ARTICLE 4. Protection of Fish, Game, etc., in Game Zones and Certain Other Subdivisions, § 1789.

ARTICLE 1

General Provisions

1750. Property of State.

1751. Chief game warden.

1752. County game wardens.

1753. Wardens examine for game.

1754. Wardens — oath — bond — commission — powers.

1755. State game and fish commission.

1756. Game zones.

1757. Classification of birds, animals and fish.

1758. Not allowed to fish on land of others.

1759. Confederate veterans hunt or fish without license.

1760. Orphans in eleemosynary institu-

tions hunt or fish without license.

1761. Game and fish on lands acquired by United States, or State from United States.

1762. State assents to act of Congress providing aid in wild life restoration.

1763. Sell game or fish unlawfully caught, killed, etc.

1764. Penalties violate any game, bird or fish law.

1765. Peace officers assist in enforcement.

1766. Game wardens and others not receive portion of fines.

§ 1750. Wild birds, wild game and fish property of State.—All wild birds, wild game and fish (except fish in strictly ponds and lakes entirely segregated from other waters) are hereby declared to be the property of the State.

1932 Code, § 1750; Cr. C. '22, § 732; 1919 (31) 269.

§ 1751. Chief game warden.

(1) **Election—oath—bond.**—The execution of the bird, game and non-migratory fish laws of South Carolina shall be by and under the direction of a commissioner, to be known as the chief game warden. Said chief game warden to be elected by the General Assembly of this State and then be commissioned by the Governor, and shall, before assuming the duties of his office, subscribe to the oath required of public officers, and shall furnish bond in the sum of two thousand dollars, to be approved by the Governor and filed in the office of the secretary of state.

(2) **Charge of wardens—enforce laws.**—The chief game warden shall have charge of the warden force and exercise supervision over the enforcement of the laws. He shall be empowered to make contracts with wardens:

provided, that no warden shall be paid in excess of twelve hundred dollars per annum, nor be allowed more than six hundred dollars for traveling expenses. And he shall have the power to dismiss the wardens at his discretion.

(3) **Payment of funds—reports.**—The state treasurer shall pay out money from the game warden fund on the order of the state fish and game commissioner, and the said chief game warden shall make an annual report to the treasurer, covering all moneys expended. He shall at the same time make report to the Governor and the General Assembly of the State, covering all matters relating to his department for each year he is in office.

(4) **Salary—expenses—term.**—The chief game warden shall receive the salary of \$2,500.00 per year, with an allowance for traveling expenses of \$1,000.00. There shall be no other charge on the state treasury for any amount whatsoever not credited to the game protection fund. His term of office shall be four years.

1932 Code, § 3285; Cr. C. '22, § 764; Cr. C. '12, § 747; 1910 (26) 575; 1919 (31) 101; 1920 (31) 809; 1930 (36) 1219.

As to the appointment of the chief game warden, see § 3093 and note thereto.

moving chief game warden.

The term of the game warden cannot be extended under this section. *Gibbes v. Richardson*, 107 S. C. 191, 92 S. E. 333.

Section 3097 provides for manner of re-

§ 1752. County game wardens—appointment—election—removal—compensation.—The Governor of the State shall appoint, upon the recommendation of the legislative delegation of the several counties, from time to time, bird, non-migratory fish and game wardens, whose terms of office shall be for two years and until their successors are appointed. The Governor shall issue a commission to each person appointed as a warden, and shall transmit such commission to the office of the clerk of court for the county in which the bird, non-migratory fish and game warden is a resident. No tax or fee shall be charged or collected for said commission. Any of the said wardens may be removed by the Governor upon proof satisfactory to him that they are not fit persons for said positions. The compensation of said wardens shall be fixed and paid by the chief game warden from and out of the game protection fund, as provided by law: *provided*, that the game warden for Anderson County shall be nominated in the primary election, and it is made the duty of the legislative delegation from Anderson County to recommend to the Governor for appointment the person so nominated. *Provided, further*, that the game warden for Bamberg and Pickens Counties shall be nominated in the primary election, and it is made the duty of the legislative delegation from Bamberg and Pickens Counties, respectively, to recommend to the Governor for appointment the person so nominated. *Provided*, that any game warden in the county of Charleston may be removed upon the written request of the Senator and a majority of the members of the Charleston delegation in the House of Representatives. *Provided, further*, that the game warden for Cherokee County shall be appointed by the Governor upon the recommendation of a majority of the legislative delegation from Cherokee County, provided, that the one recommended shall first have been nominated in the primary for that position. *Provided, however*, that in the case of a vacancy occurring for any cause,

it may be filled upon the recommendation of a majority of the legislative delegation without any election.

1932 Code, § 3286; Cr. C. '22, § 765; Cr. C. '12, § 748; 1907 (25) 662; 1920 (31) 809; 1922 (32) 763; 1928 (35) 1195; 1930 (36) 1219; 1934 (38) 1210; 1935 (39) 378; 1939 (41) 170.

§ 1753. Wardens examine cars, etc., for game—enforce fish and game laws use of fines.—A duly commissioned bird and game warden is authorized, upon making an affidavit before a magistrate or in any court of the State, that there exists reasonable grounds to believe that birds or game are in possession of a common carrier in violation of the law, is authorized to procure a search warrant and to open and enter and examine all cars, warehouses and receptacles of common carriers in the State, where they have reason to believe any game, taken or held in violation of this section, is to be found and seize the same. It shall be the duty of said bird and game wardens to prosecute all persons or corporations having in their possession any birds, non-migratory fish, or game, contrary to the bird, fish, and game laws of this State. It shall be their duty to see that the bird, non-migratory fish, and game laws are enforced, and to obtain information as to all violation of the said bird, non-migratory fish, and game laws. All moneys obtained from fines or forfeitures, except as otherwise directed shall be deposited with the state treasurer to the credit of the "Game Protection Fund."

1932 Code, § 3290; Cr. C. '22, § 766; Cr. C. '12, § 749; 1907 (25) 662.

See §§ 1770-7, 1778 (1), 1779, 1780-3, 1784 and 1784-1 for use certain fines, etc.

§ 1754. Wardens—oath—bond—commission—powers — badge. — Every warden appointed shall, before entering upon the duties of his office, take and subscribe before a notary public, or other officer authorized to administer an oath, an oath to perform the duties of said office, and shall execute a bond in some reliable surety company approved by the chief game warden in the sum of one thousand dollars for the faithful discharge of his duties, and the said bond and oath shall be transmitted to the office of the chief game warden who shall properly record said bond and oath and keep same on file in his office. The secretary of state shall transmit to the chief game warden the commissions of all game wardens, and the chief game warden shall deliver said commissions to the game wardens only after the said wardens have filed oath and bonds, as above provided. The warden so qualified shall possess and exercise all of the power and authorities held and exercised by the constable at common law and under the statutes of this State. The game wardens, when acting in their official capacity, shall wear a metallic shield with the words "Game Warden" inscribed thereon.

1932 Code, § 3291; 1928 (35) 1267.

§ 1755. State game and fish commission.

(1) **Appointment.**—There is hereby created a state game and fish commission to be appointed by the Governor, by and with the advice and consent of the Senate and the House of Representatives which shall be composed of six members, one from each of the present six congressional districts of the State.

(2) **Terms—vacancy—pay—meetings—removal.**—In making the appointments, two members shall be appointed for one year, two for two years, and two for three years, unless sooner removed. And thereafter, as all such terms expire, their successors shall be appointed for three years. All vacancies on said commission shall be filled through appointment for the unexpired term by the Governor. Four members of said commission shall constitute a quorum, and shall have full power to transact any and all business of the said commission. The commission shall meet at the state capitol within two weeks after their appointment and shall select from among their members a chairman and a secretary. Meetings of the commission shall be held at least quarterly at such place or places as the commission itself shall determine. The commissioners shall receive no salary, but they shall be entitled to receive the per diem allowed other state boards and commissioners by the annual appropriation act, for the time spent in the performance of their official duties, and their mileage for travel as also fixed in the appropriation act: *provided, however*, said payments shall not exceed one hundred (\$100.00) dollars to any member in one year, and shall be paid from the state game fund. The Governor may remove a commissioner for malfeasance or misconduct in office, giving him a copy of the charges against him and an opportunity of being publicly heard in person or by counsel in his own defense upon not less than ten days' notice.

(3) **Duties.**—The commission shall continuously investigate the game and fish conditions of the State and the laws relating thereto and counsel with and advise the chief game warden particularly as to the enforcement of the laws looking to the conservation, protection and replenishment of game and fish; and shall annually make report of their activities to the General Assembly, as a part of the annual report of the chief game warden, and recommend legislation and other action by the General Assembly in its judgment conducive to the conservation of wild life.

(4) **Chief game warden co-operate.**—The chief game warden shall co-operate with the commission, meet with it upon request and furnish it with clerical and other assistance that may be reasonably required.

(5) **Cumulative.**—This section is hereby declared to be supplementary to existing legislation for the protection and conservation of the wild life resources of the State, but shall supersede any provisions of such legislation inconsistent herewith.

1935 (39) 478.

§ 1756. Game zones.

(1) **State divided into 6.**—The State of South Carolina is hereby divided for the purpose of game into six (6) zones.

(2) **Zones.**—The first zone shall comprise the counties of Greenville, Pickens and Oconee; the second zone shall comprise the counties of Anderson, Abbeville, Laurens, Greenwood, Newberry and McCormick; the third zone shall comprise the counties of Saluda, Edgefield, Aiken, Lexington, Richland and Calhoun; the fourth zone shall comprise the counties of Spartanburg, Cherokee, Union, York, Chester, Fairfield and Lancaster; the fifth zone shall comprise the counties of Kershaw, Marlboro, Chesterfield, Darlington, Dillon, Marion, Horry, Florence, Lee, Sumter and Clarendon; the sixth zone shall comprise the counties of Orangeburg, Barnwell, Bamberg,

Allendale, Hampton, Jasper, Beaufort, Colleton, Dorchester, Berkeley, Williamsburg, Georgetown and Charleston: *provided*, Union County shall be in the same zone as Spartanburg County.

(3) Application of game laws.—All laws of this State now in force affecting game, shall, until changed, apply to all of the zones of the State; and all laws of the State hereafter enacted shall apply to the entire State except where otherwise specified.

1937 (40) 286; 1938 (40) 1743; 1939 (41) 469.

§ 1757. Classifications of birds, animals and fish. For the purpose hereof the following classifications shall be recognized:

(a) **DOMESTIC GAME BIRDS.**—Blackbirds, pheasants, doves, partridge (quail), and wild turkeys.

(b) **DESTRUCTIVE BIRDS.**—Eagles, buzzards, crows, Cooper's hawk, duck hawk, English sparrows, great horned owl, jaybirds, loggerheads and sharp-shinned hawk.

(c) **NON-GAME BIRDS.**—All domestic birds not named above are non-game birds, and shall not be destroyed in any way at any time.

(d) **GAME ANIMALS.**—Deer, fox, mink, muskrats, opossums, otter, rabbits, raccoons, skunk and squirrels.

(e) **GAME FISH.**—Jackfish or pickerel, pike, black bass or pond trout, striped bass or rockfish, warmouth, red belly bream, copperfaced or ball faced bream, yellow-belly perch, sun perch, redfin trout, flyer, crappie, rock bass, google eye and white perch.

1932 Code, § 1751; Cr. C. '22, § 733; 1919 (31) 269; 1920 (31) 732; 1921 (32) 224, 233; 1924 (33) 1152; 1927 (35) 372; 1928 (35) 1217; 1930 (36) 1740, 2122.

§ 1758. Not hunt, fish, etc., without consent on lands of others.—If any person, at any time whatsoever, shall hunt or range on any lands, or shall enter thereon for the purpose of hunting, fishing or trapping, without the consent of the owner or manager thereof, every such person so offending shall forfeit and pay a fine of not more than twenty dollars, or be imprisoned at hard labor not more than thirty days for each and every such offense.

1932 Code, § 1779; Cr. C. '22, § 756; Cr. C. '12, § 730; Cr. C. '02, § 542; G. S. 1689; R. S. 422; 1769 (4) 310; 1905 (24) 906.

§ 1759. Confederate veteran hunt or fish without license.—Every Confederate veteran may hunt and fish within any county in this State without obtaining a license so to do: *provided*, that while so doing each of said veterans shall wear his cross of honor.

1932 Code, § 1764; 1923 (33) 238.

§ 1760. Orphans in eleemosynary institutions hunt or fish without license.—All orphans of any orphanage or other eleemosynary institution of this State may hunt or fish within any county in this State without obtaining a license to do so: *provided*, that the superintendent or person in charge of said orphanage or eleemosynary institution shall first apply to the chief game warden for a permit allowing said orphans to hunt, giving the names of the orphans and the name of the institution: *and provided, further*, that said superintendent or person in charge of said orphans shall be the holder of a State hunting license and shall accompany said orphans on the hunt for which the permit is granted. The chief game warden is hereby

authorized to issue such permit when the above conditions have been complied with.

1932 Code, § 1765; 1930 (36) 1130.

§ 1761. Game and fish on lands acquired by United States or by State from United States and lands under control state commissioner of forestry.

(1) **General Assembly consent to Congress making rules and regulations as to game animals, game birds and non-game birds and fish on lands acquired by United States in State under act of Congress March 1, 1911.**—The consent of the General Assembly is hereby given to the making by Congress of the United States, or under its authority, of all such rules and regulations as the federal government shall determine to be needful in respect to game animals, game birds and non-game birds, and fish on such lands in the State of South Carolina as shall have been, or may hereafter be, purchased by the United States under the terms of the act of Congress of March 1, 1911, entitled "An Act to Enable any State to Cooperate with any other State or States, or with the United States for the Protection of the Water-sheds of Navigable Streams and to Appoint a Commission for the Acquisition of Lands for the Purpose of Conserving the Navigability of Navigable Rivers" (36 United States Statutes at Large, page 961), and acts of Congress supplementary thereto and amendatory thereof, and in or on the waters thereof, (Acts 1922, p. 106).

(2) **Chief game warden enter into agreements with United States for protection and management of wild life resources of national forest lands in State and for restocking same.**—The chief game warden of the State of South Carolina shall have the right and authority to enter into a co-operative agreement with the United States government, or with the proper authorities thereof, for the protection and management of the wild life resources of the national forest lands within the State of South Carolina and for the re-stocking of the same with desirable species of game, birds and other animals, and fish.

(3) **Hunting and fishing within said lands.**—The chief game warden of the State of South Carolina shall have authority to close all hunting and fishing within said lands so contracted for with the federal government for such period of time as may, in the opinion of the chief game warden, be necessary; shall have authority from time to time to prescribe the season for hunting and fishing therein, to fix the amount of fees required for special hunting licenses and to issue said licenses, to prescribe the number of animals and game, fish and birds that shall be taken therefrom and the size thereof, and to prescribe the conditions under which the same may be taken.

(4) **Section applicable to certain other properties.**—The provisions of this section shall also apply to other properties of the United States government, or to any other properties acquired or to be acquired from the United States government by the State of South Carolina. *Provided*, however, that hunting and fishing shall not be allowed on any lands under the control or ownership of the South Carolina state commissioner of forestry except by written agreement with the state commissioner of forestry.

(5) **Penalties.**—Any person violating any of the rules so promulgated by the chief game warden, or who shall hunt or fish upon said lands at any time, other than those times specified by the chief game warden, shall,

upon conviction therefor, be fined not less than \$25.00 nor more than \$100.00, or imprisonment for not less than ten days nor more than thirty days for each and every offense.

1937 (40) 203; 1940 (41) 1841.

§ 1762. State assents to act of Congress providing United States aid States in wild life restoration projects, etc.—allocation of aid.—The State of South Carolina hereby assents to the provisions of the act of Congress entitled “An Act to Provide that the United States Shall Aid the States in Wild Life Restoration Projects, and for Other Purposes,” approved September 2, 1937 (Public, No. 415, 75th Congress), and the South Carolina game and fish department is hereby authorized, empowered and directed to perform such acts as may be necessary to the conduct and establishment of cooperative wild life restoration projects, as defined in said act of Congress, in compliance with said act and with rules and regulations promulgated by the secretary of agriculture thereunder; and no funds accruing to the State of South Carolina from license fees paid by hunters shall be diverted for any other purpose than the administration of the South Carolina game and fish department.

1938 (40) 1763; 1939 (41) 531.

§ 1763. Sell game or fish unlawfully caught, killed, etc.—Any bird, non-migratory fish, or animal caught, taken or killed, shipped, or received for shipment, had in the possession or under control by any person or corporation contrary to the provisions of law, which may come into the possession of the bird and game wardens, shall be sold at auction within the State, and the bird or game warden disposing of the same shall issue a certificate to the purchaser, certifying that the said birds, nonmigratory fish or animals were legally obtained and possessed, and any one so acquiring said birds, nonmigratory fish or animals, within this State can have the right to use them as if same had been sold, killed or possessed in accordance with the laws of this State. The money received from the sale of such confiscated birds, nonmigratory fish or game shall be forwarded by the game warden to the treasurer of the State and be placed to the account of the game protection fund.

1932 Code, § 1785; Cr. C. '22, § 767; Cr. C. '12, § 750; 1907 (25) 662.

See §§ 1770-4 and 1780-2 for sale also of fish and game unlawfully caught.

§ 1764. Penalties violate any game, bird or fish law, when not otherwise specified.—When not otherwise specified, the penalty for violation of any part of the game, bird or fish laws of this State shall be a misdemeanor, and, upon conviction thereof, the offender shall suffer penalty of fine of not less than ten dollars or more than one hundred dollars, or imprisonment of not less than ten or more than thirty days.

1932 Code, §§ 1752, 1755; Cr. C. '22, §§ 734, 738; 1919 (31) 269; 1920 (31) 732; 1927 (35) 284; 1933 (38) 437.

See §§ 1770-3 and 1780-2 also for penalties.

§ 1765. Peace officers assist in enforcement of fish and game laws.—It shall be the positive duty of all sheriffs, deputy sheriffs, constables, rural policemen and special officers to actively cooperate with the game depart-

ment and game wardens in the enforcement of the game and fish laws of the State.

1932 Code, § 1756; Cr. C. '22, § 739; 1919 (31) 269.

See § 1766 following.

§ 1766. Game wardens and others not receive portion of fine imposed for violation of game and fish laws.—It shall be unlawful for any game warden or any person to receive any portion of a fine imposed by any court for the violation of the game and fish laws of the State of South Carolina.

1934 (38) 1415.

ARTICLE 2

*Protection of Fish, Oysters, Etc.

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| 1767. License fish in fresh water with fly rod, casting rod, artificial bait, etc. | 1772-2. Fishing on South Carolina side of Savannah River. |
| 1767-1. Non-resident fishing license. | 1772-3. Misdemeanor place traps on South Carolina side of Savannah River. |
| 1768. Catching of game fish. | 1772-4. Penalties. |
| 1769. Use of seines, nets, traps, etc. | 1772-5. Not obstruct free migration of fish in streams. |
| 1769-1. Close season in clear water streams. | 1772-6. Construct certain fishways. |
| 1769-2. Number and size of speckled or rainbow trout catch. | 1772-7. Not cause impurities. |
| 1769-3. Catch catfish and carp. | 1772-8. Designate fish sluices. |
| 1769-4. Penalties fish unlawfully with traps. | 1772-9. Fish sluices designated yearly. |
| 1769-5. Not pollute waters. | 1772-10. Sluices not to be designated through ways erected by public authority. |
| 1770. Not poison, pollute, etc., waters or put explosives therein. | 1772-11. Not put fish traps near dams erected by State. |
| 1770-1. Catching non-migratory and migratory fish. | 1773. Penalty obstruct navigation by fish traps. |
| 1770-2. Fishways in dams. | 1773-1. Penalties steal fish from traps. |
| 1770-3. Penalties violate. | 1773-2. Sale or traffic in game fish. |
| 1770-4. Sell fish unlawfully caught. | 1773-3. Sale of certain other game fish. |
| 1770-5. Not fish in private pond without permission. | 1773-4. Owners of private ponds draw same and dispose of fish caught. |
| 1770-6. Return game fish caught with nets. | 1773-5. Shipping or carrying game fish out of State. |
| 1770-7. Disposition of fines. | 1774. Acquire land establish fish hatcheries. |
| 1771. Owners of private ponds catch fish therein for propagation purposes. | 1774-1. Fish sanctuaries. |
| 1771-1. Not fish in ponds used breed fish. | 1774-2. Establish fishing culture. |
| 1772. Staked nets, seines, etc., not extend more than half way across stream. | 1775. Clear water streams. |
| 1772-1. Nets not obstruct passage of fish in Savannah River, near city of Augusta. | 1775-1. Laws regulating fishing in clear water streams applicable to Lake Murray. |
| | 1776. Certain federal officials may fish. |

§ 1767. License fish in fresh waters with fly rod, casting rod, artificial bait, etc.

(1) **Unlawful fish with such equipment without angler's license.**—It shall be unlawful for any person to fish in fresh water of this State by use of a fly rod, casting rod, artificial bait or any manufactured tackle or equipment other than ordinary hook and line, unless he has at first obtained an

* §§ 3299 thru 3414-13 should be consulted for further provisions relating to non-game fish, oysters, etc.

angler's license: *provided, however*, that no license shall be required for fishing with traps or nets where fishing with traps or nets is lawful.

Provided, that it shall be lawful to use seines, nets, or other devices for the stoppage, catching and/or collecting of catfish, carp, suckers and all non-game fish in Union County and York County without the license required by this section.

(2) **License fee—use of receipts.**—The license as provided for fishing in this State shall be one dollar and ten cents (\$1.10) per calendar year; ten (10c) cents of which shall go to the agent issuing said license, and the remaining funds from the sale of which shall be used solely for the rearing, protection, propagation and distribution of fish, and the publicity and dissemination of information of facts and findings as may in the opinion of the fish and game commission and the chief game warden, be deemed wise and expedient for the improvement and betterment of this section.

(3) **Button and license—display.** — All persons applying for a license shall receive a button and such license as may be provided; and every person shall, while fishing, carry conspicuously displayed on his person the said button and carry on his person said license, and shall show his license to any officer upon demand, and the license must correspond to the button as to serial number.

(4) **Pay revenues and fines to state treasurer.**—All revenues and fines arising from this section shall be paid over to the state treasurer and placed to the credit of the game protection fund.

(5) **Chief game warden provide for furnishing buttons and licenses.** The chief game warden of the State shall provide for the furnishing of buttons and licenses under the terms of this section in accordance with the provisions now in force concerning hunting licenses.

(6) **Penalties.**—Any one convicted of violating any of the provisions of this section shall be sentenced to pay a fine of not less than ten (\$10.00) dollars, nor more than one hundred (\$100.00) dollars, or serve not less than ten (10) days or more than thirty (30) days.

1937 (40) 303, 586; 1938 (40) 1659, 1688.

§ 1767-1. Non-resident fishing license.—All non-residents of this State, before fishing for game or other fish in any manner in the inland streams or waters of this State, shall first procure a non-resident fishing license, the fee for which shall be five and 25/100 (\$5.25) dollars. *Provided*, a temporary license shall be granted to any non-resident applying therefor upon payment of a fee of one and 10/100 (\$1.10) dollars, which license shall authorize the holder thereof to exercise the privileges thereby granted for the period of two consecutive days only during the calendar year in which said license may be issued. The above mentioned license shall be in form and design as designated by the chief game warden and shall be carried upon the person of the licensee at all times when fishing. It shall be unlawful to alter or to change the date or to back date any license by the licensee, the selling agent or other person, and upon the violation of this section the license shall immediately be forfeited to the State of South Carolina. Any person violating the provisions of this section shall, upon conviction, be punished by a fine of not less than twenty-five (\$25.00) dollars nor more than one hundred (\$100.00) dollars, or be imprisoned for a

period not exceeding thirty (30) days for each and every offense.

1932 Code, § 1802; Cr. C. '22, § 742; 1919 (31) 269; 1930 (36) 1354; 1937 (40) 160.

§ 1768. Catching of game fish.—The catching of game fish shall be with hook and line only in all clear-water streams and waters of the State. The tickling, pegging or catching of game fish by any means except rod and line, or hand line, or single set line, outside of beds, is strictly forbidden.

1932 Code, § 1751.

§ 1769. Use of seines, nets, traps, etc., catch fish.—Gill nets (not to extend more than halfway across a stream, lake, or pond), traps, seines, trotlines or other device which does not block the passage of fish in streams may be used in the muddy streams of the State: *provided, further*, they be not used within one hundred yards of the mouth of clear-water streams emptying into the same: *and provided, further*, that a seine or net may be used in fishing between the first day of September and the first day of May. No traps, nets or other devices shall be used at the mouth or inside of any rice fields ditches. *Provided*, that the season for the use of seines or nets in fishing shall be closed on the first day of April in Clarendon County, so that said season in Clarendon County shall be from the first day of September to the first day of April only.

1932 Code, § 1751; 1937 (40) 199.

Section held not to repeal section 488, 188 S. E. 134.
1772-5. State v. Hood et al., 181 S. C.

§ 1769-1. Close season fish in clear water streams.

(1) **Chief game warden declare closed season.**—The chief game warden is hereby authorized and directed to declare a closed season for a period of not more than sixty (60) days at any one time on fish in any clear water stream in this State on the written recommendation of the Senator and at least one-half of the Representatives from any county in which such clear water stream may be situated.

(2) **Give notice of such closed season.**—The chief game warden shall give notice of the closed season so declared by publishing in at least two (2) daily newspapers and in a newspaper in the county or counties in which the closed season is declared, provided said counties have a newspaper therein, stating length of period of said closed season.

(3) **Fishing with hook and line, etc., prima facie evidence of violation.**—Any person or persons found fishing with hook and line, or in any other manner whatsoever, within the restricted territory during a closed season so declared, shall be prima facie evidence that he or they have violated the provisions of this section, regardless whether he or they have caught any fish or not.

(4) **Penalties.**—The penalty for violation of the provisions of this section shall be a fine of not less than fifty (\$50.00) dollars, nor more than one hundred (\$100.00) dollars; or imprisonment for not less than thirty (30) days.

1932 Code, § 1807; 1931 (37) 340.

§ 1769-2. Number and size speckled or rainbow trout catch.—It shall be

unlawful for any person to take from any stream in this State more than twenty (20) speckled trout or twenty (20) rainbow trout in any one calendar day. It shall be unlawful for any person to take from any stream any speckled trout less than seven (7) inches in length or any rainbow trout less than eight (8) inches in length. It shall be lawful for any game warden or other officer of the law to search any fish container to ascertain if this law has been violated. Any person violating the provisions of this section, or who shall object to any fish container being searched, shall be guilty of a misdemeanor and liable to fine or imprisonment not to exceed one hundred (\$100.00) dollars or thirty (30) days.

1932 Code, § 1801; 1930 (36) 1216.

See §§ 1789-3 thru 1789-9 for game zone 1, §§ 1790-2 and 1790-5 for game zone 2.

§ 1769-3. Catch catfish and carp any time.—It shall be lawful for any person to catch catfish and carp during any season of the year within the borders of the State of South Carolina.

1932 Code, § 1799; 1922 (32) 1023.

§ 1769-4. Penalties fish unlawfully with traps.—Any person found guilty of violating any of the provisions of law in this State with reference to fishing with traps shall be deemed guilty of a misdemeanor and upon conviction thereof shall pay a fine of not more than two hundred (\$200.00) dollars or serve not more than ninety (90) days at hard labor in the discretion of the court.

1939 (41) 318.

§ 1769-5. Not pollute waters so as to injure fish and shell fish.—It shall be unlawful for any person, firm or corporation to throw, run, drain or deposit any dye-stuffs, coal tar, oil, sawdust, poison or other deleterious substance or substances in any of the waters, either fresh or salt, which are frequented by game fish, within the territorial jurisdiction of this State, in quantities sufficient to injure, stupefy, or kill any fish or shell fish, or destructive to their spawn which may inhabit said waters, and the master or captain in charge of any boat, ship or vessel shall be responsible for the discharge of any of said substances from his vessel. Any person convicted of violating this section shall be fined not less than three hundred (\$300.00) dollars nor more than one thousand (\$1,000.00) dollars, or imprisoned not less than three (3) months nor more than one (1) year, or both fine and imprisonment in the discretion of the court. It shall be the duty of the state fish commission of this State to see that this law is enforced. This section shall not repeal any existing law, but is in addition to the law now in force.

1932 Code, § 1820; 1925 (34) 92.

§ 1770. Not poison, pollute, etc., waters or put explosives therein, catch fish.—It is unlawful to poison the streams or waters of the State in any manner whatsoever for the purpose of taking fish. The muddying of streams or ponds or the introduction of any substance which results in making the fish sick, so that they may be caught, is hereby declared to be poisoning in the sense of this section. No sawdust or acid or other in-

jurious substance shall be discharged into any of the streams of the State where fish breed or abound. It shall be unlawful to throw, place or put any dynamite or any other explosive in any lake, stream or water in the State for the purpose of taking fish. For the violation of this section the person or persons so violating shall be fined five hundred (\$500.00) dollars or imprisonment not exceeding one year.

1932 Code, § 1803; Cr. C. '22, § 735; Cr. C. '22, § 774; Cr. C. '12, § 757; 1910 (26) 576; 1911 (27) 125, 126, 128; 1919 (31) 269.

§ 1770-1. Catching nonmigratory and migratory fish.—Any nonmigratory fish, except game fish, may be caught at any time or in any manner not prohibited by 1770 thru 1770-6. Migratory fish may be caught in accordance with such laws as now exist or may hereafter be enacted.

1932 Code, § 1806; Cr. C. '22, § 777; Cr. C. '12, § 760; 1910 (26) 576; 1911 (27) 126.

§ 1770-2. Fishways in dams.—No navigable stream of this State shall be obstructed by dam or otherwise unless there be provided a fishway in same. For the violation of this section the person or corporation so violating shall be fined not less than twenty-five (\$25.00) dollars for each day that such obstruction shall exist without said fishway in same after having been notified in writing by any person that such obstruction exists.

1932 Code, § 1805; Cr. C. '22, § 776; Cr. C. '12, § 759; 1910 (26) 576.

§ 1770-3. Penalties violate §§ 1770 thru 1770-6.—For the violation of any provisions of §§ 1770 thru 1770-6 not otherwise provided for shall, upon conviction, be fined not less than ten dollars nor more than twenty-five dollars, or be imprisoned for not less than ten days nor more than thirty days, and for the violation of any provision of section 1770-2 upon conviction, be fined not less than one dollar nor more than twenty-five dollars, or be imprisoned for not less than one day nor more than thirty days.

1932 Code, § 1808; Cr. C. '22, § 778; Cr. C. '12, § 761; 1910 (26) 526; 1911 (27) 126.

§ 1770-4. Sell fish unlawfully caught.—Any fish caught contrary to the provisions of sections 1770 thru 1770-6 shall be sold to the highest bidder and the money transmitted to the state treasurer to the credit of the game protection fund, and any fines collected under the provisions of sections 1770 thru 1770-6 shall be paid to the state treasurer to the credit of the game protection fund.

1932 Code, § 1809; Cr. C. '22, § 779; Cr. C. '12, § 762; 1910 (26) 576; 1911 (27) 126.

See also §§ 1763 and 1780-2 for sale of fish or game unlawfully caught, killed, etc.

§ 1770-5. Not fish in private pond or from banks of navigable streams without permission.—It shall be unlawful to fish in any private pond or stream without the permission of the owner, or from the banks of a navigable stream without the permission of the owner of the land: *provided*, that such permit must be in writing should the owner not be within one mile of the place where person or persons may be caught in the act of so fishing.

1932 Code, § 1804; Cr. C. '22, § 775; Cr. C. '12, § 758; 1910 (26) 576.

§ 1770-6. Return game fish caught with nets, etc., to water.—Should any

game fish be taken by net or other appliance while fishing for other fish than game fish, they shall be immediately returned to the water from whence they came.

1932 Code, § 1797; Cr. C. '22, § 771; Cr. C. '12, § 756; 1910 (26) 576.

§ 1770-7. Disposition of fines.—All fines collected for the violation of any of the sections of this chapter shall be turned into the county treasury to be disbursed the same as any ordinary county fund.

1932 Code, § 1810; Cr. C. '22, § 780; Cr. C. '12, § 763; 1911 (27) 126.

This provision comes from act 64 of 1911 which relates only to certain counties. The word chapter in line 2 hereof appeared in chapter 85 of 1932 Code, hence it is brought forward, since to translate it to definite sections is not possible as no other provisions of said 1911 act is known to be in this Code.

See §§ 1753, 1778 (1), 1779, 1780-3, 1784 and 1784-1 for use certain fines, etc.

§ 1771. Owners of private ponds catch fish therein for propagation purposes.—Persons owning private ponds in this State are allowed to catch fish therein for propagation purposes only after the issuance of a permit from the chief game warden. The chief game warden is authorized and empowered to issue such rules and regulations as in his judgment is proper concerning the issuance of such permit, the length of time that each permit will be of force, and the conditions on which issued; and he shall have full power and authority to revoke such permits in his discretion. No permit shall be issued except it be endorsed in writing by the game warden of the county in which it is to be used. All violations of law shall be enforced, and with penalties as now provided, except as hereby expressly changed.

1936 (39) 1545.

See § 1773-4.

§ 1771-1. Not fish or trespass in ponds used breed fish or oysters.—Whenever any one shall have made or created an artificial pond on his own land, and shall put therein any fish or the eggs of any fish or oysters, for the purpose of breeding and cultivating fish or oysters, and shall give notice thereof, by written or printed handbills, put up in public places near the said pond, any person or persons who shall thereafter enter in about such pond for the purpose of fishing, or shall catch or take away any fish or oysters therefrom, or shall be guilty of committing any trespass upon any artificial fish pond by fishing in the same, or in any manner using any means to destroy the fish or oysters raised or collected in such pond, or by breaking the dam or dams for the purpose of permitting the fish or oysters to escape, or by poisoning the same, or in any manner destroying or injuring the same, upon conviction, shall be deemed guilty of a misdemeanor, and shall be subject to a fine of not less than twenty dollars nor more than one hundred dollars or be imprisoned at the discretion of the court; which fine, if imposed, shall go one-half thereof to the informer and the other half thereof to the person or persons whose property shall have been injured: *provided*, that nothing in this section shall be construed as applying to ponds used as water power for manufacturing purposes.

1932 Code, § 1811; Cr. C. '22, § 781; Cr. C. '12, § 764; Cr. C. '02, § 534; G. S. 1680; R. S. 414; 1872 (15) 161.

§ 1772. Staked nets, seines, etc., not extend more than half way across stream.—It shall be unlawful at any time during the year to stretch any staked nets, seines, wire fences or traps more than half way across the river or streams, or to use any seines in any of the lakes of this State, except where such basins or lakes lie wholly within limits of private property of this State. Any person violating this section shall be deemed guilty of a misdemeanor, and be imprisoned for not more than six months, or be fined not more than one hundred dollars, or both fine and imprisonment, at the discretion of the court.

1932 Code, § 1812; Cr. C. '22, § 782; Cr. C. '12, § 765; 1901 (23) 399

§ 1772-1. Nets not obstruct passage of fish in Savannah River, near city of Augusta.—It shall be unlawful for any person or persons to obstruct the free and convenient passage of fish in the Savannah River by nets, seines, or other similar devices, or to fish with nets, seines, or similar devices in said river within one mile below or one-half of one mile above the dam across said river near the city of Augusta, and known as the Augusta canal dam.

1932 Code, § 1813; Cr. C. '22, § 783; Cr. C. '12, § 766; Cr. C. '02, § 536; G. S. 1690; R. S. 423; 1780 (5) 124.

§ 1772-2. Fishing on South Carolina side of Savannah River.—It shall be unlawful for any person or persons to establish any fishery by nets, seines, traps, or other or similar devices, on the South Carolina side of said river within the locality set forth in section 1772-1, or to enter said locality of said river from the South Carolina side thereof, for the purpose of fishing with said devices, except for the purpose of visiting traps already established.

1932 Code, § 1814; Cr. C. '22, § 784; Cr. C. '12, § 767; Cr. C. '02, § 537; G. S. 1683; R. S. 417; 1882 (17) 783.

§ 1772-3. Place traps on South Carolina side of Savannah River misdemeanor.—It shall be a misdemeanor for any person or persons to place any trap in the Savannah River, on the South Carolina side thereof, within the above distances, where no such traps are now located, or to fail to close up such traps as are now there during the closed time now provided by law.

1932 Code, § 1815; Cr. C. '22, § 785; Cr. C. '12, § 768; Cr. C. '02, § 538; G. S. 1684; R. S. 418; 1882 (17) 783.

§ 1772-4. Penalties, violate §§ 1772-1 thru 1772-3.—Any person violating the provisions of sections 1772-1 thru 1772-3, upon conviction before any court of competent jurisdiction, shall, for each offense, be imprisoned for a term of not less than three months, or fined in a sum of not less than two hundred dollars, or both fined and imprisoned, in the discretion of the court.

1932 Code, § 1816; Cr. C. '22, § 786; Cr. C. '12, § 769; Cr. C. '02, § 539; G. S. 1685; R. S. 519; 1882 (17) 783.

§ 1772-5. Not obstruct free migration of fish in streams—time not use nets, seines, etc., in waters.—At no time during the year shall there be any permanent obstructions of any kind or nature whatever in any of the inland creeks, streams or waters of the State to the free migration of fish; or shall

any seine, net or any plan or device for the stoppage or collecting of fish which obstructs any portion of any creek, stream or inland waters of the State, be set or used in any manner whatsoever in any such creeks, streams or inland water within one mile of the mouth of the Waccamaw, Great Pee Dee and Bull Creek Rivers, and not below a line from where Mosquito Creek empties into Winyah Bay, across said bay in an easterly direction to the opposite shore of said bay; and there shall be a closed time in all the creeks, streams and inland waters of the State from the setting of the sun each Saturday until the rising of the sun each Wednesday, during which time all seines, nets or any plan or device for the stoppage or collecting of fish, which obstructs any portion of any creek, stream or inland waters other than a dam for manufacturing purposes, shall be removed from said creek, streams or inland waters; and any person or persons using such seine, net, plan or device in violation of the provisions of this section shall be deemed guilty of a misdemeanor, and, upon conviction thereof before any court of competent jurisdiction, shall be fined in the sum of two hundred dollars, one-half of which shall go to the court in which the case shall be tried, or be imprisoned for a period of not less than three nor more than six months, or both, in the discretion of the court trying the case. Nothing herein contained shall apply to fishing with dip nets used by hand. And wherever any seine, net or any plan or device for the stoppage or collecting of fish, as above stated, shall be used, the chief game warden or any warden shall have the authority, in the name of the State, to seize and hold said seine, net or plan or device for the stoppage or collecting of fish, and to use the same as evidence for the purpose of convicting any person violating the provisions of this section; and, upon conviction, of the person so using said seine, net or plan or device for stoppage or collecting of fish, the same shall be forfeited to the State and sold, the proceeds of said sale to be transmitted to the credit of the game protection fund.

1932 Code, § 1817; Cr. C. '22, § 787; Cr. C. '12, § 770; Cr. C. '02, § 517; G. S. 1669; R. S. 403; 1870 (14) 338; 1871 (14) 660; 1872 (15) 191; 1878 (16) 539; 1885 (19) 58; 1889 (20) 379; 1915 (29) 187; 1918 (30) 717; 1934 (38) 1415.

See § 1824-1 for seining for fish, Spartanburg county.

Statute prohibiting fishing with nets, in all inland waters, from sunset Saturday to sunrise Wednesday each week, held not repealed by statute permitting use of nets in muddy streams of state from November 1st to March 1st, even if amendment to statute relating to muddy streams could be considered later enacted statute by reason of its amend-

ment. *State v. Hood*, 181 S. C. 488; 188 S. E. 134.

In prosecution for fishing with nets during closed time of week, where act was committed on March 26th, failure to instruct that nets could be used from November 1st to March 1st in muddy water streams held not prejudicial. *State v. Hood*, 181 S. C. 488; 188 S. E. 134.

§ 1772-6. Construct certain fishways.—All manufacturing companies or persons who have erected, or many hereafter erect, artificial dams across the inland creeks, rivers, streams or waterways of this State which prevent the migratory fish from ascending the same, unless excused by the county board of commissioners, shall construct proper fishways or ladders over the same, to be approved by the county board of commissioners of the county in which such dam is situated, and should such manufacturing company, person or persons, refuse or fail so to do within thirty days after notice from the county board of commissioners, they shall be liable

to a fine or penalty of five thousand dollars, recoverable by the county in which such dam has been or may be erected in a court of competent jurisdiction.

1932 Code, §§ 1818, 3415; Civ. C. '22, § 1031; Cr. C. '22, § 788; Civ. C. '12, § 3433; Cr. C. '12, § 771; Civ. C. '02, § 2347; Cr. C. '02, § 518; G. S. 1670; R. S. 404, 1848; 1871 (14) 661; 1908 (25) 1036.

§ 1772-7. Not cast impurities in streams.—Should any person or persons cause to flow into or be cast into any of the creeks, streams, or inland waters of this State, any impurities that are poisonous to fish or destructive to their spawn, such person or persons shall, upon conviction thereof, be punished with a fine of not less than five hundred dollars, or imprisonment of not less than six months in the county jail; the fine to go one-half to the county.

1932 Code, § 1819; Cr. C. '22, § 789; Cr. C. '12, § 772; Cr. C. '02, § 519; G. S. 1671; R. S. 405; 1726 (3) 270; 1871 (14) 661; 1934 (38) 1415.

Poisonous substance must be intentionally caused to flow.—In a prosecution under this section for causing acid to flow into a stream, thereby killing fish, where in defendant's plant there were two pipes, one conveying water and one carrying water and acid near by, both embedded in cement which was broken by a falling beam, so that the acid leaked into the water pipe, a refusal of a request instruction, that unless the substance in question was intentionally caused to flow into the

stream, to acquit defendant, was error; defendant not being guilty if the act was an accident. *State v. American Agri. Chemical Co.*, 118 S. C. 333, 110 S. E. 800.

Causing poison to flow into branch emptying into river is offense.—Under this section, an instruction that, if Monkey Spring branch flowed into the Congaree river, defendant would be liable for causing poisonous substance to flow into it that would kill the fish, was not error. *State v. American Agri. Chemical Co.*, 125 S. C. 270, 118 S. E. 535.

§ 1772-8. Designate fish sluices.—It shall be the duty of the county commissioners to designate the fish sluices on the several rivers, so as to leave one or more passages for fish up the said river, which sluices shall be sixty feet wide, or, where there are two or more such sluices, they shall be, together, sixty feet wide; and when they shall be so designated, it shall be lawful for any person to open such sluices; and if any person shall obstruct any such sluice, when once opened, so as to prevent the free passage of fish up the same, and every part thereof, he shall be deemed guilty of a public nuisance, and, on conviction thereof in the court of general sessions, shall be fined one hundred dollars, and shall stand committed until such fine be paid, for a time not exceeding ten days, at the discretion of the court before which such conviction may take place. One-half of the fine shall be paid into the treasury of said State. Whenever a fish sluice in any of the rivers aforesaid shall have been designated as aforesaid, any stoppage of the same shall be regarded as a public nuisance and may be abated as such.

1932 Code, §§ 1821, 3416; Civ. C. '22, § 1032; Cr. C. '22, § 790; Civ. C. '12, § 3434; Cr. C. '12, § 773; Civ. C. '02, § 2348; Cr. C. '02, § 520; G. S. 1672; R. S. 406, 1849; 1827 (6) 340; 1837 (6) 569; 1879 (17) 74; 1890 (20) 705; 1934 (38) 1415.

§ 1772-9. Fish sluices to be designated yearly.—The said commissioners shall designate and lay out the fish sluices but once a year, and shall execute this duty on or before the first day of October, whenever they shall determine to change them in any year.

1932 Code, § 3417; Civ. C. '22, § 1033; Civ. C. '12, § 3435; Civ. C. '02, § 2349; G. S. 1673; R. S. 1850; 1838 (15) 599.

§ 1772-10. Fish sluices not to be designated through ways erected by public authority.—Nothing herein contained shall be construed to give authority to the said commissioners to designate any fish sluice through any dam erected by public authority, for the improvement of the navigation of any of the said rivers or to designate any fish sluice through any dam erected by individuals for the purpose of propelling any machinery, where the owner of such dam shall leave open a part of the river sixty feet wide, or, where the dam extends entirely across the river, shall construct therein a sufficient fish sluice sixty feet wide, and shall keep the same open for and during the months of February, March and April, in each year.

1932 Code, § 3418; Civ. C. '22, § 1034; Civ. C. '12, § 3436; Civ. C. '02, § 2350; G. S. 1674; R. S. 1851; 1827 (6) 341.

§ 1772-11. Not put fish traps near dams erected by State on navigable streams.—It shall not be lawful for any person whomsoever, at any time, to erect or keep up any fish trap or other device for catching fish, or to fish with any net or seine, within eighty yards of any dam erected by the order or at the expense of the State across any stream intended thereby to be made navigable, in which dams there shall be left or constructed any sluice for the passage of fish; and all and every person or persons offending shall, for each and every offense, pay the sum of twelve dollars, to be recovered before the court of general sessions of the county where the offense may have been committed, one-half of which penalty shall go to the support of the work to which the dam is attached; and all traps and other devices for catching fish erected or kept up in violation of this section are hereby declared public nuisances and may be abated as such.

1932 Code, §§ 1822, 6021; Civ. C. '22, § 2086; Civ. C. '12, § 2141; Civ. C. '02, § 1412; Cr. C. '22, § 791; Cr. C. '12, § 774; Cr. C. '02, § 521; G. S. 1107, 1675; R. S. 407, 1222; 1827 (6) 340; 1822 (9) 521; 1934 (38) 1415.

The right to take fish in a navigable river is common to all, and any party has the right to construct fish traps beyond the prescribed distance from the dam. *Boatwright v. Bookman*, Rice 447,

39 L. R. A. 589, 42 L. R. A. 326, 60 L. R. A. 487, 510; *Jackson v. Lewis*, Chev. 259, 53 Am. Dec. 726, 14 L. R. A. 386, 60 L. R. A. 487.

§ 1773. Penalty obstruct navigation by fish traps.—If any person shall keep, put, or cause to be kept, put or placed by him, her or them, any fish trap in or near any boat sluice in any of the rivers within this State so as thereby to injure or in the least obstruct the free navigation of said rivers, every such person or persons so offending shall forfeit for each and every such offense the sum of one hundred dollars, for the use of the State.

1932 Code, § 1823; Cr. C. '22, § 792; Cr. C. '12, § 775; Cr. C. '02, § 522; G. S. 1676; R. S. 408; 1829 (6) 393.

See generally, *Boatwright v. Bookman*, Rice 447, 39 L. R. A. 589, 42 L. R. A. 326, 60 L. R. A. 487, 510; *Jackson v. Lewis*, Chev. 259, 53 Am. Dec. 726, 14 L. R. A. 386, 60 L. R. A. 487; *State v. Terry*, 99 S. C. 507, 83 S. E. 970.

§ 1773-1. Penalties steal fish from fish trap.—Any person who shall take and carry away from any fish trap in the waters of this State any fish caught and being in said trap, with intent to defraud and deprive the owner or owners of said trap of the said fish, shall be deemed guilty of a misdemeanor, and, on conviction thereof by indictment, shall be punished for

said offense by fine not exceeding two hundred dollars and imprisonment not exceeding six months.

1932 Code, § 1824; Cr. C. '22, § 793; Cr. C. '12, § 776; Cr. C. '02, § 523; G. S. 1677; R. S. 409; 1829 (6) 393.

§ 1773-2. Sale or traffic in game fish—not sell fresh water game fish, black bass, bream, red breast or trout.—It shall be unlawful, at any time, to sell, offer for sale, barter or traffic in fresh water game fish caught in the State of South Carolina, or to sell, offer for sale, barter or traffic in black bass, bream, red breast or trout regardless of where caught. Any violation of this section shall be punishable by a fine of not more than one thousand (\$1,000.00) dollars and imprisonment of not more than one (1) year in the discretion of the court.

1939 (41) 353.

§ 1773-3. Sale of certain other game fish.—It shall be unlawful for anyone to sell game fish exempt from provision of § 1773-2 during the months of April, May and June of each year: *provided*, nothing contained in this section shall be construed to apply to any game fish shipped into this State from a point without the State except black bass, bream, red breast or trout. Any person or persons violating the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction shall be fined not more than one hundred (\$100.00) dollars nor less than twenty-five (\$25.00) dollars or imprisonment for not less than ten (10) nor more than thirty (30) days, for each and every violation hereof: *provided*, that the provisions of this section shall not apply to persons taking fish from private ponds.

1932 Code, § 1800; 1928 (35) 1179; 1928 (25) 1179; 1932 (37) 1480.

§ 1773-4. Owners of private ponds draw same and dispose of fish caught.—It shall be lawful for the owner of any private pond, in the presence of and under the supervision of a representative of the state game department, to draw the same and dispose of the fish caught at such drawing, by sale or otherwise: *provided*, that any fish sold must be sold and disposed of at the site of the said pond in the presence of a representative of the state game department.

1940 (41) 1648.

See § 1771.

§ 1773-5. Shipping or carrying game fish out of State.

(1) **"Person" defined.**—When used in this section the word "person" includes company, partnership, corporation, association, and common carrier.

(2) **Prohibited—exceptions.**—It shall be unlawful for any person to deliver or knowingly receive for transportation, or knowingly to transport, by any means whatsoever, beyond the limits of the State of South Carolina, any large-mouth black bass (*micropterus salmoides*), or any small-mouth bass (*micropterus dolomieu*), or any jackfish or pickerel, pike, pond trout, striped bass or rockfish, warmouth, red-belly bream, copperface or ball-faced bream, yellow-belly perch, sun perch, redbfin trout,

flyer, crappie, rock bass, goggle eye, white perch, or other game fish caught in this State: *provided, however*, a non-resident of this State who is a bona-fide holder of a non-resident fishing license, or a citizen of this State, is hereby permitted to take or carry with him from the State not over fifty game fish during any one calendar week when said fish have been caught or taken in accordance with the laws of this State.

(3) **Powers of game wardens.**—It shall be lawful for any game warden or other officer of the law to search, upon reasonable information, any package or container containing fish, and to seize and hold said fish as evidence and to declare said fish forfeited, upon conviction of the offender, sell said fish to the highest bidder.

(4) **Penalties for violation.**—Any person who shall violate any of the provisions of this section shall, upon conviction, be punished by fine of not less than twenty-five (\$25.00) dollars nor more than one hundred (\$100.00) dollars, or imprisonment for not less than ten (10) nor more than thirty (30) days for each and every offense.

(5) **No effect on shipments originating and terminating outside of the State.**—Nothing in this section shall be construed to prevent the shipment in interstate commerce of live fish and fish eggs for breeding or stocking purposes when said shipment shall originate outside of the State of South Carolina and terminate outside of the State of South Carolina.

(6) **Disposition of fines or proceeds from sale of fish.**—That all fines or proceeds from sale of fish under this section shall be immediately transmitted to the chief game warden for credit of the game protection fund.

1932 (37) 1480.

See § 1786-6 for shipment of game out of state.

§ 1774. Acquire lands, establish fish hatcheries.—The chief game warden of the State of South Carolina is hereby authorized and empowered with full authority to acquire a sufficient number of acres of land in close proximity to any dam, artificial lake, impounded water or streams for the purpose of establishing fish hatcheries or fish nurseries. In order to carry out the purposes of this section the same power and authority of condemnation is hereby conferred upon the chief game warden of South Carolina that has been heretofore conferred on power companies under section 8540. This section is not intended to repeal section 1774-2, relating to the powers of the chief game warden, but is supplemental thereto.

1934 (38) 1348.

§ 1774-1. Fish sanctuaries.

(1) **Chief game warden designate and establish.**—The chief game warden of South Carolina is hereby authorized and directed, without any cost to the State whatsoever, to designate and establish sanctuaries where fish may breed unmolested in the manner and subject to the provisions herein.

(2) **Rivers and streams—post.**—The chief game warden is hereby authorized and empowered to select any place upon any river or stream within this State as a fish sanctuary. Upon making such selection the chief game warden, upon approval, in writing, of a majority of the members of the House of Representatives from the county or counties in which such proposed fish sanctuary is to be located, is authorized and empowered to des-

ignite and set apart such places as fish sanctuaries: *provided*, however, that no one sanctuary shall exceed two (2) miles in length along such river or stream. That such sanctuary when so designated and set apart, the chief game warden shall have same adequately and conspicuously marked, and designate the limits thereof in all directions.

(3) Lakes and ponds—term—post—fishing or trespassing prohibited.—Such sanctuaries may be set apart on and in any lakes or ponds upon condition that the landowner shall enter an agreement with the chief game warden to set aside and turn over to the State for such purpose any lake or pond. In all such cases where a fish sanctuary is so designated and set apart, whether by direction of the representatives in the General Assembly or by agreement with landowners in cases of private property, the same shall be effective for a period of five years from the date of such authorization or such agreement, and there shall be no fishing or trespassing upon any waters so designated as a sanctuary. The chief game warden shall have the power and authority to post such territory so designated as a sanctuary, in the name of the State, and to prosecute any person or persons fishing or trespassing thereon.

(4) Penalties for fishing or trespassing.—Any person fishing or trespassing upon any property or waters so designated as a sanctuary by the chief game warden shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not exceeding two hundred (\$200.00) dollars or by imprisonment for not more than six months.

1938 (40) 1598.

§ 1774-2. Lease, or purchase lands establish fishing culture.—The chief game warden of the State of South Carolina is hereby authorized and empowered with full authority to lease, or purchase, a suitable number of acres of land in this State for the purpose of allowing the United States fisheries to establish thereon fish hatcheries. The expense of leasing, or buying, lands mentioned in this section, and the protection and distribution shall be paid out of the game protection fund.

1932 Code, § 3294; 1930 (36) 1116.

§ 1775. Clear water streams.

(1) Lynches River.—All of Lynches River located within the borders of the State of South Carolina except that the main stream thereof in Sumter County shall be designated as and be declared to be a clear water stream.

1933 (38) 1166; 1936 (39) 1596; 1938 (40) 1580.

(2) Sumter County.—All streams in Sumter County are hereby declared to be clear water streams except the main streams of the Wateree River and Lynches River.

1936 (39) 1596; 1938 (40) 1580.

§ 1775-1. Laws regulating fishing in clear water streams applicable to Lake Murray.—For the purposes of fishing in and taking fish of any kind from, that certain body of water situate within the State of South Carolina and known as "Lake Murray" shall be deemed fresh and clear water; and all laws now of force pertaining to and regulating fishing, and prohibiting the trapping of fish, in the inland, clear and/or fresh water streams of this

State shall be and are hereby applicable to Lake Murray. The waters of Lake Murray herein referred to shall include, in addition to the main body of said lake, all the back waters therefrom reaching and extending to high-water mark when said lake is filled to its capacity.

1939 (41) 435.

§ 1776. U. S. fish commissioner and agents have free right fish and conduct fish culture operations.—Nothing contained in the laws of this State, for the protection of fish, or which provides for a closed time in the creeks, streams, and inland waters, shall be construed to restrict or interfere in any manner with the United States fish commissioner or his agents when fishing for fish of any kind in connection with operations of any fish hatcheries, but the United States commissioner of fisheries, and his duly authorized agents, are accorded full and free right to conduct fish cultural operations and scientific investigations in the waters of this State, and all fishing and other operations necessary therefor, in such manner and at such times as is considered necessary and proper by the said commissioner or his agents. This amendment shall not in any wise alter, change or repeal any amendment heretofore passed, and now existing as to said section.

1932 Code, §§ 3424, 3425; Civ. C. '22, §§ 1040, 1041; 1917 (30) 192; 1931 (37) 328.

ARTICLE 3

Protection of Game

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| 1777. Mocking bird official state bird. | 1784-1. Trapping, shipping or transporting furs, pelts, skins and hides. |
| 1778. Hunting licenses. | 1784-2. Use of dead falls for certain trapping prohibited. |
| 1779. Use of funds collected from fur tax. | 1784-3. Misdemeanor to set, sell, use steel traps. |
| 1780. Hunting season extend thru Monday when season expires on Sunday. | 1785. Night hunting. |
| 1780-1. "Hunters" and "hunting" defined. | 1785-1. Close season on domestic game during abnormal conditions. |
| 1780-2. Unlawful catch, kill, possess or transport. | 1786. Keeping birds or animals forbidden to be sold in cold storage. |
| 1780-3. Disposition of fines. | 1786-1. Unlawful to keep in cold storage partridge, wild turkey or woodcock. |
| 1780-4. Federal bird regulations. | 1786-2. Game non-resident carry from State. |
| 1781. Seasons hunt domestic game birds and animals. | 1786-3. Shipment of game within the State. |
| 1782, 1782-1. Foxes, coyotes. | 1786-4. Shipment of game. |
| 1782-2. Bears kill anytime. | 1786-5. Transportation of game birds or animals. |
| 1782-3. Rabbits destroying crops. | 1786-6. Shipping of game beyond State limits by landowner or licensee. |
| 1782-4. Bald eagles not take, catch, etc. | 1787. Destruction of birds' nests punishable. |
| 1782-5. Carrier pigeons—not shoot, maim or entrap. | 1787-1. Wild nongame birds not catch, kill. |
| 1782-6. Coyotes not bring in or release in State. | 1787-2. Certificate to take birds. |
| 1782-7. Wild cats. | 1787-3. Issue of certificates. |
| 1783, 1783-1. Deer. | 1788. Establish game sanctuaries. |
| 1783-2. Persons possessing venison or fresh deer skins liable. | 1788-1. Erection, upkeep, Camp Moore. |
| 1783-3. Not to sell certain birds. | |
| 1783-4. Not buy or sell partridge, wild turkey or woodcock. | |
| 1783-5. Own or sell pheasant eggs. | |
| 1784. License. | |

1788-2. Take over and operate Jackson National Forest as game refuge.
 1788-3. Breeding game for commercial

purposes.

1788-4. Hunting clubs and game preserves.

§ 1777. Mocking bird official state bird.—The mocking bird is one of our best song birds and is found in all parts of the State of South Carolina practically all of the year. The mocking bird is hereby designated as the official bird of the State of South Carolina. Any one intentionally killing the mocking bird within the State of South Carolina, shall upon conviction be deemed guilty of a misdemeanor and shall be punishable by a fine of not more than one hundred (\$100.00) dollars or be imprisoned for not more than thirty (30) days.

1939 (41) 483.

§ 1778. Hunting licenses.

(1) **Persons required procure—license fees—disposition of fees.**—It shall be unlawful for anyone to hunt within this State without first procuring a license to do so from the deputy game warden in the county in which he may propose to hunt, or an adjoining county of this State. A resident of any county shall pay for a county license a license fee of one and 10/100 (\$1.10) dollars. A nonresident shall pay a license fee to hunt in any county of three and 10/100 (\$3.10) dollars, except landowners and members of their families hunting or fishing on their own lands, or in waters on their lands leased by him. A temporary license to hunt shall be granted to any non-resident of this State applying therefor upon payment of a fee of three and 10/100 (\$3.10) dollars, which license shall authorize the holder thereof to exercise the privileges thereby granted in any county in this State, for a period of two (2) specified consecutive days for each such license so issued, and not more than two such licenses shall be issued to one individual in any one calendar year. Every nonresident of the State shall pay a hunter's license fee of fifteen and 25/100 (\$15.25) dollars during any one season: *provided*, any employee residing in this State may fish or hunt on the lands of his employer owning or leasing the land, by the written permission of the person so owning or leasing, or his superintendent, with the same privilege as said owner or person leasing may enjoy: *provided, further*, that all sums of money collected from the sale of said licenses shall be transmitted to the state treasurer and placed to the credit of the game protection fund: *and provided, further*, that the provisions of this section shall not prevent residents of the State from hunting without license on their own lands in any county of the State: *and provided, further*, that for Saluda County, the chief game warden of South Carolina is hereby required to issue hunting license certificates to show from what school district they were purchased, and the proceeds derived from the state and county licenses shall go back to the school district where the said purchasers reside, to be used for school purposes. The county game warden of Saluda County shall be required to list the names and the number of state and county licenses and to turn said list over to the county treasurer.

(2) **Form.**—The form of all hunting licenses shall be a button, of such quality and design as may be designated by the chief game warden, the

cost of same to be paid for out of the game protection fund.

(3) **Display while hunting.**—Every licensee shall wear the hunting license button conspicuously displayed at all times when hunting, and failure to so display said button when hunting shall constitute a violation of subsections 2-7.

(4) **Loan, etc., of license unlawful.**—It shall be unlawful for any person to borrow, loan or exchange a hunting license button with another person.

(5) **Issue of duplicates—fee.**—Duplicate hunting license buttons shall only be issued by the chief game warden, upon affidavits from licensee as to loss of original hunting license button purchased, upon payment by licensee of the cost of the duplicate.

(6) **Penalty for violation.**—The penalty for violating each and every provision of subsections 2 thru 7 shall be the same as now prescribed by law for hunting without license.

(7) **Penalties for lending, etc.—hunting after forfeiture—disposition of fines, etc.—joint committee on printing to supply licenses and receipts.**—Any person convicted of borrowing, lending or exchanging a hunting license button with another person, in addition to suffering the penalties set forth in subsection 6 of this section, shall forfeit said hunting license button and all right to said hunting license button, and be prohibited from procuring another hunting license button for the season for which the hunting license button so borrowed, exchanged or loaned was issued; and should a person attempt to hunt or hunt while laboring under such prohibition, said person shall be deemed guilty of hunting without the proper hunting license button and subject to the penalty now provided by law for hunting without license: *provided*, that all fines and forfeitures shall go the game protection fund: *provided*, that the joint committee on printing shall purchase what buttons and forms of receipts that are necessary to be used each season, to be made on competitive bids.

(8) **Game wardens issue certificate with each hunting license button—not postdate.**—All game wardens and their respective agents in this State are hereby prohibited from issuing a hunting license button without giving a certificate therefor with number corresponding to the license button, said record to be made and dated on the date of issuance. They are further prohibited from postdating any hunting license certificate. Any game warden or his agent violating the provisions of this subsection shall be guilty of a misdemeanor and punished by a fine of not less than twenty-five (\$25.00) dollars or more than one hundred (\$100.00) dollars or thirty (30) days imprisonment within the discretion of the court.

(9) **Licensee possess and display certificate on demand.**—Every licensee shall carry upon his person, while hunting, and shall show upon demand of any officer, his hunting license certificate, corresponding to serial number of his hunting license button. Any one violating the provisions hereof shall, upon conviction, be sentenced to pay fine of not less than ten (\$10.00) dollars, nor more than one hundred (\$100.00) dollars, or serve a term of not less than ten days, nor more than thirty days.

(10) **Penalties for non-resident hunt without license.**—The penalty for a non-resident hunting without a non-resident hunting license in South Carolina, shall be a fine of not less than twenty-five (\$25.00) dollars, nor

more than one hundred (\$100.00) dollars, or imprisonment for not less than ten (10) nor more than thirty (30) days, for the first day of such offense, and five (\$5.00) dollars per day additional for each and every successive day of such offense.

1932 Code, §§ 1758, 1759, 1761; Cr. C. '22, § 741; 1919 (31) 269; 1920 (31) 1117; 1924 (33) 942; 1927 (35) 277; 1929 (36) 282; 1935 (39) 242; 1936 (39) 1317; 1937 (40) 198; 1938 (40) 1763, 1814; 1939 (41) 531.

Exemptions see §§ 1759, 1760.

Expenditure of game fund, Cherokee county, § 1801.

See §§ 1753, 1770-7, 1779, 1784, 1780-3 and 1784-1 for disposition and use of penalties and certain funds.

§ 1779. Use of funds collected from fur tax.—All funds hereafter collected in the various counties of this State from the fur tax which have been paid into the county school fund heretofore shall be used subject to the control of the majority of the county legislative delegation, either for the protection of propagation of game and fish or for school purposes (as now provided by law) or for both, the same to be used in the county where collected.

1932 Code, § 1790 (3); 1925 (34) 2; 1926 (34) 1045; 1938 (40) 1763, 1814; 1939 (41) 531.

See sections 1758 and 1784-1 along with this section. see sections 1780-3.

For use of certain funds in Georgetown, Hampton, and Saluda Counties, Penalties violate this section see last sentence in § 1785-1.

§ 1780. Hunting season extend through Monday when season expires on Sunday.—In all instances when the open season for the hunting of game expires on Sunday, such period shall be extended to include the following Monday.

1936 (39) 1303.

§ 1780-1. "Hunters" and "hunting" defined in game laws providing punishment.

(1) **Hunters.**—The word "hunters" in the game laws of this State providing punishment, shall not be construed so as to include persons who, without guns, assist others with dogs and horses, or in the finding or retrieving of birds.

(2) **Hunting.**—The word "hunters" as herein defined shall also be applicable to the legal construction of the word "hunting."

1939 (41) 119.

§ 1780-2.—Unlawful catch, kill, possess or transport, or attempt to catch, kill, possess or transport, any bird or animal in violation of certain provisions.—It shall be unlawful for any one to catch, kill, possess or transport, or to attempt to catch, kill, possess or transport any bird or animal in violation of any of the provisions of §§ 1750, 1757, 1758, 1759, 1760, 1763, 1764, 1765, 1767-1, 1768, 1769, 1769-2, 1769-3, 1770, 1770-6, 1773-3, 1778, 1779, 1780-3, 1780-4, 1781, (1, 2, 3, 4, 15), 1782 (1) 1782-2, 1782-3, 1782-6, 1782-7, 1783-1, 1783-2, 1783-3, 1783-4, 1783-5, 1784-1, 1784-2, 1784-3, 1785, 1785-1, 1786, 1786-1, 1786-2, 1786-3, 1786-4, 1786-5, 1786-6, 1787, 1787-1, 1787-2, 1787-3, 1788, 1802-1,

1802-2 and 7109, and the unlawful transportation or possession of any part of any bird or animal shall be equally unlawful. Any and all such birds or animals, and any and all parts thereof, found in the possession of any person, firm or corporation shall be confiscated, sold to the highest bidder, and the proceeds thereof turned over to the state treasurer for the credit of the game protection fund. In addition to such confiscation, any violation thereof shall be a misdemeanor and the offender, upon conviction, fined not less than twenty-five (\$25.00) dollars, nor more than one hundred (\$100.00) dollars, or imprisoned for not less than ten (10) days nor more than thirty (30) days.

1935 (39) 170.

See §§ 1764 and 1770-3 also for penalties.

See §§ 1763 and 1770-4 for sale fish and game unlawfully possessed.

§ 1780-3. Disposition of fines and forfeitures.—It is hereby provided that all fines or forfeitures obtained for violation of §§ 1783-1, 1783-3, 1783-4, 1786 and 1786-1, except as otherwise provided herein, shall be paid to the state treasurer, to the credit of the game protection fund, and that same shall be disbursed by the state treasurer on the order of the chief game warden of South Carolina: *provided*, that all funds collected or accruing to Saluda County under the game laws of the State, relating to the hunting or killing of pheasants, except license fees paid by hunters, shall be paid into the office of the state game warden and by him used in purchasing pheasants for the county of Saluda: *provided*, that all funds accruing to the county of Georgetown under the game laws of this State, whether they be from fines, licenses, or other sources, except license fees paid by hunters, shall be paid over to the county treasurer of Georgetown County for school purposes, and shall be used exclusively for building schoolhouses when state aid can be obtained for such purpose under the provisions of the general school law in South Carolina. Said money shall be paid out by the treasurer of Georgetown County upon warrants signed by the county board of education of Georgetown County: *provided*, further, all funds hereafter collected in Hampton County from the sale of hunting licenses, except license fees paid by hunters, and from the fur tax which have been paid into the county school fund heretofore, shall be used subject to the control of the Hampton County legislative delegation either for the schools, or school buildings, or for the protection or propagation of game and fish.

1932 Code, § 1775; Cr. C. '22, § 753; Cr. C. '12, § 727; 1910 (26) 572; 1927 (35) 868; 1928 (35) 1156; 1929 (36) 875; 1938 (40) 1763; 1939 (41) 531.

See §§ 1753, 1770-7, 1778 (1), 1779, 1784, and 1784-1 for disposition of certain fines and funds.

§ 1780-4. Federal bird regulations—penalties violate.—The federal migratory bird treaty regulations being the supreme law of the land under article VI of the Constitution of the United States, are hereby declared to be the law of this State and the penalty for their violation shall be punishment of not less than \$10.00 nor more than \$25.00 fine, or thirty days' imprisonment.

1932 Code, § 1767; Cr. C. '22, § 744; 1919 (31) 269.

§ 1781. Seasons hunt domestic game birds and animals.

(1) The open season for hunting domestic game birds and animals in South Carolina shall be from Thanksgiving Day to March 1st, inclusive, except that deer (bucks only) may be hunted from August 15th to January 1st, inclusively; and raccoon and opossums may be hunted from September 1st, to March 1st; *provided*, between September 1st and Thanksgiving Day rabbits may be hunted without firearms, and squirrels may be hunted without dogs. The trapping or snaring of quail or wild turkeys is absolutely prohibited, except as provided for scientific or propagating purposes: *provided*, that the bag limit for quail and partridge shall be fifteen per day to the hunter: *provided*, that the bag limit for wild turkeys shall be two per day and a total of twenty per season to the hunter, but no wild turkey shall at any time be shot from any natural or artificial blind or hiding place when lured by bait. The open season for hunting male wild turkeys (gobblers) in South Carolina shall be from the day before Thanksgiving to March 1st, inclusive, and it shall be unlawful to hunt or kill female wild turkeys (hens) at any time.

(2) Raccoons and squirrels may be killed by owners of crops from July 15th, if such animals are destroying said crops.

(3) The bag limit for squirrels shall be fifteen (15) per day in York County.

(4) The season for shooting squirrels in Florence County shall be opened October 1st and closed March 1st of each year.

1932 Code, § 1751; 1937 (40) 127; 1939 (41) 232; 1940 (41) 1872.

(6) There shall be no trapping of quail in Edgefield County for any purpose.

(7) The open season for shooting quail and partridges in Chesterfield County shall be from Thanksgiving Day to the 15th day of February, both inclusive, of each year.

(8) The bag limit for quail in Clarendon, Florence and Horry Counties shall be twelve (12) for one day's hunt. And the season's bag for Saluda County shall be 100 birds. *Provided*, that in Williamsburg County the bag limit for quail shall be fifteen (15) for one day's hunt.

1936 (39) 1636; 1937 (40) 99.

(9) It shall be unlawful to hunt doves in Florence County between January 31st and Thanksgiving Day of each year.

1938 (40) 1533.

(10) A closed season for hunting birds in Horry County shall begin February 1st and end Thanksgiving Day of each year; and for hunting raccoons and opossums from February 1st to November 1st, of each year. Any violation of this paragraph shall be punishable by a fine of not over one hundred dollars or by imprisonment for not over thirty days.

1937 (40) 210.

(11) In Marion County the open season for hunting raccoons and opossums shall extend from Thanksgiving Day to March 1st of the year next thereafter. The open season for hunting squirrel in Marion County shall be from September 1st to March 1st in each year.

1935 (39) 225; 1941 (42) 159.

(12) The open season for hunting deer (bucks only) in Horry County shall be from the first day of October to January first, inclusive.

1935 (36) 286; 1937 (40) 209.

(13) The open season for hunting deer in Lexington County shall be from October 15th to December 15th, both dates inclusive. *Provided*, that bucks only, shall be killed.

1940 (41) 1858.

(14) There is hereby declared and provided a closed season for the hunting of turkeys and deer in Fairfield County for a period of three (3) years from February 19, 1940. Any violation of the closed season declared and provided in this paragraph shall constitute a misdemeanor punishable by a fine not exceeding one hundred (\$100.00) dollars or imprisonment for not exceeding thirty (30) days.

1940 (41) 1617.

(15) It shall be lawful to hunt rabbits in Chester County in all seasons with firearms, when so engaged on land owned by or under the lawful control of the person so hunting, or with the consent of such person. It shall be unlawful to hunt rabbits with firearms in said counties on the land of any other than the owner thereof, or the person in lawful control, except during the open bird season, and during such season only with the consent of such owner or the person in lawful control of said land. This paragraph shall not affect the license law for hunting birds or other game as now provided. Any person convicted of violating any of the provisions of this paragraph shall be guilty of a misdemeanor, and fined not more than one hundred (\$100.00) dollars, or imprisoned not more than thirty (30) days.

1932 Code, § 1752-A; 1930 (27) 1658; 1940 (41) 1728.

(16) It shall be unlawful for any person to kill any deer, wild turkey or pheasant in Lee County for a period of five (5) years from March 17, 1939. Any person violating the provisions of this paragraph shall be guilty of a misdemeanor and punished by a fine of not less than twenty-five (\$25.00) dollars nor more than one hundred (\$100.00) dollars, or by imprisonment of not less than ten (10) days nor more than thirty (30) days.

1939 (41) 112.

§ 1782. Foxes—hunting—when kill.

(1) It shall be unlawful to hunt, shoot, trap or kill any foxes in this State, or to dig out of the ground or to push or drag out of a tree or log any fox or foxes in this State, except as hereinafter provided: *provided*, that fox or foxes may be hunted or run with dogs in this State from September the 15th until the 15th day of February each year: and, *provided, further*, that any person or persons may shoot, chase or kill any fox or foxes at any time that they are doing any damage upon the property of such person or persons or property under their control: and, *provided, further*, it shall be lawful to sell and ship live fox within the State: and, *provided, further*, that no person or persons shall chase any fox or foxes as herein provided except on his or their own land or lands under his or their control. Any person or persons violating the provisions of this section shall be punished by a fine of not more than twenty-five dollars or by imprisonment for not more than thirty days: *provided*, that the provisions of this section shall not apply to hunting, shooting, trapping and killing foxes in Colleton County, or digging out of the ground or pushing or dragging out of a tree or log of foxes in said county: *provided*, that in Chester County fox or foxes may be

hunted or run with dogs from September 15th until March 1st of each year. *Provided, further*, that in Chesterfield County fox or foxes may be hunted or run with dogs from 1st day of September until the 15th day of February of each year. *Provided, further*, that in Williamsburg County foxes may be hunted or run with dogs from September 1st until March 1st of each year.

1932 Code, § 1768; Cr. C. '22, § 745; 1920 (31) 1049; 1924 (33) 986; 1933 (38) 126; 1934 (38) 1416; 1935 (39) 140; 1936 (39) 1700, 1752; 1937 (40) 185; 1938 (40) 1657; 1940 (41) 1728.

(2) There shall be no closed season for the hunting, shooting, trapping, catching and killing of foxes in Aiken and Darlington Counties, and it shall be lawful at any time to hunt, shoot, trap, catch or kill foxes in Aiken and Darlington Counties. *Provided*, that there is hereby created a closed season between March 1st and September 1st for trapping, hunting with dogs, or otherwise, shooting, maiming, or killing foxes in that portion of Aiken County bounded on the northwest by Edgefield and Saluda County lines; on the northeast by the North Edisto River; on the southeast by state highway No. 215, and on the southwest by South Edisto River: *provided*, that in case any fox is committing a depredation on any domestic animal or bird, the property of some person, firm or corporation, the provisions of this proviso shall not apply. A violation of the terms of this proviso is declared to be a misdemeanor and shall subject the offender, upon conviction, to a fine of not less than five (\$5.00) dollars, nor more than twenty-five (\$25.00) dollars, or imprisonment for not less than one (1) nor more than fifteen (15) days.

1937 (40) 159; 1938 (40) 1746; 1939 (41) 337; 1940 (41) 1841; 1941 (42) 130.

(3) It is lawful to hunt and/or kill foxes at any and all seasons of the year in Dorchester County.

1937 (40) 277; 1941 (42) 130.

(4) There shall be an open season upon foxes in Edgefield County, and that any citizen shall have the right to trap, kill or destroy by any means of any kind whatsoever any foxes in Edgefield County. *Provided, however*, that all persons hunting, assisting in a hunt or accompanying one who is hunting shall be required to have hunting license as now required by law. The legislative delegation in Edgefield County may at any time by published notice, and the consent of the chief game warden of the State of South Carolina, close the season for the hunting, destruction and killing of foxes in Edgefield County.

1941 (42) 69.

(5) There shall be no closed season for the hunting, shooting, trapping, catching and killing of foxes in Florence County, for a period of five years from April 29, 1937, and it shall be lawful at any time to hunt, shoot, trap, catch or kill foxes in Florence County, for the said period of five years.

1937 (40) 380.

(6) There shall be no closed season for the hunting, shooting, catching and killing of foxes in Kershaw County and it shall be lawful at any time to hunt, shoot, catch and kill fox in said county. It shall be unlawful to use steel traps in catching fox in said county and any person so doing shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not exceeding one hundred (\$100.00) dollars or imprisonment not exceeding thirty (30) days within the discretion of the court.

1937 (40) 346; 1941 (42) 202.

(7) There is hereby created an open and closed season for the hunting of fox in Spartanburg County, to-wit: such open season shall be from the 1st day of September of each year until the 1st day of March of the following year, both dates inclusive, and such closed season shall be from the last day of February until the 31st day of August, both dates inclusive, of each year. It shall be lawful for any person to hunt fox in said county during such open season. It shall be unlawful for any person to hunt fox in said county during such closed season, and any person so doing shall be guilty of a misdemeanor and, upon conviction, be punishable by a fine of not more than one hundred (\$100.00) dollars nor less than ten (\$10.00) dollars, or imprisonment for not exceeding thirty (30) days.

1937 (40) 271; 1939 (41) 444.

(8) There shall be an open season for the hunting and killing of fox in Saluda County throughout the entire year and that it shall be lawful to take or kill fox by any manner or means.

1941 (42) 92.

(9) An open season throughout the year is hereby declared for killing foxes in Allendale, Jasper, Barnwell, Bamberg and Clarendon Counties, and any person shall have the right to shoot, trap, kill or destroy by any means whatsoever any and all foxes in Allendale, Jasper, Barnwell, Bamberg and Clarendon Counties. The legislative delegation of Allendale, Jasper, Barnwell, Bamberg and Clarendon Counties may, at any time, by published notices with the consent of the chief game warden of South Carolina close said season for the destruction of foxes in their respective counties.

1941 (42) 130.

§ 1782-1. Foxes and coyotes destroying property—open season on.—Whenever it shall appear that foxes or coyotes are destroying birds, poultry, pigs, lambs or other property in any county in this State the chief game warden, upon the written request of a majority of the legislative delegation of any such county, shall declare an open season on foxes or coyotes in the county or counties suffering from such destruction and for such period of time as said delegations may deem desirable.

1932 (37) 1312.

§ 1782-2. Bears—kill any time.—It shall be lawful for any person to kill any bear at any and all times in this State.

1932 Code, § 1796; 1927 (35) 354.

§ 1782-3. Rabbits destroying crops—open season on.—When in any section of any county or counties, or in any county, in this State rabbits are destroying crops, the chief game warden, upon request of a majority of the legislative delegation from each such county, in writing, may declare an open season on rabbits that are destroying crops for such period of time as may be deemed advisable to the protection of said crops.

1932 Code, § 1791; 1929 (36) 151.

§ 1782-4. Bald eagles—not take, catch, etc.—It shall be unlawful to take,

catch, hunt or kill bald eagles in this State. The penalty for each and every violation of this section shall be a fine of not less than twenty-five (\$25.00) dollars, nor more than one hundred (\$100.00) dollars, or imprisonment for not more than thirty (30) days.

1932 (37) 1386.

§ 1782-5. Carrier pigeons—not shoot, maim or entrap.—The shooting, killing or maiming of an Antwerp or Homing pigeon, commonly known as a carrier pigeon, is hereby prohibited. It shall also be unlawful for any person or persons to entrap or detain any carrier pigeon that has the name of its owner stamped on its wing or tail feathers or has upon its leg a band bearing the owner's name, initials or a number on said band. Any person or persons violating the provisions of this section shall be guilty of a misdemeanor and punishable by a fine not exceeding ten (\$10.00) dollars or imprisonment not exceeding ten (10) days.

1935 (39) 422.

§ 1782-6. Coyotes—not bring in or release in State—trap or kill.—It shall be unlawful to bring into the State of South Carolina in any manner or to release within the State, a coyote, and any violation of this section shall be punishable by imprisonment for not more than one year or by a fine not exceeding five hundred (\$500.00) dollars: *provided*, the provision of this section shall not apply to coyotes brought into the State and kept in captivity for exhibition purposes.

It shall be lawful for any person to trap or kill any coyote in this State at any time.

1932 Code, § 1792, 1793; 1931 (37) 113, 114.

§ 1782-7. Wild cats—kill.—Wild cats may be killed by owners and officers of the law upon their holdings and without license at any time.

1932 Code, § 1751.

§ 1783. Deer—not hunt, shoot or kill from water conveyance.—It shall be unlawful for any person to hunt, shoot, or in anywise kill deer from a motor boat, raft, or any water conveyance. Any person guilty of violating this section shall be deemed guilty upon conviction of committing a misdemeanor and shall be imprisoned for a period not exceeding thirty (30) days, or fined not exceeding one hundred (\$100.00) dollars. *Provided*, the provisions of this section shall not apply to Hampton, Colleton and Allendale Counties.

1939 (41) 427.

§ 1783-1. Deer—not buy or sell.—It shall be unlawful to buy or sell, offer for sale or barter, or to have in possession for sale any deer or part thereof; and for violation of this section, upon conviction of the party or parties shall be fined not less than twenty-five dollars for any deer or part thereof.

1932 Code, § 1772; Cr. C. '22, § 750; Cr. C. '12, § 723; 1910 (26) 572.

§ 1783-2. Persons possessing venison or fresh deer skins liable.—Any person in whose possession recently killed venison, or fresh deer skins, shall

be found between the dates above mentioned, shall be liable to the same penalty as those violating section 1782.

1932 Code, § 1776; Cr. C. '22, § 754; Cr. C. '12, § 729; Cr. C. '02, § 541; G. S. 1688; R. S. 421.

Dates referred to in this section are not known.

§ 1783-3. Dove or willet—not sell.—It shall be unlawful to buy or sell, expose for sale or to have in possession for sale or barter, any willet or dove. Any person or persons violating this section shall be fined, upon conviction, ten dollars for each bird or animal sold or offered for sale, or be imprisoned one day for each dollar fined and unpaid, not to exceed a fine of one hundred dollars, or thirty days' imprisonment.

1932 Code, § 1770; Cr. C. '22, §§ 747, 749; Cr. C. '12, §§ 719, 722; 1910 (26) 572; 1919 (31) 269.

§ 1783-4. Partridge, wild turkey or woodcock—not buy or sell.—It shall be unlawful for any person to buy or barter for sale any partridge, wild turkey or woodcock within this State; and any person or persons violating this section shall be fined ten dollars for each partridge, wild turkey or woodcock so bought, or imprisoned one day for each dollar fined and unpaid.

1932 Code, § 1774; Cr. C. '22, § 752; Cr. C. '12, § 726; 1910 (26) 572.

§ 1783-5. Pheasant eggs—own or sell.—It shall be lawful for anyone to own, possess, control, sell or otherwise dispose of pheasant eggs within this State, or to sell or otherwise dispose of the same beyond the borders of the State, under such regulation as the chief game warden may promulgate.

1932 Code, § 1789; 1931 (37) 354.

§ 1784. License buy furs, hides, pelts, etc.—fees—disposition of fees—license each buyer.—It shall be unlawful for any person, firm or corporation to engage in the business of buying furs, hides, pelts, etc., in this State without first procuring a license to do so from the deputy game warden in the county in which he resides. Any resident of this State may procure a state license for such purposes upon the payment of an annual license fee of twenty-five (\$25.00) dollars, which shall entitle such resident to purchase hides, furs, etc., in all counties in the State. A non-resident engaged in the buying of furs, hides, pelts, etc., shall pay an annual license fee of one hundred (\$100.00) dollars. *Provided, further*, all funds arising from the sale of licenses and fines provided for in this section shall be paid through the chief game warden into the state treasury and placed to the credit of the game protection fund, and shall be disbursed by the chief game warden by warrants on the state treasurer as now provided by law for disbursement of funds derived from the sale of hunting licenses: *provided, however*, that fifty per cent. of all funds arising from the sale of licenses and fines shall be returned to the treasurers of said counties at the end of the fiscal year of said state game department to-wit: July 1 of each year, for school purposes: *provided, further*, that it shall be unlawful for any person, firm or corporation to borrow, loan or exchange a license: *provided, further*,

that this section shall not apply to dealers in hides of domestic animals. *Provided*, that every firm or corporation engaged in the business of buying furs, hides, pelts, etc., shall be required to purchase a separate license for each individual buyer.

Any person, firm or corporation violating any of the provisions of this section shall be guilty of a misdemeanor and upon conviction shall be fined not less than one hundred (\$100.00) dollars, nor more than five hundred (\$500.00) dollars or imprisoned for not less than thirty (30) days nor more than six (6) months.

1932 Code, § 3298; 1930 (36) 1348; 1931 (37) 206; 1941 (42) 7.

See §§ 1753, 1770-7, 1778 (1) 1779, 1780-3, 1784-1 for use of certain penalties and funds.

§ 1784-1. Trapping, shipping or transporting furs, pelts, skins and hides.

(1) **Open season.**—The open season for trapping shall be from Thanksgiving Day to March 1 of each year.

(2) **Tag skins of game animals bought, stored or transported.**—All persons or corporations buying, storing, shipping or transporting furs, or pelts, or skins, shall make application to the game warden or his authorized deputy for a tag, which said tag or label shall be securely attached to the fur, pelt, skin or hide so bought, stored, shipped, or transported. Said tags or labels to be of such design and in such form as the chief game warden may prescribe, and the cost of said tags or labels to the person, buying, storing, shipping or transporting said furs, pelts, skins or hides shall be according to the following schedule: for each tag or label for buying, storing, shipping or transporting otter hide or skin, one (\$1.00) dollar; for each tag or label for buying, storing, shipping or transporting a red fox hide or skin, one (\$1.00) dollar; for each tag or label for buying, storing, shipping or transporting a raccoon, grey fox, or mink hide or skin fifteen (15c) cents; for each tag or label for buying, storing, shipping or transporting a skunk hide or skin ten (10c) cents; for each tag or label for buying, storing, shipping or transporting an opossum or muskrat hide or skin five (5c) cents each: *provided*, that the tag shall be purchased in the county where the furs, pelts, or skins are bought, stored, shipped or transported. The penalty for violation of this subsection shall be punishment by a fine of not less than one hundred (\$100.00) dollars, nor more than five hundred (\$500.00) dollars, or imprisonment for not less than thirty (30) days, nor more than six (6) months for each and every offense.

(3) **Receipt for transportation without tag on package unlawful—inspection of packages—penalties.**—It shall be unlawful for any transportation company, express company or common carrier or person to receive for shipment or transportation any of the skins, furs or pelts mentioned in this section except when there shall be affixed to each package a stamp, tag or label furnished by the chief game warden or his authorized deputy, certifying that the said tags or labels required to be attached to each article under the provisions of this section contained in said package have been properly attached and paid for: *provided*, that any game warden or representative of the chief game warden shall have the right to open and inspect any

package containing furs, pelts or skins shipped or transported under the provisions of this section for the purpose of ascertaining whether the tags provided for herein have been properly attached to each article as required in this section. Any person, firm or corporation violating the provisions of this subsection shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than one hundred (\$100.00) dollars, nor more than five hundred (\$500.00) dollars, or imprisonment for not less than thirty (30) days nor more than six (6) months.

(4) Forgery of tags.—Whoever shall be convicted of falsely making, forging or counterfeiting, or causing or procuring to be falsely made, forged or counterfeited, or of wilfully acting or assisting in the false making, forging or counterfeiting of any stamp, tag or label provided for in this section, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined not less than one hundred (\$100.00) dollars, nor more than five hundred (\$500.00) dollars, or be imprisoned for not less than thirty (30) days nor more than six (6) months for each offense.

(5) Reports of shipment—penalties failure to report.—Every person, firm or corporation shipping or transporting skins, pelts, furs or hides as provided for in this section, shall make a report to the county game warden on or before the fifteenth day of each month stating the number of skins, pelts, furs or hides that have been shipped or transported during the preceding calendar month. The penalty for failure to make such report shall be a fine of not less than one hundred (\$100.00) dollars, nor more than five hundred (\$500.00) dollars for each offense, or imprisonment for not less than thirty (30) days nor more than six (6) months for each offense.

(6) Control of tags—proceeds of sale—penalties to misappropriate.—All tags or labels placed with any game warden or other person or persons for sale, and the proceeds arising from the sale of all tags or labels are to be held in trust, subject to the order of the chief game warden. All funds arising from the sale of all tags or labels shall be paid over to the chief game warden at such times as he may direct; and, all unused tags or labels shall be returned to said chief game warden upon demand. All game wardens or other person or persons with whom tags or labels are placed for sale shall be liable for the loss, misplacement or destruction of all such tags or labels while in their care to the full extent of the value of same. All game wardens or other person or persons who shall fail or neglect to remit to the chief game warden for all funds arising from the sale of tags or labels, or who shall fail or neglect to return to the said chief game warden any unused tags or labels, upon demand of the said chief game warden for said funds or unused tags or labels, shall be liable to a fine of not less than five hundred (\$500.00) dollars, or imprisonment for six (6) months, in addition to the full value of said tags or labels placed with said game warden or person or persons for sale.

(7) Use of proceeds.—All funds arising from the sale of tags or labels or fines or forfeitures provided for in this section shall be paid through the chief game warden into the state treasury and placed to the credit of the game protection fund, and be disbursed by the chief game warden by warrants on the state treasurer as now provided by law for the disbursement

of funds derived from the sale of hunting licenses: *provided, further*, that fifty (50) per cent. of all funds arising from the sale of said tags and labels, in the respective counties, shall be returned to the treasurers of said counties at the end of the fiscal year of said state game department, to-wit: July first of each year, for school purposes.

1932 Code, § 1761-A; 1923 (33) 108; 1935 (39) 372.

See §§ 1753, 1770-7, 1778 (1), 1779, 1780-3, and 1784 for use of certain penalties and funds.

§ 1784-2. Use of dead falls for certain trapping prohibited.—The use of a trap commonly known as a “dead fall” for the catching or trapping of certain animals is hereby declared unlawful. Any person, firm or corporation violating this section shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than ten (\$10.00) dollars nor more than one hundred (\$100.00) dollars, or be imprisoned not less than ten days nor more than thirty days, within the discretion of the court..

1932 Code, § 1762; 1923 (33) 239.

§ 1784-3. Set, sell or use steel trap—misdemeanor—exceptions.—It shall be unlawful for any person, firm, or corporation to set, sell, make or use a steel trap or any like device within this State: *provided*, that the provisions of this section shall not apply to any person setting a steel trap within two hundred yards of his residence or within twenty-five yards of any poultry house, which is set for the protection of his property, nor shall the same apply to merchants who have steel traps for sale outside of this State. Any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor and shall upon conviction be punished by a fine of not more than one hundred dollars nor less than twenty-five dollars, or imprisonment for not more than thirty days, for each offense.

1932 Code, § 1763; 1927 (35) 223.

§ 1785. Night hunting.—There shall be no night hunting in this State except for raccoons, opossums, foxes, mink and skunk, and these may not be hunted with lights, commonly known as head lights, attached to the head or otherwise attached to the body, and the penalty for any violation of this section shall be a fine not exceeding two hundred (\$200.00) dollars, or imprisonment not exceeding sixty (60) days. *Provided*, that any person convicted of hunting deer at night shall be punished by a fine of not exceeding one thousand (\$1,000.00) dollars, or imprisonment of not exceeding one (1) year, or both fine and imprisonment, in the discretion of the court.

1932 Code, § 1754; Cr. C. '22, § 737; 1919 (31) 269; 1920 (31) 732; 1930 (36) 1395; 1937 (40) 85.

§ 1785-1. Close season on domestic game during abnormal conditions.—

(1) The chief game warden is hereby authorized, within his discretion, to declare a closed season for a period of not over ten (10) days at any one time, on any of the waters or swamps in the State, when it shall appear to him on account of abnormal conditions, such as freezes or freshets, that deer or other game cannot protect themselves. And when in any county or

counties in the State there exists an abnormal scarcity of game, the chief game warden, upon the request of a majority of the legislative delegation from each such county, in writing, may shorten the open season for hunting in any such county or counties. The chief game warden shall give notice of the closed season so declared by publishing in at least two daily newspapers and in a newspaper of the county or counties in which the closed season is declared, provided said county or counties have a newspaper therein, stating the length of period of said closed season. Any person or persons found hunting with gun, or guns, dog or dogs, within the restricted territory during a closed season so declared, shall be prima facie evidence that he or they have violated the provisions of this section, regardless of whether he or they have killed any game or not. The penalty for violation of the provisions of this section shall be a fine of not less than fifty (\$50.00) dollars nor more than one hundred (\$100.00) dollars, or imprisonment for not less than thirty (30) days.

1932 Code, § 1790 (1, 2, 5); 1925 (34) 294; 1926 (34) 1045.

§ 1786. Keeping of birds or animals forbidden to be sold in cold storage.—

It shall be unlawful to keep any of the birds or animals forbidden to be sold by the terms of 1780-3, 1783-1, 1783-3, 1783-4 and 1786-1, in cold storage or refrigerating plants, except in a private dwelling, unless the bird or animal in cold storage, or the package containing same, shall bear the name and address and the serial number and the class of the hunting license of the owner of such bird or birds, animal or animals. Any person violating this section shall be fined not less than fifty dollars nor more than one hundred dollars, or imprisoned one day for each dollar fined or unpaid, either or both, at the discretion of the court trying the case.

1932 Code, § 1771; Cr. C. '22, § 748; Cr. C. '12, § 720; 1910 (26) 572; 1935 (39) 235.

See § 1786-1.

§ 1786-1. Not keep in cold storage partridge, wild turkey or woodcock.—

It shall be unlawful to keep in cold storage or a refrigerating plant any partridge or wild turkey or woodcock; and any person violating this section shall be fined twenty-five dollars for each day said birds remain in cold storage, or imprisoned one day for each dollar fined and unpaid, except in private residences.

1932 Code, § 1773; Cr. C. '22, § 751; Cr. C. '12, § 725; 1910 (26) 572.

See § 1786.

§ 1786-2. Game nonresident carry from State.—Any person holding a hunter's license to hunt in South Carolina shall be permitted to take in his hand openly from the State fifty partridges, or twelve ruffed grouse, or four wild turkeys, or fifty beach birds, or fifty wild ducks and geese, or two deer in a season.

1932 Code, § 1784; Cr. C. '22, § 763; Cr. C. '12, § 746; 1907 (25) 659.

See § 1780-4 herewith.

§ 1786-3. Shipment of game within the State.

(1) **Limit allowed.**—It shall be lawful for a person to ship during any one

week not over the bag limit for two days, as now provided by law, of any domestic game, birds or animals to any private address in this State when he shall have conformed to the rules and regulations prescribed by the chief game warden under subsection 2 hereof.

(2) Regulations—label.—Any person so desiring to ship game, birds or animals as above described during the open season for such game, birds or animals or within five days after the closing of the same, shall make application to the chief game warden or his deputy, and upon such application the chief game warden or his deputy, if it shall appear to him that such shipment is for private and personal use and not for the sale of said game, birds or animals, shall issue to the applicant a tag or label for use in shipping such game, birds or animals; said label to be of such design and in such form as the chief game warden shall prescribe.

1932 Code, § 1777; Cr. C. '22, § 755; 1920 (31) 757.

§ 1786-4. Shipment of game.—It shall be unlawful for any transportation company to receive for shipment any of the game birds or animals of the State, except in season, and unless the package containing them shall be so labeled as to show the consignor or consignee, and the number and kind of birds and animals.

1932 Code, § 1753; Cr. C. '22, § 736; 1919 (31) 269.

See §§ 1786-3 and 1786-5 also.

§ 1786-5. Transportation of game birds or game animals beyond limits of State.—No person or corporation shall knowingly receive for transportation, or shall transport or cause to be transported, or have in his or her possession with the intent to transport, or to secure the transportation of beyond the limits of this State, any of the partridges, grouse, wild turkeys, snipe, woodcock, or other game birds or game animals which have been killed or captured in this State, and each bird or game animal so killed or taken or had in possession, received for transportation or transported, contrary to the provisions of §§ 1763 and 1786-2, shall constitute a separate offense. The reception by any person or corporation within this State of any such birds or game for shipment to a point beyond the limits of this State shall be prima facie evidence that said birds or game were killed within the State for the purpose of conveying same beyond its limits; but the provisions of this section shall not apply to common carriers into whose possession birds or game shall come in the regular course of their business for transportation while they are in transit through the State from any place without the State: *and provided, further*, that nothing herein shall prohibit persons from having in their possession for the purpose of domestication and propagation any of the birds and animals referred to in §§ 1763 and 1786-2.

1932 Code, § 1783; Cr. C. '22, § 762; Cr. C. '12, § 741; 1907 (26) 660.

See §§ 1786-3 and 1786-4 for other provisions relating to shipping of game.

§ 1786-6. Shipping of game beyond State limits by landowner or licensee.—It shall be lawful for any land owner or licensee to ship during any one week not over the bag limit for one day, as now provided by law, of any

domestic game, birds or animals, beyond the limits of the State, when he shall have conformed to the rules and regulations prescribed by the chief game warden under this section. Any land owner or licensee desiring to ship domestic game, birds or animals beyond the limits of the State, during the open season for such game, birds or animals, shall make application to the chief game warden, giving location of property and class and serial number of license held, and upon such application, if it shall appear to said chief game warden that such shipment is for private, personal or charitable use, and not for sale of said game, birds or animals, he may issue to the applicant a tag or label for use in shipping such game, birds or animals; said tag or label to be of such design and in such form as the chief game warden shall prescribe. Any person, firm or corporation shipping or receiving for shipment beyond the limits of the State, any of the domestic game, birds or animals in violation of the provisions of this section, shall be liable to fine of not less than fifty (\$50.00) dollars nor more than one hundred (\$100.00) dollars, or imprisonment for thirty (30) days for each and every offense.

1932 Code, § 1778; 1924 (33) 1056.

See § 1773-5 for shipment of fish out of State.

§ 1787. Destruction of birds' nests punishable.—The destruction of birds' nests shall be punishable in the same way as the destruction of the birds.

1932 Code, § 1757; Cr. C. '22, § 740; 1919 (31) 269.

See § 1787-1 (3).

§ 1787-1. Wild nongame birds.

(1) **Not catch, kill, etc., wild birds.**—No person within the State shall kill, catch or have in his or their possession, living or dead, any resident or migratory wild bird other than a game bird or buzzard, or purchase, offer or expose for sale any such wild nongame bird after it has been killed or caught, except as permitted by sections 1787-2, 1787-3 and 1787-4.

(2) **Not sell plumage, skin or body of certain birds.**—No part of the plumage, skin or body of any bird protected by this section shall be sold or had in possession for sale, and this irrespective of whether said bird was captured or killed within or without the State.

(3) **Not destroy eggs or nests of wild birds.**—No person within the State shall take or destroy, or attempt to take or destroy, the nest or the eggs of any wild bird, or have such nest or eggs in his or their possession, except as permitted in this section.

(4) **Wild non-game birds not to be transported.**—It shall be unlawful for any person or persons, or any corporation acting as a common carrier, its officers, agents or servants, to ship, carry, take or transport, either within or beyond the confines of the State, any resident or migratory wild nongame bird, except as permitted by section 1787-3.

(5) **Penalties.**—Any person violating any of the provisions of this section shall be guilty of a misdemeanor, and shall be liable to a fine of not less than one dollar nor more than five dollars for each bird, living or dead, or part of a bird, or nest or set of eggs, or part thereof, killed or captured or

possessed, in violation of this section, or be imprisoned in the county jail for not more than thirty days.

1932 Code, § 1780; Cr. C. '22, §§ 757, 761; Cr. C. '12, §§ 734, 739; 1905 (24) 950; 1918 (30) 794.

§ 1787-2. Certificate to take birds.—Section 1787-1 shall not apply to any person holding a certificate giving the right to take birds, their nests or eggs, for strictly scientific purposes, as provided for in section 1787-3, nor shall anything contained in section 1787-1 prevent any householder from keeping any resident or migratory birds, whether game or nongame, in aviaries or cages as pets or for experimental and breeding purposes, and from trapping or catching them for such purposes: *provided*, that no one shall trap or catch the same save on his own lands: *and provided, further*, that the same are not kept for barter, sale or exchange, and shall not be shipped or transported beyond the confines of this State.

1932 Code, § 1781; Cr. C. '22, § 758; Cr. C. '12, § 735; 1905 (24) 950.

§ 1787-3. Issue certificates.—Certificates may be granted by the chief game warden to any properly accredited person of the age of fifteen years or upwards, permitting the holder thereof to collect birds, their nests or eggs, for strictly scientific purposes only. In order to obtain such certificate the applicant for the same must present to the chief game warden written testimonials from two well-known ornithologists, certifying to the good character and fitness of said applicant to be entrusted with such privilege, and must pay to said office one dollar to defray the necessary expenses attending the granting of such certificate. On proof that the holder of such certificate has captured or killed any bird, or taken the nests or eggs of any bird for other than scientific purposes, the certificate shall become void and he shall be liable to a fine of not more than one hundred dollars, or imprisonment not exceeding thirty days. The certificates authorized by this section shall expire on the 31st day of December of the year issued, and shall not be transferable.

1932 Code, § 1782; Cr. C. '22, §§ 759, 760; Cr. C. '12, §§ 736, 737; 1905 (24) 950; 1920 (31) 783.

§ 1788. Establish game sanctuaries.—The chief game warden is hereby authorized and directed without any costs whatsoever to the State to designate and establish sanctuaries where game, birds, and animals may breed, unmolested: *provided*, that if any landowner shall enter into any agreement with the said chief game warden to set aside and turn over to the State for such purpose any certain number of acres of land: *provided, further*, that there shall be no hunting or trespassing upon such lands so designated as a sanctuary by anyone for a period of five years from date of agreement. And the chief game warden shall have the power and authority to post said lands so designated as a sanctuary, or sanctuaries, in the name of the State, and to prosecute any persons hunting or trespassing thereon. Any agreement entered into under authority herein given may be terminated at any time by mutual consent of the landowner or landowners and the chief game warden. And anyone hunting or trespassing upon any land designated as a sanctuary under the provisions of this sec-

tion shall be fined for each offense not less than one hundred (\$100.00) dollars nor more than two hundred (\$200.00) dollars or imprisoned for not less than one, nor more than six months.

1932 Code, § 1790 (4); 1925 (34) 294; 1926 (34) 1045.

Penalties violate this section see last sentence in § 1785-1.

Game sanctuaries, Kershaw County, § 4529-3; Sumter County, § 1825.

§ 1788-1. Camp Moore game propagation farm—erection, upkeep and supervision—distribution of game.—The chief game warden is hereby authorized and directed to expend from the game protection fund not in excess of five thousand (\$5,000.00) dollars, for the erection, upkeep, necessary equipment and supervision of a game propagation farm, on the property now belonging to the State of South Carolina, in Lexington County, known as “Camp Moore” at Styx: *provided*, that in no case shall any moneys be used which, under the present law, now accrue to the school funds. The site of the said farm to be selected by a committee consisting of the inspector and adjutant general, the secretary of state, and the chief game warden. The erection, upkeep, purchase of necessary equipment and supervision of said game propagation farm shall be under the direction and authority of the said chief game warden. The distribution of game birds or animals raised on said game propagation farm, shall be made to citizens of the State upon requisitions endorsed by the respective county delegations, in such proportions and in such manner as may be deemed proper and appropriate by said chief game warden, for the purpose of re-stocking any sections of the State that have been depleted.

1932 Code, § 3292; 1924 (33) 1184.

§ 1788-2. Take over and operate Jackson National Forest as game refuge.—The chief game warden of South Carolina is hereby authorized to take over the Jackson National Forest as a game refuge, and to comply with the conditions required by the United States government, through its department of agriculture with reference thereto, and to employ a game warden and pay him a salary not to exceed the amount now provided by law, in order that he may live on this property and protect it; to purchase a saddle horse, bridle and saddle and feed for said horse: *provided*, that the above-mentioned expenditures shall be paid out of the game protection fund.

1932 Code, § 3293; 1928 (35) 1991.

§ 1788-3. Breeding game for commercial purposes—license.—Any person, firm or corporation desiring to engage in the business of raising, breeding and selling live pheasants, partridge, quail, Hungarian or gray leg partridge or other game bird in a wholly enclosed preserve, or entire island of which he is the owner or lessee, may make application in writing to the game warden of the State of South Carolina for a license to do so and said game warden when it shall appear that such application is made in good faith shall upon the payment of a fee of two dollars and fifty (\$2.50) cents issue to such applicant a breeder's license, permitting such

applicant to raise, breed and sell pheasants, partridge, quail, hungarian or gray leg partridge or other game bird on such preserve or entire island, and to sell the same at any time for breeding or stocking purposes and said license shall expire on the last day of January of each year: *provided*, that any person, firm or corporation who secures a breeder's permit from the chief game warden may secure from the said game warden's office a permit allowing the shipping of live birds that they raise beyond the limits of South Carolina.

It shall be unlawful for any person, firm or corporation to engage in the raising, breeding, and selling for stocking purposes the game birds in this section mentioned without first obtaining a license therefor and any violation of this section shall be punishable by a fine of not less than twenty-five (\$25.00) dollars, or imprisonment for not more than thirty (30) days.

1932 Code, § 3296; 1927 (35) 285; 1930 (36) 1383.

§ 1788-4. Hunting clubs and game preserves register—reports—penalties.—

All hunting clubs and game preserves in South Carolina shall register with the chief game warden of the State the name and location of such club or game preserve, giving the name and post office address of each club or game preserve and the name and residence address of each and every member of said club or game preserve. Such registration shall be made on or before July 1st of each year of all clubs or game preserves in this State by that time, and all new clubs or game preserves established after July 1st of each year shall be promptly registered with the game warden. All new members taken into any hunting club or game preserve shall be promptly registered with the chief game warden at the time they become members thereof. Between March 1st and April 1st of each year each and every hunting club or game preserve shall file report with the chief game warden giving the number and kind of game birds and game animals killed or taken by the members of said hunting club or game preserve during the hunting season ending March 1st of each year. The penalty for violating each and every provision of this section shall be a fine of not less than twenty-five (\$25.00) dollars, nor more than one hundred (\$100.00) dollars, or imprisonment for not less than thirty (30) days nor more than six (6) months.

1932 Code, § 3297; 1927 (35) 161.

ARTICLE 4

Protection of Fish, Game, Etc., in Game Zones and Certain Other Subdivisions

1789 thru 1789-9. Game zone 1.
 1790 thru 1790-5. Game zone 2.
 1792 and 1792-1. Game zone 4.
 1794. Game zone 6.
 1795. Abbeville County.
 1796. Aiken County.
 1797. Anderson County.
 1800. Charleston County.
 1801 thru 1801-2. Cherokee county.

1802 thru 1802-2. Chester County.
 1803. Chesterfield and Lexington Counties.
 1805. Colleton County.
 1806 thru 1806-2. Darlington County.
 1807. Dillon County.
 1807-1. Dillon and Marion Counties.
 1807-2. Florence, Georgetown, and Horry Counties.

1808. Dorchester County.	1819. McCormick County.
1809. Edgefield County.	1820. Marion County—game warden.
1810. Fairfield County.	1820-1. Certain waters of Little Pee Dee River fish sanctuary.
1812. Greenville County.	1822 and 1822-1. Newberry County.
1814 and 1814-1. Kershaw County.	1824-21. Spartanburg County.
1815. Lancaster County.	1825. Sumter County.
1816. Laurens County.	1826. Union County.
1818. Lexington County.	1827 and 1827-1. Williamsburg County.
1818-1. Lexington, Newberry, Richland and Saluda Counties.	1828 and 1828-1. York County.

Game zone 1 (Greenville, Oconee, and Pickens Counties.)

§ 1789. Seasons hunt certain game.—There is hereby created open and closed seasons for the hunting of game in game zone No. 1 for South Carolina, consisting of Pickens, Oconee and Greenville Counties, to-wit:

- (a) There shall be no open season for the hunting of turkeys.
- (b) There shall be no open season for the hunting of deer.
- (c) The open season for hunting raccoons, and opossums shall be from October 1st to January 31st of each year.
- (d) The open season for hunting quail shall be from Thanksgiving Day to January 31st of each year.
- (e) There shall be no closed season for the hunting of fox.
- (f) The open season for hunting squirrel shall be from September 1st to Thanksgiving Day without dogs and from Thanksgiving Day to January 31st with dogs.
- (g) The open season for hunting rabbits without fire arms shall be from September 1st to Thanksgiving Day, and with fire arms from Thanksgiving Day to January 31st.
- (h) The closed season for hunting and killing turtle doves shall begin on the 1st of October.

1938 (40) 1657; 1939 (41) 534; 1941 (42) 225.

§ 1789-1. Unlawful hunt game during closed season.—It shall be unlawful for any person to hunt for any of the game hereinabove enumerated during the closed season for the hunting of same.

1938 (40) 1657.

§ 1789-2. Hunt game during one season—quail and squirrel bag limits.—It shall be lawful for any person to hunt for any of the game hereinabove enumerated during the open season for the hunting of same: *provided, however*, it shall be unlawful for any person to catch and/or kill more than ten (10) quail during any one calendar day, or more than twelve (12) squirrels during any one calendar day.

1938 (40) 1657.

§ 1789-3. Season not fish for or take trout in clear water streams.—There is hereby created a closed season for the fishing of trout in, or taking of trout from, the clear water streams in said zone No. 1, beginning on the 1st day of October and terminating on the 31st day of December of each year.

1938 (40) 1657.

§ 1789-4. Unlawful fish for or take trout during such closed season.—It

shall be unlawful for any person to fish for trout in, or to take trout from, any clear water stream in said zone during said closed season therefor: *provided, however*, that in the event any person fishing for fish other than trout during such closed season for the fishing for trout, shall catch any trout, such shall not be unlawful if such person shall immediately return such trout so caught to the stream from which same was caught.

1938 (40) 1657.

§ 1789-5. Unlawful possess trout caught or taken during such closed season.

—It shall be unlawful for any person, during the closed season set out in section 1789-3 above, to have in his or her possession in said zone any trout caught in or taken from any fresh water stream in said zone. Upon any person being found in possession of fresh water trout in said zone during such closed season, a presumption, subject to being rebutted, shall arise, that such trout was caught in the clear water streams in said zone during said closed season, by the person in possession of same.

1938 (40) 1657.

§ 1789-6. Season fish for and catch trout—size and number catch—wardens search containers.—Subject to the provisions of sections 1789 through 1789-9, it shall be lawful for any person to fish for and catch trout in said zone at any time except during the closed season therefor: *provided, however*, it shall be unlawful for any person to take from any stream in this State more than twenty (20) speckled trout or twenty (20) rainbow trout in any one calendar day. It shall be unlawful for any person to take from any stream any speckled trout less than seven (7) inches in length or any rainbow trout less than eight (8) inches in length. It shall be lawful for any game warden or other officer of the law to search any fish container to ascertain if this law has been violated.

1938 (40) 1657.

§ 1789-7. Seines—nets—pole and line—rod and reel—rod and line—bait—lures—set lines.—It shall be unlawful for any person at any time to use within said zone or in any of the waters thereof any net of any description commonly called a seine for the purpose of gathering, hemming, or driving fish in any of said waters. And the word “net” shall be deemed and interpreted to include any and every device in the nature of a net whether made of cotton, hemp, rayon, silk or wire. But the provisions of §§ 1789 through 1789-9 shall not prevent the use of a circular net commonly called a “landing net” to be used in landing a fish, provided it is not over fourteen inches (14 in.) in diameter and eighteen inches (18 in.) deep. The said fish shall be caught only with rod and reel, or rod and line, or pole and line, with single bait or lure in the hands of the operator, or by throwing when not more than one lure and line is used by the person throwing: *provided*, that when the the pole and line is used, the fisherman may use not exceeding three poles provided the same be used in his view, and he is not required to have the same in his hands all of the time: *provided, further*, that it shall not be unlawful for a person fishing with pole and line to have in his possession and use at intervals a rod and reel or rod and line: *provided, however*, baskets and seines not exceeding fifteen (15) feet in length

and with meshes not less than one (1) inch square, and trotlines may be used in catching non-game fish in streams and waters south of the main line of the Southern Railway, which said railway line crosses Greenville, Pickens and Oconee Counties: *provided, further*, seining is hereby permitted in the waters of Keowee River, south of Old Pickens Bridge and seining is hereby permitted in the waters of Twelve Mile River. *Provided, further*, that seining in Oconee County be permitted in all streams south of the main line of the Southern Railroad except in Coneross Creek above Lousdale Power Dam, or better known as the High Bridge Road. *Provided*, that in Oconee and Pickens Counties trot lines, throw lines and set hooks may be used in the waters of Tugaloo River below the confluence of Talulah and Chatooga Rivers, of Seneca River below the confluence of Keowee and Twelve Mile Rivers and of Saluda River below the "Saluda dam" bridge and in each of said streams to the Anderson County line.

1938 (40) 1657; 1939 (41) 318; 1941 (42) 225.

§ 1789-8. Closed season on certain fish.—The closed season in zone 1 is hereby declared in all waters and streams except that territory lying south of the Southern Railway, against catching large mouth bass and small mouth bass during the month of April and for crappie and bream and warmouth for the month of May. No bass shall be caught, or if caught, must be immediately placed back in the water, under 10 inches in length and bream, crappie and warmouth under six inches in length.

1941 (42) 225.

§ 1789-9. Penalties.—Any violation of any of the provisions of §§ 1789 through 1789-8 shall be punishable by a fine of not more than one hundred (\$100.00) dollars nor less than ten (\$10.00) dollars, or imprisonment for not more than thirty days.

1938 (40) 1657.

Game zone 2 (Abbeville, Anderson, Greenwood, Laurens, McCormick and Newberry Counties)

§ 1790. Season hunt certain game.—There is hereby created open and closed seasons for the hunting of game in zone No. 2 of South Carolina, consisting of Anderson, Abbeville, Laurens, Greenwood, Newberry and McCormick Counties, as follows:

- (a) There shall be no open season for the hunting of turkeys.
- (b) There shall be no open season for the hunting of deer.
- (c) The open season for hunting raccoons and squirrels shall be from October 1st to February 1st of each year.
- (d) The open season for the hunting of o'possum shall be from September 1st to February 1st of each year.
- (e) The open season for the hunting of rabbits and quail shall be from and including Thanksgiving Day to February 1st of each year.

Provided, however, that rabbits may be hunted without guns, and with dogs only, from September 1st to Thanksgiving Day of each year.

- (f) The open season for hunting of foxes shall be from September 1st to March 1st and then only with dogs.

1940 (41) 1728.

§ 1790-1. Hunt during open season—quail and squirrel bag limits.—It shall be unlawful for any person to hunt for any of the game hereinabove enumerated at any time other than the open season for hunting of game as set out in section 1790. It shall be unlawful for any person to catch or kill more than ten (10) quail during any one calendar day, or more than ten (10) squirrels during any one calendar day.

1940 (41) 1728.

§ 1790-2. Use of seines, nets or traps catch fish.—It shall be unlawful to use seines, nets, baskets, or traps for the catching of fish in any back waters caused by the damming of any running stream in said zone, and it shall be unlawful to use a seine, with mesh smaller than one and one-quarter ($1\frac{1}{4}$) inches square for the catching of fish in any of the waters in said zone.

1940 (41) 1728.

§ 1790-3. Deputy game wardens.—A majority of the legislative delegation, together with the Senator from any county in said zone shall have the privilege in their discretion of authorizing the employment of additional deputy game wardens for not more than three (3) months during the hunting season, and compensation of such wardens shall be made from game fund on hand.

1940 (41) 1728.

§ 1790-4. Penalties.—Any violation of any of the provisions of §§ 1790 through 1790-4 shall be punishable by a fine of not more than one hundred (\$100.00) dollars, nor less than ten (\$10.00) dollars, or imprisonment for not more than thirty (30) days.

1940 (41) 1728.

§ 1790-5. Fishing in certain artificial lakes with area of 10,000 acres or over, game zone 2.

(1) Catch fish with hook and line—waters exempted.—It shall be unlawful to catch and carry away from any artificial lake of an area of ten thousand acres or more within game zone No. 2 of this State any fish of any kind except by hook and line which shall include poles, rod and reel and natural or artificial bait and no person shall use more than two poles at the same time. *Provided*, that the provisions of this section shall include the tributaries upstream of lake or lakes herein mentioned for a distance of one mile above where the water ceases to flow.

(2) Fish catch and carry away daily—presumption.—It shall be unlawful for any person to take from the waters of any artificial lake of ten thousand acres or more in area of game zone No. 2 more than five (5) bass and not more than fifteen (15) other kinds of game fish in any one day and it shall be presumed that anyone having in his or her possession in and around or upon said lake a larger amount of game fish than is provided for herein has been guilty of violating the provisions of this section. *Provided, further* that not more than twenty (20) game fish including the five (5) bass hereinbefore mentioned and fifteen (15) other game fish shall be caught in any one day by any one person.

(3) Minimum catch.—It shall be unlawful for any person to take and bag

a bass less than ten (10) inches in length and other game fish less than six (6) inches in length from the waters of any artificial lake of ten thousand acres or more in game zone No. 2. The measurements herein provided shall be made from the tip of the head to the tip of the tail.

(4) Sale—illegal fishing devices.—It shall be unlawful to sell or offer for sale any game fish caught from the waters of any artificial lake having an area of ten thousand acres or more within game zone No. 2 and any and all illegal fishing devices such as traps, nets or other contraptions shall be confiscated and destroyed.

(5) Seasons not fish—penalties.—No fishing game fish whatever shall be allowed during the months of April and June of every year within the waters of any artificial lake having an area of ten thousand acres or more nor in the tributaries upstream of said lake for a distance of one mile above where the water ceases to flow. Any person violating any of the provisions of this section shall be guilty of a misdemeanor and shall be punished by a fine of not less than ten (\$10.00) dollars nor more than one hundred (\$100.00) dollars or by imprisonment of not less than ten (10) days or more than thirty (30) days. *Provided*, the terms of this section shall only apply to artificial lakes within game zone No. 2 as have their dam sites physically located in said zone.

1941 (42) 113.

Game zone 4 (Cherokee, Chester, Fairfield, Lancaster, Spartanburg, Union and York Counties)

§ 1792. Season hunt bobwhite quails.—There is hereby created an open and closed season for the hunting of bobwhite quail in game zone No. 4 of South Carolina, said zone consisting of Spartanburg, Cherokee, Union, York, Chester, Fairfield, and Lancaster Counties, to-wit: the open season for the hunting of bobwhite quail shall be from Thanksgiving day to February 1st, both inclusive, of each year. Any violation of any of the provisions of this section shall be punishable by a fine of not more than one hundred (\$100.00) dollars nor less than ten (\$10.00) dollars, or imprisonment for not exceeding thirty (30) days.

1939 (41) 232.

§ 1792-1. Season hunt squirrels.—There is hereby created an open and closed season for the hunting of squirrels in game zone No. 4 of South Carolina consisting of Spartanburg, Cherokee, Union, York, Chester, Fairfield and Lancaster Counties, to-wit: such open season shall be from the 1st day of October of each year until the 1st day of March of the following year, both dates inclusive, and such closed season shall be from the 2nd day of March until the 2nd day of October, both dates inclusive, of each year. It shall be lawful for any person to hunt squirrels in the counties comprising said zone during such open season. It shall be unlawful for any person to hunt squirrels in any of the counties comprising said zone during such closed season, and any person so doing shall be guilty of a misdemeanor and, upon conviction, be punishable by a fine of not more than one hundred (\$100.00) dollars nor less than ten (\$10.00) dollars, or imprisonment for not exceeding thirty (30) days.

1939 (41) 484.

Game zone 6 (Allendale, Bamberg, Barnwell, Beaufort, Berkeley, Charleston, Colleton, Dorchester, Georgetown, Hampton, Jasper, Orangeburg, Williamsburg Counties.)

§ 1794. Season hunt rabbits.—There shall be no closed season for the purpose of hunting rabbits in state game zone number six.

1940 (41) 1692.

Abbeville County.

§ 1795. Game warden—nomination.—The game warden for Abbeville County shall be nominated in the Democratic primary for the year 1936, for a term of two (2) years, and his successor every two years thereafter, and the person so nominated in such primary shall be recommended by the delegation to the Governor for appointment, and he shall be commissioned by the Governor as game warden for Abbeville County. In the event of a vacancy by resignation, death or otherwise, the unexpired term of the game warden shall be filled by appointment, by the Governor, upon the recommendation of a majority of the Abbeville delegation.

1935 (39) 26.

Aiken County

§ 1796. Game wardens—examination—appointment — terms—removal.—On or prior to August 1, 1940, and every two years thereafter, after notice thereof by publication in some newspaper having circulation within the county of Aiken, the chief game warden of the State of South Carolina shall provide for, prescribe and hold an examination to determine the fitness and qualifications of any and all applicants for the office of game warden for Aiken County. Any resident of Aiken County shall be eligible to take said examination, and of the number so applying and taking such examination the said chief game warden shall certify to the Aiken County legislative delegation the names of the four persons receiving the highest grade and rating as determined by him. Of the four names so certified said delegation shall recommend one to the Governor for appointment as game warden for Aiken County, and one or more for appointment as assistant game wardens for said county, the need and number of assistants to be determined by said delegation. The person so recommended to the Governor for game warden or assistant game warden for said county of Aiken shall be appointed and commissioned by the Governor as such. Said game wardens to be appointed as aforesaid shall hold office for the term of two years, and until their respective successors shall have been appointed, unless sooner removed for cause.

1940 (41) 1884.

Anderson County

§ 1797. The Broadway Lake commission, Anderson County.

(1) Appointment—term—meetings—pay.—There is hereby created a commission in Anderson County to be known as The Broadway Lake commission and composed of five members, residing in said county, who shall,

upon the recommendation of a majority of the Anderson County legislative delegation, be appointed by the Governor for a term of two years until their successors shall have been appointed and qualified: *provided*, that the initial members of said commission, created under the provisions of this section and their terms of office shall be as follows.....

who respectively shall hold office until their successors have been appointed and qualified. The members of said commission shall annually elect one of their number as chairman, and said commission shall meet at such times and places as said chairman, or a majority of the members thereof, may designate. The members of said commission shall serve without pay, except each member shall be paid the sum of three (\$3.00) dollars for each meeting attended, not to exceed twelve meetings during any one calendar year.

(2) **Majority act.**—In all matters before the said commission the acts and doings of the majority of the same shall be construed to be the acts and doings of the commission.

(3) **Manage and control Broadway Lake—develop and improve park areas—patrolman—pay—jurisdiction.**—The said commission shall have the management and control of Broadway Lake in said county, the park areas in and near said lake, and all property, right of ways and easements now owned or hereafter owned by said county by virtue of and in connection with the establishment, operation, management and control of said lake. Said commission is authorized and empowered to develop and improve park areas. It is authorized and empowered to employ a patrolman, and upon doing so, the person so employed shall, as long as he remains so employed, possess all the powers, duties and authorities of a peace officer, with power to arrest and preserve order and peace in like manner as other peace officers. The jurisdiction of such patrolman and peace officer shall not be confined to the lake area, but shall be over the entire county of Anderson. The said commission may pay the patrolman such salary as it deems advisable.

(4). **Sheriff and deputies cooperate with patrolman.**—The sheriff of Anderson County and his deputies shall at all times cooperate with the patrolman of said lake in the maintenance of peace and order at and around said lake.

(5) **Rules and regulations for use and enjoyment of lake project—regulate sanitary conditions.**—The said commission is hereby authorized and empowered to make such rules and regulations governing and concerning the said lake, the use of the waters thereof, park areas, the county property thereat, the assemblage of people thereat, and all other matters pertinent to the use and enjoyment of the Broadway Lake project by the people of Anderson County and adjoining territories to the end that said project may be used and enjoyed by such people in the most advantageous way to the happiness, welfare and health of such people, and shall have power to prescribe for the lake and territory adjacent thereto and drainage therein, the types of toilets that may be used and may forbid pig pens and/or any

other thing which would tend to pollute the waters of the lake or be injurious to the health and/or comfort of the community.

(6) Erect walk-way—obstruction and use of right-of-way and easement of county—improve public park, beaches, and camping ground — fishing piers.—The said commission shall, as far as is practicable, with the aid of the supervisor of said county, construct and maintain a five-foot walk-way around the entire lake within the forty-foot right-of-way and easement owned by said county, and said walk-way shall be as close to the water's edge as practicable. It shall be unlawful for any person to obstruct the forty-foot right-of-way and easement of said county with any buildings, fences or in any other manner whatsoever without the premission of said commission. Any such permission by the said commission shall be with the understanding that such permission may at any time be revoked and the person granted such permission required to remove said obstruction. Any permanent building erected on said forty-foot right-of-way or easement prior to May 20, 1941, shall not be required to be removed, and the said five-foot walk-way shall go around said buildings in the most direct manner. The entire forty-foot right-of-way and easement owned by said county may be used by the general public for passing and repassing, and for fishing, but shall not be used for camping purposes or picnics. The said commission, with the aid of the supervisor of said county, shall as far as practicable improve the public park, beaches, and camping ground of said county at or near said lake. Such park shall be clearly marked and kept in a clean and sanitary condition for the convenience of the public. Said commission shall as far as practicable build, erect, and maintain fishing piers at such lake, park, beaches and camping ground.

(7) Erection of building, fence, etc., on easement and right-of-way around lake.—It shall be unlawful for any person to erect any building, fence or other obstruction on any part of the forty-foot easement and right-of-way of said county around said lake: *provided, however*, any person with the consent of said commission may construct a walk and/or boat house extending over the water's edge into the lake, if such walk, or boat house does not cover more than one-third of the water frontage of the lot upon which the same is erected. Such boat houses or walks when so constructed shall be the private property of the owner of the property upon which same are constructed.

(8) Acquire property.—The said commission is hereby authorized and empowered to purchase, lease, condemn and otherwise acquire, take and use any real estate which may be desired for the bed of the lake, shore line, or park adjacent to the lake, or for any other purpose found desirable in creating the lake and adjacent park areas as contemplated by this section. Condemnation of any such real estate shall be in the manner prescribed by section 7297.

(9) Remove certain obstructions on easement and right-of-way.—Any person, who, prior to May 20, 1941, shall have erected, or caused to be erected, any fence or other obstruction on any part of the county's forty-foot easement and right-of-way, shall, within thirty days after May 20, 1941, remove such construction, and the property owner failing so to do shall be guilty of a misdemeanor; *provided, however*, the provisions of

this subsection shall not apply to permanent buildings that have been erected upon such right-of-way or easement prior to May 20, 1941.

(10) **Commercial enterprises—license.**—The commission is authorized and directed to license any commercial enterprise which makes use directly or indirectly of the water, the parks, or the county's right-of-way, and it shall be unlawful for any one to operate any business enterprise without first obtaining said license from the commission. The license shall be such amount as the commission deems advisable and may be graduated on the volume of business done, or on the public space taken up, and used by said business or in such other manner as the commission deems advisable.

(11) **Fishing—license.**—It shall be unlawful for any person to catch fish, or attempt to catch fish in said lake, that is to say, in any of the waters impounded by the erection of the dam known as Broadaway Lake dam, except in the manner as hereinafter prescribed. Fishing, and attempting to catch fish in said lake shall be only with line and hook, pole, line, and hook; reel, rod, line and hook, and rod, line and hook, with bait attached to such hooks. Any person fishing or attempting to fish in said lake shall before so doing, if required by said commission, purchase a license so to do, and while so fishing shall have prominently displayed about his person a button, card or other insignia prescribed and furnished by said commission, indicating that such person is licensed to fish in the manner, by the means, in which said person is fishing. Licenses secured for fishing in said lake shall be in lieu of all state and county licenses for such fishing. A person fishing in said lake shall not at any time, while so fishing, use more than four hooks for such fishing, and all lines, and poles used in such fishing shall at all times be within the vision of the person so fishing.

(12) **Sell licenses to fish—exemptions.**—The commission shall sell licenses to people desiring to fish in said lake, such licenses shall be issued upon a calendar yearly basis, and upon a person paying the license required the commission shall deliver to him a button, card or other insignia indicating that such person has paid such license and the date upon which such license expires, and shall keep a numbered receipt of the amount received therefor. The charge for such licenses shall be such as said commission deems advisable; *provided, however*, that a license for fishing, when rod and reel is not used, shall not exceed one (\$1.00) dollar per year, and when a rod and reel is used such license shall not exceed two (\$2.00) dollars per year. Any person securing a license issued during a calendar year which expires the following December 31st, shall be charged the same as if said license was for the entire year; *provided*, the commission may issue a per diem license, which shall not be less than twenty-five cents nor more than fifty cents per diem; *provided, further*, the commission may, if it deems advisable, not require licenses for fishing in said lake, when fishing is done with one pole, line and hook, or one line and hook.

(13) **Fishing in streams supplying water to lake.**—It shall be unlawful for any person to catch fish or attempt to catch fish in any of the streams in said county which supply water to said lake in any manner other than by line and hook, pole, line and hook, rod, reel, line and hook.

(14) **Game warden cooperate.**—The game warden of Anderson County is hereby required to cooperate with said commission in the enforcement

of the game laws of South Carolina, and Anderson County, on said lake.

(15) **Duck and game sanctuary—hunting prohibited.**—Broadaway Lake is hereby declared to be a duck and game sanctuary and no hunting shall be done thereon or in the vicinity thereof at any time. The commission shall designate the limits of said sanctuary.

(16) **License operate boat—rates.**—No person shall operate a boat on the waters of said lake except in the manner as herein prescribed, any person operating a boat for hire carrying passengers shall, before operating such boat, secure a license so to do. The licenses shall be issued upon a calendar year basis and any license obtained for a part of the year shall be at the same rate as the license for the entire year. The license shall be as the commission may deem advisable; *provided*, the license charged for the operation of boats for hire shall not be less than fifteen (\$15.00) dollars per year for power driven boats, and the license charged for all other boats used for hire shall not be more than five (\$5.00) dollars per year. Boats used to transport passengers for compensation and boats rented for compensation for use upon said lake shall be construed "boats for hire" as used in this section. Any person operating any boat when same is not being operated for hire, shall, before operating such boat, secure a license so to do. Said license shall be issued upon a calendar yearly basis and any license obtained for a part of the year shall be at the same price as the license for the entire year. The license shall be as the commission deems advisable; *provided*, same shall not be less than one (\$1.00) dollar per year. The commission in licensing any boat under the provisions of this section, shall give such boat a number, and the operator of such boat before operating it, shall have such number prominently displayed outside of said boat. Any person acquiring a boat upon which a license to operate upon said lake has been procured, shall become vested with the rights to operate said boat in the same manner as the original licensee had. The said commission may refuse to license any boat that it deems unsafe. 'Boats' as used in this section shall be construed to mean any kind of conveyance that will carry one or more persons over the top of the water and "boats for hire" as used in this section shall mean any boat which for consideration is rented to a person for use upon the waters of said lake and any boat which carries passengers upon the waters of said lake which passengers pay any consideration therefore.

(17) **Operation of motor boats—boat races.**—All motor boats used in the waters of said lake shall be operated with mufflers, and it shall be unlawful to operate any motor on said waters with a cutout; *provided*, that the commission may waive this provision during any race which the commission has approved, and the commission may for the purpose of holding boat races designate a track or space on the waters of said lake and may for the duration of the race prohibit other craft from using or entering said space.

(18) **Licenses issued by Anderson County game and fish commission.**—All licenses issued by the Anderson County game and fish commission prior to May 20, 1941, are hereby validated and shall be accepted by said Broadaway Lake commission and shall be valid in like manner as licenses issued by the said Broadaway Lake commission.

(19) **Funds use pay expenses.**—The said commission shall pay its expenses in carrying out the provisions of this section from funds that it may receive under the provisions of this section, together with any funds that may be furnished it by Anderson County through legislative enactment, or otherwise.

(20) **Reports—file rules and regulations.**—Within six months after May 20, 1941, the said Broadaway Lake commission shall make a written report of its receipts, expenditures and disbursements, received and incurred, from May 20, 1941, up to the time of the making of such report and thereafter at least once every six months, the said commission shall make a similar report covering such receipts, expenditures and disbursements from the date of its preceding report. Said report when so made shall be filed with the clerk of the court of said county and kept by him where same may be publicly inspected. The rules and regulations made, promulgated and adopted by said commission shall be written and a copy of the same shall be filed in the office of the clerk of court for said county for public inspection and no person shall be required to obey any such rules, or regulations until a copy of same shall have been filed as aforesaid; *provided, however,* this stipulation shall not apply to, or have the effect of saving any person from prosecution for fishing, or operating a boat on the waters of said lake without obtaining a license so to do, or in a manner contrary to the provisions set out in this section.

(21) **Liability of Anderson County.**—There shall be no liability on the part of Anderson County for any damage or injury to any person frequenting Broadaway Lake, or the property of the county which is a portion of the Broadaway Lake project.

(22) **Successor to Anderson County game and fish commission and Broadaway Lake commission.**—The said commission is successor to Anderson County game and fish commission and Broadaway Lake commission, and shall hold title to all real estate right-of-ways and easements held by the said Anderson County game and fish commission and by Broadaway Lake commission under various acts of the South Carolina General Assembly heretofore enacted into law.

(23) **Penalties.**—Any person violating any of the provisions of this section or violating any of the rules and regulations prescribed by the commission under the provisions of this section shall be deemed guilty of a misdemeanor and, upon conviction, be punished within the discretion of the court by a fine of not exceeding one hundred (\$100.00) dollars or imprisonment not exceeding thirty (30) days. In the event of such violation, each day of such violation shall be considered a separate offense.

(24) **Invalidity.**—If any section, phrase, clause or provision of this section be declared unconstitutional it shall not affect the remaining sections, phrases, clauses or provisions of same.

1941 (42) 231.

Charleston County

§ 1800. **Length of seines use catch fish, etc., on and near beaches.**—It shall be unlawful to use on any of the beaches of Charleston County in this State or within the distance of three hundred yards from any such beach

any seine or other net, for the capturing of fish or other forms of marine life, exceeding two hundred (200) feet in length. Any person or persons violating the provisions of this section shall be fined not less than twenty-five (\$25.00) dollars, and not more than one hundred (\$100.00) dollars or be imprisoned for not less than five (5) nor more than thirty (30) days for the first offense; and shall be fined not less than one hundred and ten (\$110.00) dollars nor more than two hundred and fifty (\$250.00) dollars or be imprisoned not less than thirty (30) nor more than sixty (60) days for the second and each subsequent offense.

1936 (39) 1369.

Cherokee County

§ 1801. Expenditure of game funds.—The funds accruing to Cherokee County from the office of the chief game warden of the State shall be paid to the fish and game club of Cherokee County, and expended by the club in the protection and propagation of fish and game.

1935 (39) 382.

§ 1801-1. Fishing in.—It shall be unlawful for any person to use within Cherokee County, or any of the waters thereof, or any of the waters contiguous thereto, any traps, nets and baskets of any description used for the purpose of gathering, hemming or driving fish in any of said waters. The word “nets” herein shall be deemed and interpreted to include any and every device in the nature of a net whether made of cotton, hemp, rayon, silk or wire. But the provisions of this section shall not prevent use of a circular net commonly called a “landing net” to be used in landing a fish, provided it not be over fourteen inches (14 in.) in diameter and eighteen inches (18 in.) deep. The said fish shall be caught only with rod and reel, or rod and line, or pole and line, with single bait or lure in the hands of the operator, or by throwing when not more than one lure and line is used by the person throwing: *provided*, that when the pole and line is used, the fisherman may use not exceeding three poles, provided the same be used in his view, and he is not required to have the same in his hands all of the time: *provided further*, that it shall not be unlawful for a person fishing with pole and line to have in his possession and to use at intervals a rod and reel or rod and line. The possession of any device of the nature hereinabove described upon or in the waters of the county aforesaid shall be deemed to be an infraction of this section. Any of the violations of the provisions of this section shall be deemed a misdemeanor and punishable by a fine of not more than one hundred (\$100.00) dollars or not more than thirty (30) days imprisonment in the discretion of the court.

1937 (40) 78.

§ 1801-2. Cherokee fish and game club.—There is created hereby a fish and game club for Cherokee County, to be known as Cherokee Fish and Game Club. The purpose of said club shall be to conserve and propagate, game fish and game birds in said county, and to co-operate and assist in the enforcement of all local and state laws to this end. It shall be the duty of the president, subject to the rules and by-laws of the club, to procure from

government sources and other available sources, necessary stock for propagating game fish in the streams of the said county of Cherokee, and for propagating wild game in said county, and to further such measures as are necessary for acquiring preserves and for otherwise propagating and protecting said fish and game from unlawful destruction. The secretary of said club shall perform such duties as are prescribed by the by-laws and the constitution of said club and to keep an accurate and permanent record of all the meetings of said club. Said club shall be governed in all respects other than are herein set out, by the by-laws and constitution of said club.

1936 (39) 1311.

Chester County

§ 1802. Fishing in back waters of Catawba and Wateree Rivers restricted. Chester, Fairfield, and Lancaster Counties.—There is hereby declared a closed season for a period of five (5) years for fishing in the back waters of the Catawba and Wateree Rivers in the counties of Fairfield, Chester and Lancaster, except with rod and reel and hook and line, and split wood baskets. Any violation of this section shall be punishable by a fine of not less than twenty-five (\$25.00) dollars nor more than one hundred (\$100.00) dollars or by imprisonment for a period of not less than twenty (20) days nor more than thirty (30) days.

1939 (41) 454; 1940 (41) 1692.

§ 1802-1. Bounty for coyotes.

(1) **Authority of game warden.**—The game warden of Chester County is authorized to pay out of the funds herein provided, until such funds shall be exhausted, a bounty of five (\$5.00) dollars per head for every coyote which shall be caught and/or killed in Chester County after the approval of this section and after the designation of the fund hereinbelow mentioned, except the very young ones taken in the bed or den and for these the sum of two (\$2.50) dollars and fifty cents per head shall be paid. Such evidence or proof of the catching and/or killing of said coyotes in Chester County as the game warden may require, shall be produced before any bounty shall be paid.

(2) **Fund designated.**—The fund out of which the bounty herein provided shall be paid shall be such fund as shall be designated or set apart by Chester County legislative delegation out of the Chester County game fund, and the game warden shall not advertise or pay any bounty until such fund shall be designated or set aside for the purpose herein named and he shall not be liable then for such bounty, if such fund shall be exhausted.

(3) **Advertising bounty.**—The game warden may use such an amount of said fund as may be necessary, not exceeding twenty-five (\$25.00) dollars, for printing vouchers, advertising the bounty, notice of exhaustion of the fund and such other printing as may be necessary to carry out the provisions of this section.

(4) **Manner of payment.**—The said fund shall be placed in the office of the treasurer of Chester County and held by him under such account title as he may choose and to be paid out on vouchers issued by the game warden,

giving at least the name of the payee, the date and place of catching and/or killing the coyote or coyotes in Chester County.

(5) **Account of vouchers.**—The game warden shall be required to keep an account of the vouchers issued, the date and amount of each, the number of coyotes paid for, and the date and place of the taking or killing of same, and make report thereof to the delegation together with the amount on hand, if any, and if the funds are exhausted, the date of same, the said report to be made by January first of each year.

1932 Code, § 1794; 1931 (37) 55, 114.

§ 1802-2. Trap partridges stock or replenish certain parts county.—Authority and power are conferred upon the chief game warden of the State, upon the written application of the game warden of Chester County requesting permission to trap partridges in certain parts of Chester County, to be used in stocking or replenishing other parts of the county in which such birds have become extinct, or nearly so, to grant to said county game warden premission for a stated period of time to trap partridges for the purpose named in the said request. The application on the part of the county game warden shall set forth with approximate definiteness the area of the county in which he desires to trap partridges and the area or areas, which he desires to replenish or stock with the said birds. The chief game warden of the State, if in his judgment it is advisable to do so, is given the power to limit the number of birds which may be caught, or trapped, in any particular section of the county, and he is charged with the duty of seeing that the stock of birds in any particular area shall not be unreasonably diminished, or affected by the exercise of any powers conferred under the terms of this section. The said chief game warden shall also have the power, if in his judgment the privileges exercised under the terms of this section are violated, or seem to him to be destructive to the end hereby sought to be accomplished, to-wit: the preservation and increasing of partridges in Chester County, to revoke absolutely or for a limited time, any permission granted under the terms of this section to the county game warden.

1932 Code, § 1795; 1931 (37) 232.

Chesterfield County

§ 1803. Game wardens, Chesterfield and Lexington Counties—election—vacancies.—The game wardens for Chesterfield and Lexington Counties shall be nominated in the primary election of every election year, and it shall be the duty of the Senator and/or legislative delegation of said county to recommend to the Governor for appointment the person so nominated, *provided*, that in case of a vacancy for any cause the Governor shall fill such vacancy upon a recommendation as hereinabove provided, and the one so appointed shall hold as game warden until the primary election thereafter.

1932 (37) 1550.

See § 1818 for term of Lexington County game warden.

Colleton County

§ 1805. Not take shad from Ashepoo River for ten years.—The taking of shad from the Ashepoo River and its tributaries in Colleton County for a period of ten (10) years from May 8, 1936, is hereby prohibited. Any person, firm or corporation violating the provisions of this section shall be deemed guilty of a misdemeanor and punished by a fine of one hundred (\$100.00) dollars or imprisonment for a period of thirty (30) days or both fine and imprisonment at the discretion of the court: *provided*, that the provisions of this section shall not apply to the state board of fisheries taking shad to be used in hatcheries.

1936 (39) 1535.

Darlington County

§ 1806. Game wardens, appointment.—All applicants for the position of county game warden for Darlington County shall file a written application with the state game warden, who shall give an examination to all such applicants after due notice to such applicants of the time and place of such examination. The state game warden shall certify the name of the applicant having the best mark or grade on such examination to the Governor, who shall appoint such permanent county game warden for Darlington County. The county game warden for Darlington County shall appoint all assistant game wardens for Darlington County.

1940 (41) 1838.

§ 1806-1. Season fish with nets.—There shall be a closed season for fishing with nets in any of the waters or streams of Darlington County during the period comprised within the following dates: April 15th and December 31st, next thereafter of each year. *Provided*, that the provisions hereof shall not apply to privately owned ponds or lakes. *Provided, further*, that this section shall be construed to be a special provision from the general law regulating fishing in this State. Any person violating the provisions of this section shall be deemed guilty of a misdemeanor and shall be subject to a term of imprisonment of not less than five (5) days nor more than thirty (30) days, or pay a fine of not less than ten (\$10.00) dollars, nor more than thirty (\$30.00) dollars.

1938 (40) 1672.

§ 1806-2. Fish catch in Prestwood Lake.—It shall be unlawful to catch and carry away any flat fish under six (6) inches in length from Prestwood Lake, Darlington County, South Carolina, and not more than ten (10) such fish shall be caught and carried away by any person in one day. It shall be unlawful to catch and carry away trout fish from said lake under ten (10) inches in length, and the bag limit for such fish shall not be more than four (4) per person per day.

1939 (41) 534.

Dillon County

§ 1807. Game warden, appointment—term.—The game warden for Dillon

County shall, beginning with the elections in the year 1934, be nominated in the primary election of each election year, and it shall be the duty of the legislative delegation of Dillon County to recommend to the Governor, or such other proper authority as may be provided, for appointment the person so nominated; *provided*, that should a vacancy occur during any term of such office, the delegation may recommend to the Governor a person to be appointed as game warden for the remainder of the term, and until another such primary shall be held. The term of office of game warden in Dillon County shall be for a period of four years and until his successor has been duly appointed and qualified.

1933 (38) 259; 1938 (40) 1649.

§ 1807-1. Use of nets, seines or traps catch fish, Dillon and Marion Counties.

—It shall be unlawful for any person to set, place or use any fish nets, seines or traps of any kind or nature in any of the lakes or navigable streams or their tributaries, for the purpose of catching or taking fish of any kind from from said waters in the counties of Dillon and Marion. *Provided, however*, that the provisions of the section shall not be construed to prohibit the use of any nets or seines used exclusively for the purpose of catching shad fish in accordance with the regulations of the state board of fisheries. Any person having in his possession or under his control any fish nets, seines or traps, prepared or partially prepared in the waters, in boats or on the banks of said lakes or navigable streams, or within two hundred yards of said lakes or navigable streams or their tributaries, which may be used for the purpose prohibited by the foregoing provisions hereof, shall constitute *prima facie* evidence of the fact that any such net, seine or trap has been used in violation of this section. Any person violating any one or more of the provisions of this section shall be guilty of a misdemeanor and upon conviction shall suffer imprisonment of not more than ninety (90) days or be subject to a fine of not more than one hundred and fifty (\$150.00) dollars, in the discretion of the court. All fish nets, seines and traps prohibited by the terms of this section found in any of the lakes or navigable streams, or their tributaries, of this State, or in the possession or control of any person or in any motor or boat or other vehicle as defined in this section, shall be forfeited to the State and confiscated by the game warden or other officer gaining possession thereof.

1940 (41) 1890.

§ 1807-2. Fishing in certain waters, Florence, Georgetown and Horry Counties.—There shall be a closed season against fishing in Florence, Georgetown and Horry Counties, in the waters of Little Pee Dee River, Lumber River, Waccamaw River, and Black River, or any of their tributaries, from the 15th day of May until the 1st day of July of each year. During the closed season established hereinabove, if any person is caught on the waters of the rivers named hereinabove, or any of their tributaries, having in his possession any fishing tackle, or wares of any kind whatever, used for the purpose of taking fish from said waters, it shall be *prima facie* evidence that he is fishing and catching fish, and shall be punished according to the provisions of this section. In the counties of Florence, Georg-

town and Horry fishing with hook and line and rod and reel shall be permitted during the closed season. This exemption from the provisions of this section shall not extend the fishing season with set hooks, nets, fish traps or any devices for the catching of fish except one pole and hook and line or rod and reel with one line for each person so fishing. Any person convicted of violating any provisions of this section shall be fined not less than ten (\$10.00) dollars nor more than thirty (\$30.00) dollars, or be required to work upon the public works of the respective counties not less than ten (10) days nor more than thirty (30) days, or both, in the discretion of the court.

1935 (39) 420; 1936 (39) 1665; 1938 (40) 1836; 1940 (41) 1890.

Dorchester County

§ 1808. Not fish in night during May, June and July in Bridge Lake.—Fishing in the night time during the months of May, June and July is hereby prohibited in Bridge Lake, waters of Four-Hole Swamp, in Dorchester County, and anyone violating the provisions of this section shall be subject to a fine of not more than one hundred (\$100.00) dollars, or to a term of imprisonment of not more than thirty (30) days.

1938 (40) 1549.

Edgefield County

§ 1809. Fishing in.—There is hereby declared a closed season for a period of two (2) years for fishing in any of the waters of Edgefield County, except with rod and reel, hook and line, trot line and split wood baskets: *provided*, that the chief game warden shall have the right to suspend the hereinabove provisions of this section upon the recommendation of a majority of the Edgefield County legislative delegation. Any violation of the provisions of this section shall be punished by a fine of not less than ten (\$10.00) dollars nor more than one hundred (\$100.00) dollars or by imprisonment for a period of not less than ten (10) days, nor more than thirty (30) days.

1939 (41) 454.

Fairfield County

§ 1810. Game warden, nomination—vacancy—term.—At the regular Democratic primary election to be held in Fairfield County in the year 1932, and every two years thereafter, one person shall be nominated as game warden for said county, under the rules and regulations governing the nomination of other officers in said primary, and the persons so nominated shall be accordingly appointed and commissioned by the chief game warden. The terms of office of the game wardens so nominated and appointed for the said county shall be for a period of two years, respectively, beginning on January 1st next after their respective nominations. In case of a vacancy occurring in the office of game warden for Fairfield County by reason of resignation, death or otherwise such vacancy for the unexpired term shall be filled by appointment of the chief game warden, upon the

recommendation of a majority of the legislative delegation of Fairfield County.

1932 (37) 1318.

See § 1802 for fishing in back waters of Catawba and Wateree Rivers.

Georgetown County

See § 1807-2 for fishing in certain waters in.

Greenville County

§ 1812. Distribution of fish raised in hatchery Greenville County.—The distribution of fish raised in the hatchery on the lands donated in Greenville County by J. Harvey Cleveland, shall be liberated under the direction and supervision of the chief game warden or his duly authorized deputies, in the lakes and streams of this State.

1932 Code, § 3295; 1931 (37) 309.

Horry County

See § 1807-2 for fishing in certain waters in.

Kershaw County

§ 1814. Game warden—nomination—appointment—term — vacancy—removal.—A game warden for Kershaw County shall be nominated in the Democratic primary of 1936 and in the Democratic primary every two years thereafter, and his term of office shall be for two (2) years or until his successor is appointed and qualified as now provided by law. Upon a warden being nominated, the chairman of the Democratic executive committee of said county shall certify to the Governor of the State the person nominated as game warden in such primary, and upon receiving such certificate the Governor shall appoint the person so certified as game warden to fill the next regular term commencing next after the primary election. Vacancies occurring shall be filled by appointment by the Governor upon the recommendation of a majority of the legislative delegation including the Senator. *Provided*, that upon failure of the county game warden to do his duty, it is made the duty of the chief game warden of the State to remove said game warden from office and to fill said unexpired term by appointment, such appointee, however, to be approved by the legislative delegation from the county.

1936 (39) 1585.

§ 1814-1. Game sanctuaries.

(1) **County commissioners may set aside certain lands for—advertise—trespass.**—The county board of commissioners of Kershaw County as the forfeited land commission of Kershaw County hereby is directed to forthwith set aside for game sanctuaries, such tracts of land owned by such forfeited land commission of not less than one hundred (100) acres in each tract, in the several sections of Kershaw County, suitable for such purposes; and upon the setting aside of such lands as herein directed, the said board shall forthwith advertise in the two newspapers published in Ker-

shaw County a notice against trespass thereon, and post notice against trespass by any person for the purpose of hunting thereon. Such land so set aside as herein provided shall be held as game sanctuaries for a period of not less than twenty years.

(2) **Provide for protection.**—The said board shall provide for the protection of said game sanctuaries from fire, and shall for such purpose cause such fire brakes to be cut as may be necessary, using chain gang labor whenever necessary for such work as may be proper to protect and preserve such sanctuaries from fire, and for the purpose of planting food or cover crops or pine or other merchantable trees thereon.

(3) **Peace officers protect from trespass and fire.**—It shall be the duty of the rural police, the sheriff, game warden and constables of Kershaw County to protect the said lands so set aside as aforesaid from trespass, or fire, and to prosecute any person trespassing, or setting out fire on said lands set aside as aforesaid.

(4) **File deeds of such lands in clerk's office—use of premises.**—Upon setting aside such lands as hereinabove provided, the said board shall file and cause to be recorded in the proper books of the office of the clerk of court a deed or deeds, setting aside said lands as game sanctuaries of said county for the period of twenty years, and for such period of time said lands shall be held and used for no other purpose, save to take therefrom such timber as may be merchantable and to plant and harvest food and cover crops thereon.

1935 (39) 211.

See § 4529-4 for appropriation for game sanctuaries.

Lancaster County

§ 1815. **Game warden—nomination.**—The game warden for Lancaster County shall be nominated in the Democratic primary for the year 1936 for a term of two (2) years, and his successor every two years thereafter, and the person so nominated in such primary shall be recommended by the delegation to the Governor for appointment, and shall be commissioned by the Governor as game warden for Lancaster County. In the event of a vacancy by resignation, death or otherwise, the unexpired term of the game warden shall be filled by appointment, by the Governor, upon the recommendation of a majority of the Lancaster delegation.

1935 (39) 41.

See § 1802 for fishing in back waters of Catawba and Wateree Rivers.

Laurens County

§ 1816. **Game warden—nomination—term—vacancy.**—A game warden for Laurens County shall be nominated in the Democratic primary for the year 1934 and subject to the rules thereof, and the man so nominated in such primary shall be appointed by the chief game warden and commissioned by the Governor as game warden for Laurens County, who shall serve for a term of two (2) years, or until his successor is appointed and qualified. In case of resignation by death or otherwise, the unexpired term

of the game warden shall be filled by appointment by the Governor and with the consent of the Senate.

1933 (38) 248.

Lexington County

§ 1818. Game warden—term.—The term of office of the game warden of Lexington County shall be for a period of four (4) years.

1938 (40) 1710.

See § 1803 for nomination Lexington County game warden.

§ 1818-1. Operation fish hatcheries, Lexington, Newberry, Richland and Saluda Counties.—After the development of a fish hatchery, or hatcheries, within the counties of Lexington, Newberry, Richland and Saluda by the works progress administration, or any other agency of the United States government not more than twenty-five (25%) per cent annually of the funds collected and accruing to the said counties, in any one year, from the sale of hunting licenses and from the fur tax referred to in section 1779, may be used for the maintenance and operation of a fish hatchery, or hatcheries, and the distribution of fish from said hatcheries to the streams and lakes in the counties of Lexington, Newberry, Richland and Saluda.

1936 (39) 1632.

McCormick County

§ 1819. Not fish with seine in certain waters.—It shall be unlawful for any person to use a seine for the catching of fish in any of the streams or waters of McCormick County: *provided, however*, that the provisions of this section shall not apply to Savannah River which constitutes a boundary between the State of South Carolina and the State of Georgia.

1939 (41) 422.

Marion County

§ 1820. Game warden—appointment—term—removal.—All applicants for the position of county game warden for Marion County shall file a written application with the state game warden, who shall give an examination to all such applicants after due notice to such applicants of the time and place of such examination. The state game warden shall certify the names of the three applicants having the best mark or grade on such examination to the Marion County legislative delegation. The Governor shall appoint the one of the three applicants recommended by a majority of the Marion County legislative delegation. The game warden so appointed shall serve for a period of two (2) years and/or until his successor shall be appointed and qualified; *provided*, that the game warden so appointed shall not be removed except by the unanimous action of the entire county delegation.

1940 (41) 1871.



§ 1820-1. Waters on each side of highway in Little Pee Dee River swamp at Gallivant's Ferry fish sanctuary.—There is hereby created an established in the streams or waters on each side of the highway in Little Pee Dee

River Swamp in Marion County near Gallivant's Ferry, a fish sanctuary. It shall be unlawful for any person to fish, seine, net or otherwise enter upon or trespass upon the streams of water lying along and on each side of the highway in Little Pee Dee River swamp in Marion County, near Gallivant's Ferry. Any person violating the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than twenty-five (\$25.00) dollars nor more than one hundred (\$100.00) dollars or imprisonment of not less than fifteen nor more than thirty days.

1938 (40) 1825.

Use of nets, seines, etc., see § 1807-1.

Newberry County

§ 1822. Game warden—nomination.—The game warden for Newberry County shall be nominated in the primary election, and it is made the duty of the legislative delegation from Newberry County to recommend to the Governor for appointment the person so nominated: *provided*, in case of a vacancy by any cause whatsoever, his successor shall be appointed by the Governor upon the recommendation of the chief game warden to fill the unexpired term until his successor shall be qualified.

1932 Code, § 3289; 1929 (36) 86.

§ 1822-1. Fish catch for bait.—It shall be unlawful for any person or persons to catch or remove any minnows or other fish from the streams of Newberry County for the purpose of using same as fish bait; that nothing herein shall prevent anyone from catching fish from his own premises for such purposes: *provided, however*, that if anyone have the consent of such landowner such fish may be caught for said purposes. Any violations of the provisions of this section shall be a misdemeanor and punished in the manner now provided by law.

1933 (38) 387.

See § 1818-1 for operation fish hatcheries.

Richland County

See § 1818-1 for operation fish hatcheries.

Saluda County

See § 1818-1 for operation fish hatcheries.

Spartanburg County

See § 1797 for seining for fish.

§ 1824-21. Seining for fish, Spartanburg County.—It shall be unlawful for any person to use within Spartanburg County, or any of the waters thereof, or any of the waters contiguous thereto, any net of any description commonly called a seine for the purpose of gathering, hemming or driving fish in any of said waters: *provided*, that the provisions of this section shall not apply to the waters of Enoree River, where the said river constitutes

the boundary line between Spartanburg and Laurens Counties.

And the word "net" herein shall be deemed and interpreted to include any and every device in the nature of a net whether made of cotton, hemp, rayon, silk or wire.

But the provisions of this section shall not prevent the use of a circular net commonly called a "landing net" to be used in landing a fish, provided it shall not be over fourteen inches (14 in.) in diameter and eighteen (18 in.) deep. The said fish shall be caught only with rod and reel, or rod and line, or pole and line, with single bait or lure in the hands of the operator, or by throwing when not more than one lure and line is used by the person throwing: *provided*, that when the pole and line is used, the fisherman may use not exceeding three poles, provided the same be used in his view, and he is not required to have the same in his hands all of the time; *provided, further*, that it shall not be unlawful for a person fishing with pole and line to have in his possession and to use at intervals a rod and reel or rod and line. The possession of any device of the nature described hereinabove upon or in the waters of the county aforesaid shall be deemed to be an infraction of this section. Any of the violations of the provisions of this section shall be deemed a misdemeanor and punishable by a fine of not more than one hundred (\$100.00) dollars or not more than thirty (30) days imprisonment in the discretion of the court.

1933 (38) 333; 1936 (39) 1571; 1937 (40) 592; 1938 (40) 1657, 1747; 1939 (41) 318; 1940 (41) 1728.

Sumter County

§ 1825. Game sanctuaries.

(1) **Duties of county board of commissioners.**—The county board of commissioners of Sumter County as the forfeited land commission of Sumter County be, and it hereby is directed to forthwith set aside for game sanctuaries, such tracts of land owned by such forfeited land commission of not less than two hundred (200) acres in each tract, in the several sections of Sumter County, suitable for such purposes; and upon the setting aside of such lands as herein directed, the said board shall forthwith advertise in the two newspapers published in Sumter County a notice against trespass thereon, and post notice against trespass by any person for the purpose of hunting thereon. Such land so set aside as herein provided shall be held as game sanctuaries for a period of not less than twenty years.

(2) **Protection for sanctuaries and game—plant crops or trees.**—The said board shall provide for the protection of said game sanctuaries from fire, and shall for such purpose cause such fire brakes to be cut as may be necessary, using chain gang labor whenever necessary for such work as may be proper to protect and preserve such sanctuaries from fire, and for the purpose of planting food or cover crops or pine or other merchantable trees thereon.

(3) **Duties of county peace officers.**—It shall be the duty of the rural police, the sheriff, game warden and constables of Sumter County to protect the said lands so set aside as aforesaid from trespass, or fire, and to

prosecute any person trespassing, or setting out fire on said lands set aside as aforesaid.

(4) **Record deeds for sanctuaries—use restricted.**—Upon setting aside such lands as hereinabove provided, the said board shall file and cause to be recorded in the proper books of the office of the clerk of court a deed or deeds, setting aside said lands as game sanctuaries of said county for the period of twenty years, and for such period of time said lands shall be held and used for no other purpose, save to take therefrom such timber as may be merchantable and to plant and harvest food and cover crops thereon.

1933 (38) 79.

Union County

§ 1826. **Game warden—election—term—duties and powers—compensation—bond.**—The game warden of Union County shall be elected in the general election every two (2) years beginning with the general election following the first after March 9, 1940, as provided by law for the election of other county officers. He shall be voted on in the primaries as is done in the case of other elective officers in said county. The term of office of the present game warden shall expire on the April 1st following the date of the general election and the warden elected under the provisions of this section shall take office and his term shall begin on said date to-wit: April 1st following the date of the general election in 1940. The regular term of office of the game warden shall be for two years and until his successor shall have been elected and qualified as herein provided. The warden herein provided for shall have and exercise the same duties and powers as are now provided for by law for the game warden of Union County. His compensation shall be such as now provided for by law, and his bond shall likewise be the same as is provided for by law.

1940 (41) 1631.

Williamsburg County

§ 1827. **Size and number of flat fish, trout, or bass catch per day.**—It shall be unlawful in Williamsburg County to catch or take from the waters by any means whatsoever more than twenty (20) flat fish, nor more than five (5) trout or bass, per day, per person. It shall be unlawful to take or catch by any means whatsoever any flat fish less than five (5) inches in length, or any trout or bass fish less than ten (10) inches in length. In the event a fish of less length than this section permits to be taken from the water or caught is taken from the water or caught, said fish shall be immediately placed back in the water and freed. Any violation of this section shall be punishable by a fine of not more than one hundred (\$100.00) dollars, or by imprisonment for not more than thirty (30) days, in the discretion of the magistrate.

1940 (41) 1834.

§ 1827-1. **Use of nets and seines in clear water streams.**—It shall be unlawful to set or use any fish nets or seines whatever in clear water streams in Williamsburg County, South Carolina, except where said nets or seines

are used for the purpose of catching shad fish under the rules and regulations provided by the state board of fisheries. *Provided, further*, that this shall not apply to private ponds and lakes. Any violation of the above provisions hereof shall be a misdemeanor, and, upon conviction thereof, the offender shall pay a fine of not less than \$25.00 nor more than \$100.00, or be imprisoned for a period of thirty days.

1939 (41) 182.

York County

§ 1828. Game warden—appointment.—The game warden for York County shall be nominated in the primary election of every election year and it shall be the duty of the legislative delegation of York County to recommend to the Governor for appointment a person or persons so nominated: *provided*, that should a vacancy occur during the interim of primaries the delegation may recommend to the Governor a person to be appointed as game warden until such primary shall be held.

1932 Code, § 3287; 1930 (36) 2128.

§ 1828-1. Operation of fish hatcheries.—After the development of a fish hatchery, or hatcheries, within the county of York by the works progress administration, or any other agency of the United States government, twenty-five (25%) per cent of the funds collected and accruing to the said county, in any one year, from the sale of hunting licenses and from the fur tax referred to in section 1779, may be used for the maintenance and operation of a fish hatchery, or hatcheries, and the distribution of fish from said hatcheries to the streams and lakes in the county of York.

1936 (39) 1772.

CHAPTER 86

Intoxicating Liquors

- ARTICLE 1. Manufacture, Sale, Possession, Transportation and Use, § 1829.
 ARTICLE 2. Provisions Relating to Sale of Alcohol, Nuisances, Seizures, Etc., of Contrabands, § 1864.
 ARTICLE 3. When Unlawful Sell, Buy, Use, Transport and Possess Alcoholic Liquors, § 1910.

ARTICLE 1

Manufacture, Sale, Possession, Transportation and Use

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| 1829. Manufacture, sale, possession, transportation and use. | 1838. License and taxes, extent. |
| 1830, 1832, 1833, 1834. License. | 1839. Manufacturers and wholesalers. |
| 1831. Applicant operate retail liquor store advertise intention make application therefor. | 1840. Working of minors. |
| 1835. Chesterfield County, sale, etc. | 1841. Purchase. |
| 1836. License tax. | 1842. Administration and enforcement. |
| 1837. Stamp—sale. | 1843. Rules and regulations. |
| | 1844. Collection and distribution of funds. |
| | 1845. Manufacture, store, keep, receive, |

- possess, transport ship, buy, sell, barter or exchange liquors except as provided unlawful.
1846. Counterfeit or use stamps second or more times unlawful.
1847. Alcoholic liquors in containers without stamp affixed contraband.
1848. Penalties when not otherwise provided for unlawful manufacture, sale, barter, etc., of alcoholic liquors.
1849. Expenses deductible before distribution of receipts from taxes.
1850. Sale on Sundays and on election days prohibited.
1851. Appropriation for enforcement by state constabulary.
1852. Violation a misdemeanor.
1853. Distribution of fines.
1854. Additional compensation for certain officials of tax commission.
1855. Advertise alcoholic liquors on billboards on public highways and streets unlawful.
1856. Complementary to beer, wine, etc., laws.
1857. Possess firearm during unlawful manufacture or sale a misdemeanor.
1858. Department of agriculture accept alcoholic liquors for storage without stamps.
1859. Take sample from retailer—label—analyze.
1860. Not put in commerce misbranded alcoholic liquors and beverages.
1861. Saving clause.
1862. Pay state's portion of revenue into special school account each month.
1863. Sell wine in licensed liquor stores.

§ 1829. Manufacture, sale, possession, transportation and use.

(1) **Definitions.**—For the purposes of this article and unless otherwise required by the context:

(a) The words “alcoholic liquors” mean any spirituous malt, vinous, fermented, brewed (whether lager or rice beer), or other liquors any compound or mixture thereof by whatever name called or known which contains alcohol and is used as a beverage: *provided*, that the foregoing definition shall not extend to wine when manufactured or made for home consumption and which is not sold by the maker thereof or by any other person: *provided, further*, that the provisions of this article shall not apply to any beverage heretofore or hereafter declared by statute to be non-alcoholic or non-intoxicating.

(b) The word “person” means and includes natural persons, associations, co-partnerships and corporations.

(c) The word “manufacturer” means any person operating a plant or place of business within this State for distilling, rectifying, brewing, fermenting, blending or bottling any alcoholic liquors.

(d) The word “wholesaler” means any person who shall from without the State purchase, acquire, or import, or who shall purchase or acquire from a manufacturer within the State any alcoholic liquor for resale.

(e) The words “retail dealer” shall mean any holder of a license issued under the provisions of this article, other than a manufacturer or wholesaler.

(f) The words “tax commission” shall mean the South Carolina tax commission.

1935 (39) 325.

§ 1830. License manufacture, wholesale or retail—application—qualifications of licenses—alcohol—used in manufacture and sale of certain products exempted.—Every person, before engaging in the business as a manufacturer, wholesaler, or retailer of alcoholic liquors, shall first apply to and procure from the tax commission an annual license for the privilege of engaging in such business, and for the privilege of carrying on such business shall be subject to the payment of licenses and taxes in the amounts

hereinafter provided. The said application shall be under oath, and shall set forth the name or names of the parties applying for such license, and the name of the party who shall have actual control and management of the business, and shall give the address of each of said parties named in said application, and it shall describe the place where said business is to be conducted or operated, the race and nationality of the applicant. No person shall be permitted to operate any such business unless the applicant and the person who is to have actual control and management of such contemplated business shall be a citizen of the United States and shall be a person over twenty-one (21) years of age; and such application shall state facts sufficient to comply with said provisions and each and all applications made shall state that the applicant or applicants are all of good repute and have due regard for law; who will operate said business in a lawful manner, as that term is hereinafter defined, and that neither he nor any person, firm or corporation, for whom said business is to be operated, has had his or her license cancelled within the last five years preceding the filing of such application; *provided*, that no license shall be issued to a corporation, as such, but only to individuals authorized to act for such corporation, who shall assume all responsibility as individuals and be subject to all the penalties, conditions and restrictions imposed upon licensees under the provisions of this article. If the application is made for a corporation, a license shall be applied for and be issued to an officer, or officers, of said corporation for the use of the corporation. *Provided, further*, that no provision in this article shall apply to alcohol intended for use in the manufacture and sale of any of the following when they are unfit for beverage purposes, namely:

(a) Denatured alcohol produced and used pursuant to acts of Congress and regulations promulgated thereunder;

(b) Patent, proprietary, medicinal, pharmaceutical, antiseptic and toilet preparations;

(c) Flavoring extracts, syrups and food products;

(d) Scientific, chemical, mechanical and industrial products.

Any person who shall knowingly sell any of the products enumerated in paragraphs (a), (b), (c) and (d), for beverage purposes shall be subject to the penalties provided for in § 1843. No provision of this article shall apply to ethyl alcohol intended for use by hospitals, colleges, governmental agencies and other permittees entitled to obtain such alcohol tax-free, as provided by acts of Congress and regulations promulgated thereunder.

1935 (39) 325; 1939 (41) 303.

§ 1831. Applicant operate retail liquor store advertise intention make application therefor.—Every individual, firm, or corporation desiring to operate a retail liquor store shall furnish to South Carolina tax commission evidence that they or it have advertised their or its intention to make application for such license once a week for three (3) successive weeks in a newspaper published in the county in which the licensee is to do business; or, if there be no newspaper published in said county, that such advertisement be inserted in a newspaper in circulation in said county. *Provided, however*, the present owners of liquor stores, which now have approved

licenses, shall not have to advertise before filing such application for renewal of the same, or before such renewal may be granted. Said advertisement shall be in large type and cover a space one column wide and not less than two inches deep and shall contain a statement that the individual, firm, or corporation has applied, or will apply, to South Carolina tax commission for a retail liquor license to sell alcoholic liquors and shall state the exact location at which the proposed business is to be operated.

1939 (41) 110.

§ 1832. License—issuance—form—display—forfeit on violating article—tax commission revoke for cause.—Upon presentation to the tax commission of the application under oath, provided for in §1830, if the tax commission is convinced that the facts stated in the application are true and that the applicant is a fit person to engage in or operate said business, and that the location is a proper one, then upon compliance by the applicant with the further requirements of this article, the said tax commission shall issue a license to said applicant, or applicants, who shall then be permitted to engage in said business at the place mentioned in the application during the term of said license, unless said license is forfeited for violation of the terms of this article. The said tax commission shall prescribe the form of license to be issued under the provisions of this article, and said license when so issued shall be conspicuously and continuously displayed in said place of business. Any licensed dealer violating the terms of this article shall forfeit his license, and shall not, within a period of five years, be again licensed. The tax commission is hereby vested with authority to revoke for cause any license granted under the provisions of this article. In the event of resort to any court from such revocation in whatsoever form the proceedings may be brought, it shall in no wise act as a supersedeas of the order of revocation. The license so revoked shall stand as suspended, pending the termination of the proceedings.

1935 (39) 325.

§ 1833. Applicant for license file bond or deposit securities—terms—subject to forfeiture—procedure.—No license shall be issued unless the applicant shall first file with the tax commission a surety bond approved by the tax commission, and sold and countersigned by some duly authorized insurance agency in the county where the licensee is to do business; the amount of said surety bond shall be in the penal sum of two thousand (\$2000.00) dollars, and any additional amount that the tax commission shall deem wise, conditioned upon the lawful operation of said business and the prompt payment of all licenses and taxes provided in this article: *provided*, that in lieu of a surety bond, the applicant for license may deposit with the state treasurer cash or security, in like amount, satisfactory to the state treasurer. Upon any violation of this article by said licensee, the said security or securities shall be subject to forfeiture upon a rule to show cause, directed to the licensee by the tax commission, requiring the said licensee to show cause, upon notice of not less than ten (10) days, why the said security or securities should not be forfeited hereunder. Upon the return to the said rule, in the event of a finding by the tax commission that sufficient cause has not been shown by the said licensee, the said tax com-

mission is hereby authorized to issue its order declaring the said securities forfeited, whereupon the licensee shall have the right to appeal upon written notice from such order to the court of common pleas of the county in which the place of business is located, within ten (10) days after notice of the ruling of the tax commission. A judge of the said court of common pleas or any justice of the Supreme Court, after four days' notice to the tax commission of the application therefor, shall have the power to issue an order superseding the order of the said tax commission hereinbefore provided for upon such terms, conditions, and surety as to the court may seem proper, pending final determination of the said appeal. In the event of such appeal, the tax commission shall certify its findings upon the rule to show cause to the court of common pleas of the county in which the place of business is located, and a trial de novo shall be had in the said court of common pleas, which trial shall have the right of way over all other civil jury cases at the next succeeding term of the court of common pleas in the said county, or in any subsequent term at which said trial may be had. Upon final determination of the forfeiture of said securities, the state treasurer, after fifteen days' advertisement, shall sell the same at public auction and the funds derived therefrom shall be turned into the state treasury to be disposed of as other licenses and taxes under this article. In addition to the punishment hereinafter referred to for the violation of any of the provisions of any of the sections of this article, every violation by a licensee shall constitute a breach of the condition of the bond, and the full amount thereof shall be paid by the licensee or his surety. On failure to pay the same, the tax commission is hereby authorized and directed to recover same in a suit brought in its name against the licensee and his surety in the county in which the licensee was operating.

1935 (39) 325.

§ 1834. Licenses—issue annually—fees—death of licensee.—The licenses shall be issued annually upon compliance with the provisions of this article and the payment to the tax commission of the following fees, which shall be in addition to the license taxes hereinafter provided, to wit: (a) manufacturer's license, two thousand (\$2,000.00) dollars; (b) wholesaler's license, two thousand (\$2,000.00) dollars; (c) retailer's license, two hundred fifty (\$250.00) dollars. All licenses shall expire on June 30 of each year: *provided further*, that persons obtaining licenses on or after January 1, and before June 30 of any year may obtain the same for the remainder of the license year upon the payment of one-half of the license fees above provided: *provided, further*, that in the event of the death of any person who may have acquired a license as a retail or wholesale dealer in alcoholic liquors during the term for which said license is issued that the personal representative of such deceased person, with the consent of the probate court as required by law and subject to approval by the tax commission as a proper party to conduct such business upon the same basis as an original applicant, may continue to operate such business for and during the life of said license, or may elect to discontinue such business upon the death of the licensee and in such event the unearned license tax shall be returned or refunded to the estate or personal representative of the deceased licensee. The

amount of such refund shall be based upon the cost of the license per month for the period for which it has been issued.

Executor or administrator of estate of deceased licensee sell stock owned by deceased.—In case of the death of a person holding a retail or wholesale license under the provisions of this article, during the license period, the executor or administrator of said licensee's estate is hereby authorized to sell to a licensed wholesale or retail dealer, alcoholic liquors in bulk which were owned by said deceased licensee. Said sale shall be made at the place of business of the deceased licensee and a report thereof immediately made to South Carolina tax commission.

1935 (39) 325; 1936 (39) 1308, 1556.

§ 1835. Manufacture and sale alcoholic liquors, wines or beers, Chesterfield County.—In the county of Chesterfield it shall be unlawful for any licensee to manufacture or sell, at retail or wholesale, alcoholic liquors, wines or beers within three hundred (300) yards of any public school or church. The South Carolina tax commission is hereby prohibited from issuing any license to manufacture or sell at retail or wholesale any alcoholic liquors, wines or beers at place within three hundred (300) yards of any public school or church in said county. Any person violating the provisions of this section shall be deemed guilty of a misdemeanor, and be punished within the discretion of the court: *provided*, the provisions of this section shall not apply to the sale or manufacture of alcoholic liquors, wines or beers in any incorporated town or city in said county.

1938 (40) 1798.

§ 1836. License tax—payment—affixation of stamps on containers—etc.—Every person doing business within the State of South Carolina and engaging in the business of selling alcoholic liquors, except distillers thereof, for the privilege of carrying on such business shall be subject to the further payment of a license tax which shall be measured and graduated in accordance with the volume of sales of such business. There shall be levied, assessed, collected and paid in respect to the alcoholic liquors referred to in this article, the following amounts: Upon each eight (8) ounces or a fractional quantity thereof, six (6) cents.

The tax herein levied shall be paid by affixing stamps on each bottle or container of alcoholic beverages. The said stamps shall be cancelled by writing or printing thereon the name of the person, firm or corporation first having possession of same in South Carolina for resale within the State, and such other data as required by the tax commission. In case a bottle is enclosed in a sealed metal container, the tax commission, in its discretion, may allow the affixing of the required stamps to the metal container instead of to the bottle. The stamps shall be affixed to the bottle or container immediately upon receipt of the alcoholic liquor contained therein, or immediately upon the alcoholic liquors being bottled: *provided*, that when stamps have been once affixed, as provided in this article, no other or further stamps shall be required, regardless of how often such alcoholic liquors may be sold or resold within the State: *provided, further*, that the stamps shall be affixed in such manner that their removal will require con-

tinued application of steam or water. Every licensee, upon receipt of a shipment of alcoholic liquor for sale within the State of South Carolina, under the provisions of this article, shall within twenty-four hours after receiving the same, and before it is offered for sale, furnish to the tax commission a true invoice of the alcoholic beverages so received. All wholesalers shall furnish to the tax commission duplicate copies of all invoices for the sale of alcoholic beverages within twenty-four (24) hours after such alcoholic beverages have been removed from the wholesalers' place of business.

1935 (39) 325; 1939 (41) 303.

§ 1837. Stamp—sale.—The tax commission is hereby authorized and directed to have prepared and distributed stamps suitable for denoting the tax on alcoholic liquors enumerated herein and said stamps, and other stamps required under this article, shall be sold only to such persons as hold a valid wholesale license under the provisions of this article. The tax commission may promulgate rules and regulations for the enforcement of the provisions of this section: *provided*, the tax commission is hereby authorized and directed to refund to a licensee the cost of stamps affixed to goods which have been damaged and unfit for sale, or such goods as are returned to the manufacturer or jobber, and to make such other rules and regulations as are necessary and feasible for carrying out the provisions of this section.

1935 (39) 325; 1939 (41) 303.

§ 1838. License and taxes herein in lieu of other licenses and taxes except property, income, and corporation license taxes.—The licenses and excise taxes herein provided, for the privilege of engaging in the business of manufacturing and selling alcoholic liquors, shall be in lieu of all other taxes and licenses—state, county, and municipal—except property, state income, and corporation license taxes.

1935 (39) 325.

§ 1839. Manufacturers and wholesalers—places of business—sales—drinking on premises prohibited—stamp alcoholic liquors when bottled in this State.—It shall be unlawful for any manufacturer to own or operate more than one plant, establishment, or place of business for the manufacture of alcoholic liquors in any one county of this State, nor shall he sell, barter, exchange, give, transfer, or deliver any alcoholic liquors to persons within this State other than the holders of wholesale licenses; nor shall the alcoholic liquors be transported or delivered to any one within this State not holding a license hereunder. It shall be unlawful for any manufacturer to permit alcoholic liquors to be drunk on the premises, and likewise it shall be unlawful for persons to drink alcoholic liquors on the premises of any manufacturer. In the event any alcoholic liquors are bottled within the State of South Carolina, such alcoholic liquors shall be stamped when bottled. It shall be unlawful for the wholesaler to sell, barter, exchange, give, transfer, or deliver for consumption any alcoholic liquors within this State to any person not holding a license hereunder, nor shall a wholesaler permit any alcoholic liquor to be drunk on the premises. Every wholesaler

hereunder shall maintain a separate store or warehouse for the purpose of conducting the business of a wholesaler, and no other goods, wares, or merchandise shall be kept or stored therein, and no place of amusement shall be maintained within said place or building, or in connection therewith, and no sales shall be made between the hours of sundown and sunrise; nor shall any wholesale business or sales be conducted or made outside of the boundaries of any incorporated municipality within this State.

1935 (39) 325.

§ 1840. Working of minors—minimum containers—hours of sale—drinking on premises—sale to minors, insane and drunk persons—storeroom—sale on interstate trains—dealers in country communities—penalties.—It shall be unlawful for any person under the age of twenty-one (21) years to work as an employee or otherwise in a retail, wholesale, or manufacturing liquor business, and any person under twenty-one (21) years of age working in such and the person knowingly employing him shall be guilty of a misdemeanor and punishable as hereinafter provided. It shall be unlawful for any retail dealer to sell, offer for sale, barter, or exchange, or permit to be sold, bartered or exchanged any alcoholic liquor in less quantities than one-half ($\frac{1}{2}$) pint, or to own or keep in his possession any alcoholic liquor in separate packages containing less than one-half ($\frac{1}{2}$) pint; nor shall he sell, barter, exchange or offer for sale, barter, or exchange, or permit such alcoholic liquor to be sold, bartered, or exchanged between the hours of sundown and sunrise, and he shall securely close and lock every means of entrance to his place of business at sundown and not open the same for business before sunrise; nor shall he permit any alcoholic liquor to be drunk on the premises; nor shall he sell, barter, or exchange, or offer for sale, barter, or exchange, or permit to be sold, bartered, or exchanged any alcoholic liquors to minors. If any person is found drinking alcoholic liquor on said premises, it shall be prima facie evidence of the violation of this section, and the person so found drinking on said premises shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not less than five (\$5.00) dollars, nor more than one hundred (\$100.00) dollars, or imprisoned for not more than thirty (30) days. No retail dealer shall knowingly sell, offer for sale, barter, or exchange any alcoholic liquors to any person when drunk or intoxicated, nor to a minor, nor to any insane person, and upon violation of any of these provisions, upon conviction, shall suffer the penalties hereinafter provided. Every retailer hereunder shall maintain a separate store, of, a single room, with no means of ingress or egress save from the front, and no other goods, wares or merchandise shall be kept or stored therein, nor sold therefrom, and no place of amusement shall be maintained within said place, or in connection therewith and no sale shall be made between the hours of sundown and sunrise: *provided*, that any municipality may, by ordinance, require liquor stores located therein to be closed from 3:00 p. m. Saturday to sunrise Monday. *Provided, further*, that the restrictive provisions of this section shall not apply to sales of alcoholic beverages by railroad or pullman companies or interstate trains to passengers for consumption thereon, such sales being hereby authorized and permitted. *Provided, further*, that the tax commission may, in its discretion, after due investigation, license retail

dealers in unincorporated towns and in country communities when, in the opinion of the tax commission, it would be to the interest of such unincorporated town or community to have a licensed retailer therein: *provided, further*, however, that the tax commission shall not license a retail dealer in any locality unless and until the tax commission is assured that such locality is under proper police protection.

1935 (39) 325.

§ 1841. Purchase from licensed dealers only—possession of unstamped containers containing alcoholic liquor—penalties.—It shall be unlawful for any person to purchase, or otherwise procure, within this State any alcoholic liquor other than that purchased from licensed dealers within the State as provided for in this article, and any persons found in possession of any bottle or other package containing alcoholic liquor without having affixed the revenue stamps thereto, as required by this article, either or both, shall be guilty of a misdemeanor and, upon conviction, for the first offense shall be fined not less than fifty (\$50.00) dollars, nor more than two hundred (\$200.00) dollars, or imprisoned not less than fifteen (15) days nor more than thirty (30) days; and, upon conviction for a second offense as provided in this section, shall be punished by imprisonment for not less than thirty (30) days.

1935 (39) 325.

§ 1842. Tax commission administer and enforce—trade practices—amount transport.—The licenses and taxes herein provided for shall be paid to the tax commission, which shall administer and enforce the provisions of this article, and to that end the tax commission is hereby authorized and directed to adopt and promulgate, repeal and amend such rules, regulations, standards, requirements and orders not inconsistent with the provisions of this article or any law of this State or of the United States as it may deem necessary or proper for the control of fair trade practices, the stabilization of prices, credit sales, and all other matters related to the conduct of the business of selling, storing, transporting and possessing alcoholic liquors, and said commission shall have power to enforce such rules, regulations, standards, requirements and orders by the suspension or revocation of the license of any licensee, whether a wholesaler or retailer. The tax commission, any of its agents or representatives or any and all peace officers, shall have the power to enter the premises of any taxpayer hereunder and to examine, or cause to be examined, all books, papers, records, memoranda, or commodities bearing upon the amount of the license tax payable, and to secure other information, directly or indirectly concerned in the enforcement of this article; that all licenses and license taxes herein provided shall be held as a debt payable to the State by the taxpayers against whom same shall be charged, and all such licenses and license taxes shall be a first lien in all cases whatsoever upon all property of the taxpayer charged therewith: *provided*, that no alcoholic liquors in excess of one (1) gallon shall be transported from a point without the State to a point within the State except by railroad companies, express companies, and truck carriers authorized to do business in South Carolina, as common carriers by South

Carolina public service commission, and no alcoholic liquors shall be accepted by licensed dealers in South Carolina except that transported as above outlined.

1935 (39) 325; 1939 (41) 303.

Regulations of South Carolina Tax Commission Pertaining to Alcoholic Liquors

(Filed secretary of state's office December 20, 1940.)

Regulation 1 The words "alcoholic liquors", "person", "wholesaler", "retail dealer" and "Tax Commission", when used in these regulations, have the same meaning as in the Alcoholic Liquors Tax Act.

Regulation 2 The receipt of a license binds the licensee to abide by all the provisions of the Alcoholic Liquors Tax Act and amendments thereto and all rules, regulations and orders then in effect or thereafter put into effect by the Tax Commission; and the licensee thereby agrees that the sale of alcoholic liquors is a privilege and not a right.

Regulation 3 Every license is issued upon condition that the licensee will procure all necessary permits from the Federal Alcoholic Administration, or other Federal agency, and a failure to do so will result in the immediate suspension by the Tax Commission of the licensee's license.

Regulation 4 Upon satisfactory proof that a license was obtained by fraud, misrepresentation or concealment, it will be revoked by the Tax Commission.

Regulation 5 No licensee shall engage or permit any other person to engage in any other business on the licensed premises.

Regulation 6 No wholesaler may give a retail dealer any free goods, samples, rebates, gratuities, or other thing of value, as a trade inducement, or for any reason.

Regulation 7 No person shall call upon a retail dealer for the purpose of soliciting, taking orders for, or selling alcoholic liquors, unless he is the holder of a permit issued by the Tax Commission. Such permits will be issued to proper persons free of charge upon application therefor, and will continue in effect until the following June 30th after issuance. The Commission may revoke such permit for cause. The owner of any brand who permits his representative to violate this regulation will not be allowed to sell his brand in this State.

Regulation 8 The standards of identity and labeling requirements for distilled spirits of the Treasury Department, Federal Alcoholic Administration Division, shall be effective in South Carolina as the standards of identity and labeling requirements for distilled spirits, except insofar as the same shall differ from existing laws of the State and/or regulations adopted heretofore or hereafter by the Tax Commission.

Regulation 9 All shipments of alcoholic liquors received by a wholesaler from a point without the State shall be transported by railroad companies, steamship companies, express companies or truck carriers, authorized to do business in this State as common carriers by South Carolina Public Service Commission, and no alcoholic liquors shall be accepted by a wholesaler except that so transported.

Regulation 10 A wholesaler may deliver alcoholic liquors to a wholesaler or a retail dealer only. Delivery may be made in vehicles owned and operated by the wholesaler, or by a common carrier as defined in Regulation 9, but in no other way; and delivery may be made only at the licensed premises of the purchaser.

Regulation 11 Every wholesaler is required to keep and maintain on his licensed premises adequate records of all business transactions, and such records shall at all times be open to the inspection of any authorized representative of the Tax Commission. All way-bills, freight receipts, invoices of purchases, invoices of sales, and similar documents must be filed in an orderly manner and preserved for two (2) years, so that the Tax Commission may readily determine the amount of purchases and sales, the name and address of the seller or buyer, the amount of each purchase, the items of each purchase, the license number of the buyer, and the name of the carrier. True copies of all invoices of purchases and duplicate copies of all invoices of sales must be mailed to the Tax Commission within twenty-four (24) hours after receipt of goods purchased or delivery of goods sold.

Regulation 12 The granting of credit by a retail dealer is strictly forbidden as is the giving of any free goods, samples, rebates, gratuities, or other thing of value, as a trade inducement or for any reason whatsoever.

Regulation 13 Retail dealers shall keep all invoices and other proper records relative to each purchase of alcoholic liquors made by them for a period of two (2) years and such records shall at all times be open to the inspection of any representative of the Tax Commission.

Regulation 14 All retail prices must be displayed by the retail dealer on the shelf under each bottle size in the present customary manner.

Regulation 15 No sale or delivery of alcoholic liquors shall be made by a retail dealer except over the counter of his place of business. Curb delivery is strictly forbidden.

Regulation 16 No retail dealer may receive from any retail dealer any alcoholic liquors whatsoever either by way of sale, loan, exchange, gift, or otherwise, without the special permission of the Tax Commission, unless such dealers are licensed to do business in the same municipality and the sale takes place in the same municipality.

Regulation 17 Every licensee shall have printed on the front window of his licensed premises, or on a sign on the front of the building in which the licensed premises are located, the name of the licensee, the number of his license, and the words "Wholesale Liquor Dealer" or "Retail Liquor Dealer", as his case may be. No other printed words or signs of any sort will be permitted on the windows or other exterior parts of the licensed premises, except as may be required by the Federal authorities.

Regulation 18 No matter of any kind, printed, painted, electric, or otherwise, advertising alcoholic liquors will be permitted on the exterior or interior of any licensed premises.

Regulation 19 The displaying in show windows of packages containing bottles of alcoholic liquors and bottles is permitted, but all advertising matter other than such as appears on the labels on the packages and bottles is forbidden.

Regulation 20 Neither a wholesaler nor a retail dealer shall advertise his wares except in magazines, newspapers, and other publications issued at regular intervals and no advertisement shall contain a direct or indirect reference to price. All advertising of alcoholic liquors shall conform to the regulations heretofore or hereafter adopted by Federal Alcoholic Administration, except as herein restricted. The owner of any brand of alcoholic liquors will be required to observe this regulation in his advertisements in publications issued in this State and upon failure to do so will be deprived of the right to sell his brands in this State.

Regulation 21 No wholesaler or retail dealer shall use the words "cut rate", or words of similar import in connection with his business.

Regulation 22 The license of any wholesaler or retail dealer who violates any of the provisions of these regulations, or any other regulation of the Tax Commission, will be revoked or suspended.

Regulation 23 The license of any wholesaler or retail dealer who directly or indirectly lends assistance in the evasion of the payment of the alcoholic liquors tax, or in the violation of the Alcoholic Liquors Tax Act, or any regulation of the Tax Commission concerning same will be revoked or suspended.

Regulation 24 Whenever the Tax Commission has reasonable cause to believe that the license of any wholesaler or retail dealer should be revoked or suspended, notice will be given such licensee at his business address, of a hearing before the Tax Commission in not less than seven (7) days for the date of such notice. The licensee may appear in his defense in person, or through counsel, or both, and shall be entitled to offer evidence before the Tax Commission with respect to the charges against him. If the licensee waive hearing or shall fail to appear at the time and place set for the hearing, the Tax Commission may proceed, *ex parte*, unless the time for the hearing be extended. Upon a finding by the Tax Commission that the licensee is guilty of a violation of the provisions of the Statute, or of any regulation promulgated pursuant thereto, the license of the said wholesaler or retail dealer may be revoked or suspended for such time as the Tax Commission may determine.

Regulation 25 Any wholesale liquor dealer is permitted to deliver from his stamped stock of alcoholic liquors to Officers' Club, Canteens or other Government agencies located on Government reservations within the geographical bounds of South Carolina, when such purchases are permitted under the regulations of the Federal Government. Such deliveries by wholesalers to be made in a vehicle owned and operated by such wholesaler or by a common carrier.

No refund will be made to such wholesaler on account of alcoholic liquors tax stamps on liquors sold and delivered to such Officers' Club, Canteens, and other Government Agencies, as above defined.

Regulation 26 All Regulations applicable to the place of business of a licensed liquor dealer, now in force under Regulations of the Tax Commission, shall also be applicable to wine stored, handled, or sold at the place of business of a licensed liquor dealer.

Regulation Number 10, this day repealed, shall remain in full force and effect in connection with any accounts which are incurred prior to December 20, 1940, the effective date of the Regulations herewith adopted.

§ 1843. Tax commission issue rules and regulations—licensees cooperate—penalties violate.—Any person subject to this license tax engaging in or permitting such practices as are prohibited by the rules and regulations of the tax commission, or any other practice which makes it difficult to enforce the provisions of this article by inspection, or if any person who shall, upon demand of any officer or agent of the tax commission, or of any peace officer, refuse to allow full inspection of the premises, or any part thereof, or who shall hinder, or in anywise delay or prevent such inspection when demand is made therefor, shall be deemed guilty of a misdemeanor and, upon conviction, be fined not more than two hundred (\$200.00) dollars for each offense, or imprisoned for a period not exceeding sixty (60) days, or both, in the discretion of the court: *provided*, that the tax commission is hereby authorized, empowered and directed to promulgate rules and regulations, not inconsistent with the provisions of this article, for the payment and collection of the licenses and taxes herein levied and such rules and regulations shall have the force and effect of law. *Provided, further*, that the tax commission is further authorized, empowered and directed to promulgate rules and regulations for the disposition and sale to licensed retailers or wholesalers of such alcoholic liquors as may be lawfully in the hands of said common carriers by reason of the rejection or refusal of shipments and the restrictive provisions of this article shall not apply to such sales when made in accordance with the said rules and regulations.

1935 (39) 325.

§ 1844. Collection and distribution of funds received from licenses, taxes and penalties from bonds—times make distributions of such funds.—The licenses, taxes, and any sum derived from the violation of any bond herein required shall be paid to the South Carolina tax commission and the said commission shall pay same into the state treasury, as now provided by law for the payment in to the state treasury of other taxes. The South Carolina tax commission shall distribute such funds as follows: sixty-five (65%) per cent shall be paid into state treasury for school purposes; twenty (20%) per cent shall be paid to the county in which the licensee is conducting business, which percentage shall be based upon the actual retail sales and the fees collected in said county, regardless of where the stamps may be affixed to the containers; and fifteen (15%) per cent shall be paid to the municipality in which the licensee is conducting business, which percentage shall be based upon the actual retail sales and the fees collected in said municipality, regardless of where the stamps may be affixed to the containers. All revenue derived under the provisions of this article from business conducted outside of incorporated towns or cities shall be dis-

tributed as follows: sixty-five (65%) per cent of such revenue shall be paid to the state treasury for school purposes, and thirty-five (35%) per cent shall be paid to the county in which such business is conducted. In the event that the tax commission shall be unable to determine exactly the municipality or county which may be entitled to any particular revenue, then in such case the revenue shall be turned into the state treasury to be used for schools as herein provided. *Provided*, that before above distribution is made sixteen (16c) cents tax per gallon shall be paid to the state treasurer for credit to the special school account. The distribution provided for in this section shall be made as of July 1, and on the first of every alternate month thereafter, upon warrant drawn by the tax commission upon the state treasurer, after the deductions as provided for in this article.

1935 (39) 325; 1937 (40) 546.

§ 1845. Manufacture, store, keep, receive, possess, transport, ship, buy, sell, barter or exchange alcoholic liquors except as herein provided unlawful—sales—storage—contraband—seizure.—It shall be unlawful for any person, firm or corporation to manufacture, store, keep, receive, have in possession, transport, ship, buy, sell, barter, or exchange, any alcoholic liquors except according to the provisions of this article: *provided*, that all alcoholic liquors found in the possession, custody, or within the control of any person, handled, stored, used, or distributed in violation of the provisions of this article, or with the design to avoid payment of the license taxes herein, may be seized by the tax commission, its agents or employees, or any peace officer, without warrant in like manner as is provided in section 1847: *provided, further*, that all alcoholic liquors found in the possession, control, on the premises of, or in a conveyance of a person who has made an unlawful sale within twenty-four (24) hours by agent or otherwise, is hereby declared to be contraband, and shall be subject to seizure, confiscation and sale, as is provided in section 1847: *provided, further*, that such sale shall await and be governed by event of the trial.

It shall be unlawful for any person, firm or corporation to store or have in possession in his, her, or its place of business other than a licensed liquor store, any alcoholic liquors whatsoever. A place of business shall be, and include, any place where goods, wares, or merchandise are sold or offered for sale, or distributed, and also places of amusement. A place of business shall also include residences and transportation vehicles when sale of any merchandise is made therefrom. A place of business shall also include outbuildings, warehouses and garages, when adjacent to or used in connection with any place of business where any goods, wares or merchandise are sold, or offered for sale, or distributed therefrom; *provided, further*, that all alcoholic liquor found in places of business, as above defined, is hereby declared to be contraband and shall be subject to seizure, confiscation and sale, as is provided in section 1847: *provided, further*, that any violation of this section shall subject the person so violating the same to a penalty of not less than three months, nor more than two years, at hard labor, or pay a fine of not less than one hundred (\$100.00) dollars for the first violation; that, for any subsequent violation the penalty shall be not less than six months at hard labor, in addition to any fine.

1935 (39) 325; 1939 (41) 303.

§ 1846. Counterfeit or use stamps second or more times unlawful—penalties.—Whoever counterfeits, removes, or otherwise prepares any adhesive stamp with intent to use, or cause the same to be used after it has already been used, or knowingly or wilfully buys, sells, offers for sale, or gives away any such counterfeit, used, washed, or restored stamp to any person for use, or knowingly uses the same, or has in his possession any counterfeit stamp, or any washed, restored, or altered stamp which has been removed from the article to which it had been previously affixed, or whoever, for the purpose of indicating the payment of any tax hereunder, reuses any stamp which has heretofore been used for the purpose of paying any tax provided in this article, shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not more than one thousand (\$1,000.00) dollars, or imprisoned for not more than five (5) years, or both, in the discretion of the court; that all stamps described in this article, whenever and wherever found, shall be seized, destroyed or retained as evidence. That if any stamp attached to a bottle or other container to denote the payment of a tax hereunder is found to be torn, or in any wise mutilated, or if such stamp is found to be soiled, dirty, or faded, or if any foreign matter be attached thereto other than the bottle, container or label on such bottle or container, the same shall be prima facie evidence that such stamp has been used a second time to denote payment of the tax.

1935 (39) 325.

§ 1847. Alcoholic liquors in containers without stamps affixed thereto contraband—disposition—chattels used unlawfully in transporting alcoholic liquors—disposition.—Any alcoholic liquors found in the possession of any one within this State not having affixed to the bottle or container the stamps required in this section, as hereinabove provided, are hereby declared to be contraband, and the same may be seized by the tax commission, or its agents or employees, or by any peace officer without warrant, and the sheriff of the county in which such seizure is made shall take possession of said alcoholic liquors so seized for sale at public auction to the highest bidder, after due advertisement, but no sale shall be made to any person other than licensed manufacturers, wholesalers, or retail dealers licensed under the provisions of this section, and the sheriff before delivery of any goods so seized to any purchaser shall require the purchaser to affix the proper amount of stamps to the individual packages, as above defined. The proceeds of sale for any alcoholic liquors sold hereunder shall be immediately turned over to the tax commission to be thereafter turned over to the state treasury, as other funds collected by said commission: *Provided*, that the cost of confiscation and sale shall be paid out of the proceeds derived from such sale before making remittance to the tax commission: *provided, further*, that any chattel used primarily and with knowledge of the owner in the transportation of alcoholic liquors in violation of the provisions of this article, shall be subject to confiscation and sale in the same manner as provided for unstamped alcoholic liquors, except that such chattel may be sold to any person, and excepting further, that when such chattel has been seized by municipal officers the proceeds of such sale shall be paid to such municipality for its use. For the purpose of confiscating

said vehicle and alcoholic liquors above referred to, the sheriff shall proceed as nearly as may be practicable under the provisions of subdivision (9) section 2527, *provided, further*, that no alcoholic liquors except such as may have been manufactured by a licensed manufacturer, either within or without the State, or alcoholic liquors of unquestioned purity and content, shall be sold at public auction as herein provided, and that any other liquors which may be confiscated shall be destroyed by the proper officers as now provided by law, *provided, further*, that no liquors so sold shall be delivered within a period of five days after such sale, during which time the tax commission may, in its discretion, reject any bid and order the liquors resold until a satisfactory bid is had: *provided, further*, that after confiscated liquors are offered for sale, after advertisement, as herein provided on two different dates, and no bids are made thereon, then the same shall be destroyed by the proper officers, as now provided for by law.

1935 (39) 325; 1937 (40) 210.

§ 1848. Penalties, when not otherwise provided, for unlawful manufacture, sale, barter, exchange, etc., of alcoholic liquors.—The manufacture, sale, barter, exchange, receipt or acceptance for unlawful use, delivery, storing and keeping in possession within this State of any alcoholic liquors, as herein defined, except as is provided in this article, is hereby prohibited under penalty of not less than three (3) months, nor more than two (2) years at hard labor, or pay a fine of not less than one hundred (\$100.00) dollars, nor more than five thousand (\$5,000.00) dollars, or both fine and imprisonment, in the discretion of the court for each violation: *provided*, that for a second or other violation the penalty shall be not less than six (6) months at hard labor, in addition to any fine which may be imposed.

1935 (39) 325; 1939 (41) 303.

§ 1849. Expenses deductible before distribution of receipts from taxes.—The cost of stamps, supplies, etc., and the administration of this article shall be paid out of the proceeds derived from the collection of this tax, and before the allocation provided for in § 1844, upon warrants drawn by the tax commission upon the state treasurer.

1935 (39) 325.

§ 1850. Sale on Sundays and on election days prohibited—Governor prohibit sale on other days.—No alcoholic beverages as herein defined shall be sold on Sundays nor on election days. The Governor in addition to other powers in him now reposed, is hereby vested with authority to prevent the sale of alcoholic liquors on legal holidays or during periods of local or state emergency, as he may order by proclamation in the interest of law and order or public morals and decorum.

1935 (39) 325.

§ 1851. Appropriation for enforcement by state constabulary—appointment, pay, removal, etc., of constables.—From the revenue collected under the terms of this article, and before the allocation provided for in section 1844, the sum of sixty thousand (\$60,000.00) dollars, if so much be necessary, is hereby appropriated annually to be used by the Governor in enforcing this law, other than the provisions which are to be enforced by the

tax commission, and any and all other laws, by means of a state constabulary—the personnel, equipment and compensation of which shall be fixed by the Governor—which said sum shall defray all expenses of said state constabulary. The said monies shall be deposited with the state treasurer as soon as available as the Governor's law enforcement fund, to be paid out on vouchers drawn by him. The Governor is hereby authorized and empowered to determine the number of men to be appointed as state constables, the compensation of the various constables, the qualifications for the position, and the equipment to be used by the constables. Said constables shall work under the direction of the Governor, shall hold office at his pleasure, and shall be subject to discharge by the Governor with or without cause, with full power in the Governor to fill all vacancies.

1935 (39) 325.

§ 1852. Violation a misdemeanor—penalties.—Any violation of any of the provisions of this article shall be deemed a misdemeanor, and where no penalty has heretofore been imposed, upon conviction, the same shall be punishable by fine or imprisonment in the discretion of the court.

1935 (39) 325.

§ 1853. Distribution of fines.—In all prosecutions for violation of the provisions of this article, where municipal officers are solely responsible for discovering the violation or producing the witnesses or the evidence upon which a conviction is had, the fines collected in such cases shall be equally divided between the county and such municipality. The municipality's portion shall be paid upon voucher issued by the governing board of the county after approval of a claim duly filed, setting forth the case and the witnesses produced.

1935 (39) 325.

§ 1854. Additional compensation for certain officials of tax commission.—In compensation for the additional duties placed upon officials of the tax commission for the administration of this article, the General Assembly shall make provisions in the general appropriation act for such increase in salary as it deems fit, and the same shall be paid as administrative cost from the revenues arising hereunder.

1935 (39) 325.

§ 1855. Advertise alcoholic liquors on billboards on public highways and streets unlawful.—It shall be unlawful for any person, firm, or corporation to advertise any alcoholic liquors by means of billboards along public highways and streets.

1935 (39) 325.

§ 1856. Complementary to beer, wine, etc., laws.—This article is hereby declared to be complementary to and not in conflict with the laws providing for the legal sale of beers, wines, and other vinous, fermented, or malt liquors.

1935 (39) 325.

§ 1857. Possess firearm during unlawful manufacture, transportation or

sale a misdemeanor.—If any person shall unlawfully manufacture, transport or sell any alcoholic beverages, as herein defined, and at the time of such unlawful manufacturing, transporting, or selling, or aiding or assisting in any manner in such act, shall carry on or about his person, or have on or in any vehicle which he may be using to aid him in any such purpose, or have in his possession—actual or constructive—any firearm or any weapon of like kind, he shall be guilty of a misdemeanor, and upon conviction, shall be confined in the penitentiary not less than one year nor more than three years.

1935 (39) 325.

§ 1858. Department of agriculture accept alcoholic liquors for storage without stamps affixed thereto—penalties for removal without affixing stamps—administrative costs.—The state department of agriculture may accept for storage and warehousing any alcoholic liquors as defined in this article in the same manner as cotton or other agricultural products are stored, and in addition to all applicable laws relating to warehousing of cotton, the said state department of agriculture may make such rules and regulations, not inconsistent with this article nor with the statutes defining the duties of that office, that alcoholic liquors may be stored in such suitable warehouse as may be determined by said department, without having affixed thereto the revenue tax stamps provided for under this article, but when any alcoholic liquors is to be removed from a warehouse, the owner of said alcoholic liquor shall affix the revenue tax stamps provided for in this article before the removal thereof. Any person removing any alcoholic liquor from such warehouse without having first affixed thereto the tax stamps required under this article shall be guilty of a misdemeanor and, upon conviction, shall be fined not less than one thousand (\$1,000.00) dollars or imprisoned for not less than one (1) year, either or both, in the discretion of the court. The commissioner of agriculture is hereby authorized and empowered to pay from the fees collected by him from the storage and warehousing of intoxicating liquors the administrative costs incurred by him in the performance of his official duties as to such storing and warehousing, and this being done the balance remaining in his hands shall be paid to the state treasurer.

1935 (39) 325; 1941 (42) 119.

§ 1859. Take sample from retailer—label—analyze.—The state constabulary and all other peace officers are hereby empowered, when and as directed by the Governor, to take samples of all beers, ales, porters, wines, and similar malt and fermented beverages, from any and all retailers thereof, for the purpose of ascertaining by analysis the alcoholic content. The sample so taken shall be the smallest bottle or container of any particular brand of which a sample is taken. In case a sample is taken from bulk beverages, the sample shall not exceed one pint. The samples shall immediately upon being taken have affixed to them a label giving the date, place, and name of the retailer from whom taken, together with the name of the officer taking the same, and shall be forthwith transmitted with the original seal unbroken to the state chemist. The state chemist shall furn-

ish a report of his analysis of all samples to the Governor, with a duplicate to the retailer from whom the sample was taken. In the event the alcoholic content is found in excess of that allowed by law in beverages of this kind the chemist shall transmit to the Governor with his report of the analysis the residue of the sample taken, to be preserved and used as evidence.

1935 (39) 325.

§ 1860. Not put in commerce misbranded alcoholic liquors and beverages—confiscate and sell such.—It shall be unlawful for any person, firm or corporation to sell or otherwise introduce into commerce any alcoholic liquors and non-alcoholic and non-intoxicating beverages, legalized under the provisions of this article, unless labeled in accordance with the provisions of the Federal Alcoholic Administration Act, and rules and regulations promulgated thereunder: *provided*, that any violation of the provisions of this section shall subject the alcoholic liquors, non-alcoholic and non-intoxicating beverages found in the possession of any person so violating this section, to seizure, confiscation and sale, as is provided in § 1847.

1935 (39) 325; 1939 (41) 303.

§ 1861. Saving clause—captions.—If any clause, sentence, paragraph, or part of this article shall, for any reason, be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this article, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered. No caption of any section, or set of sections, shall in any way affect the interpretation of this article or any part thereof.

1935 (39) 325.

§ 1862. Pay state's portion of alcoholic liquor and beer and wine revenue into special school account each month.—The state's portion of all revenue derived from the sale of alcoholic liquors and of beer and wine as defined in the acts legalizing the manufacture and sale thereof shall be paid to the state treasurer for credit to the special school account on the last day of each month. The South Carolina tax commission is hereby authorized and directed to transfer to the special school account from any unallocated funds on hand on the last day of each month the state's portion of such revenue.

1935 (39) 325; 1211; 1936 (39) 1624, 1308, 1351, 1456, 1780, 1556.

§ 1863. Sell wine in licensed liquor stores.—Wine may also be sold in licensed liquor stores and shall be taxed at the rate provided in section 2557-2.

1939 (41) 302.

ARTICLE 2

Provisions Relating to Sale of Alcohol, Nuisances, Seizures, Etc.

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| 1864. Alcohol—wholesale druggists sell. | 1885. Sheriff report seizures of liquors, Allendale County. |
| 1865. Alcohol—sale and use by retail druggists. | 1886. Peace officers report seizures of liquors, Anderson County. |
| 1866. Sell alcohol. | 1887. Reports of seizures of alcoholic liquors in Laurens County. |
| 1867. When and how prescriptions may be filled. | 1888. Debt contracted for transporting or selling illicit liquors void. |
| 1868. Sell alcohol for use in arts or scientific and mechanical purposes. | 1889. How search warrants may be issued. |
| 1869. Statement by purchaser. | 1890. Persons violating law may be arrested without warrant. |
| 1870. Prescriptions to be recorded. | 1891. Penalty for rescuing liquors from officer. |
| 1871. Druggist keep record of sale. | 1892. Interference with officers forbidden. |
| 1872. Manufacture and sale of wood, denatured ethyl and methyl alcohol. | 1893. Affidavits may be on information and belief. |
| 1873. Ethyl alcohol not to be sold in this State unless denatured. | 1894. Punishment for violation of law. |
| 1874. Shipment and storage. | 1895. Officers neglecting duty. |
| 1875. Record of shipments of alcohol. | 1896. Where liquor may be kept. |
| 1876. Storing of alcohol in warehouses. | 1897. Import alcohol for manufacture of ginger ale and like beverages. |
| 1877. Penalties and remedies for violation. | 1898. Assisting in transportation of liquors. |
| 1878. Disposition of forfeited property. | 1899. Unlawful to attach to motor vehicle device. |
| 1879. Revoke license of druggist. | 1900. Smoke screen attachment in or on motor vehicle unlawful. |
| 1880. Unlawful sale of alcoholic liquors a common nuisance. | 1901. Unlawful to operate such motor vehicle. |
| 1881. Resorts for drinking declared nuisance. | 1902. Penalty. |
| 1882. Proceedings against nuisances. | 1903. Such vehicles forfeited. |
| 1883. Person maintaining club rooms for unlawful use of liquor guilty of misdemeanor. | |
| 1884. Powers of constables to detain suspicious packages. | |

§ 1864. Alcohol—wholesale druggists sell.—Wholesale druggists may lawfully sell in wholesale quantities to retail druggists and to public or charitable hospitals or to medical or pharmaceutical colleges, and in no other way, pure alcohol for medical purposes only, or grain alcohol to be used by chemists or bacteriologists actually engaged in scientific work and for such purposes only, and such wholesale druggist shall, at the end of each month in which any such sales have been made, file with the clerk of the court of the county in which they do business, a statement in writing under oath, giving the name of the purchaser, the price paid, the date of sale, and the quantity and character of the alcohol sold. If said wholesale druggist making such sale is not a resident of the State of South Carolina, then such statement shall be filed in the office of the clerk of the court of the county in which the purchaser resides.

1932 Code, § 1830; Cr. C. '22, § 821; Cr. C. '12, § 795; 1909 (26) 60.

This section was not repealed by Act of 1915, XXIX, 140. Mathews Co. v. Atlantic, etc., R. Co., 102 S. C. 494, 86 S. E. 1069.

§ 1865. Alcohol—sale and use by retail druggists.—Any retail druggist whose place of business is located in any of the incorporated towns or cities of this State, who is himself a registered or licensed pharmacist, or who regularly employs a registered or licensed pharmacist, may sell, in the

manner herein set out, upon filing a bond in the sum of five thousand dollars, to be approved by the clerk of the court, in which such druggist does business, conditioned for a faithful observance of the provisions of sections 1864 thru 1870, such bond to be approved by the clerk of the court, pure alcohol for medical purposes only, grain alcohol to chemists and bacteriologists actually engaged in scientific work, and for such purposes only: *provided*, that nothing herein contained shall prevent such druggists from using alcohol in the compounding of prescriptions or other medicines, the sale of which would not subject him to the payment of a special tax required of liquor dealers by the government of the United States: *provided, further*, that nothing herein contained shall prevent such druggists from compounding or selling medicinal preparations manufactured in accordance with formulas prescribed by the United States pharmacopoeia and national formulary which contain no more alcohol than is necessary to extract the medicinal properties of the drugs contained in such preparations, and no more alcohol than is necessary to hold the medicinal agents in solution, and which are manufactured and sold as medicine, and not as a beverage.

1932 Code, § 1831; Cr. C. '22, § 823; Cr. C. '12, § 796; 1909 (26) 60; 1935 (39) 325.

§ 1866. Sell alcohol upon physicians' prescriptions.—No sale of pure alcohol, for medicinal purposes, shall be made by any retail druggist, except upon the prescription of a regular practicing physician of this State, who, before writing such prescriptions, shall make an actual examination of the person for whom the prescription is issued, and the said prescription shall be substantially in the following form: "State of South Carolina _____ County. To _____ druggist.

I, _____, a regular licensed and practicing physician under the laws of this State, do hereby certify that I have examined _____, a patient in my charge, and I do hereby prescribe for the use of said patient _____ alcohol, and I further certify, that the use of such alcohol is, in my judgment, absolutely necessary to alleviate or cure the illness or disease from which said patient is now suffering, and that I am not interested in the drug store to which this prescription is directed, nor in the profits on the drugs herein prescribed.

Dated _____ M. D."

1932 Code, § 1832; Cr. C. '22, § 824; Cr. C. '12, § 797; 1909 (26) 60.

§ 1867. When and how prescriptions may be filled.—No prescription shall be filled herein except upon the day upon which it is issued or the following day, and no more than one-half pint of alcohol shall be sold and delivered on any one prescription, and when such prescription is filled, it shall not be refilled, but shall be delivered to the druggist filling the same, and at the end of the month in which the same is filled, it shall be filed by such druggist in the office of the clerk of court of the county in which said druggist is engaged in business: *provided*, no druggist, who is also a practicing physician, shall fill his own prescriptions hereunder, nor shall they be filled at any drug store in which the said physician is financially interested: *provided, further*, that the delivery of such alcohol sold under such prescription shall be made only directly to the person for whom such

prescription is issued or to the physician, or to some one authorized by the physician, or in case of a minor to his parent or guardian or physician or some one authorized by said physician.

1932 Code, § 1833; Cr. C. '22, § 825; Cr. C. '12, § 798; 1909 (26) 60.

Validity of sale of the quantity prescribed in portions depends upon circumstances.—Under Act. S. C. Dec. 1884, amending Gen. St. § 1743, which prohibits a druggist from selling whiskey more than once on the same prescription, whether or not it directs more than one sale, and provides that such second sale shall be deemed to have been made without a prescription, a sale of the quantity authorized by a prescription in portions, on three different occasions, instead of the whole quantity at once, depends for its validity on the circumstances of each particular case; and the bona fides of the sale for medicinal purposes is a question for the jury. *State v. May*, 33 S. C. 39, 11 S. E. 440, 21 L. R. A. 450, Ann. Cas. 12D, 1345, Ann. Cas. 18E, 929.

When a druggist innocently fills a prescription for three pints of liquor by delivering it on three several days, one pint each day he does not violate the law. *State v. May*, 33 S. C. 39, 11 S. E. 440, 21 L. R. A. 450, Ann. Cas. 12D, 1345, Ann. Cas. 18E, 929.

Evidence of the number of prescriptions issued by defendant within a given

time, to be filled at the same drug store, is relevant to the issue of defendant's good faith in making them. *State v. Atkins*, 33 S. C. 100, 11 S. E. 693, 57 L. R. A. 882, Ann. Cas. 18E, 916.

Prescription to person not a bona fide patient is an offense.—The penalty for violating a former statute forbidding physician to give a prescription for intoxicating liquors to a person not a bona fide patient, applies alike to towns where sales of liquor have been prohibited by special statute and by local option laws. *State v. Atkins*, 33 S. C. 100, 11 S. E. 693, 57 L. R. A. 882, Ann. Cas. 18E, 916.

Distinct from offense of druggist selling without prescription.—The offense under former statutes of selling liquor by druggists without a physician's prescription, and the offense by physicians of giving prescriptions for liquor except to bona fide patients, were held separate and distinct offenses although the statute provided in one section for a fine, etc., for violating these sections. *State v. Atkinson*, 33 S. C. 100, 11 S. E. 693, 57 L. R. A. 882, Ann. Cas. 18E, 916.

§ 1868. Sell alcohol for use in arts or scientific and mechanical purposes.—

Any retail druggist whose place of business is located in any of the incorporated towns or cities of the State may lawfully sell alcohol in quantities not greater than five (5) gallons to be used in the arts or for scientific or mechanical purposes, and such druggist may sell, in like quantities, to chemists and bacteriologists engaged in scientific work, and for such purposes only.

1932 Code, § 1834; Cr. C. '22, § 826; Cr. C. '12, § 799; 1909 (26) 60; 1935 (39) 325.

§ 1869. Statement by purchaser.—Any person desiring to purchase alcohol for the purposes set out in section 1868 shall sign a written printed statement, giving his name, residence, occupation and the purpose for which he intends to use said alcohol, and he shall certify that said alcohol is purchased in good faith for such purpose and no other, and that said druggist shall, at the end of each month, file with the clerk of court of the county in which he is engaged in business, all such statements, with a certificate under oath, that said statements contain a true statement of all such sales.

1932 Code, § 1835; Cr. C. '22, § 827; Cr. C. '12, § 800; 1909 (26) 60.

§ 1870. Prescriptions to be recorded.—All statements or prescriptions required by sections 1864 thru 1868, to be filed in the office of the clerk of court, shall be recorded and properly indexed by him in a book kept for that purpose, which shall at all times be opened for public inspection, and a certified copy of such record, or the original statement or prescription, with

the certificate of the clerk of court indorsed thereon, showing that it has been recorded, shall be prima facie evidence of the facts recited therein. For making such record, the clerk of the court shall be entitled to charge and collect for each prescription, a fee of five cents, and for each statement, other than prescription, a fee of fifteen cents, which shall be paid by the party filing the same.

1932 Code, § 1837; Cr. C. '22, § 829; Cr. C. '12, § 802; 1909 (26) 60.

§ 1871. Druggists keep a record of sales.—In addition to the requirements hereinbefore prescribed, all licensed and registered druggists selling alcohol by prescription shall keep a record thereof, which shall bear the true dates of the sales, the names of the persons to whom sales were made, the names of physicians or surgeons upon whose prescriptions each were made; such records shall be subject at all times to the inspection of the solicitor of the district, the sheriff and other peace officers of the county, the mayor and police officers of the city or town in which said licensed and registered pharmacist's business is located, and all other persons, and each druggist making any such sales shall be required to report, under oath, to the circuit judge presiding at each term of court of the county in which said druggist is engaged in business, a true statement of such facts, and also file on Monday morning of each week a list of the alcohol sold by him, to whom sold and by what physician prescribed, with the chief of police and the mayor or intendant of municipality, and post one copy in some public place in such municipality.

1932 Code, § 1838; Cr. C. '22, § 830; Cr. C. '12, § 803; 1909 (26) 60.

§ 1872. Manufacture and sale of wood, denatured ethyl and methyl alcohol.—Nothing in this article shall prevent the sale of wood or denatured alcohol. Any person, firm or corporation may manufacture ethyl and methyl alcohol from sawdust, slabs or any other wood substance, or from molasses.

1932 Code, § 1839; Cr. C. '22, § 831; Cr. C. '12, § 804; 1909 (26) 64; 1910 (26) 570; 1918 (30) 780.

§ 1873. Ethyl alcohol not to be sold in this State unless denatured.—Any person, firm or corporation engaged in the manufacture of ethyl alcohol, as provided in section 1872 shall not sell the same in this State unless denatured, but may ship the same undenatured to any place without the State for use in manufacturing purposes, and in the sciences and arts: *provided*, no alcohol manufactured under the provisions of sections 1872 thru 1877, shall ever be used either within or without this State as a beverage or for medicinal purposes.

1932 Code, § 1840; Cr. C. '22, § 832; Cr. C. '12, § 805; 1910 (26) 570.

§ 1874. Shipment and storage of ethyl alcohol in warehouses.—Ethyl alcohol, manufactured under the provisions of sections 1872 thru 1877, shall not be shipped to any point within this State unless denatured, and may be shipped to points without this State only in the manner hereinafter provided. Such alcohol may be carried from such warehouse as may be authorized under the provisions of said sections, and delivered to a common

carrier and forthwith shipped to its destination without this State. Such alcohol may also be transported to another bonded warehouse without this State, when such shipment is made under bond, as required by the United States revenue laws.

1932 Code, § 1841; Cr. C. '22, § 833; Cr. C. '12, § 806; 1910 (26) 570.

§ 1875. Record of shipments of alcohol.—A record shall be kept, which shall show the quantity of alcohol manufactured and the quantity transported or shipped, to whom and where shipped, and such record shall be subject to the inspection of any attorney representing the State of South Carolina.

1932 Code, § 1842; Cr. C. '22, § 834; Cr. C. '12, § 807; 1910 (26) 570.

§ 1876. Storing of alcohol in warehouses.—All persons, firms and corporations manufacturing any alcohol under the provisions of sections 1872 thru 1877 shall, while such alcohol remains in this State, store and keep the same in general United States bonded warehouses, or in other warehouse or warehouses, and file with the secretary of state a declaration setting forth the exact location, description and dimension of each and every such warehouse used, and to be used for such purpose, and it shall be unlawful to store or keep any alcohol manufactured under the provisions of said sections in any other place or places than such as may be described in the declaration above provided for.

1932 Code, § 1843; Cr. C. '22, § 835; Cr. C. '12, § 808; 1910 (26) 570.

§ 1877. Penalties and remedies for violation of §§ 1872 thru 1878.—If any person, firm or corporation manufacturing alcohol under the provisions of §§ 1872 thru 1878, shall sell or consent to be used as a beverage, either within or without this State, any ethyl alcohol so manufactured, or shall violate the provisions of said sections in any respect, they, or it, shall forfeit to the State of South Carolina all property within this State connected with and incident to the manufacture of such alcohol. It shall be the duty of the attorney general and of solicitors to institute an action in any court of competent jurisdiction in any county in this State, which the attorney general or solicitor may select, for determining whether the provisions of said sections have been violated, and whether the property has been thereby forfeited to the State: *provided, further*, that any person, firm or corporation engaging in the manufacture of alcohol under the provisions of said sections, shall enter into a bond to the State of South Carolina, in the sum of ten thousand dollars, with surety, to be approved by the Governor, conditioned for the faithful observance and compliance with all the provisions of said sections. And it shall be the duty of the attorney general and the circuit solicitors, whenever any provision of said sections is violated, to sue in any county in this State for the penalty of such bond for the benefit of the State: *provided, further*, it shall be prima facie evidence of the violation of the provisions of said sections if any ethyl alcohol so manufactured and not denatured, shall be found within this State, and not in the custody of a United States revenue officer, or not in course of shipment to some point in another State: *provided, further*, that a reasonable time

shall be allowed for conveying the alcohol directly from a warehouse to a common interstate carrier.

1932 Code, § 1844; Cr. C. '22, § 836; Cr. C. '12, § 809; 1910 (26) 570.

§ 1878. Disposition of forfeited property.—Any and all property forfeited under the provisions of sections 1872 thru 1878 shall be delivered to the sinking fund commission.

1932 Code, § 1845; Cr. C. '22, § 837; Cr. C. '12, § 810; 1910 (26) 570.

§ 1879. Revoke license of druggist for violation §§ 1864 thru 1871.—Any druggist or physician who violates in any way the provisions of sections 1864 thru 1871, shall, in addition to the punishment herein provided, have their license revoked for a period of not more than one year for each offense.

1932 Code, § 1848; Cr. C. '22, § 839; Cr. C. '12, § 812; 1909 (26) 64.

§ 1880. Unlawful sale, etc., of alcoholic liquors a common nuisance.—The unlawful sale, barter, exchange, storage and keeping in possession in this State of any spirituous, malt, vinous, fermented, brewed (whether lager or rice beer), or other liquors and beverages, or any compound or mixture thereof which contains alcohol and is used as beverage, is hereby declared a common nuisance.

1932 Code, § 1853; Cr. C. '22, § 844; Cr. C. '12, § 817; Cr. C. '02, § 555; 1893 (21) 430; 1894 (21) 731; 1896 (21) 123; 1897 (22) 532; 1910 (26) 572.

§ 1881. Resorts for drinking declared nuisance.—All places where persons are permitted to resort for the purpose of drinking alcoholic liquors or beverages are hereby declared nuisances, and the keeper or manager of such places, upon conviction, shall be punished as provided in section 1846, 1932 Code.

1932 Code, § 1854; Cr. C. '22, § 845; Cr. C. '12, § 818; 1907 (25) 473.

§1846, 1932 Code, repealed by act 232 of 1935. Said section was as follows:

Any person who violates any of the provisions of any law of this State prohibiting, relating to or regulating the sale of intoxicating liquors, shall be guilty of a misdemeanor and upon conviction thereof, shall be imprisoned at hard labor for not less than six months, nor more than two years, and for any subsequent offense, upon conviction, shall be imprisoned for a term of not less than a year nor more than five years: *provided*, that any circuit judge may, in his discretion, suspend all of such imprisonment except thirty days for the first offense and sixty days for subsequent offenses upon such terms and conditions as he may see fit to impose, but in each and every case any person convicted of the violation of any of said laws shall be required to serve at least thirty days for the first offense and sixty days for any subsequent offense of the sentence imposed upon him: *provided*, that the provisions of this section shall not apply to cases pending on or to offenses committed prior to February 19, 1916.

Prosecution under this section involves statutory nuisance.—Charge that prosecution for maintaining nuisance involved statutory, not common-law, nuisance, was proper. *State v. Johnson* (S. C.), 156 S. E. 351.

And to constitute such nuisance resort need not be open to public.—To constitute a nuisance it is not essential to render such a place a nuisance that the public, or even a considerable portion of

it, be admitted or enticed there to drink intoxicants, but it is sufficient if some "persons" are permitted to resort there for such purpose, *State v. City Club*, 83 S. C. 509, 65 S. E. 730, 23 L. R. A. (N. S.) 691, 38 L. R. A. (N. S.) 105, 48 L. R. A. (N. S.) 309, Ann. Cas. 12A, 1089, Ann. Cas. 14A, 440, Ann. Cas. 14C, 875, Ann. Cas. 15C, 1129.

Nor need acts complained of be done in defendant's presence.—Error, if any,

in admitting testimony regarding acts at defendant's business place in defendant's absence, is harmless under evidence raising inference that defendant, charged with maintaining nuisance, knew thereof. *State v. Johnson* (S. C.) 156 S. E. 351.

Wife is presumed coerced where prosecuted with husband.—In prosecution of husband and wife for maintaining nuisance where liquor was drunk, in violation of this section, there is presumption that wife by allowing drinking to take place in presence of her husband was coerced; but this is rebuttable presumption. *State v. McMillan*, 144 S. C. 121, 142 S. E. 236.

In a prosecution of husband and wife for maintaining a nuisance where liquor was allowed to be drunk, in violation of this section, refusal of charge that intoxicating liquors found on premises were presumed to belong to husband, was not error, for though it states a sound proposition of law, it was not pertinent to the case. *State v. McMillan*, 144 S. C. 121, 142 S. E. 236.

In a prosecution of husband and wife for maintaining a nuisance where liquor was allowed to be drunk, in violation of this section, the evidence was sufficient to take to jury the question whether testimony rebutted the presumption that wife allowing drinking to take place in

presence of husband was coerced. *State v. McMillan*, 144 S. C. 121, 142 S. E. 236.

But either husband or wife or both may be convicted.—In a prosecution of husband and wife for maintaining a nuisance where liquor was allowed to be drunk, in violation of this section, refusal of charge that wife was not guilty unless she was keeper or manager jointly of place alleged to be nuisance was proper, since both or either of defendants might have been convicted as keeper or manager. *State v. McMillan*, 144 S. C. 121, 142 S. E. 236.

Provided it is shown that wife acted deliberately.—In a prosecution of husband and wife for maintaining nuisance where liquor was drunk, in violation of this section, wife cannot be convicted under testimony showing joint offense, unless evidence shows that she participated freely and deliberately in the act. *State v. McMillan*, 144 S. C. 121, 142 S. E. 236, 237.

Court's comment on evidence erroneous.—In prosecution for maintaining a liquor nuisance where court erroneously commented on evidence, the error was not cured by the general charge informing jury that they were the sole judges of the facts and weight and sufficiency of evidence in the case. *State v. Pruitt*, 187 S. C. 58, 196 S. E. 371.

§ 1882. Proceedings against nuisances—restraining order—contempt—solicitor and attorney general.—Any person may go before any magistrate in the county and swear out an arrest warrant on personal knowledge or on information and belief, charging said nuisance, giving the names of witnesses against the keeper or manager of such place, and his aids and assistants, if any, and such magistrate shall direct such arrest warrant either to the sheriff of the county or to any special constable, commanding said defendant to be arrested and brought before him to be dealt with according to law, and shall issue a search warrant in which the premises in question shall be particularly described, commanding such sheriff or constable to thoroughly search the premises in question and to seize all alcoholic liquors found thereon, and dispose of them as provided in section 1860, 1932 Code, and to seize all vessels, bar fixtures, screens, bottles, glasses and appurtenances apparently used or suitable for use in retailing liquors, to make a complete inventory thereof, and to deposit the same with the sheriff. Under the arrest warrant the defendant shall be arrested and brought before such magistrate, and the case shall be disposed of as in case of other crimes, except that when he commits or binds over the parties for trial to the next term of court of general sessions for the county, he shall make out every paper in the case in duplicate and file one with the clerk of the court for the county, and immediately transmit the other to the solicitor of the circuit, whereupon the said solicitor shall at once apply to any circuit judge at chambers within that circuit, or to the nearest circuit judge if there be none in that circuit, for an order or injunction restraining the defendants, their servants or agents, from keeping, receiving, bartering, sell-

ing or giving away any alcoholic liquors until the further order of the court, or perpetually after hearing after notice to the defendant. Such circuit judge is hereby authorized, empowered and required to grant the said restraining order or injunction, without requiring a bond or undertaking upon the hearing or receipt by him of said papers from the court of the said magistrate by the hands of the solicitor, and any violation of said restraining order or injunction shall be deemed a contempt of court and punished as such by said judge or court or any other circuit judge, as for the violation of an order of injunction. Liquors seized as hereinbefore provided, and the vessels containing them, shall not be taken from the custody of the officers in possession of the same by any writ of replevin or other process, except as provided in section 1860, 1932 Code. No suit shall lie for damages alleged to arise by seizure and detention of liquors under this article. Any person violating the terms of any restraining order granted in such proceedings shall be punished for contempt by a fine of not less than two hundred dollars nor more than one thousand dollars, and by imprisonment not less than ninety days nor more than one year. In contempt proceedings arising out of the violation of any injunction granted under the provisions of this chapter, the court, or, in vacation, any judge thereof, shall have power to try summarily and punish the party or parties guilty as required by law. The affidavits upon which the attachment for contempt issues shall make a prima facie case for the State. At the hearing upon the charge for contempt, evidence may be oral or in the form of affidavits, or both. The defendant shall not necessarily be discharged upon his denial of the fact stated in the moving papers. The clerk of court shall, upon the application of either party, issue subpoenas for witnesses, and, except as above set forth, the practice in such contempt proceedings shall conform as nearly as may to the practice in the court of common pleas. When any solicitor neglects or refuses to perform any duty, or to take any steps required of him by any provisions of this section, or by any of the provisions of this chapter, the attorney general, on his own motion, or by request of the Governor, shall, in person, or by his assistant, proceed to the locality and perform such neglected duty, and take such steps as are necessary in the place of such solicitor, and at his discretion to cause a prosecution to be instituted, not only in the matter so neglected, but also a prosecution against the solicitor for malfeasance or misfeasance in office, or for official misconduct, or for other charges justified by facts, and to pursue the prosecution to the extent of a conviction and dismissal from office of any such solicitor. And in such event the attorney general is hereby authorized and empowered to appoint one or more additional assistants, who shall each have while actually employed the same compensation, to be paid from the litigation fund of the attorney general. Any duty herein imposed upon a solicitor may be performed with equal force and effect by the attorney general or other person authorized by him to perform such duty.

1932 Code, § 1855; Cr. C. '22, § 846; Cr. C. '12, § 819; Cr. C. '02, § 578.

§ 1860, 1932 Code, repealed by act 232 of 1935. Said section was as follows:

All alcoholic liquors in possession of any person for unlawful use shall be seized without warrant, and if no action to recover same is begun within the thirty days from such seizure, or if such action be begun and the judgment of the court be ad-

verse to the plaintiff, then such liquors shall be destroyed publicly by the sheriff of the county.

The proceedings are on the equity side of the court. State v. Weil, 83 S. C. 478, 65 S. E. 634, 26 L. R. A. (N. S.) 461.

Injunction proceedings.—State v. New Charleston Hotel Co., 80 S. C. 120, 130, 61 S. E. 207; State v. Chicco, 82 S. C. 122, 63 S. E. 306; State v. Union Social Club, 82 S. C. 142, 63 S. E. 545, 12 A. L. R. 436; State v. City Club, 83 S. C. 509, 514, 65 S. E. 730, 23 L. R. A. (N. S.) 691, 38 L. R. A. (N. S.) 105, 48 L. R. A. (N. S.) 309, Ann. Cas. 12A, 1089, Ann. Cas. 14A, 440, Ann. Cas. 14C, 875, Ann. Cas. 15C, 1129; State v. Argyle Hotel Co., 80

S. C. 119, 61 S. E. 209; State v. Carroll, 80 S. C. 117, 61 S. E. 209; State v. Charleston Turnverein Society, 80 S. C. 116, 61 S. E. 209; State v. German Rifle Club, 80 S. C. 126, 61 S. E. 208; State v. Palmetto Bowling Club, 80 S. C. 114, 61 S. E. 209; State v. Schiaderessi, 80 S. C. 115, 61 S. E. 210; State v. Riddock, 78 S. C. 286, 58 S. E. 803, 80 S. C. 118, 61 S. E. 210.

See generally. State v. Williams, 79 S. C. 101, 60 S. E. 229; Smith v. Lafar, 67 S. C. 491, 497, 46 S. E. 332.

§ 1883. Persons maintaining club rooms for unlawful use of liquor guilty of misdemeanor.—Every person who shall, directly or indirectly, keep or maintain by himself, or by associating or combining with others, or who shall in any manner aid, assist or abet in keeping or maintaining any club room, or other place in which any alcoholic liquors or beverages are received or kept for unlawful use, barter or sale as a beverage, or for distribution or division among the members of any club or association by any means whatever, and every person who shall receive, barter, sell, assist or abet another in receiving, bartering or selling, any alcoholic liquors or beverages so received or kept, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment for a term of not less than three months nor more than twelve months.

1932 Code, § 1856; Cr. C. '22, § 847; Cr. C. '12, § 820; 1907 (25) 473.

What constitutes sale.—When a so-called club is a mere device to evade the law against the sale of intoxicating liquors, and its real or main purpose is to provide liquors for its members, and such liquors are delivered at a price paid, or agreed to be paid, there is a sale. State

v. City Club, 83 S. C. 509, 65 S. E. 730, 23 L. R. A. (N. S.) 691, 38 L. R. A. (N. S.) 105, 48 L. R. A. (N. S.) 309, Ann. Cas. 12A, 1089, Ann. Cas. 14A, 440, Ann. Cas. 14C, 875, Ann. Cas. 15C, 1129.

See generally. State v. Bradley, 109 S. C. 411, 96 S. E. 142.

§ 1884. Powers of constables to detain suspicious packages.—All constables, deputy constables, sheriffs, magistrates or municipal policemen shall have the right, power and authority, and it shall be their duty, whenever they are informed or suspect that any such suspicious package in possession of a common carrier contains alcoholic liquors or liquids, to detain the same for examination for the term of twenty-four hours without any warrant or process whatever.

1932 Code, § 1859; Cr. C. '22, § 850; Cr. C. '12, § 827; Cr. C. '02, § 585; 1896 (22) 127; 1897 (22) 520; 1898 (22) 805; 1901 (23) 706.

§ 1885. Sheriff report seizures of liquors, Allendale County.—The sheriff of Allendale County is hereby, required to make to the clerk of court of said county, on the first day of each month, a report of all intoxicating liquors seized and confiscated during the preceding month, specifying the amount seized in each case and the name of the person, or persons, from whom such seizure was made. The clerk of court of the county of Allen-

dale is hereby required to record in a book to be secured for that purpose, the report of the sheriff required to be filed by him as directed in this section. It shall be deemed a misdemeanor for the sheriff to wilfully fail to comply with the terms of this section, and, upon conviction thereof, shall be fined not less than one thousand (\$1,000.00) dollars, or be confined upon the public works of Allendale County for not more than twelve (12) months.

1932 Code, § 1861; 1923 (33) 509.

§ 1886. Peace officers, report seizures of liquors, Anderson County.—The sheriff and all other peace officers of Anderson County are hereby required to make to the clerk of court of said county, on the first day of each month, a report of all intoxicating liquors seized and confiscated during the preceding month, specifying the amount seized in each case and the name of the person, or persons, from whom such seizure was made. The clerk of court of the county of Anderson is hereby required to record in a book to be secured for that purpose, the report of said peace officers required to be filed by him as directed in this section. It shall be deemed a misdemeanor for the sheriff or any peace officer to fail to comply with the terms of this section, and, upon conviction thereof, shall be fined not less than one thousand (\$1,000.00) dollars, or be confined upon the public works of Anderson County not more than twelve (12) months.

1932 Code, § 1862; 1923 (33) 514.

§ 1887. Reports of seizures of alcoholic liquors in Laurens County.—The deputy sheriff in Laurens County is hereby required to deliver to the sheriff all alcoholic liquors and beverages seized by him within twenty-four (24) hours after said seizure, and file a report with the sheriff stating the date and from whom said seizure was made and the amount seized, and it shall be the duty of the sheriff upon the delivery of said alcoholic liquors and beverages to issue to the person making the delivery a receipt for same, stating the amount received; and it shall be the duty of the sheriff to keep said alcoholic liquors and beverages in his custody until the next succeeding court of general sessions, and deliver same to the grand jury of Laurens County, and the grand jury shall immediately destroy same. The deputy sheriff is hereby required to turn over all receipts to the grand jury received from the sheriff for the alcoholic liquors and beverages delivered to said sheriff; said receipts shall be delivered to the foreman of the grand jury on the first day of each term of the court of general sessions for Laurens County, and the amount of whiskey or alcoholic beverages seized shall correspond to the receipts issued: *provided*, that the sheriff may, within his discretion, retain a portion of the alcoholic liquors and beverages seized when same is necessary to be used as evidence in the trial of any person violating the prohibition law, and after the trial is ended it shall be the duty of the sheriff to immediately destroy that portion of the alcoholic liquors and beverages which have been kept by him for that purpose. Any violation of the provisions of this section shall be deemed and considered a misdemeanor, and, upon conviction thereof, shall be fined or imprisoned within the discretion of the court.

1932 Code, § 1863; 1923 (33) 739; 1933 (38) 10.

§ 1888. Debt contracted for transporting or selling illicit liquors void.—Any obligation, note of indebtedness, contracted in the sale or transportation of illicit liquors, is declared to be absolutely null and void, nor shall any action or suit for the recovery of the same be entertained in any court in this State.

1932 Code, § 1864; Cr. C. '22, § 852; Cr. C. '12, § 829; Cr. C. '02, § 582; 1896 (22) 127; 1897 (22) 520; 1898 (22) 805; 1901 (23) 705; 1935 (39) 325.

§ 1889. How search warrants may be issued.—Upon affidavit, which may be on information and belief, to the effect that contraband liquor is being unlawfully concealed, kept or stored in any place, a search warrant may be issued by any magistrate of the county, empowering any officer or person who may be deputized, to enter the said place by day or night and to search the said premises for the purpose of seizing the said contraband liquors therein concealed, kept or stored, which said liquor, when so seized, shall be disposed of as hereinbefore provided for the disposition of unlawful liquors: *provided*, that no dwelling house shall be searched in the nighttime.

1932 Code, § 1865; Cr. C. '22, § 853; Cr. C. '12, § 830; 1907 (25) 472.

§ 1890. Persons violating law may be arrested without warrant.—Any person detected in the act of violating any of the provisions of this article shall be liable to arrest without warrant: *provided*, a warrant shall be procured within a reasonable time thereafter.

1932 Code, § 1866; Cr. C. '22, § 854; Cr. C. '12, § 831; Cr. C. '02, § 590; 1896 (22) 127; 1897 (22) 526; 1898 (22) 805; 1901 (23) 705.

Application. — Where police officers discover unconcealed whiskey in an automobile without making a search therefor, and liquor is being unlawfully transported, and arrest of the occupants of the automobile without warrant is not violative of Const. of 1895, art. 1, § 5, protecting citizens from unlawful arrest, the occupants having been discovered in the

act of violating law against transportation of liquor. *State v. Quinn*, 111 S. C. 174, 97 S. E. 62, 1 A. L. R. 589, 3 A. L. R. 1500, 1517.

Evidence obtained by arrest without warrant of arrest and search for transporting liquor held admissible. *State v. McMillen*, 170 S. C. 182; 170 S. E. 143.

§ 1891. Penalties for rescuing liquors from officer.—Every person who dispossesses or rescues from a constable or other officer, or attempts so to do, any alcoholic liquors or beverages taken or detained by such officer charged with the enforcement of this law shall, upon conviction, be punished by imprisonment not less than three months nor more than twelve months, or by a fine of not less than one hundred dollars nor more than five hundred dollars.

1932 Code, § 1867; Cr. C. '22, § 855; Cr. C. '12, § 832; Cr. C. '02, § 592; 1896 (22) 127; 1897 (22) 805; 1901 (23) 705.

§ 1892. Interference with officers forbidden.—Any interference by any person with, obstruction or resistance of, or abusive language to, any officer or person in the discharge of the duties herein enjoined, or the use of abusive language by any such officer or person to any other person or persons, shall be deemed a misdemeanor, and the person or persons so offending shall, upon conviction, be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or imprisonment for a term of not less than three months nor more than twelve months.

1932 Code, § 1868; Cr. C. '22, § 856; Cr. C. '12, § 833; Cr. C. '02, § 586; 1896 (22) 127; 1897 (22) 526; 1898 (22) 805; 1901 (23) 705.

§ 1893. Affidavits may be on information and belief.—Whenever in this article it is provided that process shall issue upon an affidavit based on information and belief, the affidavit shall contain a statement setting forth the sources of information, the facts and grounds of belief upon which the affiant bases his belief: *provided*, that it shall not be necessary to set forth the sources of information, the facts and grounds of belief in the affidavit upon which a warrant of arrest shall issue, but it shall only be necessary in cases of search warrants.

1932 Code, § 1869; Cr. C. '22, § 857; Cr. C. '12, § 836; Cr. C. '02, § 599; 1896 (22) 127; 1897 (22) 526; 1898 (22) 805; 1901 (23) 705.

Applied in *State v. Harrell*, 142 S. C. C. 268, 131 S. E. 419.
17, 140 S. E. 256; *State v. Du Pre*, 134 S.

§ 1894. Punishment for violations of law in cases not specifically prescribed.—Upon conviction of any person for the violation of any provisions of this article, where punishment is not provided for, such person shall be fined, or imprisoned at hard labor, in the discretion of the court: *provided*, the fine shall not be less than one hundred dollars, and the imprisonment not less than three months.

1932 Code, § 1870; Cr. C. '22, § 858; Cr. C. '12, § 839; 1907 (25) 472.

Applied in *State v. Tooley*, 107 S. C. 408, 93 S. E. 132.

§ 1895. Officers neglecting duty.—Any constable, deputy constable, sheriff or magistrate, who shall neglect or refuse to perform the duties required by this article, shall be subject to suspension by the Governor.

1932 Code, § 1871; Cr. C. '22, § 859; Cr. C. '12, § 841; Cr. C. '02, § 585.

This section is unconstitutional, since, when the constitution creates an office, fixing its term and prescribing the mode of filling it, the legislature is without power to abolish the office, vary the term, or suspend or remove the officer, while the specification by the constitu-

tion of the circumstances under which the Governor may suspend officers clearly negatives that it was intended that he should exercise the power otherwise than provided. *State v. Hough*, 103 S. C. 87, 87 S. E. 436, L. R. A. 1918F, 1049.

§ 1896. Where liquor may be kept.—It shall be unlawful for any intoxicating liquors to be stored or kept except for one's own personal use, or that of his immediate family, or for religious purposes, and then only at his usual place of residence, and only when the same shall have been procured in a lawful manner. The residence of a person shall be where his family resides, if he has a family residing in this State, and if not, at the place where he usually sleeps: *provided, however*, that it shall be unlawful for any person to have in his possession, or to store or keep, for any purpose, any quantity of such liquors in any room in which, or in connection with which, there is maintained or conducted any place of amusement, club house, fraternity house, lodge or meeting place, cafe, rest room, store, office, shop or factory, and no such place shall be considered a residence within the meaning of this section.

1932 Code, § 1885; Cr. C. '22, § 873; 1917 (30) 69.

Storing any quantity of liquor for any purpose unlawful.—In a prosecution for unlawful possession of intoxicating liquor, an instruction that the storing or having in possession any quantity of intoxicating liquor for any purpose in a room in which is maintained a store is unlawful, is not error, the jury being

further instructed on defendant's contention that storing or keeping implied continuity or habit. *State v. Drakeford*, 120 S. C. 400, 113 S. E. 307.

Applied in *State v. Glover*, 133 S. C. 124, 130 S. E. 213; *State v. Burns*, 133 S. C. 238, 130 S. E. 641.

§ 1897. Import alcohol for manufacture of ginger ale and like beverages.

—Any person, firm or corporation manufacturing in this State ginger ale or similar soft drinks in which there is an alcoholic ingredient not exceeding one-third of one per cent. may import alcohol into this State, or order and receive the same from another State, in quantities not exceeding ten gallons, for which no permit shall be required: *provided*, that such person, firm or corporation first file with the clerk of court of the county in which said manufacturing plant is located a bond with an approved surety company as surety in the sum of one thousand (\$1,000.00) dollars, to be forfeited to the State upon proof of misuse of such alcohol or disposition of it otherwise than contemplated in this section for the manufacture of said product. The solicitor shall bring action upon said bond upon information or belief, as he may see fit.

1932 Code, § 1893; Cr. C. '22, § 880; 1917 (30) 69.

§ 1898. Assisting in transportation of liquors—forfeiture.—Any person acting as an advance, or rear guard, or pilot to any person engaged in the transportation of alcoholic liquors in violation of any of the provisions of law of this State shall be guilty of the offense of knowingly transporting alcoholic liquors for unlawful purposes as defined by the laws of this State, and shall be punishable as provided therefor; and the buggy, wagon, automobile, railroad car, bicycle, motorcycle, or other vehicle, or any boat, launch, or other vessel used by such person in rendering such aid, if he shall be the owner thereof, or if used with knowledge or consent of the owner thereof, or of the agent of such owner in charge thereof, is hereby declared forfeited to the State and may be confiscated in the same method and manner as now provided by law for the confiscation of any vehicle actually used in the carrying of such alcoholic liquors.

1932 Code, § 1903; 1928 (35) 1148.

§ 1899. Not attach to motor vehicle device emit smoke screen, etc.—It shall be unlawful for any person to attach to any motor vehicle in this State any device to emit from the exhaust pipe, or any other part of such vehicle, any smoke screen, noisome gases or odors.

1932 Code, § 1904; 1930 (36) 1256.

§ 1900. Smoke screen attachments in or on motor vehicles unlawful.—It shall be unlawful for any person to drive upon any road or highway within this State or to have in possession any motor vehicle to which is attached or unattached, or in which is transported any device or substantial part of a device, attached or unattached, used in whole or in part for the emission of any smoke screen, or any noisome gases or odors.

1932 Code, § 1905; 1930 (36) 1256; 1934 (38) 1365.

§ 1901. Unlawful to operate such motor vehicles.—It shall be unlawful for any person to use or operate in this State any device attached to any motor vehicle so as to emit from such device any smoke screen, noisome gases or odors.

1932 Code, § 1906; 1930 (36) 1256.

§ 1902. Penalties operate such vehicles.—Any person violating any of the provisions of sections 1899, 1900 and 1901 shall be guilty of a felony, and, upon conviction, shall be imprisoned for not less than six months nor more than two years, or fined not less than two nor more than five hundred dollars, in the discretion of the court.

1932 Code, § 1907; 1930 (36) 1256.

§ 1903. Such motor vehicles forfeited—redeeming—rights of owners and mortgagees.—Any motor vehicle possessed or operated by any person in violation of the provisions of sections 1899, 1900 and 1901 shall be forfeited to the county in which such conviction is had: *provided*, said motor vehicle may be redeemed by the owner upon the payment to the county treasurer of a sum of money agreed upon by the board of county directors or other governing body of county and the sheriff of such county: *provided*, further, that the rights of innocent owners or mortgagees shall be protected.

1932 Code, § 1908; 1930 (36) 1256.

ARTICLE 3

When Unlawful Sell, Buy, Use, Transport and Possess Alcoholic Liquors

§ 1910. Alcoholic beverages—when not to sell, buy, use transport and possess.

(1) **Unlawful sell, buy, use, transport and possess.**—On and after the effective date of this Act It shall be unlawful for any person, firm or corporation to sell, buy, use, transport and possess any alcoholic beverages of any kind or nature.

(2) **Not issue license for any such purposes.**—On and after the effective date no license shall be issued to any person firm or corporation to buy, sell, use, transport or have in possession any alcoholic beverages of any nature or kind.

(3) **Penalties.**—Any person, firm or corporation violating any of the provisions of this section shall be punished for the first offense by a fine not exceeding Two Hundred (\$200.00) Dollars or imprisonment for a term not exceeding six months and for a second violation of this section shall be punished by a fine not exceeding one thousand (\$1,000.00) dollars and imprisonment for a term of not more than two years.

(4) **Time effective.**—This section shall become effective ninety (90) days after the chairman of the South Carolina tax commission shall certify in writing to the secretary of state that additional revenue has been provided by the General Assembly and approved by the Governor, by the imposition of new taxes in a sufficient amount to equal the revenues collected

from liquor, beer and wine laws during the fiscal year beginning July 1, 1939, and ending June 30, 1940, which said new revenue shall be so designated in lieu thereof in the act or acts providing it, and be distributed as the revenue derived from the present liquor, wine and beer law is now distributed. Unless the foregoing provisions of this section are complied with prior to July 1, 1942, this section shall be null and void and of no effect.

(5) **Invalidity.**—If any part or section of this section shall be declared unlawful or unconstitutional, then the whole section shall be invalid.

1942 (42) 1433.

CHAPTER 88

Offenses Relating to Sailors and Immigrants

1924. Punishment of offenders.

1925. Harboring mariners over one hour.

1926 thru 1928. Harboring deserting seamen.

1929, 1931. Evidence.

1930. Impressng seamen.

1932. Bond of masters lodging deserting seamen in jail.

1933 and 1934. Procurers of seamen.

1935. Burden of proof.

§ 1924. Offenders against laws as to immigrants and seamen guilty of misdemeanor.—Whoever shall offend against any or either of the provisions contained in article 2 of chapter 134, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof, be punished by imprisonment for a term not exceeding one year and not less than thirty days, or by a fine not exceeding two hundred and fifty dollars and not less than one hundred dollars, or by both such fine and imprisonment.

1932 Code, § 1924; Cr. C. '22, § 907; Cr. C. '12, § 897; Cr. C. '02, § 611; G. S. 1648; R. S. 493; 1866 (18) 472.

See § 6294 for reference article 2, chapter 134.

§ 1925. Harboring mariners over one hour—discharged mariners excepted.—It shall not be lawful for any tavern keeper, punch house keeper or victualler, within this State, to harbor, entertain, or employ any seaman or mariner, exceeding one hour in four and twenty, without an order or direction in writing for so doing under the hand of the master or commander of the ship or vessel to which such seaman or mariner shall belong, under pain of forfeiting the sum of ten dollars for every such offense, to be recovered by indictment in any court of competent jurisdiction, and applied one-half to the informer and the other half for the use of the State: *provided always, nevertheless*, that nothing herein contained shall extend, or be construed to extend, to such seaman or mariner as shall be legally discharged from any ship or vessel.

1932 Code, § 1925; Cr. C. '22, § 908; Cr. C. '12, § 898; Cr. C. '02, § 612; G. S. 1650; R. S. 494; 1751 (3) 735.

§ 1926. Harboring deserting seamen and enticing them to desert.—Any person who shall be convicted of harboring deserting seamen, or of inveigling or procuring them to desert any service for which they have engaged, or disregard any article into which they have entered, shall be held guilty of a misdemeanor, and, upon trial and conviction, shall be punished by fine

and imprisonment, at the discretion of the judge, not to exceed three hundred dollars' fine and three months' imprisonment; and, upon a second conviction, the person so offending, if the keeper of a public or lodging house for seamen, in addition to the penalty before provided, shall forfeit his or her license.

1932 Code, § 1926; Cr. C. '22, § 909; Cr. C. '12, § 899; Cr. C. '02, § 613; G. S. 1651; R. S. 495; 1695 (2) 119; 1836 (6) 557.

§ 1927. Magistrate may order search for deserting seamen.—In case any such seaman, or any boy apprenticed on board any ship or vessel, shall be harbored, secreted, or detained, it shall be lawful for any magistrate, upon complaint, on oath, made by the master of the said ship, or on his behalf, to inquire into the matter, and, if he shall see fit, by warrant under his hand and seal, to cause search to be made into any place wherein the said seaman or apprentice may be harbored or secreted, and to cause such seaman or apprentice to be restored to the master of said ship.

1932 Code, § 1927; Cr. C. '22, § 910; Cr. C. '12, § 900; Cr. C. '02, § 614; G. S. 1652; R. S. 495; 1695 (2) 119; 1836 (6) 557.

§ 1928. Last two sections extend to all shipping agreements.—The provisions of sections 1926 and 1927 shall extend to every agreement to proceed or continue on a voyage made in this State or elsewhere, by a seaman, and whether in contemplation of a voyage to be commenced in the State or elsewhere: *provided*, that the said agreement, at the time when any such seaman may be harbored or secreted contrary to the provisions of the said sections, shall not have been fully executed and determined, but shall be of force and binding on such seaman, according to the laws of this State or of the country where the same was entered into, or to which the ship or vessel in which such voyage was to be made may belong.

1932 Code, § 1928; Cr. C. '22, § 911; Cr. C. '12, § 901; Cr. C. '02, § 615; G. S. 1653; R. S. 497; 1837 (6) 376.

§ 1929. Articles of ship admissible in evidence.—On the prosecution or trial of any indictment under the provisions of this chapter, a copy of the articles of the ship or vessel, authenticated by the affidavit of the captain, sworn to before any notary public or magistrate of this State, shall be admissible in evidence, and shall be sufficient to establish the fact that any seaman whose name appears subscribed thereto has signed the agreement contained in such articles, until the contrary be made to appear by proof.

1932 Code, § 1929; Cr. C. '22, § 912; Cr. C. '12, § 902; Cr. C. '02, § 616; G. S. 1056; R. S. 498; 1837 (6) 577; 1850 (13) 171.

§ 1930. Misdemeanor to impress seamen.—Any attempt by fraud or force to ship, against his will, any person as a seaman on board any vessel in any port in this State is hereby declared a misdemeanor, to be punished by fine and imprisonment, at the discretion of the court.

1932 Code, § 1930; Cr. C. '22, § 913; Cr. C. '12, § 903; Cr. C. '02, § 617; G. S. 1657; R. S. 499; 1855 (12) 402.

§ 1931. Evidence of masters of vessels taken de bene esse.—When any prosecution shall be commenced against any person under the provisions of this chapter, providing for the punishment of harboring seamen who have

deserted, and it shall appear to the magistrate before whom the prosecution was commenced that the testimony of any master of a vessel or other transient person will be important on such trial, such magistrate shall have authority, after five days' notice to the party accused, to summon such witness before some judge of the court of general sessions, or the recorder of the city court of Charleston, to appear and give evidence in the said matter, when such witness shall be examined, with the right to the party accused to examine or cross examine such witness, as in trials in open court; and the judge or recorder shall certify and seal up such evidence, to be used on the trial of the cause, in the same manner as if the same had been given orally on such trial: *provided*, that such testimony shall in no case be used unless it shall appear, by the affidavit of the magistrate before whom prosecution shall have been commenced, that such witness is not at the time of such trial within the jurisdiction of the State.

1932 Code, § 1931; Cr. C. '22, § 914; Cr. C. '12, § 904; Cr. C. '02, § 618; G. S. 1658; R. S. 500; 1852 (12) 172; 1855 (12) 402.

§ 1932. Masters lodging seamen in jail for desertion to give bond.—

All masters of vessels, and others, lodging seamen in the jails of this State, for desertion, shall, previously thereto, give bond, with security, to the sheriff of the county to be by him approved, in the sum of five hundred dollars, for every seaman so lodged in any jail in this State, with a condition that he or they shall be bound to take away the said seaman or seamen from the jail, and pay the expenses thereof.

1932 Code, § 1932; Cr. C. '22, § 915; Cr. C. '12, § 905; Cr. C. '02, § 619; G. S. 1659; R. S. 501; 1808 (5) 574.

§ 1933. Procurers of seamen not to board vessels without permission of master.—

It shall not be lawful for any broker, shipping master, or other person engaged in the business of procuring seamen for vessels, or furnishing them with such seamen; or making contracts for their services, to enter or attempt to go on board of any vessel lying at any port in any waters within the jurisdiction of this State, except as herein provided, without having previously obtained the permission of the master or other person having the care, custody, and control of such vessels; and any such person so entering any vessel as aforesaid, without such permission, shall be deemed guilty of a misdemeanor, and shall, upon conviction, be punished by fine and imprisonment, at the discretion of the judge who tries the case, not to exceed three hundred dollars and three months' imprisonment.

1932 Code, § 1933; Cr. C. '22, § 916; Cr. C. '12, § 906; Cr. C. '02, § 620; G. S. 1660; R. S. 502; 1852 (12) 171.

§ 1934. Master may arrest offenders.—It shall be lawful for the master or other person having the command of the said vessel, or the care, custody, and control of the same, to seize and arrest all persons while so offending, and to take them before any magistrate, to be committed or bound over to appear as in other cases of misdemeanor.

1932 Code, § 1934; Cr. C. '22, § 917; Cr. C. '12 § 907; Cr. C. '02, § 621; G. S. 1661; R. S. 503; 1852 (12) 171.

§ 1935. Burden of proof.—Upon the trial of any person indicted under

sections 1933 and 1934, in case it shall be proved that any such person shall have entered or attempted to go on board any vessel within the jurisdiction of this State, it shall be obligatory upon the person accused to prove that he had previously received the required permission; and in default of such proof, such person shall be presumed to have entered without such permission, and be found guilty accordingly.

1932 Code, § 1935; Cr. C. '22, § 918; Cr. C. '12, § 908; Cr. C. '02, § 622; G. S. 1662; R. S. 504; 1852 (12) 171.

CHAPTER 89

Accessories and Aiders to Felonies

1936. Punishment of accessory before the fact. 1937. When accessory subject to conviction.

§ 1936. Persons accessory before fact punished as principal.—Whoever aids in the commission of a felony, or is accessory thereto before the fact, by counseling, hiring, or otherwise procuring such felony to be committed, shall be punished in the manner prescribed for the punishment of the principal felon.

1932 Code, § 1936; Cr. C. '22, § 919; Cr. C. '12, § 919; Cr. C. '02, § 634; G. S. 2610; R. S. 521. See 4 and 5 P. and M., c. 4; 1714 (2) 484.

As to accessories after the fact, see § 1022 and the note thereto.

Acquittal as principal does not bar trial of defendant as accessory.—Although punishment of principals and accessories before the fact in felonies is the same under this section, nevertheless the distinction between principals and accessories before the fact is recognized; and, although withdrawal of case from jury in murder prosecution would have effect of preventing subsequent trial on charge of principal, it is immaterial as respects trial of same defendant as accessory before the fact. *State v. Jennings*, 158 S. C. 422, 155 S. E. 621.

But accessory may not be convicted on indictment as principal.—Under this section, the conviction of a defendant charged in the indictment as a principal, on evidence tending to show that, if guilty of any offense at all, it was of being an accessory before the fact, is illegal. *State v. Sheriff*, 118 S. C. 327, 110 S. E. 807.

In treason and misdemeanors there are no accessories; all participating are principals. *Whitaker v. English*, 1 Bay 15, 54 Am. Dec. 205, 73 Am. Dec. 138; *State v. Lymburn*, 1 Brev. 397, 2 Am. Dec. 669, 41 L. R. A. 652, 43 L. R. A. (N. S.) 5, Ann. Cas. 12A, 830; *State v. Westfield*, 1 Bail. 132.

Whatsoever will make one an accessory before the fact in felony will make him a principal in treason, petit larceny and misdemeanors. *State v. Lymburn*, 1 Brev. 397, 2 Am. Dec. 669, 41 L. R. A.

652, 43 L. R. A. (N. S.) 5, Ann. Cas. 12A, 830; *State v. Westfield*, 1 Bail. 132.

A person cannot be convicted as accessory to the crime of arson for procuring another to burn his own dwelling. *State v. Sarvis*, 45 S. C. 668, 24 S. E. 53, 54, 55 Am. St. Rep. 806, 101 Am. St. Rep. 26, 32 L. R. A. 647, 21 L. R. A. (N. S.) 28, Ann. Cas. 13C, 1165, 5 A. L. R. 783, 17 A. L. R. 1169.

There can be no accessory before the fact in manslaughter. *State v. Putman*, 18 S. C. 175, 44 Am. Rep. 569. But see *State v. Sims*, 2 Bail. 29, 1 Am. Dec. 574, 23 Am. Dec. 128, 103 Am. St. Rep. 28, 50 L. R. A. (N. S.) 951, and *State v. Crank*, 2 Bail. 66, 1 Am. Dec. 574, 23 Am. Dec. 117, 35 Am. Dec. 756, 36 Am. Dec. 533, 39 Am. Dec. 452, 45 Am. Dec. 473, 47 Am. Dec. 238, 51 Am. Dec. 375, 58 Am. Dec. 248, 80 Am. Dec. 97, 3 Am. St. Rep. 280, 6 Am. St. Rep. 248, 18 L. R. A. (N. S.) 790, 50 L. R. A. (N. S.) 951, Ann. Cas. 14C, 326.

And indictment against an accessory before the fact need not allege the conviction or execution of the principal.—*State v. Sims*, 2 Bail. 29, 1 Am. Dec. 574, 23 Am. Dec. 128, 103 Am. St. Rep. 28, 50 L. R. A. (N. S.) 951; *State v. Crank*, 2 Bail. 66, 1 Am. Dec. 574, 23 Am. Dec. 117, 35 Am. Dec. 756, 36 Am. Dec. 533, 39 Am. Dec. 452, 45 Am. Dec. 473, 47 Am. Dec. 238, 51 Am. Dec. 375, 58 Am. Dec. 248, 80 Am. Dec. 97, 3 Am. St. Rep. 280, 6 Am. St. Rep. 248, 18 L. R. A. (N. S.) 790, 50 L. R. A. (N. S.) 951, Ann. Cas. 14C, 326; *State v. Posey*,

4 Strob. 103.

It is sufficient if it allege that the murderer was committed by a person un-

known, and the prisoner was an accessory before the fact. State v. Green, 4 Strob. 128.

§ 1937. Accessories before fact—when and how tried.—Whoever counsels, hires, or otherwise procures a felony to be committed, may be indicted and convicted as an accessory before the fact, either with the principal felon or after his conviction, or may be indicted and convicted of a substantive felony, whether the principal felon has or has not been convicted, or is or is not amenable to justice, and, in the last mentioned case, may be punished in the same manner as if convicted of being an accessory before the fact.

1932 Code, § 1937; Cr. C. '22, § 920; Cr. C. '12, § 920; Cr. C. '02, § 635; G. S. 2611; R. S. 522. See 4 and 5 P. and M., c. 4; 1712 (2) 484.

As to accessories after the fact, see § 1022, and the note thereto.

The three elements that must concur in order to justify the conviction of one as an accessory before the fact are: (1) that he advised and agreed, or urged the parties or in some way aided them, to commit the offense; (2) that he was not present when the offense was committed; (3) that the principal committed the crime. State v. Farne, 190 S. C. 75, 1 S. E. 912.

One who is present, aiding and abetting in the commission of a felony, is not an accessory, but a principal.—State v. Kennedy, 85 S. C. 146, 67 S. E. 152, 18 A. L. R. 919; State v. Putman, 18 S. C. 175, 44 Am. Rep. 569; State v. Fley, 2 Brev. 338, 4 Am. Dec. 583, 51 Am. Dec. 376, 3 Am. St. Rep. 280; State v. Posey, 4 Strob. 103, 138.

Where principal kills wrong person accessory is nevertheless guilty.—If one intends to murder another and misses the intended victim, his accessory, under

this section, is as guilty as if the principal had killed the person he intended to kill. State v. Kennedy, 85 S. C. 146, 67 S. E. 152, 18 A. L. R. 919.

Accessory may not be convicted on indictment as principal.—See this catchline under the preceding section.

The record of the conviction of the principal, if had, must be produced, unless he and accessory are tried together.—State v. Crank, 2 Bail. 66, 1 Am. Dec. 574, 23 Am. Dec. 117, 35 Am. Dec. 756, 36 Am. Dec. 533, 39 Am. Dec. 452, 45 Am. Dec. 473, 47 Am. Dec. 238, 51 Am. Dec. 375, 58 Am. Dec. 248, 80 Am. Dec. 97, 3 Am. St. Rep. 280, 6 Am. St. Rep. 248, 18 L. R. A. (N. S.) 790, 50 L. R. A. (N. S.) 951, Ann. Cas. 14C, 326.

The testimony of an accomplice is altogether for the jury, and they may act upon it without any confirmation of his statement. State v. Brown, 3 Strob. 508, 71 Am. Dec. 671, 51 Am. Rep. 315, 12 A. L. R. 805.

TITLE 22

Prisons and Imprisonment

CHAPTER 90. Jails and Prisoners, § 1938.

CHAPTER 91. State Penitentiary, § 1961.

CHAPTER 92. Correctional Institutions, § 2014.

CHAPTER 90

Jails and Prisoners

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| 1938. Custody of jail. | 1958. Bloodhounds. |
| 1939. Prison of industrial communities. | 1959. Houses of correction for female convicts. |
| 1940 and 1941. Jailer. | 1960. Working convicts, Beaufort County. |
| 1942, 1943. Federal prisoners. | 1960-1. Working convicts, Berkeley County. |
| 1944. Separation of felons and debtors. | 1960-2. Service of sentence under 18 months, Charleston County. |
| 1945 and 1946. Coroner's prisoners. | 1960-3. Prisoners awaiting trial, Clarendon and Sumter Counties. |
| 1947, 1949. No imprisonment of paupers, lunatics, etc. | 1960-4. Working prisoners, Colleton County. |
| 1948. Return of prisoners' names to court. | 1960-5. Working convicts, Georgetown County. |
| 1950. Discrimination in treatment of prisoners. | 1960-6. Use of prisoners, Jasper County. |
| 1951. Removal of prisoners on destruction of jail. | 1960-7. Prisoners awaiting trial, Lee County. |
| 1952. Impressing a guard and posse comitatus. | 1960-8. Power of jailor, Pickens County. |
| 1953. Report of condition of jail. | 1960-9. Acceptance and discharge of convicts, Saluda County. |
| 1954. Blankets and bedding for prisoners. | 1960-10. Place prisoners in municipal jails, York County. |
| 1955. Alteration in court house or jail. | |
| 1956. Physician for Charleston County jail. | |
| 1957. No structures to be erected on jail or court house lots. | |

§ 1938. Sheriff control jail—liable for acts of jailer.—The sheriff shall have custody of the jail in his county, and if he appoint a jailer to keep it, the sheriff shall be liable for him, and the sheriff, or jailer, shall receive and safely keep in prison any person delivered or committed to either of them, according to law: *provided*, that in the county of Florence, the governing board of Florence County shall have the custody of the jail and shall have the right to appoint a jailer to keep it, and the sheriff of said county is relieved from the duty of safely keeping in prison any person delivered or committed to said jail or prison according to law: *provided, however*, that in the county of Sumter, the county board of commissioners for Sumter County shall have the custody and keeping of the county jail and shall have the right to appoint a jailer to keep it and the sheriff of said county is hereby relieved from the duty of safely keeping in prison any person delivered or committed to said jail.

1932 Code, § 1938; Cr. C. '22, § 921; Cr. C. '12, § 923; Cr. C. '02, § 638; G. S. 2690; R. S. 525; 1837 (21) 48; 1934 (38) 1219; 1940 (41) 1666.

§ 1939. Industrial communities may provide prison.

(1) **Authority to build.**—The president or treasurer, or other executive officer, having the management of any industrial corporation, located in

any industrial community, in any county in this State, may build or provide a prison or building, at some convenient place, in said industrial community, in which arrested persons, charged with violation of the law, may be confined until such arrested persons can conveniently be carried before a magistrate.

(2) **What persons may be confined.**—The police officer, or deputy sheriff, in industrial communities shall have the power to confine in such prison or building, as the president or treasurer, or other executive officer having the management of any industrial corporation, may provide in industrial communities, any person or persons who may be arrested charged with violation of law until such arrested person or persons can be conveniently carried before a magistrate: *provided, however*, that such police officer or deputy sheriff shall not detain any arrested person in said prison longer than eighteen hours, except persons arrested on Saturdays, and then not over forty-two hours: *provided, further*, that such police officer or deputy sheriff shall provide water and food, and shall also furnish such arrested person or persons, with sufficient bedding or clothing to make them comfortable in cold weather.

1932 Code, § 1939; Cr. C. '22, § 922; Cr. C. '12, § 924; 1910 (26) 765.

§ 1940. Sheriff appoint jailer—jailer live at jail.—Every sheriff in this State, who does not live in the jail, shall employ a proper and discreet person as jailer, who shall live within the same, and who is hereby prohibited from using the house for any other purpose than for which it was designated by law.

1932 Code, § 1940; Cr. C. '22, § 923; Cr. C. '12, § 925; Cr. C. '02, § 639; G. S. 2691; R. S. 526; 1812 (5) 672; 1839 (11) 48.

See §§ 1938 and 4253-4.

Sheriff may not raise question as to validity of appointment after receiving jailer's salary from county.—Under this section, providing for the appointment of a jailer by the sheriff, the following section providing that written notice of such appointment shall be deposited with the clerk of the court, and the statute providing for the salary of such jailer, in an action by a de facto jailer against the sheriff for money had and

received by the sheriff, as the salary of the jailer, it is error for the court to refuse to hear evidence as to his performance of the duties of a jailer; since the defendant may not contend that the appointment was not made in accordance with the following section, after receiving the jailer's salary from the county. *McLemore v. Lancaster*, 57 S. C. 382, 35 S. E. 743.

§ 1941. Appointment of jailer.—The sheriff shall appoint such jailer in writing, a copy of which appointment shall be deposited in the office of the clerk of the circuit court of the county wherein such jailer is appointed.

1932 Code, § 1941; Cr. C. '22, § 924; Cr. C. '12, § 926; Cr. C. '02, § 640; G. S. 2692; R. S. 527; 1812 (5) 672; 1839 (11) 48.

See the preceding section and note thereto.

§ 1942. Prisoners committed by United States to be kept in custody.—The sheriffs or jailers in the several counties of this State shall keep in safe custody all such prisoners as may be committed to them under the authority of the United States, until such prisoners are discharged by due course of law of the United States, under the like penalties as in case of prisoners committed under the authority of this State, and upon the terms

of the resolution of the Congress of the United States at their session begun and holden on the fourth day of March, Anno Domini one thousand seven hundred and eighty-nine.

1932 Code, § 1942; Cr. C. '22, § 925; Cr. C. '12, § 927; Cr. C. '02, § 641; G. S. 2693; R. S. 528; 1790 (7) 257; 1800 (5) 379; 1839 (11) 47.

§ 1943. Use of United States prisoners on public works.—The several authorities of the several counties of this State are hereby authorized and directed to use upon the public works of the county such Federal prisoners as are able-bodied and are serving sentences in the jails of the respective counties under the same rules and regulations as apply to the state prisoners under similar sentences: *provided, however*, that no such Federal prisoners shall be so used upon the public works of any county unless by authority of an act of Congress of the United States.

1932 Code, § 1943; 1924 (33) 938.

§ 1944. Felons and debtors to be lodged apart.—The sheriff or jailer shall keep prisoners for debt, in cases of fraud, in separate apartments of the jail; and the officer herein offending shall be liable to an action of the party grieved, and also to an indictment, and on conviction shall be punished as for a misdemeanor.

1932 Code, § 1944; Cr. C. '22, § 926; Cr. C. '12, § 928; Cr. C. '02, § 642; G. S. 2694; R. S. 529; 1839 (11) 47.

§ 1945. Sheriffs to keep prisoners committed by coroner.—All sheriffs and jailers are required to receive and keep securely all persons committed by the coroner.

1932 Code, § 1945; Cr. C. '22, § 927; Cr. C. '12, § 929; Cr. C. '02, § 643; G. S. 2695; R. S. 530; 1839 (11) 76.

§ 1946. Set apart room for coroner's prisoners.—The sheriff of each county shall set apart in the jail a room for the confinement of such persons as may be exclusively in the custody of the coroner, of which the coroner shall have exclusive control.

1932 Code, § 1946; Cr. C. '22, § 928; Cr. C. '12, § 930; Cr. C. '02, § 644; G. S. 2696; R. S. 531; 1825 (6) 262; 1839 (11) 78.

§ 1947. Not imprison paupers, lunatics, et al, but send to state hospital.—No pauper, lunatic, idiot or epileptic shall be confined for safekeeping in any jail; and if any such person shall be imprisoned, under and by virtue of any legal process, it shall be the duty of the sheriff in whose custody he may be, to obtain his discharge as speedily as possible, and send him forthwith to the state hospital, according to law, at the expense of the county within whose limits he shall have gained a settlement.

1932 Code, § 1947; Cr. C. '22, § 929; Cr. C. '12, § 931; Cr. C. '02, § 645; G. S. 2696; R. S. 532; 1839 (11) 51.

§ 1948. Sheriff to return names of prisoners to court.—Every sheriff shall make a return to every court of general sessions of his county on the first day of the term, of the name of every prisoner and the time and cause of his or her confinement, whether civil or criminal.

1932 Code, § 1948; Cr. C. '22, § 930; Cr. C. '12, § 932; Cr. C. '02, § 646; G. S. 2698; R. S. 533; 3 H. 7, c. 3; 1712 (2) 453; 1839 (11) 52.

§ 1949. Jailer to report lunatics.—It shall be the duty of the jailers of the several counties of this State, at the sitting of each court of sessions, to report to the presiding judge the names of the persons confined in jail who are lunatics, idiots or epileptics, with the cause of their detention.

1932 Code, § 1949; Cr. C. '22, § 931; Cr. C. '12, § 933; Cr. C. '02, § 647; G. S. 2699; R. S. 534; 1829 (6) 382; 1839 (11) 48.

§ 1950. No discrimination in treatment of prisoners.—It shall be unlawful for sheriffs or jailers to make any discrimination in the treatment of prisoners placed in their custody.

Every violation of this section shall be a misdemeanor, and upon conviction thereof, the party convicted shall be fined not less than twenty-five dollars, and imprisoned for not less than one month, nor more than twelve months.

1932 Code, § 1950; Cr. C. '22, § 932; Cr. C. '12, § 934; Cr. C. '02, § 648; G. S. 2700; R. S. 535; 1868 (14) 107.

§ 1951. Removal of prisoners on destruction of jail.—In all cases where any person shall be apprehended or in confinement according to law, in any county in this State, wherein the jail may be destroyed by fire or other accident, he shall be committed to the jail nearest the one destroyed, for safekeeping; and the several jailers in this State, keepers of the jails nearest to those jails that may be destroyed as aforesaid, are authorized and required to receive and safely keep such person.

1932 Code, § 1951; Cr. C. '22, § 933; Cr. C. '12, § 935; Cr. C. '02, § 649; G. S. 2701; R. S. 536; 1812 (5) 672; 1839 (11) 47.

§ 1952. Sheriff may impress a guard, and call out posse comitatus—penalty for refusing to assist.—When any person accused of a capital offense shall be in custody and the sheriff, acting by himself or his regular deputy, shall have cause to suspect that such person may be unlawfully taken from his custody, or will probably effect his escape, he may impress a sufficient guard for securing and keeping safely such prisoner, so long as it may be his duty to keep said prisoner in jail or in his custody. And the sheriff, by himself or his regular deputy, shall have power to call out the posse comitatus to his assistance, whenever he is resisted, or has reasonable grounds to suspect and believe that such assistance will be necessary in the service or execution of process in any criminal case; and any person refusing to act as such guard, or to assist as one of the posse comitatus in the service or execution of such process, when required by the sheriff, shall be liable to be indicted therefor, and upon conviction shall be fined and imprisoned, at the discretion of the court.

1932 Code, § 1952; Cr. C. '22, § 934; Cr. C. '12, § 936; Cr. C. '02, § 650; G. S. 2702; R. S. 537; 1839 (11) 52.

§ 1953. Sheriff to report condition of jail, etc.—Each sheriff shall, annually, report to the county commissioners the actual condition of the jail, the repairs which may be wanting, and their probable cost.

1932 Code, § 1953; Cr. C. '22, § 935; Cr. C. '12, § 937; Cr. C. '02, § 651; G. S. 2703; R. S. 538; 1839 (11) 48.

§ 1954. County to furnish blankets and bedding for prisoners.—It shall be the duty of the county commissioners in this State to furnish, at all times, blankets and such other bedding as shall be necessary for prisoners confined in jail in their respective counties; and prisoners confined on a criminal charge shall be provided with at least two blankets in the winter season.

1932 Code, § 1954; Cr. C. '22, § 936; Cr. C. '12, § 938; Cr. C. '02, § 652; G. S. 2704; R. S. 539; 1842 (11) 226; 1861 (12) 908; 1869 (14) 274.

§ 1955. County commissioners may make alterations in court house or jail.—The several boards of county commissioners are authorized and required to make any alterations and additions deemed advisable, or which may become necessary, to any court house or jail now erected or hereafter to be built, in their several counties.

1932 Code, § 1955; Cr. C. '22, § 937; Cr. C. '12, § 939; Cr. C. '02, § 653; G. S. 2705; R. S. 540; 1841 (11) 156.

§ 1956. Physician for Charleston County jail.—A physician for the prisoners confined in the jail in Charleston County shall be appointed by the sheriff of Charleston County upon the recommendation in writing of the Senator and a majority of the House members for Charleston County, his attendance to commence on the date of his appointment and to continue for a period of one year, and until another appointment shall have been made in the manner aforesaid. He shall receive as his compensation such amount as shall be annually appropriated therefor in the appropriation act of said county, and the account of no other physician, surgeon or apothecary, for attendance, operations, or medicines, on the said prisoners, shall be allowed or paid.

1932 Code, § 1956; Cr. C. '22, § 938; Cr. C. '12, § 940; Cr. C. '02, § 654; G. S. 2706; R. S. 541; 1820 (6) 143; 1879 (17) 18; 1935 (39) 94.

§ 1957. Buildings and fences not to be erected on jail or court house lots—exceptions.—If any person shall erect, or cause to be erected any dwelling house, outhouse or other building, or shall erect or cause to be erected any kind of fence, wall or paling of any kind, on any public lot or square whereon the jails and court houses in the several counties are erected, or who may hereafter hold, occupy or use any house, outhouse or other building erected on such square or lot, such person shall, for every such offense, upon being thereof legally convicted by indictment, be fined in a sum not less than one hundred dollars nor more than one thousand dollars: *provided, nevertheless*, that the jailers of the respective counties, who reside in the jails, shall not be subject to such penalty for erecting or using such buildings or fences for their private accommodation: *provided, further*, that in the county of Richland the county board of commissioners is authorized and allowed to enter into a contract with the city of Columbia whereby the said city shall be allowed, at its own cost, to erect a suitable jail or jails upon the jail lot of said county, upon such terms and conditions as to the said board of county commissioners shall seem fit and proper.

1932 Code, § 1957; Cr. C. '22, § 939; Cr. C. '12, § 941; 1911 (27) 45.

§ 1958. County board of commissioners may purchase bloodhounds, etc.—

It shall be the duty of the county boards of commissioners of the several counties in this State, when in their judgment it is necessary, to require the sheriff to purchase a pair of bloodhounds or other serviceable dogs, to be kept at the court house and used as he may deem expedient, for the tracking and arrest of escaped convicts and other fugitive lawbreakers. The county board of commissioners of each county are hereby authorized to appropriate the sum of one hundred dollars, if so much be necessary, for the purchase of said bloodhounds or other serviceable dogs.

1932 Code, § 1958; Cr. C. '22, § 940; Cr. C. '12, § 945; Cr. C. '02, § 659; 1897 (22) 427.

In view of this section, providing for the use of bloodhounds for tracking escaped convicts and fugitives from justice, the conduct or action of dogs which were placed on the supposed track of the

offender is admissible as a circumstance to be weighed with other circumstances. State v. Brown, 103 S. C. 437, 88 S. E. 21, L. R. A. 1916D, 1295, L. R. A. 1917E, 734, 17 A. L. R. 912.

§ 1959. Houses of correction for female convicts.—The county board of commissioners of the several counties in this State may provide and maintain, in connection with the poor farm, a suitable house of correction to which female convicts may be sentenced, except convicts for capital offenses, wherein such convicts shall be employed in useful occupations.

1932 Code, § 1959; Cr. C. '22, § 941; Cr. C. '12, § 967; 1911 (27) 146.

§ 1960. Working of convicts and persons in jail awaiting trial. Beaufort County.

(1) **Convicts.**—The supervisor of Beaufort County is authorized and empowered to work any able-bodied male person, sentenced to a term of imprisonment in the county jail or on the county chaingang at such labor as he is able to perform, on the public roads or highways of Beaufort County, whenever in his judgment it is feasible and practicable to do so, under such guard as he may deem sufficient. During such term of service the convict may be quartered and maintained in the county jail, and while so maintained, the dieting fees may be paid out of the general road fund: *provided*, that the sheriff shall not be responsible for the safekeeping of any such convict while at the jail.

(2) **Persons in county jail awaiting trial.**—Whenever any person is duly committed to the county jail in default of bond and is awaiting trial and intends to plead guilty at the term of court next ensuing and desires to enter service upon the public roads of said county, as provided for convicts under sentence by subsection 1, hereof, such person may indicate such desire by filing with the clerk of court a written statement to that effect, and thereupon the supervisor of Beaufort County may cause such person to be taken from the jail and worked upon the highway, as provided in subsection 1 hereof: *provided*, that it shall be the duty of the supervisor to have any such person returned to the county jail at least two (2) days before the convening of the term of court at which he expects to enter plea of guilty, and shall at the same time certify to the clerk of court of general sessions the length of time served by any such person: *provided*, further, upon request by any such person voluntarily serving to be relieved of such service and returned to the county jail, it shall be the duty of the supervisor to

forthwith return such person to the county jail. It shall be the duty of the trial judge imposing sentence in any such case to take into consideration the time served by any such person, and if the trial judge shall certify that the term of sentence that he would ordinarily have imposed in any case would be less than the term actually served, it shall be the duty of the county to pay such person for the time served in excess of the sentence that would have been imposed at the rate of fifty (50) cents per day. And the same shall apply in case of trial and sentence upon conviction, or if upon trial and acquittal, such person shall be paid at the same rate for all of the time served. Or should any person be confined in the county jail of Beaufort, upon any charge or held for any reason and is unable to give recognizance for his appearance and not intending to plead guilty, desires to work upon the highways and receive the remuneration herein provided, dependent upon the outcome of his case, he shall likewise be entitled to avail himself of the benefits of this section. While any person is confined in the county jail, in the custody of the sheriff, or shall be away therefrom in the custody of the supervisor or any guard designated by him to have the custody of such person, the sheriff shall not be liable for his treatment and neither shall he be liable in the event of the escape of such prisoner.

1935 (39) 99.

§ 1960-1. Working of convicts and persons in jail awaiting trial, Berkeley County.

(1) **Convicts.**—The supervisor of Berkeley County is authorized and empowered to work any able-bodied male person, sentenced to a term of imprisonment in the county jail or on the county chaingang at such labor as he is able to perform, on the public roads or highways of Berkeley County, whenever in his judgment it is feasible and practicable to do so, under such guard as he may deem sufficient. During such term of service the convict may be quartered and maintained in the county jail, and while so maintained, the dieting fees may be paid out of the general road fund: *provided*, that the sheriff shall not be responsible for the safekeeping of any such convict except while at the jail.

(2) **Persons in jail awaiting trial.**—Whenever any person is duly committed to the county jail in default of bond and is awaiting trial and intends to plead guilty at the term of court next ensuing and desires to enter service upon the public roads of said county, as provided for convicts under sentence by section 1960-1 (1), such person may indicate such desire by filing with the clerk of court a written statement to that effect, and thereupon the supervisor of Berkeley County may cause such person to be taken from the jail and worked upon the highway, as provided in section 1960-1 (1): *provided*, that it shall be the duty of the supervisor to have any such person returned to the county jail at least two (2) days before the convening of the term of court at which he expects to enter plea of guilty, and shall at the same time certify to the clerk of court of general sessions the length of time served by any such person: *provided, further*, upon request by any such person voluntarily serving to be relieved of such service and returned to the county jail, it shall be the duty of the supervisor to forthwith return such person to the county jail. It shall be the duty of the trial judge im-

posing sentence in any such case to take into consideration the time served by any such person, and if the trial judge shall certify that the term of sentence that he would ordinarily have imposed in any case would be less than the term actually served, it shall be the duty of the county to pay such person for the time served in excess of the sentence that would have been imposed at the rate of fifty (50c) per day. And the same shall apply in case of trial and sentence upon conviction, or if upon trial and acquittal, such person shall be paid at the same rate for all of the time served. Or should any person be confined in the county jail of Berkeley, upon any charge or held for any reason and is unable to give recognizance for his appearance and not intending to plead guilty, desires to work upon the highways and receive the remuneration herein provided, dependent upon the outcome of his case, he shall likewise be entitled to avail himself of the benefits of this section. While any such person is confined in the county jail, in the custody of the sheriff, or shall be away therefrom in the custody of the supervisor or any guard designated by him to have the custody of such person, the sheriff shall not be liable for his treatment and neither shall he be liable in the event of the escape of such prisoner.

1932 Code, §§ 3832, 3833; 1931 (37) 261.

§ 1960-2. Service of sentences by prisoners under 18 months or less sentence, Charleston County.—All persons sentenced by the magistrates of Charleston County, or by the judge of the civil and criminal court of Charleston, and all prisoners sentenced by the court of general sessions for Charleston County to serve eighteen (18) months or less who are not sent to the state penitentiary by order of the county board of commissioners of Charleston County, shall serve such sentences in the Charleston County prison farm, unless any such prisoner may, by order of the said county board of commissioners, be temporarily lodged in the Charleston County jail.

1940 (41) 1623.

See § 4075-1 for chaingang, Charleston County.

§ 1960-3. Prisoners awaiting trial work on chaingang Clarendon and Sumter Counties.

(1) **Able bodied males.**—Any able bodied male person who may be committed to jail in Clarendon County or Sumter County in default of bond may signify his willingness in writing to serve upon the county chaingang until the next term of the court of general sessions, whereupon the county supervisor shall take custody of him, if his services are needed and desirable upon the public works of the county, and be responsible for his safe-keeping; provided any such prisoner may be returned to jail at any time by the supervisor.

(2) **Give consideration for days served if convicted—compensation if acquitted.**—The number of days so served by any prisoner shall be certified to the presiding judge before whom he appears by the supervisor, and upon a plea of guilty or conviction of the crime charged, the court shall, in passing sentence, take into consideration the time served; and upon acquittal or nol pros any such prisoner shall be entitled to collect from the county

forty (40c) per day for every day so served.

(3) **Liability of sheriff and county limited.**—The sheriff shall not be responsible for the safety of any prisoner so voluntarily serving upon the chaingang while awaiting indictment and/or trial; and there shall be no liability upon the county of any kind or nature to any person on account of the working of prisoners, as above provided, except to pay the amount hereinabove prescribed to such prisoners so working who do not subsequently plead guilty or suffer conviction in the court.

1932 (37) 1374.

§ 1960-4. Working of prisoners committed to jail, Colleton County.—

The county supervisor of Colleton County is hereby authorized and empowered to work on the public works of Colleton County prisoners committed to the county jail, upon the following conditions: said prisoners shall be lodged each night in the county jail, and there be given their breakfast and supper while at the jail. The jailer or other person furnishing meals to prisoners shall furnish as necessary dinner for the prisoners so worked, to be conveyed by the supervisor to the said prisoners while on the public works, said prisoners being transported as necessary to and from the county jail in each day's work.

1935 (39) 459.

§ 1960-5. Working of convicts and persons in jail awaiting trial, Georgetown County

(1) **Convicts.**—The board of county commisoiners of Georgetown County is authorized and empowered to work any able-bodied male person, sentenced to a term of imprisonment in the county jail or on the county chaingang at such labor as he is able to perform, on the public roads or highways of Georgetown County, whenever in his judgment it is feasible and practicable to do so, under such guard as it may deem sufficient. During such term of service the convict may be quartered and maintained in the county jail.

(2) **Persons in jail awaiting trial.**—Whenever any person is duly committed to the county jail in default of bond and is awaiting trial and intends to plead guilty at the term of court next ensuing and desires to enter service upon the public roads of said county, as provided for convicts under sentence by subsection 1 hereof, such person may indicate such desire by filing with the clerk of court a written statement to that effect, and thereupon the board of county commissioners of Georgetown County may cause such person to be taken from the jail and worked upon the roads and highways as provided in subsection 1 hereof: *provided*, that it shall be the duty of the board of county commissioners to have any such person returned to the county jail at least two (2) days before the convening of the term of court at which he expects to enter a plea of guilty, and shall at the same time certify to the clerk of court of general sessions the length of time served by any such person: *provided, further*, upon request by any such person voluntarily serving to be relieved of such service and returned to the county jail, it shall be the duty of the board of county commissioners to forthwith return such person to the county jail. It shall be the duty of the trial judge imposing sentence in any such case to take into considera-

tion the time served by any such person, and if the trial judge shall certify that the term of sentence that he would ordinarily have imposed in any case would be less than the term actually served, it shall be the duty of the county to pay such person for the time served in excess of the sentence that would have been imposed at the rate of fifty (50c) per day. And the same shall apply in case of trial and sentence upon conviction, or if upon trial and acquittal, such person shall be paid at the same rate for all of the time served. Or should any person be confined in the county jail of Georgetown, upon any charge or held for any reason and is unable to give recognizance for his appearance and not intending to plead guilty, desires to work upon the highways and receive the remuneration herein provided, dependent upon the outcome of his case, he shall likewise be entitled to avail himself of the benefits of this subsection. While any person shall be away from the county jail, in the custody of the board of county commissioners or any guard designated by it to have the custody of such person, the sheriff shall not be liable for his treatment and neither shall he be liable in the event of the escape of such prisoner.

1935 (39) 299.

§ 1960-6. Use of prisoners, Jasper County.—The supervisor of Jasper County is hereby authorized, empowered and directed to use any prisoners confined in the Jasper jail, who have been convicted and have received sentences of sixty (60) days or less, on the public works of the county. The supervisor in using said prisoners, shall not maintain a separate establishment in taking care of the said prisoners, but shall keep same in the county jail. *Provided*, that the supervisor, if he so desires, may work on the public works of Jasper County any and all prisoners who may be convicted in the courts of said county and who receive sentences of six (6) months and under.

1932 Code, § 3840; 1931 (37) 814; 1937 (40) 365.

§ 1960-7. Prisoners awaiting trial work on chaingang, Lee County.

(1) **Authorized.**—Any able bodied male person who may be committed to jail in Lee County in default of bond may signify his willingness in writing to serve upon the county chaingang until the next term of court of general sessions, whereupon the county board of commissioners shall take custody of him, if his services are needed and desirable upon the public works of the county, and be responsible for his safe-keeping: *provided*, any such prisoner may be returned to jail at any time by the county board of commissioners.

(2) **Receive credit on sentence or pay.**—The number of days so served by any prisoner shall be certified to the presiding judge before whom he appears by the county board of commissioners, and upon a plea of guilty or conviction of the crime charged, the court shall, in passing sentence, take into consideration the time served; and upon acquittal or nol pros any such prisoner shall be entitled to collect from the county forty (40c) per day for every day so served.

(3) **Liability of sheriff and county.**—The sheriff shall not be responsible for the safety of any prisoner so voluntarily serving upon the chaingang while awaiting indictment and/or trial; and there shall be no liability upon

the county of any kind or nature to any person on account of the working of prisoners, as above provided, except to pay the amount hereinabove prescribed to such prisoners so working who do not subsequently plead guilty or suffer conviction in the court.

1937 (40) 291.

§ 1960-8. Jailor has power of rural police, Pickens County.—The jailor of Pickens County is hereby authorized, empowered and directed, in addition to his present duties, to assist the rural police of Pickens in the enforcement of the law in said county, and said jailor shall have the same power and authority, in the enforcement of the law, as the rural police in said county.

1932 Code, § 3812; 1928 (35) 1980.

§ 1960-9. Acceptance and discharge of convicts to and from chaingang or jail, Saluda County.

(1) **Acceptance to chaingang or jail — written commitments necessary.**—No person who has been convicted and sentenced to labor on the county chaingang or to the county jail in Saluda County shall be admitted to or accepted by the person in charge of the county chaingang or the county jail without a written commitment under the hand and seal of the magistrate or mayor of any incorporated town in the county of Saluda who may sentence such person or by the clerk of the court if such sentence is passed by a circuit judge in the court of general sessions, which commitment shall state the offense for which the person has been convicted, the date of conviction, and the term of the sentence.

(2) **Discharge or release.**—When a person has been committed to the county chaingang or the county jail under the provisions of subsection 1 hereof, he shall not be discharged therefrom except upon the expiration of the term as shown by the commitment, or upon a release issued by the magistrate who may have committed such prisoner, or by the clerk of court of Saluda County in the event a pardon has been issued for any such prisoner by the Governor of the State of South Carolina. Such release or releases, shall show upon its face the cause for same, and in the case of a pardon, the release shall so state, and in the case of the payment of a fine, the magistrate issuing such a release shall show on its face the amount of the fine paid.

(3) **File commitment and discharge in clerk of court's office.**—When the term of a convict is terminated by service or by discharge in the manner provided for in subsection 2 hereof, the commitment and discharge shall be, by the chaingang officer or by the county jailor, filed in the office of the clerk of court for Saluda County, and shall be accessible for public inspection at any time.

(4) **Penalties for violation.**—Any jailor, chaingang captain, sergeant or other officer in charge of prisoners and/or convicts in Saluda County who receive prisoners and/or convicts except under the terms of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof be subject to a fine of not exceeding one hundred (\$100.00) dollars or imprisonment not exceeding thirty (30) days.

1933 (38) 317.

§ 1960-10. Place state and county prisoners in municipal jails, York County—per diem pay.—The municipalities of York County are authorized and empowered to receive, keep and maintain county and state prisoners in the jails of the municipalities. The municipalities shall receive twenty-five cents per day or fractional part of a day for every prisoner placed in its jail by state and county authorities. State and county police officials are authorized and empowered to place prisoners in municipal jails of York County when so permitted by the municipality. The proper city official of the respective municipality shall keep a record of the name of each prisoner jailed by county and state officers and shall present said record to the county board of commissioners monthly. The said commissioners are hereby authorized to pay for same at the rate of 25c as set out above out of the county funds.

1937 (40) 569.

CHAPTER 91

State Penitentiary

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| 1961, 1962, 1964. Board of directors. | 1973. Refusal to aid superintendent. |
| 1963. Superintendent. | 1974. Compensation for aiding superintendent. |
| 1965. Operate manufacturing plants. | 1975. No liability for injury to person aiding. |
| 1966. Purchase or lease of farms. | 1976. Powers of keeper. |
| 1967. Prosecution of law violators. | 1977. Connivance at escape. |
| 1967-1. Board permit connections to water main used to serve woman's penitentiary. | 1978. Clothing and transportation. |
| 1968. Penal institutions purchase clothing. | 1979. Exemption from jury duty. |
| 1968-1. South Carolina penal board grant leaves of absence to inmates of institutions when Governor out State. | 1980. Cost of maintaining convicts furnished state institutions. |
| 1968-2. Board approve discharge of inmates from certain institutions. | 1981. Rewards and payment of expenses. |
| 1969. Who may be confined. | 1982. Harboring or employing escaped convicts. |
| 1970. Federal prisoners. | 1983. Duty of clerk of court and superintendent as to convicts. |
| 1971. Actions in which penitentiary is party. | 1984. Expense of transportation. |
| 1972. Suppression of disorders. | 1986 thru 1991. Capital punishment. |
| | 1992. Use of convicts by county supervisors. |

§ 1961. Board of directors of the penitentiary.

(1) **Appointment—terms.**—There is hereby created and established a board of directors of the penitentiary, to be composed of seven (7) members, one of whom shall be the Governor, ex officio, who shall be the chairman and the other six (6) shall be elected, one from each of the six congressional districts of the State. The regular terms of office of the members, other than the Governor, shall be for six years and until their successors shall have been appointed and qualified. The six members shall be appointed by the Governor by and with the advice and consent of the Senate. Their initial terms of office shall be 1, 2, 3, 4, 5 and 6 years respectively. The length of the terms of each shall be designated by the Governor in his letter, transmitting the nominations to the Senate. The initial members shall hold office until their successors shall have been appointed and qualified.

(2) **Compensation.**—The compensation of the members of the board shall

be ten (\$10.00) dollars per day when actually engaged in their duties, and traveling expenses for not exceeding four (4) days in any one month; said per diem and expenses to be paid out of the maintenance fund.

(3) **Qualifications.**—No one shall be eligible to the office of director who has any interest in the hiring of convict labor, or who has any direct personal pecuniary interest in any work upon which convict labor is employed; and should any director at any time during his term of office become disqualified as above, his office shall become ipso facto vacant, and it shall be the duty of the Governor to fill the same by appointment, and the director so appointed shall remain in office till the adjournment of the next session of the general assembly, and until his successor shall have been elected and qualified.

(4) **Report as to sentences, condition, etc., of convicts to Governor for executive clemency.**—To inquire and examine into the sentence under which the convicts in the prison are confined, and also into the condition, physical or otherwise, of the convicts so undergoing such sentence, and to report to the Governor quarterly, on the first day of November, February, May and August in each year, such cases as they may deem, after such examination, fit subjects for executive clemency.

1932 Code, § 1962; Cr. C. '22, § 944; Cr. C. '12, § 948; Cr. C. '02, § 662; G. S. 2711; R. S. 547; 1868 (14) 94; 1878 (16) 561; 1883 (18) 553; 1923 (33) 224; 1939 (41) 107.

§ 1962. Board manage and supervise state penitentiary. The Industrial School for White Boys. The State Industrial School for White Girls. and The John G. Richards Industrial Training School for Negro Boys.

(1) **Authorized—employees.**—The said board of directors is charged with the duty of managing, conducting and supervising the state penitentiary and all of the departments thereof. The Industrial School for White Boys in Florence County, The State Industrial School for White Girls, The John G. Richards Industrial Training School for Negro Boys. They shall appoint such superintendents or other executive officers, fix their salaries; (*Provided*, that all salaries not specifically fixed by law or the annual appropriation bill shall be approved by the budget commission.) terms of office, their powers and duties, except as otherwise may be specifically provided for herein, and in case where any special provision is made, shall have full power and authority to appoint such additional managing officers or executives as in its judgment necessity demands.

(2) **Powers as to such institutions.**—The board of directors shall have, in respect to the several institutions herein named, exclusive power: (1) to generally supervise the respective institutions, the property set apart for each, and the inmates thereof; (2) to prescribe such general and specific rules and regulations for the conduct and management of the respective institutions, prescribe rules and regulations for the government and discipline of the employees and inmates, and to modify the same from time to time as in its judgment will best promote the objects and purposes of the respective institutions.

(3) **Such institutions report annually to Governor.**—The said board of directors and the superintendent, in the case of the state penitentiary, and the board of trustees and such executive officers of the other named insti-

tutions as may be designated by the board, shall report annually with respect to each of the named institutions, to the Governor on or before the first day of November in each year, of the state and condition of the institution, the persons confined therein, moneys expended and received therefor, and generally of all proceedings done and had with respect to the management and conduct of each; the said report to be laid before the General Assembly.

(4) Conduct in such institutions.—The said board shall also have full power and authority to investigate any misconduct occurring in any of the said institutions, to provide suitable punishment therefor and to execute the same, and to take all such precautionary measures as in its judgment will make for the safe conduct and welfare of the respective institutions.

(5) Remove employees.—The said board is also empowered to remove any employee of any of said institutions, including the superintendent of the penitentiary, when in its judgment such removal will make for a more efficient or economic administration of the duties assigned to such employee.

(6) Employees — supplies—records—finances—riots and insurrections.—It is specifically declared herein that the said board of directors with respect to the conduct and management of the respective institutions, shall have full power and authority to employ all persons necessary to the proper conduct of the said institutions, to purchase the supplies reasonably necessary therefor, within the limits of the funds duly appropriated for any such purposes. The board shall provide for the keeping of accurate books and accounts touching and concerning said institutions and shall expend public funds appropriated therefor only for the specific purpose for which the same have been appropriated, and at all times from the records kept, it shall be able to determine the unexpended balance of any appropriation. The said board is specifically authorized and empowered to suppress any disorders, riots or insurrections that may take place in any of the institutions, and to prescribe any and all such rules and regulations as in its judgment are reasonably necessary to avoid any such occurrence.

(7) Powers herein exclusive.—The power and authority herein conferred in respect to the named institutions are exclusive in respect to them and shall be deemed to supersede any provisions of law now existing in respect thereto.

1939 (41) 107.

§ 1963. Superintendent of state penitentiary.—They shall appoint a superintendent of the state penitentiary whose regular term of office shall be for four (4) years and until his successor has been named and qualified; the expiration date of his office to be coincident with that of the term of office of the Governor who is a member of the board at the time of his appointment. His compensation is fixed at thirty-six hundred (\$3,600.00) dollars per annum, payable monthly, unless otherwise provided for in the annual appropriation bill for any particular year. In case of a vacancy occurring for any cause in such office, his successor shall be named for the unexpired term in the manner provided for in the original appointment. Before entering upon the duties of his office, the superintendent of the penitentiary shall take the oath prescribed for public officers and shall give bond, with

two or more sufficient sureties, in the sum of twenty thousand (\$20,000.00) dollars, payable to the State of South Carolina, conditioned upon the faithful performance of the duties of his office.

1939 (41) 107.

§ 1964. Board permit use of convicts upon state highways or other public projects.—The board of directors of the state penitentiary hereby are authorized and empowered to permit the use of convict labor on state highway projects or other public projects that may be practical and consistent with the safe guarding thereof. The state highway commission and/or other agencies of the State charged with the making of any public improvement for the benefit of the State may apply to the board of directors of the state penitentiary for such convict labor as in their judgment could be used to advantage in such highway projects or other public improvement or development. If in the judgment of the said board of directors such labor can with safety be devoted to any such highway projects or other public purposes, the board of directors of the penitentiary shall be authorized and empowered to devote such labor to such public use or uses. In all such work, the labor so employed shall be under the officers appointed and designated by the board of directors of the state penitentiary; but the direction of such work on any such highway project or other public improvement shall be under the control and supervision of the person or persons designated by the agency charged with the duty of performing such work or making such improvement. The authorities herein designated to let such labor and to use the same may make such contract with respect thereto as they may mutually determine upon.

1933 (38) 527.

§ 1965. Board operate manufacturing plants of state penitentiary as state enterprises.—In the event that any manufacturing and selling contract shall be abrogated by the manufacturer, or, in the event the board of directors of the South Carolina penitentiary may deem it more profitable to operate any such industry as a state owned and operated enterprise, the said board of directors of the South Carolina penitentiary are hereby authorized and empowered to conclude all agreements with any or all such manufacturers and to operate such plants and equipment as and for the State of South Carolina. In connection with the operation of such manufacturing plants, the board of directors of the South Carolina penitentiary are authorized to purchase materials entering into the manufacture of the products thereof, and to incur such other costs and expense as may be involved in the manufacture of such products. The board of directors is further authorized and empowered to provide for the sale of such products in any manner that may be deemed advisable by the said board of directors, either through selling representatives or by contracts with selling agencies. The board of directors are hereby authorized to use a sufficient amount of the appropriation and other current revenue of the South Carolina penitentiary for the purpose of carrying out the provisions of this section and all revenue received from the operation of such manufacturing plant shall be deposited in the state treasury to the credit of the

appropriation account of the South Carolina penitentiary.
1936 (39) 1528.

§ 1966. Board purchase or lease farms.—The board of directors of the penitentiary is authorized, in their discretion, to purchase or lease, out of the surplus earnings of the penitentiary, one or more farms in any part of the State, due regard being had to the reasonable healthfulness of the locality.

1932 Code, § 1981; Cr. C. '22, § 965; Cr. C. '12, § 982; Cr. C. '02, § 694; R. S. 575; 1885 (19) 74; 1939 (41) 107.

§ 1967. Board prosecute violations of law relating to convicts.—It shall be the duty of the board of directors of the penitentiary and it is hereby required, to prosecute all violations of the law in reference to the treatment of convicts.

1932 Code, § 1982; Cr. C. '22, § 966; Cr. C. '12, § 983; Cr. C. '02, § 695; R. S. 576; 1885 (19) 74; 1939 (41) 107.

§ 1967-1. Board permit connections to water main used to serve woman's penitentiary.—The board of directors of the state penitentiary is hereby authorized and empowered to permit residents on or near the Columbia to Greenville highway to connect onto the water main that the State owns and being used to serve the woman's penitentiary, upon such rates, terms and conditions as the said board may deem advisable. The said board is authorized and empowered to charge and collect such rates and to enforce the terms and conditions of connection made under the provisions of this resolution in such manner as it deems advisable: *provided*, that all net revenue, after deducting the costs of operation, derived from this resolution shall go into the state treasury.

1941 (42) 130, 246.

§ 1968. Penal institutions purchase certain clothing from state penitentiary.—All penal institutions in the State of South Carolina owned, operated or controlled by the State of South Carolina or any subdivision thereof, county, or municipal shall purchase all strips, overalls, shirts or any other clothing to be used in dressing or outfitting prisoners and convicts from the State of South Carolina penitentiary, at Columbia, South Carolina, at a price not greater than can be bought elsewhere. All purchases made from the state penitentiary shall be paid for within ten (10) days after delivery thereof.

1938 (40) 1829.

§ 1968-1. South Carolina penal board grant leaves of absence to inmates of penal institutions when Governor out State.—When the Governor is without the State the South Carolina penal board hereby is clothed with the power to grant, upon proper showing of emergencies, temporary leaves of absence to any inmate of any penal institution in South Carolina. Such board shall promptly report its action to the Governor with its reasons therefor.

1940 (41) 1706.

§ 1968-2. Such board approve discharges of inmates from certain institutions.—The South Carolina penal board is hereby authorized to pass upon all applications for temporary or final discharges of any inmates from the Industrial School for Boys at Florence, S. C., the Industrial School for Girls at Columbia, S. C., and from the John G. Richards Industrial School for Colored Youth, and issue discharges.

1940 (41) 1706.

§ 1969. Persons confine in penitentiary.—The penitentiary at Columbia, in the county of Richland, shall be the general penitentiary and prison of the State, for the reformation as well as the punishment of all offenders, in which shall be securely confined, employed, and governed, in the manner hereinafter directed, all offenders who shall have been convicted and sentenced according to law to the punishment of solitary imprisonment or confinement therein at hard labor. *Provided*, that the superintendent of the state penitentiary is authorized and directed to admit and detain in the state penitentiary for safe-keeping any prisoners so tendered by any law enforcement officer in this State by commitment duly authorized by the Governor. And no person or persons so committed and detained shall have a right or cause of action against the State or any of its officers or servants by reason of having been committed and detained in said penitentiary as aforesaid: *provided, however*, a warrant in due form for the arrest of any person so committed shall be issued within forty-eight hours after such commitment and detention.

1932 Code, § 1961; Cr. C. '22, § 943; Cr. C. '12, § 947; Cr. C. '02, § 661; G. S. 2710; R. S. 546; 1868 (14) 92; 1935 (39) 476.

See section 1039-1 for time suspended sentence to run.

Persons convicted of assault and battery are not to be sentenced to confinement in the penitentiary. *State v. Hord*, 8 S. C. 84, 45 L. R. A. 157.

The service of a sentence commences on entry into the penitentiary. *Ex parte Duckett*, 15 S. C. 210, 213, 40 Am. Rep.

694, 27 L. R. A. 600.

If sentenced to the penitentiary, one's only remedy is by appeal. *Ex parte Bond*, 9 S. C. 80, 30 Am. Rep. 20, 23 Am. St. Rep. 110, 55 Am. St. Rep. 274, 87 Am. St. Rep. 192, 45 L. R. A. 138.

§ 1970. Receive prisoners sentenced by United States authorities.—The superintendent shall receive and safely keep at hard labor, in the prison, all prisoners sentenced to confinement, at hard labor therein, by the authority of the United States, until they shall be discharged agreeably to the laws of the United States.

1932 Code, § 1970; Cr. C. '22, § 954; Cr. C. '12, 958; Cr. C. '02, § 672; G. S. 2721; R. S. 557; 1868 (14) 94.

18 USCA § 693 et seq., authorizing imprisonment of federal prisoners in state penal institutions, have not been superseded by federal penitentiary legislation, and direction of federal court that fed-

eral sentence imposed in South Carolina be served in South Carolina state penitentiary, as authorized by this section, is therefore lawful. *Harrison v. Snook*, 22 F. (2d) 169.

§ 1971. Suits at law to be in the name of superintendent.—All actions or suits at law accruing to the penitentiary shall be brought in the name of the superintendent thereof, who shall also appear for and defend actions or suits at law in which it is the interest of the penitentiary to appear as a party defendant: *provided*, that no suit or action of law shall be brought

for or defended on behalf of the penitentiary except by authority of the board of directors.

1932 Code, § 1971; Cr. C. '22, § 955; Cr. C. '12, § 959; Cr. C. '02, § 673; G. S. 2722; R. S. 558; 1882 (18) 255.

§ 1972. Superintendent require aid to suppress disorders.—In order to suppress any disorders, riots or insurrection among the prisoners, the superintendent may require the aid and assistance of any of the citizens of the State.

1932 Code, § 1965; Cr. C. '22, § 949; Cr. C. '12, § 953; Cr. C. '02, § 667; G. S. 2716; R. S. 552; 1868 (14) 94.

§ 1973. Penalty refuse aid superintendent.—If any person, when so required by the superintendent, shall neglect or refuse to give such aid and assistance, he shall pay a fine not exceeding fifty dollars.

1932 Code, § 1966; Cr. C. '22, § 950; Cr. C. '12, § 954; Cr. C. '02, § 668; G. S. 2717; R. S. 553; 1868 (14) 94.

§ 1974. Compensation for aiding superintendent.—Any person so aiding and assisting the superintendent shall receive a reasonable compensation therefor, to be paid by the superintendent, and allowed him on the settlement of his account.

1932 Code, § 1967; Cr. C. '22, § 951; Cr. C. '12, § 955; Cr. C. '02, § 669; G. S. 2718; R. S. 554; 1868 (14) 94.

§ 1975. Superintendent guiltless if injury results to persons aiding.—If, in suppressing any such disorder, riot or insurrection, any person who shall be acting, aiding or assisting in committing the same, shall be wounded or killed, the superintendent, keeper, or any person aiding or assisting him, shall be held as justified and guiltless.

1932 Code, § 1968; Cr. C. '22, § 952; Cr. C. '12, § 956; Cr. C. '02, § 670; G. S. 2719; R. S. 555; 1868 (14) 94.

§ 1976. Powers of keeper in regard disorders.—In the absence of the superintendent, the keeper shall have the same power in suppressing disorders; riots and insurrections, and in requiring aid and assistance in so doing, that is herein given to the superintendent.

1932 Code, § 1969; Cr. C. '22, § 953; Cr. C. '12, § 957; Cr. C. '02, § 671; G. S. 2720; R. S. 556; 1868 (14) 94.

§ 1977. Penalty for connivance at escape.—If any person employed in keeping, taking care of or guarding the penitentiary, or the prisoners therein, shall contrive, procure, connive at or otherwise voluntarily suffer or permit the escape of any such prisoner or prisoners, he, on conviction thereof, shall be confined at hard labor in the penitentiary not exceeding twenty years.

1932 Code, § 1975; Cr. C. '22, § 959; Cr. C. '12, § 963; Cr. C. '02, § 676; G. S. 2725; R. S. 561; 1868 (14) 95.

§ 1978. Transportation, etc., for discharged convicts — payments.—Whenever a convict shall be discharged from the penitentiary it shall be the duty of the board of directors thereof to furnish such convict with a suit of common clothes, if deemed necessary, and transportation from the penitentiary

to his home, or as near thereto as can be done by public conveyances. The cost of such transportation and clothes shall be paid at the treasury, on the draft of the said board, countersigned by the comptroller general.

1932 Code, § 1976; Cr. C. '22 § 960; Cr. C. '12, § 964; Cr. C. '02, § 678; G. S. 2727; R. S. 563; 1868 (14) 69; 1939 (41) 107.

§ 1979. Guards, keepers, et al exempt from jury, military, road or street duty.—All guards, keepers, employees and other officers employed at the penitentiary, shall be exempted from serving on juries and from military, road or street duty.

1932 Code, § 1977; Cr. C. '22, § 961; Cr. C. '12, § 965; Cr. C. '02, § 679; G. S. 2728; R. S. 564; 1872 (15) 232.

§ 1980. Costs of maintaining convicts by state institutions.—Any institution of this State getting convicts from the state penitentiary by any act or joint resolution of the General Assembly of this State shall be required to pay to the superintendent of the penitentiary all moneys expended by him for transportation, guarding, clothing and feeding said convicts while working for said institutions, and also for medical attention, and the officer or officers in charge of said institutions shall also execute and deliver to said superintendent of the penitentiary, at the end of each year, a receipt for five dollars and fifty cents per month for the work of each convict so employed.

Clemson Agricultural and Mechanical College is required to pay to the board of directors of the state penitentiary hire for all convicts used by said college, at the rate of six dollars per month, and to pay the cost of clothing, feeding and guarding said convicts while so used; and also to pay the transportation of said convicts and guards back and forth from the penitentiary to Clemson College.

1932 Code, § 1978; Cr. C. '22, § 962; Cr. C. '12, § 974; 1908 (25) 1201.

§ 1981. Rewards for capture of escaped convicts, and payment of expenses.—The superintendent of the penitentiary is authorized and required to offer a reward of twenty-five dollars for the capture of each escaped convict, and besides said reward, to pay to any person who captures and returns to the penitentiary any escaped convict, five cents per mile each for said person and convict, and any reasonable allowance for expenses for board during the travel to the penitentiary.

1932 Code, § 1979; Cr. C. '22, § 963; Cr. C. '12, § 976; Cr. C. '02, § 689; G. S. 2734; R. S. 570; 1882 (17) 952.

§ 1982. Penalties harbor or employ escaped convicts.—Whoever shall harbor or employ any escaped convict, knowing him to be such, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined or imprisoned, or both fined and imprisoned, in the discretion of the presiding judge.

1932 Code, § 1980; Cr. C. '22, § 964; Cr. C. '12, § 979; Cr. C. '02, § 691; G. S. 2736; R. S. 572; 1882 (17) 953.

§ 1983. Clerks of court to notify superintendent of number of convicts.—It shall be the duty of the clerks of the courts of general sessions and com-

mon pleas of the several counties in this State, and they are severally hereby directed, immediately after the adjournment of the court of general sessions, in their respective counties, to notify the board of directors of the penitentiary of the number of convicts sentenced by the court to imprisonment in the state penitentiary; and it shall be the duty of the said board as soon as it receives said notice to send a suitable number of guards to convey said convicts to the penitentiary.

1932 Code, § 1983; Cr. C. '22, § 967; Cr. C. '12, § 986; Cr. C. '02, § 698; G. S. 579; 1886 (19) 486; 1939 (41) 107.

§ 1984. Expenses of transportation—how paid.—No sum beyond the actual expenses incurred in conveying such convicts to the penitentiary shall be allowed for such services, which said sum shall be paid to the said board by the state treasurer upon the warrant of the comptroller general.

1932 Code, § 1984; Cr. C. '22, § 968; Cr. C. '12, § 987; Cr. C. '02, § 699; R. S. 577.

As to the pardoning power of the Governor, see Const. of 1895, art. 4, § 11, and note thereto. As to the board of pardons, see §§ 3094 et seq., and the note thereto.

§ 1986. Capital punishment to be by electrocution.—All persons convicted of capital crime and have imposed upon them the sentence of death shall suffer such penalty by electrocution within the walls of the state penitentiary, at Columbia, under the direction of the superintendent of the penitentiary instead of by hanging.

1392 Code, § 1986; Cr. C. '22, § 970; 1912 (27) 702.

As to the punishment for murder, see § 1102 and the note thereto.

A sentence that defendant be hanged "at the usual place of execution," which is fixed by this section, is not a sentence "to be publicly executed." — State v. Anderson, 85 S. C. 229, 67 S. E. 237, 137 Am. St. Rep. 887, 46 L. R. A. (N. S.) 907, L. R. A. 1916 A, 1195. This section now calls for electrocution in the place of hanging, and the place of execution has been changed.—Ed. note.

convicted before change in punishment.

—The change of the method of punishment, place of execution, and number of witnesses in this section is not disadvantageous to one convicted of murder for an act performed prior to the enactment of the law; and therefore, in so far as it applies to him, is not objectionable as an ex post facto law. State v. Malloy, 95 S. C. 441, 78 S. E. 995, Ann. Cas. 15C, 1053; Malloy v. State, 237 U. S. 180, 183, 35 S. Ct. 507, 59 L. Ed. 905; State v. Vaughn, 95 S. C. 455, 79 S. E. 312.

§ 1987. Board provide for electrocution—transportation of criminals.—The board of directors of the state penitentiary are authorized and required to provide a death chamber and all necessary appliances for inflicting such penalty by electrocution and pay the costs thereof out of any funds in their hands. The expense of transporting any such criminal to the state penitentiary shall be borne by the county in which the offense was committed.

1932 Code, § 1987; Cr. C. '22, § 971; 1912 (27) 702.

§ 1988. Judges impose sentence in conformity—sheriff convey prisoner to state penitentiary for execution.—Upon the conviction of any person in this State of a crime, the punishment of which is death, it shall be the duty of the presiding judge to sentence such convicted person to death according to the provisions of section 1986, and to make such sentence in writing, which shall be filed with the papers in the case against such convicted per-

son, and a certified copy thereof shall be transmitted by the clerk of the court of general sessions in which said sentence is pronounced to the superintendent of the state penitentiary, at Columbia, not less than ten days prior to the time fixed in the sentence of the court for the execution of the same, and in all cases it shall be the duty of the sheriff of the county in which such convicted person is so sentenced, together with one deputy or more, if in his judgment it is necessary, to convey such convicted person to the penitentiary, at Columbia, to deliver him or her to the superintendent of the state penitentiary not more than twenty days nor less than two days prior to the time fixed in the judgment for the execution of such condemned person, unless otherwise directed by the Governor, or unless a stay of execution has been caused by appeal, or granting of a new trial, or other order of court of competent jurisdiction.

1932 Code, § 1988; Cr. C. '22, § 972; 1912 (27) 702.

§ 1989. Persons witness execution.—At such execution there shall be present the executioner and at least two assistants, the penitentiary surgeon and one other surgeon, if the condemned person so desires, and electrician, the condemned person's counsel and relatives, if they so desire, ministers of the Gospel, not exceeding three, if they so desire, and not less than twelve nor more than twenty-four respectable citizens of this State, to be designated by the executioner.

1932 Code, § 1989; Cr. C. '22, § 973; 1912 (27) 702.

§ 1990. Executioner certify execution.—The executioner and the attending physician shall certify the fact of such execution to the clerk of the court of general sessions in which such sentence was pronounced, which certificate shall be filed by the clerk with the papers in the case.

1932 Code, § 1990; Cr. C. '22, § 974; 1912 (27) 702.

§ 1991. Disposition of body.—The body of person executed shall be delivered to relatives; and in case no claim is made by relatives for such body the same shall be disposed of as bodies of convicts dying in the state penitentiary: *provided*, that if nearest relatives of persons so executed desire, that body be carried to former home, if in the State, the expenses for such transportation shall be paid by penitentiary authorities, who shall draw their warrant upon county treasurer of county from which said convict came and said county treasurer shall pay same and charge to item of court expenses.

1932 Code, § 1991; Cr. C. '22, § 975; 1912 (27) 702.

§ 1992. Supervisors may use certain convicts.—The county supervisor from each county in the State may be allowed to use any of the convicts he may select, sentenced from his county to the state penitentiary, without charge, for the purpose of working the roads of his county, and for such other purposes as he may deem proper. Said convicts shall be under the absolute custody and control of the supervisor and whatever guards he may ap-

1932 Code, § 1992; Cr. C. '22, § 976; 1914 (28) 626.
point.

Supervisor need not obtain consent of superintendent.—Under this section, allowing the county supervisor to select convicts needed to work roads, the supervisor is not bound to obtain the consent of the superintendent of the penitentiary to his selection. *White v. Sanders*, 114 S. S. 54, 103 S. E. 86.

CHAPTER 92

Correctional Institutions

- ARTICLE 1. South Carolina Industrial School, § 2014.
ARTICLE 2. John G. Richards Industrial Training School for Negro Boys, § 2021.
ARTICLE 3. The State Industrial School for Girls, § 2024.

ARTICLE 1

South Carolina Industrial School

- | | |
|---|---|
| 2014. Established—authority. | 2019. Support. |
| 2016. Procedure for commitment and dismissal of boys. | 2020. Transfer certain inmates to state hospital. |
| 2017. Courts may commit boys to. | |

§ 2014. Established—authority.—There is hereby established under the care of this State a reformatory and industrial school, under the name and style of South Carolina Industrial School, which is hereby declared to be a body corporate, and as such may sue and be sued, plead and be impleaded, in its corporate name, and may have and use a common seal, which it may alter at its pleasure, and shall have the right to acquire, by purchase, deed, devise, bequest or otherwise, such property, real and personal, as may be necessary or proper for its purposes, and may have and exercise all such powers and privileges as may be necessary or proper for carrying out the purposes of its organization, as herein declared.
1932 Code, § 2014; Cr. C. '22, § 998; Cr. C. '12, § 990; 1906 (21) 133; 1916 (29) 884; 1939 (41) 107.

§ 2016. Procedure for commitment and dismissal of boys.—White boys between their twelfth and seventeenth year may be voluntarily committed to said institution by their parents or guardians, or the persons having such boys in charge, or who, having no parent or guardian, or other person to care for them, may voluntarily commit themselves to its keeping: *provided*, that in the case of boys committed otherwise than upon a conviction of crime, the warrant of commitment shall not be valid until approved and endorsed in writing by a judge of the circuit court, or probate court, or a judge of a county court, of this State, at chambers or otherwise, after careful investigation: any commitment under this section, whether by judge, magistrate, parent or guardian, or by any other person having in charge the said boy, or by the said boy himself, if he has no person to care for him, shall be full and sufficient authority to the trustees, officers and agents

of said school for the detention and keeping therein of the boy so committed. Any boy committed to said institution under the provisions of sections 2014 to 2017, inclusive, shall be kept therein until he arrives at the age of twenty-one years, unless sooner dismissed therefrom by order of the South Carolina penal board. From the time of the lawful reception of any boy into said institution, and during his stay therein, said institution shall have exclusive care, custody and control of said boy. Any boy committed under the terms of said sections to said institution shall be conveyed by the sheriff, deputy sheriff, or persons appointed by the sheriff of the county in which such boy resides, to the said institution at Florence, and the expense of such conveyance and delivery shall be borne by such county: *provided*, that the judge who commits or approves the commitment may in his discretion order that such boy be sent to said institution without the attendance of an officer or in such manner as may be advisable.

1932 Code, § 2016; Cr. C. '22, § 1000; Cr. C. '12, § 993; 1906 (25) 133; 1916 (29) 886; 1926 (34) 1728; 1939 (41) 107; 1940 (41) 1706.

Discretion as to parole.—The discretion left to the managers of the state industrial school to determine when an infant shall be paroled, is not arbitrary, but subject to supervision, revision, and control in manner prescribed by law. *State v. Cagle*, 111 S. C. 548, 96 S. E. 291, 8 A. L. R. 854.

§ 2017. Courts may commit boys to.—When any white boy between his twelfth and seventeenth birthday shall be indicted for any crime, before he is tried, by consent of his parents or guardian or person having lawful custody of him, the judge or magistrate before whom he is indicted may commit such boy to the industrial school for training and education, or if after trial and conviction in lieu of sentence for punishment of such crime, the presiding judge or magistrate may commit such boy to said industrial school until released by order of the South Carolina penal board.

1932 Code, § 2017; Cr. C. '22, § 1001; Cr. C. '12, § 994; 1906 (25) 133; 1910 (26) 756; 1912 (27) 530; 1926 (34) 1728; 1939 (41) 107; 1940 (41) 1706.

Section is not unconstitutional as denying equal protection of the laws.—This section, providing that infants tried and convicted may be sentenced to the state industrial school until they reach the age of 21, is not unconstitutional, in that it denies infants equal protection of the laws, especially in view of Const. of 1895, art. 12, § 7, expressly conferring upon the legislature authority to establish a reformatory for juvenile offenders. *State v. Cagle*, 111 S. C. 548, 96 S. E. 291, 8 A. L. R. 854.

Section to be liberally construed.—Statutes concerning infants are entitled to favorable and liberal construction, and it is not a valid objection to them that within reasonable limits they may deprive children of their liberty or their

parents of their custody. *State v. Cagle*, 111 S. C. 548, 96 S. E. 291, 8 A. L. R. 854.

This section authorizes the court to sentence an infant to the industrial school without the parents' consent. *State v. Cagle*, 111 S. C. 548, 96 S. E. 291, 8 A. L. R. 854.

And discretion to commit will not be disturbed by Supreme Court without good cause.—Where court found that interests of infant defendants would be promoted by sentence to state industrial school, Supreme Court is bound to assume that discretion was wisely exercised, where evidence upon which that conclusion was reached is not before it. *State v. Cagle*, 111 S. C. 548, 96 S. E. 291, 8 A. L. R. 854.

§ 2019. Support.—All expenses of maintaining said reformatory at Florence shall be borne by the State, except such sums as may be paid by the parents or guardians of certain boys.

1932 Code, § 2019; Cr. C. '22, § 1003; Cr. C. '12, § 997; 1906 (25) 133; 1912 (27) 530.

§ 2020. Transfer certain inmates to state hospital.—Whenever any inmate of the South Carolina Industrial School, located at Florence, in the county of Florence, is found demented or insane, this fact being determined as now provided by law in such cases, such inmate shall be forthwith conveyed by the said school to the state hospital for care and treatment, and the expenses therefor shall be borne by the county from which such inmate has been committed.

1932 Code, § 2020; Cr. C. '22, § 1004; 1914 (28) 666.

ARTICLE 2

John G. Richards Industrial Training School for Negro Boys

2021. Establishment.

2023. Commitment.

2022. Designated—maintenance.

§ 2021. Establishment — support — persons commit to—discipline — authority of directors.—The board of directors of the state penitentiary is hereby authorized and required to set apart so much of the state farm, in the county of Lexington, as may be necessary for a reformatory, exclusively for colored boys. The board shall also provide suitable buildings and stockade for the safekeeping and comfort of persons sentenced thereto.

The board of directors of the penitentiary is authorized to use any money on hand, or that may accrue out of the profits of the state penitentiary, to defray the expenses incurred in providing such buildings and stockade and other appurtenances to the state reformatory farm.

The board of directors of the penitentiary shall place in the reformatory all male criminals, other than white boys, under sixteen years of age, but not under age of twelve, who shall be legally sentenced to said reformatory on conviction of any criminal offense in any court having jurisdiction thereof and punishable by imprisonment in the state penitentiary. The discipline to be observed in the said prison shall be reformatory, and the warden shall have power to use such means of reformation, consistent with the improvement of the inmates, as may be prescribed by the board. The board shall provide for the instruction of the inmates in morals as well as useful labor.

1932 Code, § 2021; Cr. C. '22, § 1005; Cr. C. '12, § 989; Cr. C. '02, § 700; 1900 (23) 443; 1906 (24) 133; 1926 (34) 1728; 1939 (41) 107.

§ 2022. Designated—maintenance.—The reformatory now in operation on the state farm, in Lexington County, referred to in section 2021, shall be used exclusively for colored boys and shall be known and designated as the John G. Richards Industrial Training School for Negro Boys. The cost of maintaining such reformatory for colored boys to be defrayed, as at present, out of the earnings of the state penitentiary.

1932 Code, § 2022; Cr. C. '22, § 1006; Cr. C. '12, § 996; 1906 (25) 133; 1930 (36) 2160; 1939 (41) 107.

§ 2023. Commitment.—The present laws governing commitment of boys

to the South Carolina Industrial School, shall apply to John G. Richards Industrial School for Negro Boys; it being the intention of this section to make uniform the laws governing the two institutions.

1932 Code, § 2023; Cr. C. '22, § 1007; 1918 (30) 890; 1930 (36) 2160; 1939 (41) 107; 1940 (41) 1706.

ARTICLE 3

The State Industrial School for Girls

2024. Established.

2025. Corporate powers.

2026. Advisory group for girls' industrial school.

2027. Buildings.

2029. Persons admit.

2030. Commitment.

2031. Procedure for commitment.

2032. Term and form of commitment.

2033. Custody of inmates.

2034. Transfers to penitentiary.

2035. Epileptics etc., not to be admitted.

2036. Paroles.

2037. Accessories to violations of rules.

2037-1. Public school.

§ 2024. Established.—There is hereby established under the provisions of §§ 2024 thru 2037 an institution for females to be known as "The State Industrial School for Girls."

1932 Code, § 2024; Cr. C. '22, § 1008; 1918 (30) 853.

§ 2025. Corporate powers.—The State Industrial School for Girls is hereby declared to be a body corporate and, as such, may sue and be sued, plead and be impleaded, in its corporate name; may have and use a proper seal, which it may alter at its pleasure; and shall have the right to acquire by purchase, deed, devise, lease for a term of years, bequest, or otherwise, such property, real and personal, in fee simple without limitations as may be necessary or proper for carrying out the purposes of its organization as herein declared.

1932 Code, § 2025; Cr. C. '22, § 1009; 1918 (30) 853.

§ 2026. Advisory group for girls' industrial school.—The Governor is hereby authorized to appoint three women, who shall act as an advisory group for the administration of the Girl's Industrial School.

1939 (41) 432.

§ 2027. Buildings.—It is declared to be the purpose and policy of the State with respect to said institution that the buildings to be constructed for its use shall be plain and inexpensive in character, and that, in so far as practicable, the labor in constructing such buildings, improvements, and facilities, shall be supplied by the convicts of the state penitentiary, as hereinafter provided.

1932 Code, § 2027; Cr. C. '22, § 1011; 1918 (30) 853; 1920 (31) 999; 1939 (41) 107.

§ 2029. Persons admit.—Sections 2024 thru 2037 shall apply only to white females between the ages of twelve and twenty years residing within or actually being within the borders of any county or city of the State of South Carolina:

(a) Who shall have been tried before any magistrate, county, city, or cir-

cuit court and found guilty of violating any law or laws for which the punishment is fine or imprisonment in the state penitentiary, or in any county or city jail, or by hard labor for any county or city; or

(b) Who knowingly associate with thieves, vicious, or immoral persons; are incorrigible; absent themselves from home without the consent of their parents or guardians or without just cause; are growing up in idleness or crime; knowingly visit or enter a house of ill repute; visit or patronize gambling houses, saloons, or other vicious or immoral resorts; wander about the streets at night; use vile, obscene, or indecent language; or are immoral or indecent.

1932 Code, § 2029; Cr. C. '22, § 1013; 1918 (30) 853; 1926 (34) 1728.

§ 2030. Commitment.—When any white female between the ages of twelve and twenty years shall have been tried before any magistrate, county, city or general sessions court, and found guilty of a violation of any law or laws punishable by fine or imprisonment in the state penitentiary, or in any county or city jail, or by hard labor for any county or city, if, in the opinion of said court, the interest of such female would thereby be promoted said court may commit said female, in lieu of fine or imprisonment, to The State Industrial School for Girls for an indeterminate period not to extend beyond the twenty-first birthday of said female: *provided*, that if, in the opinion of said court, said female should be placed on probation rather than imprisoned or fined, said court shall remand said female to the judge of probate in the county in which her case arose with instructions to this effect, if it be a general sessions court, or with recommendations, if it be any other court; and in the latter instance the said judge of probate shall then handle the case as he may deem best in accordance with the provisions of §§ 2024 thru 2037 and the laws of this State.

1932 Code, § 2030; Cr. C. '22, § 1014; 1918 (30) 853; 1926 (34) 1728.

§ 2031. Procedure for commitment.—Any reputable person, or any state, county or municipal official, having reason to believe that a white girl comes within the provisions of §§ 2024 thru 2037, may file with the judge of probate of the county in which said girl is at that time living, a petition, which may be upon information and belief, stating the girl's name and residence, together with the names and residences of her parents, guardian, or other person or persons having custody, control, or supervision of such girl in so far as same may be known to petitioner. The petitioner shall also state the reasons upon which he or she believes said female a juvenile delinquent under the terms of §§2024 thru 2037. Thereupon, the said judge of probate shall issue a summons to said female and to the person or persons having the custody or control of said female to appear with her before him and if, in the opinion of said judge, said summons is ineffectual or likely to be, he may issue a warrant for said female and the parents or custodians of said girl, and in either case failure to appear may be treated as contempt of court. The court shall designate the disposition of the female pending trial. In handling the case the court may adopt any form of procedure which it deems best suited to ascertain the truth. When demanded by said female, or when the court deems advisable, a jury of six shall be empaneled to decide the case. All trials provided for herein shall be as nearly pri-

vate as possible, the public being excluded to the maximum extent. If said female be adjudged guilty, the court shall either commit her to the State Industrial School for Girls or place her on probation: *provided*, that if she violates her probation she shall then be committed to the said industrial home: *provided*, that when a jury of six is to be empanelled the sheriff shall, at the request of the probate judge, prepare a list of eighteen names from which the six jurors shall be drawn in the same manner as jurors are drawn now in magistrate's court.

1932 Code, § 2031; Cr. C. '22, 1015; 1918 (30) 853; 1923 (33) 174.

§ 2032. Term and form of commitments.—All commitments to The State Industrial School for Girls shall be for an indeterminate period not to extend beyond the twenty-first birthday of the person committed; they shall be made in the following form or one of similar import, according to the facts, and shall not be valid unless approved and endorsed in writing by the judge of the court making the commitment and attested thereto by the clerk of said court if there be such clerk:

ORDER OF COMMITMENT

State of South Carolina,
County of _____

Be it remembered, That on the _____ day of _____, A. D. 19____ application was made to the undersigned, magistrate or judge of the _____ court of _____ County, State of South Carolina, by _____ for the commitment of _____ to the custody of board of directors of state penitentiary, and upon due proof, I do find that said _____ is a suitable person to be so committed.

It is, therefore, ordered that the application of the said _____ be granted; that the said _____ be, and is hereby, committed to the custody of board of directors of state penitentiary, to be detained by it at the State Industrial School for Girls, or such other place as may be designated by said board, where she can be most faithfully and properly cared for, and that she shall be detained therein until she reaches the age of twenty-one years, unless sooner released by said board, subject to such rules and regulations as said board may establish; it is further ordered that the entire cost of conveying her thereto be paid by _____ County as provided by law.

I find that said girl is charged with (state the charge explicitly) _____
That she was born at _____ on the _____ day
of _____ A. D. _____. That her father's name and residence is
_____, and his occupation is _____. That her
mother's name and residence is _____, and her occupation is
_____. That the names and residences of her nearest rela-
tives, or of her guardian, are as follows:

In witness whereof, I have hereunto subscribed my name and caused to be
affixed the seal of said court, at _____, this _____ day of _____
A. D. 19____

_____, Judge of the Court of _____ County.

Attest:

_____, Clerk of said Court

1932 Code, § 2032; Cr. C. '22, § 1016; 1918 (30) 853; 1939 (41) 107.

§ 2033. Custody of inmates.—Any commitment under §§ 2024 thru 2037 shall be full and sufficient authority to the said board, officers, and agents of the said industrial school for the detention and keeping therein of any girl until she arrives at the age of twenty-one years, unless sooner dismissed therefrom by order of the South Carolina penal board, or released therefrom by order of a judge of the Supreme Court or circuit court of this State, rendered at chambers or otherwise, in a proceeding in the nature of an application for a writ of habeas corpus. From the time of lawful reception of any girl into said institution, and during her stay therein, said institution shall have exclusive care, custody, and control of said girl, and the said board of directors shall cause said girl to be instructed in such branches of useful knowledge as may be suited to her years and capacity; and the said board shall also cause said girl to be taught a useful trade or other means of earning an honest livelihood.

1932 Code, § 2033; Cr. C. '22, § 1017; 1918 (30) 853; 1939 (41) 107; 1940 (41) 1706.

§ 2034. Transfers to penitentiary.—The said board of directors of the penitentiary shall have the power to transfer temporarily to the State penitentiary any white female who has been committed to the said industrial home, who is more than eighteen years of age, and whose presence in the said industrial home for girls appears to be seriously detrimental to the welfare of the institution. It shall be the duty of the superintendent of the state penitentiary, on behalf of the board of directors thereof, to receive such females as may be transferred thereto as herein provided, and properly care for them. Each female thus transferred to the state penitentiary shall be held therein, subject to all the rules and discipline of the said state penitentiary, until she shall reach the age of twenty-one years, provided that the said board may by written requisition, which the said superintendent of the said penitentiary shall honor, require the return to the said industrial school of any female who may have been so transferred. The costs in making such transfers to and from the said state penitentiary shall be borne by the said industrial school for girls.

1932 Code, § 2034; Cr. C. '22, § 1018; 1918 (30) 853; 1939 (41) 107.

§ 2035. Epileptics, etc., not to be admitted—transfers.—No girl shall be committed to said industrial school who is epileptic, insane, or feeble-minded. The court shall also furnish a statement of such facts as can be ascertained concerning the personal and family history of the girl. If it shall develop, after a girl is committed to this institution, that she is an epileptic, insane, feeble-minded, or paralytic, such girl may be transferred by the said board to such other state institution, now in existence or hereafter created, as in their judgment is best qualified to care for such girl, in accordance with the laws of this State.

1932 Code, § 2035; Cr. C. '22, § 1019; 1918 (30) 853; 1939 (41) 107.

§ 2036. Paroles—parole officers.—Whenever the South Carolina penal

board shall deem it for the best interests of any girl in its custody, it shall instruct the superintendent of the said industrial home to release such girl on parole as soon as suitable provisions therefor shall have been made. One or more women shall be employed as visiting agents or parole officers for the said school, whose duty it shall be, under the direction of the said board, to find homes for the girls so released, visit them thereafter, and to carry on such other features of good parole work as may from time to time prove necessary or advisable. No girl shall be placed in a home which has not been previously investigated by such agent and a full report thereof made to the said board. Such agent shall visit such girls as often as the board shall deem necessary to ascertain whether they are properly placed, and shall from time to time make to the board full reports of all investigations and visits made by her. It shall be the duty of the board to recall any girl who may not conduct herself properly or who does not have a suitable home.

It shall be the duty of the said visiting agent or agents to ascertain and report to the board all facts regarding the personal and family history of the girl she can, together with such other data as may be deemed of value in the proper treatment of said girl.

1932 Code, § 2036; Cr. C. '22, § 1020; 1918 (30) 853; 1939 (41) 107; 1940 (41) 1706.

§ 2037. Accessories to violations of rules, etc., guilty of misdemeanor.—The board of directors of penitentiary shall adopt rules for the conduct of the girls legally committed to their custody not inconsistent with §§ 2024 thru 2037. Any person who is convicted in any court of competent jurisdiction of causing or encouraging any such girl to violate any of such rules shall be deemed guilty of a misdemeanor, and shall be fined in any sum not exceeding five hundred dollars, to which may be added imprisonment in the state penitentiary for a period not exceeding six months.

Specifically, it shall be unlawful for any person to cause, aid, encourage or influence any girl, who is a ward of the State Industrial School for Girls, to enter or remain in a house of prostitution, a house or lodging place used for immoral purposes, a gambling place, to violate any law of this State or ordinance of any city, to indulge in vicious or immoral conduct, to violate her parole or run away from the supervision of the authorities of said industrial school, or to harbor any such girl who has escaped from such industrial school, or who is running away from the supervision of the authorities of same; and any person who violates any of the provisions of this section shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not exceeding five hundred dollars, to which may be added imprisonment in the state penitentiary for a period not exceeding six months.

1932 Code, § 2037; Cr. C. '22, § 1021; 1918 (30) 853; 1939 (41) 107; 1940 (41) 1706.

§ 2037-1. Public school at The State Industrial School for Girls.

(1) **Establish.**—The county board of education of Richland County is hereby empowered and directed to establish a public school at The State Industrial School for Girls, near Columbia, South Carolina, for the inmates of the said school whose age would make them eligible for attendance upon any public school of the State. Upon the establishment of the said school

it shall participate in state aid along with the other public schools of the State and under the provisions of law applicable to them. State aid accruing to the said school shall be paid by the State over to the county treasurer of Richland County, and shall be paid out by him upon warrants duly approved and signed by the county board of education of Richland County. *Provided, however,* that the said school shall not participate in the proceeds of the tax arising from the three-mill constitutional levy.

(2) Teachers.—The teachers for the said school shall be employed by the board of directors of state penitentiary: *provided, however,* that anyone who has been teaching in the said school for the past three years, immediately preceding March 10, 1938, shall be considered as having had teaching experience in public schools and entitled to be paid on the basis of such experience.

(3) Reports.—The teacher who is designated as principal of the school shall make monthly and annual reports to the county superintendent of education of Richland County as now required by law of principals of other public schools in the State.

1938 (40) 1608; 1939 (41) 107.

Constitution of the United States of America of 1787 and Amendments

Article I

1. Legislative powers, in whom vested.
2. House of Representatives, how Representatives, and by whom chosen. Qualifications of a Representative. Taxes, how apportioned. Census. Vacancies to be filled. Power of choosing officers, and of impeachment.
3. Senators, how and by whom chosen. How classified. State Executive to make temporary appointments in case, etc. Qualifications of a Senator. President of the Senate has right to vote. President pro tem. and other officers of Senate, how chosen. Power to try impeachment. When President is tried, Chief Justice to preside. Sentence.
4. Times, etc., of holding elections, how prescribed. One session in each year.
5. Membership. Quorum, Adjournments. Rules. Power to punish or expel. Journal. Time of adjournment limited unless, etc.
6. Compensation. Privileges. Disqualification in certain cases.
7. House to originate all revenue bills. Veto. Bill may be passed by two-thirds of each House, notwithstanding, etc. Bill not returned in ten days. Provision as to all orders, etc., except, etc.
8. Powers of Congress.
9. Provision as to migration or importation of certain persons. Habeas corpus. Bills of attainder, etc. Taxes, how apportioned. No exports duty. No commercial preferences. No money drawn from Treasury unless, etc. No titular nobility. Officers not to receive presents, unless, etc.
10. States prohibited from the exercise of certain powers.

Article II

1. President and Vice-President, their term of office. Electors of President and Vice-President, number, and how appointed. Electors to vote on same day. Qualification of President. On whom his duties devolve in case of his removal, death, etc. President's compensation. His oath.
2. President to be Commander-in-Chief. He may require opinion of, etc., and may pardon. Treaty-making power.

Nomination of certain officers. When President may fill vacancies.

3. President shall communicate to Congress. He may convene and adjourn Congress in case, etc. Shall receive ambassadors, execute laws, and commission officers.
4. All civil offices forfeited for certain crimes.

Article III

1. Judicial power. Tenure. Compensation.
2. Judicial power, to what cases it extends. Original jurisdiction of Supreme Court. Appellate. Trial by jury, except, etc. Trial, where.
3. Treason defined. Proof of, punishment.

Article IV

1. Credit to be given to public Acts, etc., of every State.
2. Privileges of citizens of each State. Fugitives from justice to be delivered up. Persons held to service, having escaped, to be delivered up.
3. Admission of new States. Power of Congress over territory and other property.
4. Republican form of government guaranteed. Each State to be protected.

Article V

Constitution, how amended. Proviso.

Article VI

Certain debts, etc., adopted. Supremacy of Constitution, treaties and laws of the United States. Oath to support Constitution, by whom taken. No religious test.

Article VII

What ratification shall establish Constitution.

AMMENDMENTS

Article I

Religious establishment prohibited. Freedom of speech, of the press, and right to petition.

Article II

Right to keep and bear arms.

Article III

No soldier to be quartered in any house unless, etc.

Article IV

Right of search and seizure regulated.

Article V

Provisions concerning prosecutions, trials and punishments. Private property not to be taken for public use without, etc.

Article VI

Further provisions respecting criminal prosecutions.

Article VII

Right of trial by jury secured.

Article VIII

Bail, fines and punishments.

Article IX

Rules of construction.

Article X

Same subject.

Article XI

Same subject.

Article XII

Manner of choosing President and Vice-President.

Article XIII

1. Slavery abolished.
2. Power of Congress, etc.

Article XIV

1. Who citizens; privileges.
2. Apportionment and basis of representation.

sentation.

3. Political disabilities.
4. Validity of public debt; debts of the rebellion, or for slaves, invalid.
5. Power of Congress, etc.

Article XV

1. Right to vote not abridged by race, color or previous condition.
2. Power of Congress, etc.

Article XVI

Power of Congress to collect taxes on incomes.

Article XVII

Senators, vote of.

Article XVIII

Prohibiting sale liquors, etc.

Article XIX

Vote of citizen not to be denied or abridged on account of sex.

Article XX

Time terms of President, Vice-President and members of Congress commence—Vacancy in President's office or Vice-President's office.

Article XXI

Eighteenth amendment repealed—intoxicating liquors.

Preamble and Object of the Constitution

WE THE PEOPLE of the United States, in order to form a more perfect Union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this CONSTITUTION for the United States of America.

Article I

§ 1. Legislative powers—in whom vested.—All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

§ 2. (1) House of Representatives—how and by whom chosen.—The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislature.

(2) Qualifications of a Representative.—No person shall be a Representative who shall not have attained the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

(3) Representatives and direct taxes, how apportioned—census.—[Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective

numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons.] The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of Representatives shall not exceed one for every thirty thousand, but each State shall have at least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five and Georgia three.

(4) **Vacancies to be filled.**—When vacancies happen in the Representation from any State, the Executive authority thereof shall issue writs of election to fill such vacancies.

(5) **Power of choosing officers and of impeachment.**—The House of Representatives shall chuse their speaker and other officers; and shall have the sole power of impeachment.

§ 3. (1) **Senators—how and by whom chosen.**—The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six years; and each Senators shall have one vote.

(2) **How classified—state executive to make temporary appointments, in case, etc.**—Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the Senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one-third may be chosen every second year; and if vacancies happen by resignation, or otherwise, during the recess of the Legislature of any State, the Executive thereof may make temporary appointments until the next meeting of the Legislature, which shall then fill such vacancies.

(3) **Qualification of a Senator.**—No person shall be a Senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.

(4) **President of the Senate—his right to vote.**—The Vice-President of the United States shall be president of the Senate, but shall have no vote, unless they be equally divided.

(5) **President pro tem., and other officers of Senate—how chosen.**—The Senate shall chuse their other officers, and also a president *pro tempore*, in the absence of the vice-president, or when he shall exercise the office of President of the United States.

(6) **Power to try impeachments—when President is tried, Chief Justice to preside.**—The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no person shall be convicted without the concurrence of two-thirds of

the members present.

(7) **Sentence.**—Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.

Subdivision (2) of this section bears a striking resemblance to §§ 2 and 3 of art. 5 of the State Constitution—so much so that we are unhesitatingly led to believe that the framers of our state constitution intended to organize a Supreme Court upon the model of the senate of the United States as to classification of its component parts and their periodical rotation, and also as to the mode of perpetuating the scheme by providing elections to fill vacancies in unexpired terms. *Simpson v. Willard*, 14 S. C. 191, 199, 50 L. R. A. (N. S.) 346.

All that we design to show is the fact that this section of the constitution of the United States, so analogous in its phraseology and provisions to that of the section of our constitution, has never received by any legislative body, state or national, nor by any learned commentator on constitutional law, but one exposition, and that is that the terms of office of the three classes of senators must follow each other in duration and end in regular order of rotation and periodical succession, and can never, by election to fill unexpired terms and casual vacancies, be so deranged as to destroy this sliding scale. *Simpson v. Willard*, 14 S. C. 191, 200, 50 L. R. A. (N. S.) 346.

The original division of senators into three classes, to enter and to depart at stated periods in regular rotation, is a fundamental feature of the organic law, intended to be a continuing and perpetual feature of the senate so long as that august body lasts; and that this succession of entry and departure by the classes of senators cannot be interfered

with nor deranged by any action, either executive or legislative, state or federal. Hence, in every instance, under the constitution, of an election of a senator to fill a vacancy created by the death, resignation or removal of an incumbent before the expiration of his term, the senator-elect has only held until the expiration of the unexpired term which he was chosen to fill, and no longer. It is needless to say that by no other construction could the original, leading, fundamental scheme of rotation of classes be maintained.

And that this scheme should be maintained and perpetuated was evidently the leading design and main object of the framers of the constitution; and, being so, all minor provisions must be construed to be subordinate and subservient thereto. The supplying of vacancies in unexpired terms is incidental to the preservation of an existing term of office, and hence must be so conducted and carried out as not to derange, but to preserve this fundamental and leading design of succession and regular rotation. As state after state has been admitted into the Union, two senators from each have been chosen by the legislature, invariably for the term of six years, but immediately upon entering that body, they have each, by lot, been cast into one class or another of the three divisions of senators, and their respective terms of office have been made to conform to that of the class to which lot had assigned them. *Simpson v. Willard*, 14 S. C. 191, 199, 50 L. R. A. (N. S.) 346.

§ 4. (1) Times, etc., of holding elections—how prescribed.—The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.

U. S. Stats. 1842, 47, § 2.

(2) **One session in each year.**—The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

See *Smith v. Blackwell*, 115 F. (2d) 186.

§ 5. (1) Membership—quorum—adjournments.—Each House shall be

the judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner and under such penalties as each House may provide.

(2) **Rules—power to punish or expel.**—Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member.

(3) **Journal.**—Each House shall keep a Journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either House on any question shall, at the desire of one-fifth of those present, be entered on the Journal.

(4) **Time of adjournment limited, unless, etc.**—Neither House, during the session of Congress, shall without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting.

§ 6. (1) **Compensation—privileges.**—The Senators and Representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the Treasury of the United States. They shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same; and for any speech or debate in either House, they shall not be questioned in any other place.

(2) **Disqualification in certain cases.**—No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States shall be a member of either House during his continuance in office.

Editor's note.—It is to be regretted that the Supreme Court of the United States has not spoken in regard to the true meaning to be accorded the words "privileged from arrest." See *Worth v. Norton*, 56 S. C. 56, 33 S. E. 792, 76 Am. St. Rep. 524, 45 L. R. A. 563, Ann. Cas. 17B, 643. It is fortunate, however, that a great many of the lesser courts have construed this term, and a great many of these constructions, including one by the United States Circuit Court, have been placed hereunder.

The privilege of a member of congress is the same as a member of parliament. *State v. Smalls*, 11 S. C. 262, 274, 58 Am. Dec. 244, 97 Am. Dec. 715, 53 L. R. A. 573, L. R. A. 1916A, 835. See also, the authority therein cited.

The words "privileged from arrest" as used in this section mean freedom from service of any civil process. These are the words of the common law of the mother country. *Worth v. Norton*, 56 S. C. 56, 33 S. E. 792, 76 Am. St. Rep. 524,

45 L. R. A. 563, Ann. Cas. 17B, 643.

And this includes freedom from a summons in a civil case.—In our own state, in the case of *Tillinghast v. Carr*, 4 McC. 152, 76 Am. St. Rep. 534, 23 L. R. A. 633, when the privilege of a member of the house of representatives of the State of South Carolina was invaded by a summons in a civil proceeding, the court held that the language of the fourteenth section of art. 3 of the state constitution (which was in these words: "The members of both houses shall be protected in their persons and estates, during their attendance on, going to, and returning from, the legislature, but these privileges shall not be extended so as to protect any member who shall be charged with treason, felony or breach of the peace") was broad enough to cover the case, not only of arrest, but summons in a civil proceeding. The court in its reasoning uses this language: "It must be obvious that a member may be much harassed, by suits, although his body is

not arrested. His mind must, of course, be greatly disturbed and drawn off from his business; besides, it brings upon him a sort of odium which lessens his usefulness. If it be admitted that he may be served with a summons while attending on the legislature, it follows that he may be served with a summons *eundo et redeundo*, and thus he might, by ill-natured and malicious creditors, be sued in every district through which he passed, going and returning, and might be required to attend a court which might be sitting while the legislature was convened, and thus perhaps an undue advantage be taken of him," etc. *Worth v. Norton*, 56 S. C. 56, 33 S. E. 792, 76 Am. St. Rep. 524, 45 L. R. A. 563, Ann. Cas. 17B, 643.

Public policy demands such a construction.—Public policy, as well as the federal constitution, demands that these gentlemen, who are elected by the people as their representatives in the lower house of Congress, should not be harassed by civil suits while Congress is in session, and also for a reasonable time in going to and returning from Washington. *Worth v. Norton*, 56 S. C. 56, 33 S. E. 792, 794, 76 Am. St. Rep. 524, 45 L. R. A. 563, Ann. Cas. 17B, 643.

And United States circuit court has so held.—There has been a more recent case (that of *Miner v. Markham*, 28 F. 387) where Judge Dyer, of the United States circuit court, in construing this same provision of the Federal Constitution, held that "a member of Congress is entitled to exemption from service of process, although not accompanied with an arrest of the person, while on his way to attend a session of Congress." *Worth v. Norton*, 56 S. C. 56, 33 S. E. 792, 793, 76 Am. St. Rep. 524, 45 L. R. A. 563, Ann. Cas. 17B, 643.

And the courts of other states have given the term of similar construction.—There are at least two decisions of courts in other states which have construed the meaning of the word "arrest" in the Federal Constitution, as used in the section of that instrument already quoted herein, to include freedom from a summons in a civil action, as well as actual arrest in such an action. The case of *Doty v. Strong*, 1 Pin. (Wis.) 84, arose when a delegate in Congress from the territory of Wisconsin had been served with summons in a civil action. He pleaded his privilege, as a member of congress, of freedom from arrest and summons in a civil action. The Supreme Court held that, as a member of Congress, under the Federal Constitution, he was free, not only from actual arrest, but also from any summons in a civil action. Here is the language used by Mr. Justice Miller in delivering the opinion of the court: "The defendant relied upon

the sixth section of the first article of the Constitution of the United States, which, in speaking of the senators and representatives in Congress, contains the following language: 'They shall, in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to or returning from the same.' The reason of this provision is obvious. The people elect their representatives to Congress to protect their rights and advance their interests, which should not be jeopardized by the arrest of their representative for debt or private contracts of his own; and it is equally necessary that his rights and interests should be protected while absent in the public service. In order to render this provision available to the extent of its necessity, it will not do to construe the words 'privilege from arrest' in a confined or literal sense." *Worth v. Norton*, 56 S. C. 56, 33 S. E. 792, 793, 76 Am. St. Rep. 524, 45 L. R. A. 563, Ann. Cas. 17B, 643.

In the case of *Geyer v. Irwin*, 4 Dall. (Pa.) 107, 1 L. Ed. 762, the decision was made upon the same provisions in the constitution of that state, and couched in the same language as that under consideration. The court in that case declared that "a member of the general assembly is undoubtedly privileged from arrest, summons, citation, or other civil process during his attendance on the public business confided to him, and that, upon principle, his suits cannot be forced to a trial and decision while the session of the legislature continues." *Worth v. Norton*, 56 S. C. 56, 33 S. E. 792, 793, 76 Am. St. Rep. 524, 45 L. R. A. 563, Ann. Cas. 17B, 643.

It is necessary that this term be given a liberal construction.—A liberal construction must be given to these words upon principle and reason. It is just as necessary for the protection of the rights of the people that their representative should be relieved from absentsing himself from his public duty during the session of Congress, for the purpose of defending his private suits in court, as to be exempt from imprisonment on execution. If the people elect an indebted person to represent them, this construction of the Constitution must also be made to protect his rights and interests, although it may operate to the prejudice of his creditors; but the claims of the people upon his personal attendance are paramount to those of individuals, and they must submit. *Worth v. Norton* 56 S. C. 56, 33 S. E. 792, 793, 76 Am. St. Rep. 524, 45 L. R. A. 563, Ann. Cas. 17B, 643.

But it has been said in a dissenting opinion that the words "privileged from arrest" mean freedom from actual arrest only.—*Worth v. Norton*, 56 S. C. 56,

33 S. E. 792, 794, 76 Am. St. Rep. 524, 45 274, 58 Am. Dec. 244, 97 Am. Dec. 715,
L. R. A. 563, Ann. Cas. 17B, 643. 53 L. R. A. 573, L. R. A. 1916A, 835.
Applied in *State v. Smalls*, 11 S. C. 262,

§ 7. (1) House to originate all revenue bills.—All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills.

(2) Veto—bill may be passed by two-thirds of each House, notwithstanding, etc.—return.—Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his objections to that House in which it shall have originated, who shall enter the objections at large on their Journal, and proceed to reconsider it. If after such reconsideration two-thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered, and if approved by two-thirds of that House, it shall become a law. But in all such cases the votes of both Houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the Journal of each House respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.

(3) Provision as to all orders, etc., except, etc.—Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

§ 8. Powers of Congress.—The Congress shall have power (1) To lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States.

(2) To borrow money on the credit of the United States.

(3) To regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

(4) To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States.

(5) To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures.

(6) To provide for the punishment of counterfeiting the securities and current coin of the United States.

(7) To establish postoffices and post roads.

(8) To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.

(9) To constitute tribunals inferior to the Supreme Court.

(10) To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations.

(11) To declare war, grant letters of *marque* and *reprisal*, and make rules concerning captures on land and water.

(12) To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years.

(13) To provide and maintain a navy.

(14) To make rules for the government and regulation of the land and naval forces.

(15) To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions.

(16) To provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress.

(17) To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square), as may, by cession of particular States, and the acceptance of Congress, become the seat of the Government of the United States, and to exercise like authority over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines and arsenals, dock yards, and other needful buildings;—and,

(18) To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.

Congress has power to regulate commerce in its most enlarged and liberal sense.—By the terms used in this article, as well as from the nature of the power conferred, Congress has the exclusive power to regulate commerce, in the most enlarged and liberal sense. *Chapman v. Miller*, 2 Speer 769, 778.

And no state can have even a concurrent jurisdiction.—Under this section no state can have even a concurrent power on the same subject. *Chapman v. Miller*, 2 Speer 769, 778.

Subdivision (3) of this section originated in the design of its authors to impart harmony and uniformity to our commercial regulations, both as it regards the relations of foreign nations and the intercourse of the states with each other. *Chapman v. Miller*, 2 Speer 769, 778.

What constitutes interstate commerce.—Interstate commerce ordinarily, consists of three elements, to wit: (1) The purchasing of merchandise by a resident of one state from a resident of another state; (2) the delivery of the articles of commerce; and (3) the transportation thereof. The purchase may be made by the buyer in person, or through a traveling salesman of the nonresident, or by an

order sent by the purchaser to the non-resident. The delivery may be made directly to the purchaser when the goods are sold, or when they reach their destination, in cases where they have been consigned to him. *State v. Holleyman*, 55 S. C. 207, 31 S. E. 362, 33 S. E. 366, 45 L. R. A. 567, 11 L. R. A. (N. S.) 552, 24 L. R. A. (N. S.) 175, 2 A. L. R. 1094.

In its more limited sense, the term commerce might be confined to buying and selling, or the interchange of commodities. But, by the Constitution, it was intended to have a much more extended meaning, as may be seen by referring to other articles of that instrument. *Chapman v. Miller*, 2 Speer 769, 778.

And navigation is included.—Commerce with foreign nations and among the states, strictly considered, consists in intercourse and traffic, including in these terms navigation, and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities. *Mobile v. Kimball*, 102 U. S. 691, 702, 26 L. Ed. 238; *State v. Napier*, 63 S. C. 60, 41 S. E. 13, 16, 129 Am. St. Rep. 282, 2 L. R. A. (N. S.) 860. See, also, *Chapman v. Miller*, 2

Speer 769, 778.

The business of hiring laborers and soliciting emigrants is not "an article of commerce," within the meaning of this section, so that requiring an emigrant agent to obtain a license is in violation of such provision. *State v. Napier*, 63 S. C. 60, 41 S. E. 13, 129 Am. St. Rep. 282, 2 L. R. A. (N. S.) 860.

And a statute is not obnoxious to this clause of the Federal Constitution which does not directly affect commerce, as thus defined. *State v. Napier*, 63 S. C. 60, 41 S. E. 13, 16, 129 Am. St. Rep. 282, 2 L. R. A. (N. S.) 860.

Rules to protect persons and property are not in themselves regulations of interstate commerce.—"The rules prescribed for the construction of railroads, and for their management and operation, designed to protect persons and property otherwise endangered by their use, are strictly within the scope of the local law. They are not in themselves regulations of interstate commerce, although they control in some degree the conduct and liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the state to regulate the rights and duties of all persons and corporations within its limits." *Crawford v. Southern Ry. Co.*, 56 S. C. 136, 34 S. E. 80, 85, 88 Am. St. Rep. 95, 123 L. R. A. 1915C, 1220, L. R. A. 1915D, 653, Ann. Cas. 16E, 1205.

Nor are rulings of the railroad commissioners in an effort to remedy inadequate accommodations.—In a case where the railroad commissioners have determined that the accommodations furnished citizens of the state at a station in the state by an interstate railroad company are inadequate, its order requiring the company to stop two of its fast mail trains transporting interstate passengers at such station on flagging, is not a burden on interstate commerce under this section, and mandamus will issue to compel the trains so to stop, the writ being so framed as to give the railroad company the alternative right to provide facilities substantially the same as would be afforded the people at such station by stopping the fast mail trains on flag. *Railroad Com'rs v. Atlantic, etc., R. Co.*, 74 S. C. 80, 54 S. E. 224, 14 L. R. A. (N. S.) 293, Ann. Cas. 17B, 1220.

And this is true of a statute providing that no contract shall exempt any railroad from the liability of a common carrier.—In the case of *Chicago, etc., Ry. Co. v. Solan*, 169 U. S. 133, 18 S. Ct. 289, 42 L. Ed. 688, it was held that a statute of a state providing that no contract shall exempt any railroad corporation from the liability of a common car-

rier, or a carrier of passengers, which would have existed if no contract had been made, does not, as applied to a claim for an injury happening within the state under a contract for interstate transportation, contravene this provision. *Crawford v. Southern Ry. Co.*, 56 S. C. 136, 34 S. E. 80, 85, 88 Am. St. Rep. 95, 123, L. R. A. 1915C, 1220, L. R. A. 1915D, 653, Ann. Cas. 16E, 1205.

But ordinances of a city fixing a special license tax for all occupations carried on within the city are illegal regulations.—An ordinance of a city, fixing a special license tax for all occupations carried on within said city, is void under this subdivision as to the agent of a nonresident company, engaged in delivering pictures under a contract previously made between the customer and said company, and selling frames to customers only, with whom the purchase of the same is voluntary, and independent of the contract for the picture. *Laurens v. Elmore*, 55 S. C. 477, 33 S. E. 560, 45 L. R. A. 249, 19 L. R. A. (N. S.) 316.

The question whether a statute violates this clause will not be reviewed on appeal where it does not appear that the commodity in question was under the protection of interstate commerce. *State v. Fant*, 88 S. C. 493, 70 S. E. 1027, 1028.

So long as Congress forbears to exercise the constitutional power to regulate commerce among the several states, each state may, for itself, and within its own limits, regulate such commerce. *State v. Pinckney*, 10 Rich. 474.

Congress has power under subdivision (5) to pass a law, making treasury notes lawful money and a legal tender in payment of debts payable in dollars and cents, whether such debts were contracted before or after the law was passed. *O'Neil v. McKewn*, 1 S. C. 147, 87 Am. Dec. 125.

In relation to traffic in intoxicating liquors.—*McCullough v. Brown*, 41 S. C. 220, 19 S. E. 458, 23 L. R. A. 410, 53 L. R. A. 764, 61 L. R. A. 125, 150, 67 L. R. A. 70, 8 L. R. A. (N. S.) 126, 14 L. R. A. (N. S.) 1157, 15 L. R. A. (N. S.) 922, 933, 948, L. R. A. 1915D, 186, 3 A. L. R. 1485, 14 A. L. R. 1153. See, also, *Cantini v. Tillman*, 54 F. 969, 971; *State v. Holleyman*, 55 S. C. 207, 31 S. E. 362, 33 S. E. 366, 45 L. R. A. 567, 11 L. R. A. (N. S.) 552, 24 L. R. A. (N. S.) 175, 2 A. L. R. 1094; *State v. Davis*, 84 S. C. 512, 66 S. E. 875.

Commerce clause of Federal Constitution merely inhibits regulations of motor vehicles which result in discrimination against motor vehicles used in interstate commerce, and does not restrict state from making regulations in exercise of its police power in respect to weight and size of motor vehicles, so long as such regulations apply equally. *State*

v. John P. Nutt Co., et al., — S. C. —, 185 S. E. 25.

Statute limiting load and width of trucks using highways of state not so unreasonable as to amount to undue restraint on interstate commerce or as to violate 14th amendment. *South Carolina State Highway Department v. Barnwell Bros.*, et al., 303 U. S. 177, 82 L. Ed. 735, 58 S. Ct. 511.

Statute requiring manufacturers of fertilizers to affix to each container a tag disclosing amount in pounds of each material used therein is within the police power of the state. In requiring disclosure of secret formulas, it does not take property without due process, even as applied to products manufactured before its enactment. *National Fertilizer Ass'n, Inc., v. Bradley*, et al., 301 U. S. 178, 81 L. Ed. 990, 57 S. Ct. 747.

The imposition of an inheritance tax in state of debtor's domicile in respect of a debt due a non-resident decedent, not having a business situs in the state, violates due process clause of 14th amendment. The indebtedness of a corporation to a non-resident majority stockholder for cash advances and dividends declared has no such business situs in the state in which the corporation is domiciled as to render it subject to inheritance tax in such state. *Beidler v. S. C. Tax Commission*, 282 U. S. 1, 75 L. Ed. 131, 51 S. Ct. 54.

Lien for federal income taxes cannot, without consent of Congress, be affected by exercise of state taxing power. Hence federal income tax liens were entitled to priority over subsequently acquired liens of state assessed for specific improvements to property. *United States v. City of Greenville*, 118 F. (2d) 963.

State tax may be validly imposed on sale of gasoline used by air transport lines in interstate transportation, since the purchase of supplies to be used in carrying on interstate business is not so identified with such business as to make a sales tax on such supplies a burden on interstate commerce. *Eastern Air Transport, Inc. v. South Carolina Tax Commission*, 285 U. S. 147, 76 L. Ed. 673, 52 S. Ct. 340.

State may tax gasoline purchased in another state and brought into state and used or stored therein. *Gregg Dyeing Co. v. Query*, 286 U. S. 472, 76 L. Ed. 1232, 52 S. Ct. 632.

State cannot impose income tax on do-

mestic corporation in such manner as to discriminate against interstate commerce. *Piedmont & N. Ry. Co. v. Query*, et al., 56 F. (2d) 172.

While power to regulate commerce between states is left to Congress, a state may enact laws that indirectly affect interstate commerce so long as such laws are not a burden thereon or does not displace or interfere with federal law. — *Hollis v. Armour & Co.*, 190 S. C. 170, 2 S.E.2d 681.

Act making it unlawful to manufacture or sell impure food or drugs did not operate as burden on interstate commerce or displace or directly interfere with federal acts and regulations, and hence was not unconstitutional. *Hollis v. Armour & Co.*, 190 S. C. 170, 2 S.E.2d 681.

The Federal Pure Food and Drug Act of 1906, the Federal Meat Inspection Act of 1906, and the federal rules and regulations of the Bureau of Animal Industry, are not exclusive of state laws, acts, and policies. *Ibid.*

Statute requiring license for display of samples of goods in temporary quarters for purpose of retail sales by a person not a regular retail merchant in state is invalid as violative of commerce clause of Federal Constitution. *State v. Yetter*, 192 S. C. 1, 5 S.E.2d 291.

"Interstate commerce," within commerce clause of Federal Constitution, ordinarily consists of purchasing of merchandise by a resident of one state from a resident of another state, the delivery of the articles of commerce and the transportation thereof, and the purchase may be made by the buyer in person, or through a traveling salesman of the non-resident, or by an order sent by the purchaser to the nonresident. *Ibid.*

The displaying of samples of goods in temporary quarters by traveling salesman of nonresident seller to be purchased in another state is an element in the negotiation for the sale, and, therefore, constitutes "interstate commerce" within commerce clause of Federal Constitution. *Ibid.*

A license tax upon interstate motor carriers for use of the streets of a municipality must be exacted as compensation for the use of the streets and not for the privilege of doing business. — *Southern Fruit Co. v. Porter*, 188 S. C. 422, 199 S. E. 537.

§ 9. (1) Provision as to migration or importation of certain persons.—The migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each

person.

(2) **Habeas corpus.**—The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

(3) **Bills of attainder, etc.**—No bill of attainder or *ex post facto* law shall be passed.

(4) **Taxes—how apportioned.**—No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

(5) **No export duty.**—No tax or duty shall be laid on articles exported from any State.

(6) **No commercial preferences.**—No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to, or from, one State, be obliged to enter, clear, or pay duties in another.

(7) **No money drawn from treasury, unless, etc.**—No money shall be drawn from the Treasury, but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

(8) **No titular nobility—officers, not to receive presents, unless, etc.**—No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them, shall without the consent of the Congress, accept of any present, emolument, office, or title of any kind whatever from any King, Prince or foreign State.

Appropriation bills are annual statutes.—Appropriation of supplies is the mode by which the legislative branch of the government regulates the manner in which the public money voted at each session is to be applied to the various objects of expenditure, and the appropriation bills are annual statutes passed for that purpose. 1 Rap. & L. Law Dict., 1

Bl. Comm. 335, Note 2 Steph. Comm. 579. Note, cited in *Carolina Grocery Co. v. Burnet*, 61 S. C. 205, 39 S. E. 381, 98 Am. St. Rep. 882, 58 L. R. A. 637, 853.

See generally, *Charleston v. Oliver*, 16 S. C. 47, 129 Am. St. Rep. 268, 34 L. R. A. 655, Ann. Cas. 15A. 80; *Chapman v. Miller*, 2 Speer, 769, 772; *Harbor Com'rs v. Pashley*, 19 S. C. 315.

§ 10. States prohibited from certain powers.—(1) No State shall enter into any treaty, alliance or confederation; grant letters of *marque* and *reprisal*; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law or law impairing the obligation of contracts, or grant any title of nobility.

(2) No State shall, without the consent of the Congress, lay any impost or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

(3) No State shall, without the consent of Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into an agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

I. Subdivision (1).

A. In General.

B. Laws Impairing Obligation of Contracts.

1. General Considerations.

2. Purpose and Scope of Clause.

3. Contracts Included in Section.

a. Rules Stated.

b. Illustrations.

II. Subdivision (2).

III. Subdivision (3).

Cross Reference.

As to provision touching laws impairing the obligation of contracts in the State Constitution of 1895, see art. 1, § 8, and note thereto.

I. SUBDIVISION (1).**A. In General.**

The prohibition of this subdivision is only applicable to the legislation of States. In re Kennedy, 2 S. C. 216, 219, 87 Am. Dec. 464, 56 L. R. A. 47, Ann. Cas. 12B, 261.

"Bills of credit" embrace only such instruments as are intended to circulate as money.—State v. Moorer, 152 S. C. 455, 150 S. E. 269.

To constitute a bill of credit within this provision, it must be issued by a state, on the faith of the state, and be designed to circulate as money. They who issue it must have authority to bind the state, and must act as agents, and incur no personal responsibility, nor impart, as individuals, any credit to the paper. State v. Billis, 2 McC. 12, 9 Am. St. Rep. 750, 40 L. R. A. (N. S.) 974, 50 L. R. A. (N. S.) 966.

The bills of credit, prohibited to be issued by the states, by this provision, are promissory notes or bills for the payment of which the faith of the state only is pledged. They are such bills as were emitted by Congress and the different state anterior to the adoption of the Constitution. State v. Billis 2 McC. 12, 9 Am. St. Rep. 750, 40 L. R. A. (N. S.) 974, 50 L. R. A. (N. S.) 966.

But a note drawn on the bank of South Carolina on the credit of a particular fund is not a bill of credit. — State v. Billis, 2 McC. 12, 9 Am. St. Rep. 750, 40 L. R. A. (N. S.) 974, 50 L. R. A. (N. S.) 966.

The constitution of the United States does not prohibit the States from passing retrospective laws generally, but only ex post facto laws. In re Kennedy, 2 S. C. 216, 226, 87 Am. Dec. 464, 56 L. R. A. 47, Ann. Cas. 12B, 261.

The provision as to ex post facto laws herein found applies to criminal cases only. Byrne v. Stewart, 3 Desaus, 466, 37 Am. St. Rep. 584; Warren, etc., Co. v. Jones, 9 S. C. 288, 290; Watson v. Mercer, 8 Pet. 88, 8 L. Ed. 876; Baltimore, etc., R. Co. v. Nesbit, 10 How.

395, 13 L. Ed. 469; Locke v. New Orleans, 4 Wall. 172, 18 L. Ed. 334; Carpenter v. Com., 17 How. 456; Home Building & Loan Ass'n v. City of Spartanburg, 185 S. C. 313, 194 S. E. 139.

It was said by Mr. Justice Story in Watson v. Mercer, 8 Pet. 88, 8 L. Ed. 876: "Ex post facto laws relate to criminal and penal proceedings which impose punishment and forfeiture and not to civil proceedings which affect private rights retrospectively." Callahan v. Callahan, 36 S. C. 454, 15 S. E. 727, 730.

But all laws must in some degree have an ex post facto relation. Byrne v. Stewart, 3 Desaus, 466, 37 Am. St. Rep. 584.

But an act reviving the jurisdiction of a Superior Court so as to enable it to try persons for offenses committed during a period wherein an inferior court had exclusive jurisdiction is not an ex post facto law. State v. Sullivan, 14 Rich. 281, 286, 37 Am. St. Rep. 595, Ann. Cas. 12A, 889.

B. Laws Impairing Obligation of Contracts.**1. General Considerations.**

In general.—It was said by Mr. Justice Swayne, in delivering the opinion of the court in Walker v. Whitehead, 16 Wall. 314, 317, 21 L. Ed. 357:

"The Constitution of the United States declares that no state shall pass any 'law impairing the obligation of contracts.' These propositions may be considered consequent axioms in our jurisprudence: The laws which exist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it. This embraces alike those which affect its validity, construction, discharge, and enforcement. Nothing is more material to the obligation of a contract than the means of enforcement. The ideas of validity and remedy are inseparable, and both are parts of the obligation which is guarantied by the Constitution against impairment. The obligation of a contract 'is the law which binds the parties to perform their agreement.' Any impairment of the obligation of a contract—the degree of impairment is immaterial—is within the prohibition of the Constitution. The states may change the remedy, provided that no substantial right secured by the contract is impaired. Whenever such a result is produced by the act in question, to that extent it is void. The states are no more permitted to impair the efficacy of a contract in this way than to attack its validity in any other manner. Against all assaults coming from that quarter, whatever guise they may assume, the contract is shielded by the Constitution. It must be left with the same force and effect, including the substantial means of enforcement, which existed when it was made. The guaranty of the Constitu-

tion gives it protection to that extent. The effect of these propositions upon the judgment before us requires but a single remark. A clearer case of a law impairing the obligation of a contract, within the meaning of the Constitution, can hardly occur." *Ex parte Folsom*, 131 F. 496, 503.

Upon questions arising under the United States Constitution the State Courts must conform their decisions to those of the Supreme Court of the United States. *Cochran v. Darcy*, 5 S. C. 125, 87 Am. Dec. 465, Ann. Cas. 12B, 261.

Historical considerations. — When the Constitution of 1868 of this State was adopted and ratified, South Carolina was not a territory, but a state within the Union, and bound, as such, by all the obligations which the Constitution of the United States imposes upon the States. *Calhoun v. Calhoun*, 2 S. C. 283, 99 Am. Dec. 575, 86 Am. St. Rep. 175, 52 L. R. A. (N. S.) 543, Ann. Cas. 16C, 947.

The acceptance by Congress of a State Constitution, as republican in form, does not give the force of law to provisions therein which the Constitution of the United States inhibits. *Calhoun v. Calhoun*, 2 S. C. 283, 99 Am. Dec. 575, 86 Am. St. Rep. 175, 52 L. R. A. (N. S.) 543, Ann. Cas. 16C, 947.

A political officer does not hold by contract, in the sense of the Constitution, nor has he any vested right of property, in a constitutional sense, in the office, or in the salary thereof, before he has earned it. *Alexander v. McKenzie*, 2 S. C. 81, 25 Am. Dec. 703.

2. Purpose and Scope of Clause.

The great principle intended to be established by the Constitution was the inviolability of the obligation of contracts as the obligation existed, and was recognized by the laws in force at the time the contracts were made. *State v. Carew*, 13 Rich. 498, 510, 79 Am. Dec. 495, 120 Am. St. Rep. 479, 9 A. L. R. 7.

And it was not designed to interfere with the internal regulations which a State may think proper to adopt. — The constitutional provision in relation to laws impairing the obligation of contracts was designed to operate only on some of the undertakings contained in the contract and was not intended to interfere with the internal regulations which a State may think proper to adopt for the government of its citizens. *Barlow v. Gregory*, 31 Conn. 261, 264, cited in *Warren, etc., Co. v. Jones*, 9 S. C. 288, 290.

Nor is it confined to acts or resolutions of the legislative bodies of a State. — The prohibition, "that no State shall pass any law impairing the obligation of contracts," is not confined to acts or resolutions of the legislative bodies of a State, but is against the exercise of the

forbidden power by a State. It is the State, no matter by what body represented, which is subjected to the restraint. *Calhoun v. Calhoun*, 2 S. C. 283, 300, 99 Am. Dec. 575, 86 Am. St. Rep. 175, 52 L. R. A. (N. S.) 543, Ann. Cas. 16C, 947.

The obligation of the contract consists in the power and efficacy of the law, which applies to, and enforces the performance of, the contract, or the payment of an equivalent for non-performance. It subsists in the law applicable to the contract. This definition looks principally to that part of the obligation which imposes on the Government the duty of enforcement, treating the power of enforcement residing in the Government, under the duty imposed by the contract, as an element of value in the contract itself, protected under the Constitution. *In re Kennedy*, 2 S. C. 216, 223, 87 Am. Dec. 464, 56 L. R. A. 47, Ann. Cas. 12B, 261.

The obligation of a contract, as spoken of in the Constitution, is a legal, not a mere moral obligation; it is the law which binds the party to perform his undertaking. The obligation does not inhere or subsist in the contract itself *proprio vigore*, but in the law applicable to the contract; and this law is not the universal law of nations, but it is the law of the State where the contract is made. *State v. Carew*, 13 Rich. 498, 509, 79 Am. Dec. 495, 120 Am. St. Rep. 479, 9 A. L. R. 7.

The civil obligation interpreted by natural or universal law, modified by the municipal law, and not the mere moral obligation, is within the protection of the Constitution. *In re Kennedy*, 2 S. C. 216, 222, 87 Am. Dec. 464, 56 L. R. A. 47, Ann. Cas. 12B, 261.

It is the duty of performing the contract according to its terms and intent which the law enforces. — In *Black on Constitutional Law*, at page 524, quoted with approval in *Smith v. Jennings*, 67 S. C. 324, 45 S. E. 821, L. R. A. 1915B, 1060, 2 A. L. R. 1593, we find: "The obligation of a contract is that duty of performing the contract according to its terms and intent which the law recognizes and enforces. Any law which precludes a recovery for a breach of contract, or excuses one of the parties from performing it, or renders it invalid, or enlarges or abridges the intention or the parties, or postpones or accelerates the time of performance, or interposes such obstacles to its enforcement as practically to annul it, impairs its obligation and is void."

The objection to a law, on the ground of its impairing the obligation of a contract, can never depend upon the extent of the change which the law effects in it. Any deviation from its terms, by postponing or accelerating the performance which it prescribes, imposing conditions

not expressed in the contract, or dispensing with the performance of those which are, however minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligation. *Green v. Biddle*, 8 Wheat. 84, 5 L. Ed. 547; *Martin v. Saye*, 147 S. C. 433, 145 S. E. 186, 191.

The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and form a part of them as the measure of the obligation to perform them by the one party and the right acquired by the other. There can be no other standard by which to ascertain the extent of either, than that which the terms of the contract indicate, according to their settled legal meaning. When it becomes consummated, the law defines the duty and the right, compels one party to perform the thing contracted for, and gives the other a right to enforce the performance by the remedies then in force. If any subsequent law affect to diminish the duty or to impair the right, it necessarily bears on the obligation of the contract in favor of one party, to the injury of the other; hence any law, which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act on the remedy, is directly obnoxious to the provisions of the Constitution. *McCracken v. Hayworth*, 2 How. 608, 612, 11 L. Ed. 397, cited in *Smith v. Jennings*, 67 S. C. 324, 45 S. E. 821, L. R. A. 1915B, 1060, 2 A. L. R. 1593; *Martin v. Saye*, 147 S. C. 433, 145 S. E. 186, 191.

Such obligation must depend upon the existing laws of the state. — The "obligation of contracts," as an abstract legal entity, in this state, as in every other state, at any particular time, must depend upon, and be ascertained by, the then existing laws of the state. *Wood v. Wood*, 14 Rich. 148, 155, 10 Am. Dec. 137, 50 Am. Dec. 393, 79 Am. Dec. 495.

The law which exists at the time and place of making a contract enters into and forms a part of it. *Shuler v. Bull*, 15 S. C. 421, 433, 56 Am. Dec. 211, 72 Am. Dec. 650, 84 Am. St. Rep. 439, 36 L. R. A. (N. S.) 258, L. R. A. 1918E, 1198, citing *Walker v. Whitehead*, 16 Wall. 314, 317, 21 L. Ed. 357.

And a contract valid under the laws as expounded at the time of its making can not be impaired by subsequent judicial decision. — The Supreme Court of the United States has in numerous cases held that where a contract is valid at the time it is made, under the laws of the State as then expounded, its validity or obligation cannot be impaired by any subsequent judicial decision giving a different exposition of the law; and the Supreme Court of this state has, in two

cases (*Walker v. State*, 12 S. C. 200, 282, 64 Am. Dec. 429, 445, 125 Am. St. Rep. 815, 23 L. R. A. 347, and *Whaley v. Gailard*, 21 S. C. 560, 572, 125 Am. St. Rep. 815) deferred to the authority of that court in that class of cases which involve the question whether a particular law or decision is in violation of that clause of the Constitution which forbids a state from passing any law impairing the obligation of a contract.

But this a doctrine confined to cases of contract, and probably not even then, where it depended upon a single case, never recognized nor followed, and overruled at the first opportunity. *McLure v. Melton*, 24 S. C. 559, 58 Am. Rep. 272, see, also *Walker v. State*, 12 S. C. 200, 64 Am. Dec. 429, 445, 125 Am. St. Rep. 815, 23 L. R. A. 347.

A contract made in 1854, for the sale of slaves, being in conformity to public policy then existing, and legal and binding, was not invalidated by the subsequent emancipation of the slaves, and a change of public policy in reference to slavery, in view of this subdivision. *Calhoun v. Calhoun*, 2 S. C. 283, 99 Am. Dec. 575, 86 Am. St. Rep. 175, 52 L. R. A. (N. S.) 543, Ann. Cas. 16C, 947.

And consideration is essential. — It is held that the term "contract," in this subdivision, is used in its ordinary sense as signifying the agreement of two or more minds for a consideration from one to the other to do or not to do certain acts, and that there is the same necessity for a consideration to make a contract of exemption as there would be if the contract were between private parties. *Grand Lodge v. New Orleans*, 166 U. S. 143, 17 S. Ct. 523, 41 L. Ed. 951, cited in *Columbia Water Power Co. v. Campbell*, 75 S. C. 34, 54 S. E. 833, 837.

The obligation of a contract includes everything within its obligatory scope. *Martin v. Saye*, 147 S. C. 433, 145 S. E. 186, 191.

Among these elements nothing is more important than the means of enforcement. This is the breath of its vital existence. Without it, the contract, as such, in view of the law, ceases to be, and falls into the class of those "imperfect obligations," as they are termed, which depend for their fulfillment upon the will and conscience of those upon whom they rest. *Edwards v. Kearzey*, 96 U. S. 595, 600, 24 L. Ed. 793; *Martin v. Saye*, 147 S. C. 433, 145 S. E. 186, 191.

The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced — by which the parties can be obliged to perform it, *Louisiana v. New Orleans*, 102 U. S. 203, 206, 26 L. Ed. 132; *Martin v. Saye*, 147 S. C. 433, 145 S. E. 186, 191.

And whatever legislation lessens the

efficacy of these means, impairs the obligation. *Louisiana v. New Orleans*, 102 U. S. 203, 206, 26 L. Ed. 132; *Martin v. Saye*, 147 S. C. 433, 145 S. E. 186, 191.

But the obligation of a contract is not identified with the means which Government may furnish to enforce it; and a prohibition to pass any law impairing it, does not imply a prohibition to vary the remedy, nor does a power to vary the remedy imply a power to impair the obligation derived from the act of the parties. *In re Kennedy*, 2 S. C. 216, 223, 87 Am. Dec. 464, 56 L. R. A. 47, Ann. Cas. 12B, 261.

The ideas of right and remedy are inseparable. Want of right and want of remedy are the same thing. *Edwards v. Kearzy*, 96 U. S. 595, 600, 24 L. Ed. 793; cited in *Martin v. Saye*, 147 S. C. 433, 145 S. E. 186, 191.

The distinction between the obligation of a contract and the remedy for its enforcement is well established by the authorities; and while the Legislature has no right to impair the obligation of the contract, it has the undoubted right to change, modify or vary the nature and extent of the remedy, provided a substantial remedy is left the creditor. Under the United States Constitution the former power is denied to the several states, but the latter exists in full force. *Von Hoffman v. Quincy*, 4 Wall. 535, 553, 18 L. Ed. 403; *State v. County Treasurer*, 4 S. C. 520, 12 Am. Dec. 606, 61 Am. Dec. 344, cited in *Warren, etc., Co. v. Jones*, 9 S. C. 288, 290.

The legal remedies for the enforcement of a contract which belong to it at the time and place where it is made, are a part of its obligation. A state may change them, provided the change involve no impairment of a substantial right. *Cochran v. Darcy*, 5 S. C. 125, 127, 87 Am. Dec. 465, Ann. Cas. 12B, 261.

All suspensions, by statute, of remedies, existing when the contract was made, is more or less impairing its obligation. *State v. Carew*, 13 Rich. 498, 510, 79 Am. Dec. 495, 120 Am. St. Rep. 479, 9 A. L. R. 7.

But a state may constitutionally abolish imprisonment for debt as to existing contracts; for, though by so doing, it impairs the remedy of the creditor, it does not "impair the obligation of the contract" in the constitutional sense of the term. *Ware v. Miller*, 9 S. C. 13, 99 Am. Dec. 218.

Whatever belongs merely to the remedy may be altered according to the will of the state, provided such alteration does not impair the obligation of the contract. *Bronson v. Kinzie*, 1 How. 311, 11 L. Ed. 143. Cited in *Warren, etc., Co. v. Jones*, 9 S. C. 288, 289.

But any legislation which materially diminishes the remedy given by the law

to the creditor at the time his contract is made, just so far impairs the obligation of the contract. *State v. Carew*, 13 Rich. 498, 510, 79 Am. Dec. 495, 120 Am. St. Rep. 479, 9 A. L. R. 7.

An Act so changing existing remedies as materially to impair the rights and interests of creditors, is within the inhibition of the Constitution of the United States in reference to laws "impairing the obligation of contracts." *State v. Bank of South Carolina*, 1 S. C. 63, Ann. Cas. 12B, 261.

A law which regulates the issuing of executions previously rendered affects the remedy merely and does not impair the obligation of the contract. *Warren, etc., Co. v. Jones*, 9 S. C. 288, 290.

This clause must be relied on in state court in order for U. S. Supreme Court to review on appeal *Gibbes v. Zimmerman*, 54 S. Ct. 140.

Right to sue state.—See *Duke Power Co. v. S. C. Tax Commission*, 81 F. (2nd), 513. *S. C. Power Co. v. S. C. Tax Commission*, 52 F. (2nd), 515, 519 (D. C.); *Broad River Power Co. v. Query*, 228 U. S. 178, 179; 53 S. Ct. 326, 77 L. Ed. 685.

3. Contracts Included in Section.

a. Rules Stated.

"Obligation of contracts" includes marriage obligations.—A dissolution of the marriage obligation without any fault or assent of the parties may as well fall within the prohibition of the Constitution as any other contract for a valuable consideration. *Callahan v. Callahan*, 36 S. C. 454, 15 S. E. 727, 730.

One of the tests that a contract has been impaired is, that its value has by legislation been diminished. It is not, by the Constitution, to be impaired at all. This is not a question of degree or manner of cause, but of encroaching in any respect on its obligation, dispensing with any part of its force. *Planters' Bank v. Sharp*, 6 How. 300, 326, 12 L. Ed. 447; *Martin v. Saye*, 147 S. C. 433, 145 S. E. 186, 191.

A state cannot impair an existing contract either by constitutional provision or by an Act.—A state can no more impair an existing contract by a constitutional provision than by an act of the legislature, both are within the prohibition of this subdivision. *Shuler v. Bull*, 15 S. C. 421, 433, 56 Am. Dec. 211, 72 Am. Dec. 650, 84 Am. St. Rep. 439, 36 L. R. A. (N. S.) 258, L. R. A. 1918E, 1198, citing *Gunn v. Barry*, 15 Wall. 610, 628, 21 L. Ed. 212.

But to so impair the contract, the action of the state must be upon and in regard to it. *Calhoun v. Calhoun*, 2 S. C. 283, 301, 99 Am. Dec. 575, 86 Am. St. Rep. 175, 52 L. R. A. (N. S.) 543, Ann. Cas. 16C, 947; *Charles River Bridge v. Warren Bridge*, 11 Pet. 419, 581, 9 L. Ed. 773.

Any law which enlarges, abridges, or in any manner changes the intention of the parties resulting from the stipulations in the contract, necessarily impairs it. *State v. Carew*, 13 Rich. 498, 509, 79 Am. Dec. 495, 120 Am. St. Rep. 479, 9 A. L. R. 7.

Any deviation from the terms of a contract by imposing conditions not expressed therein or dispensing with performance of those expressed, impairs its obligation within the meaning and in violation of this subdivision and Const. S. C. art. 1, § 8, however minute or apparently immaterial in their effect on contract they may be. *Martin v. Saye*, 147 S. C. 433, 145 S. E. 186, 187.

It is within the true meaning of the constitution if it in effect impairs the obligation of existing contracts.—*State v. Carew*, 13 Rich. 498, 509, 79 Am. Dec. 495, 120 Am. St. Rep. 479, 9 A. L. R. 7.

But anything that puts an end to the performance of a contract does not necessarily violate its obligation, but "it is the motive policy, the object, that must characterize the legislative Act, to affect it with the imputation of violating the obligation of contracts." In re *Kennedy*, 2 S. C. 216, 222, 87 Am. Dec. 464, 56 L. R. A. 47, Ann. Cas. 12B, 261.

A judgment is not in itself a contract, *Biddleston v. Whytel*, 3 Burr., 1545, and it cannot originate rights of the class protected under the United States Constitution. In re *Kennedy*, 2 S. C. 216, 226, 87 Am. Dec. 464, 56 L. R. A. 47, Ann. Cas. 12B, 261, cited in *Warren*, etc., Co. v. *Jones*, 9 S. C. 288, 290.

b. Illustrations.

The issue of bonds by a school district is a contract between it and the purchaser which in view of this subdivision and art. 1, § 8, of the South Carolina Constitution cannot be impaired. *Welch v. Getzen*, 85 S. C. 156, 67 S. E. 294, 37 L. R. A. (N. S.) 1108, cited in *Dove v. Kirkland*, 92 S. C. 313, 75 S. E. 503, 502, Ann. Cas. 15A, 532.

After assent by an executor to a pecuniary legacy there is a contract, express or implied, to pay it and though no action at law may lie on such contract, it is, nevertheless, within the provision of this section, providing that no state shall pass any law impairing the obligation of contracts. *Dunham v. Elford*, 13 Rich. Eq. 190, 94 Am. Dec. 162.

And when the State borrows money on bonds issued by it for that purpose and pledges a certain fund for the payment of the interest to accrue thereon, such pledge is a part of the contract with the holders of the bonds, and the State has no right, under this subdivision of the Constitution of the United States, to impair the obligation of the contract by diverting the fund to other purposes. *State v. Cardozo*, 8 S. C. 71, 28 Am.

Rep. 275, 101 Am. St. Rep. 162, Ann. Cas. 17B, 868.

The inhibition of this provision may inhere in a debt of the state created by an act.—The inhibition of this subdivision which states that: "No State shall pass any law impairing the obligation of contracts," inheres in a debt of the State created under an act providing, as the Constitution of the State directs, for the levy of "a tax, annually, sufficient to pay the annual interest on such debts," and prevents the Legislature of the State from depriving the public creditor of his remedy to enforce the collection of the tax under the law of force at the passage of the Act. *Morton, etc., Co. v. Comptroller General*, 4 S. C. 430, 61 Am. Dec. 344, 79 Am. Dec. 473, 98 Am. St. Rep. 883, 125 Am. St. Rep. 499, 47 L. R. A. 518, 52 L. R. A. (N. S.) 439.

An act withdrawing the property of a debtor from the operation of all legal process by his creditors impairs the obligation of contracts.—An act withdrawing the property of a debtor from the operation of all legal process by his creditors, leaving to them the barren right to sue, virtually destroys the remedy of a creditor, and impairs the obligation of his contract. *State v. Bank of South Carolina*, 1 S. C. 63, Ann. Cas. 12B, 261.

And this is true of a statute that denies validity to, modifies or refuses to enforce, a contract. *Ogden v. Saunders*, 12 Wheat., 213, 6 L. Ed. 606; In re *Kennedy*, 2 S. C. 216, 222, 87 Am. Dec. 464, 56 L. R. A. 47, Ann. Cas. 12B, 261.

And of an act of the state legislature which provides that "debt due on open accounts and other demands not heretofore bearing interest by law, shall bear interest," at least so far as it relates to debts contracted before the passage of such act. *Goggans v. Turnipseed*, 1 S. C. 80, 10 Am. Dec. 135, 98 Am. Dec. 397, 7 Am. Rep. 23, Ann. Cas. 16D, 80.

But an act suspending the statute of limitations does not impair the obligations of contracts.—An act of the legislature suspending the statute of limitations in actions upon contracts then existing does not impair the obligation of contracts and is constitutional. *Wardlaw v. Buzzard*, 15 Rich. 158, 50 Am. Dec. 393, 94 Am. Dec. 148, 16 A. L. R. 1339.

Statute, enacted after ratification of constitutional amendment eliminating stockholders' double liability, which statute repealed such double liability except in those banks which have "heretofore been adjudged insolvent," violates this section as attempting to change contractual rights and liabilities of bank stockholders existing under prior constitutional and statutory provisions. *Henry v. Alexander, et al.*, 186 S. C. 17, 194 S. E. 649.

Statute prohibiting employment of em-

ployees of enumerated manufacturing and mercantile establishments for more than 56 hours per week or 12 hours per day and exempting from its provisions certain businesses is invalid on ground that attempted classification is arbitrary and without reasonable basis and constitutes illegal discrimination amounting to impairment of employer's rights under constitutional provisions prohibiting impairment of contracts, the taking of life, liberty, or property without due process, and equal protection clause. *Gasque, Inc., v. Nates*, 191 S. C. 272, 2 S. E. 2d 36.

Where it was not shown that it was dangerous to health or safety of employees or the public for an employee to work more than 56 hours in any one week in enumerated manufacturing and mercantile establishments, the statute prohibiting employment of employees in such establishments for more than 56 hours per week or 12 hours per day could not be sustained as a proper exercise of the police power and was violative of constitutional provisions prohibiting impairment of contracts, taking of life, liberty, or property without due process and equal protection clause. *Ibid.*

The constitutional guaranty of "liberty of contract" is not absolute in the sense that there can be no state regulation of matters as to which persons might desire to contract, but the state may within its police power enact laws for the general good of the citizens even though the incidental effect of regulation thereunder will deprive some individual of liberty or property. *Ibid.*

Fees earned by county treasurer for issuing tax executions before payment of his salary are vested rights, which cannot be impaired or defeated by allowing county to set off salary paid against such fees. *Smith v. Greenville County*, 187 S. C. 424, 1 S. E. 2d 502.

Statute purporting to deprive county treasurer of fees theretofore earned on tax executions held unconstitutional as depriving county treasurer of property without due process of law and impairing obligations of contract. *Salley v. McCoy*, 182 S. C. 251; 189 S. E. 196.

An act providing for appraisal of mortgaged property after foreclosure sale, and providing that deficiency judgment shall be measured by difference between true value of property as of time of sale and judgment indebtedness, which act is not limited in duration to emergency, "impairs obligation of contract" in violation of state and federal constitutions, as respects mortgages existing when the act was passed. *Federal Land*

Bank of Columbia v. Garrison, 185 S. C. 255; 193 S. E. 308.

Any law which in its operation amounts to denial, or obstruction of rights accruing by a contract, though professing to act on the remedy, is directly obnoxious to constitutional provisions prohibiting "impairing obligation of contract." *Federal Land Bank of Columbia v. Garrison*, 185 S. C. 255; 193 S. E. 308.

Statutes fixing procedure for condemning rights of way for state highways valid hereunder. *Jennings v. Sawyer*, 182 S. C. 427; 189 S. E. 746.

II. SUBDIVISION (2).

Applied in *Harbor Com'rs v. Pashley*, 19 S. C. 315.

III. SUBDIVISION (3).

Design of subdivision.—The Constitution did not intend to control domestic regulations, by the State or city, affecting her own people. It intended that neither Congress, the States, nor any City should give such a preference to one port, by discriminating legal advantages, so as to draw commerce or trade from ports of other States. *State v. City Council*, 4 Rich. 286, 289, 57 L. R. A. 80, 60 L. R. A. 654, 695.

This subdivision was designed to forbid the levying of any tax upon a vessel as such, whether the amount of such tax was to be ascertained by reference to the tonnage capacity of the vessel, or by any other mode of measurement. *Harbor Com'rs v. Pashley*, 19 S. C. 315, 320. See, also, the authority therein cited.

It is wholly immaterial whether the amount of the tax is to be ascertained by reference to the tonnage of the vessel *eo nomine*, or in some other way, as is fully shown by the fact that the Supreme Court of the United States has, in several cases, held that a charge imposed upon a vessel, even though measured by its tonnage *eo nomine*, is not in violation of the Constitution of the United States where the charge is made as a compensation for services rendered such vessel; as, for example, a charge for the use of a wharf owned by a municipal corporation, even though the amount of such charge should, in express terms, be measured by the tonnage of the vessel, because that is a matter resting in contract, and is the exercise of a mere property right, and not an exercise of sovereign authority. *Harbor Com'rs v. Pashley*, 19 S. C. 315, 320. See, also, the authority therein cited.

Applied in *Alexander v. Wilmington, etc., R. Co.*, 3 Strob. 594, 598, 57 Am. Rep. 389; *Chapman v. Miller*, 2 Speer, 769, 772.

Article II

§ 1. (1) **President and Vice-President—their term of office.**—The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice-President, chosen for the same term, be elected as follows:

(2) **Electors of President and Vice-President—number and how appointed.**—Each State shall appoint, in such manner as the Legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

[The electors shall meet in their respective States, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves . . . And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the president, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately chuse by ballot one of them for President; and if no person have a majority, then from the five highest on the list the said House shall in like manner chuse the President. But in chusing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. In every case after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice-President. But if there should remain two or more who have equal votes, the Senate shall chuse from them by ballot the Vice-President.]

The paragraph inclosed in brackets was superseded by the twelfth amendment.

(3) **Electors to vote on same day.**—The Congress may determine the time of chusing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.

U. S. Stats. 1845, 1.

(4) **Qualifications of President.**—No person except a natural born citizen, or a citizen of the United States, at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

(5) **On whom his duties devolve in case of his removal, death, etc.**—In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office the same shall devolve on the Vice-President, and the Congress may by law provide for the case of removal, death, resignation or inability, both of the President and Vice-President, declaring what officer shall then act as

President, and such officer shall act accordingly, until the disability be removed, or a President shall be elected.

(6) President's compensation.—The President shall, at stated times, receive for his services, a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.

(7) His oath.—Before he enter on the execution of his office, he shall take the following oath or affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States and will to the best of my ability, preserve, protect and defend the Constitution of the United States."

§ 2. (1) President to be commander-in-chief—may require opinion of, etc., and may pardon.—The President shall be Commander-in-Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have powers to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

(2) Treaty making power—nomination of certain officers.—He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

(3) When President may fill vacancies.—The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

§ 3. President shall communicate to Congress—may convene and adjourn Congress—shall receive ambassadors, execute laws, and commission officers.—He shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both Houses, or either of them and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

§ 4. All civil offices forfeited for certain crimes.—The President, Vice-President, and all civil officers of the United States, shall be removed from

office on impeachment for, and conviction of treason, bribery, or other high crimes and misdemeanors.

Article III

§ 1. Judicial power—tenure—compensation.—The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The Judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

The judicial power thus conferred is that of the United States.—The judicial power thus provided for under this and the following section is that of the United States; a power to administer, to expound, to enforce the laws of the federal

government; to hear and determine causes arising under those laws, and to punish offenders against their authority. *State v. Wells*, 2 Hill 687, 691, 48 L. R. A. 39.

§ 2. (1) Judicial power—to what cases it extends.—The judicial power shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority:—to all cases affecting Ambassadors, other public Ministers and Consuls;—to all cases of Admiralty and Maritime Jurisdiction;—to controversies to which the United States shall be a party;—to controversies between two or more States;—between a State and citizens of another State;—between citizens of different States;—between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects.

(2) Original jurisdiction of Supreme Court—appellate.—In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

"Judicial power" is not identical with jurisdiction. — *State v. Davis*, 12 S. C. 528, 536, 42 Am. Dec. 57.

The term, "judicial power" is equivalent to a provision that "the judiciary of the United States shall have power to hear all cases." *State v. Wells*, 2 Hill 687, 696, 48 L. R. A. 39.

But this does not mean that the Supreme and subordinate courts of the Union should alone have the power of deciding those causes to which their authority is to extend, but that the United States should exercise the judicial power with which they are to be invested, through one supreme tribunal and a certain number of inferior ones, to be instituted by them. *State v. Wells*, 2 Hill 687, 695, 48 L. R. A. 39.

The Constitution of the United States

has extended the jurisdiction of the Federal Courts over several classes of cases, of which the State courts already had jurisdiction, and of which the Federal Courts would not have taken cognizance without such provision. *State v. Wells*, 2 Hill 687, 690, 48 L. R. A. 39.

The power given by it was merely additional to that already existing in the States.—The United States judiciary is additional to that existing in the States; and where the latter had a common law jurisdiction of subject-matter, which either had, or might arise, it was not taken from them, but the courts of the United States were clothed with the same power; and Congress might direct proceedings, civilly or criminally, to be in either one or the other. *State v. Wells*, 2 Hill 687, 696, 48 L. R. A. 39.

Both having jurisdiction Congress may select a State court as an agent.—Both having jurisdiction, Congress might, in legislating upon a subject constitutionally within its power, select the agent which should enforce its sanction, and the state authority must obey it, both as the declared will of the United States, and also of the State. *State v. Wells*, 2 Hill 687, 696, 48 L. R. A. 39.

Every grant by the Constitution is limited to the powers expressed in the terms of such grant.—Every grant to the government of the United States by the Constitution is limited to the powers expressed in the terms of such grant, or arising therefrom by necessary implication. *State v. Davis*, 12 S. C. 528, 42 Am. Dec. 57.

And Congress cannot enlarge the jurisdiction of the court beyond that here granted.—Congress cannot, by any measure, enlarge the jurisdiction of the courts of the United States beyond the measure of Art. 3 of the Constitution, or grant them powers that are not warranted by such grant of jurisdiction. *State v. Davis*, 12 S. C. 528, 536, 42 Am. Dec. 57.

Congress cannot confer upon the United States courts original jurisdiction of a case involving an offense against the laws of a state, because that the defence interposed depends for its force and effect upon the Constitution and laws of the United States. *State v. Davis*, 12 S. C. 528, 42 Am. Dec. 57.

It is clear that art. 3 was intended to limit as well as vest the judicial power of the United States. *State v. Davis*, 12 S. C. 528, 535, 42 Am. Dec. 57.

And such limitation is perceived by comparing the first and second sections of the said article.—The first limitation is perceived by comparing the first and second sections of art. 3. In the first section the judicial power of the United States is described by a limitation that has its force from the mode in which that power shall be vested, namely, in the Supreme and inferior courts of the United States. The second section gives it a further definition as to the subjects that may be brought within it, among which are cases arising under the Constitution, laws and treaties of the United States. As Congress can only establish the jurisdictions of courts, ordain their functions and delegate their powers, in virtue of the grant of judicial power, and that grant is required to be exhausted upon the United States courts, it follows that congress cannot mould the jurisdiction, remedial system or process of the state courts, and, therefore, cannot directly cut off that jurisdiction or accomplish that result in any other way than indirectly by means of constitutional jurisdiction conferred on the United States courts. *State v. Davis*, 12 S. C.

528, 536, 42 Am. Dec. 57.

And a further limitation is implied by the words "extend to."—*State v. Davis*, 12 S. C. 528, 535, 42 Am. Dec. 57.

And the very object of the Constitution in the delegation of certain governmental powers is in its nature limitative.—The object of the Constitution was to apportion certain governmental powers between the general and local governments, and such an apportionment is, in its nature, limitative. *State v. Davis*, 12 S. C. 528, 535, 42 Am. Dec. 57.

And under the tenth article of the amendment it must receive that construction.—Under the operation of the tenth article of amendment, the Constitution must receive that construction. That article is as follows: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people." This cannot with any propriety, be read as a new grant to the states or the people of such power as had not been delegated or prohibited by the Constitution, for that would assume the existence of a considerable period of time when these powers were either in abeyance or vested somewhere else, which is an assumption inadmissible as inconsistent with the nature of governmental powers. It must be concluded that art. 10 was intended as declaratory of a pre-existing intent of the Constitution, and that would lead us to construe the Constitution precisely as if the tenth article of amendment had been incorporated in it at its first adoption. Reading, then, the Constitution with this reservation, it is necessary that the terms of every grant should be construed as the express limitation of such grant where that is reasonably possible. *State v. Davis*, 12 S. C. 528, 535, 42 Am. Dec. 57.

The Constitution draws no distinction between civil and criminal causes.—The Constitution draws no distinction between civil and criminal causes as it regards the matter of jurisdiction, so that it must be controlled by provisions common to both civil and criminal cases. *State v. Davis*, 12 S. C. 528, 546, 42 Am. Dec. 57.

The grant of judicial power extending to certain prescribed cases is equivalent to its denial in all other cases.—The grant of judicial power in the Constitution to extend to certain prescribed cases, is equivalent to its denial in all other cases. *State v. Davis*, 12 S. C. 528, 536, 42 Am. Dec. 57.

And the object in defining "cases" to which it should extend was to establish and limit judicial jurisdiction.—The object of this subdivision was to establish and limit judicial jurisdiction by defining the "cases" to which it should extend. Cases are the natural boundary of

jurisdiction in one of its directions. In the other direction the character of parties is the boundary. That sense of the word "case" should then be taken as its intended sense that enables it to serve as the boundary of original jurisdiction where that jurisdiction is described by it. *State v. Davis*, 12 S. C. 528, 539, 42 Am. Dec. 57.

The Constitution assumes that the meaning of "case" is well understood.—The Constitution assumes to assign certain cases to certain jurisdictions. It assumes that what is meant by a case is well understood and attempts no new definition of the term. It signifies no intention to change any of the features of the great remedial system of the common law and equity, and yet an effect is claimed for its words that subvert fundamental principles of those systems. *State v. Davis*, 12 S. C. 528, 542, 42 Am. Dec. 57.

But there is no doubt of the intention that it should receive its definition and sense by legal exposition.—There is not the slightest doubt that it was intended that the word "case" should receive its definition and sense by means of legal exposition; and not according to any idea popularly attached to the term. Its direct and primary sense is that technical sense in which the law understands it, and if that sense best satisfies the manifest object of the use of the expression it must prevail. *State v. Davis*, 12 S. C. 528, 540, 42 Am. Dec. 57.

What the Constitution meant by a case for the purpose of determining a question of original jurisdiction is the statement of the claim or demand made by a party prosecuting another in a court. *State v. Davis*, 12 S. C. 528, 543, 42 Am. Dec. 57.

It is applicable either to a suit or other remedial proceedings.—The term case is, according to familiar legal usage, applicable either to a suit or other remedial proceeding in a court of justice, or to matters brought into an appellate court by means of a writ of error and assignment of errors, or other similar proceeding. *State v. Davis*, 12 S. C. 528, 540, 42 Am. Dec. 57.

And "cases affecting ambassadors" is not a departure from the order of expression.—The instance of "cases affecting ambassadors," etc., is not a departure from the order of expression; on the contrary, the form of the expression opens the inference that it was intended to give this jurisdiction a scope beyond the instances where the ambassador or other public minister is a party in a legal sense, as consistent with the use of word cases instead of controversies. More exact and significant language could not have been employed. *State v. Davis*, 12 S. C. 528, 540, 42 Am. Dec. 57.

And when used to designate a suit or

proceeding in a court of original jurisdiction it embraces the idea of parties and a subject matter in controversy between them, its character and description for jurisdictional purposes being determined by the nature of the demand of the party seeking the court for relief. When applied to a writ of error and assignment of errors, it covers the idea of certain alleged errors in a legal judgment consisting in failure to apply the proper law of the case to its adjudication. Every error assigned is a case in substance and effect, as it would separately and independently support a writ of error as such. It would follow that, in order to determine, for the purpose of appeal, whether a case is one arising under the Constitution, laws and treaties of the United States, inquiry would be directed to ascertain whether any of the alleged errors concern propositions of law deriving their force from that Constitution or the laws or treaties made under it. If such errors are found, a case for the appellate jurisdiction of the United States courts appears. *State v. Davis*, 12 S. C. 528, 540, 42 Am. Dec. 57.

Rule as to existence of federal jurisdiction.—The United States courts can have original jurisdiction of cases only where there is a demand of affirmative relief by plaintiff or defendant, based upon the Constitution, laws or treaties of the United States. *State v. Davis*, 12 S. C. 528, 42 Am. Dec. 57.

The United States Circuit Courts have no jurisdiction of a controversy between a State and a citizen of another State. It was not error, therefore, in the State court in such case, to refuse an order removing the cause to the United States Circuit Court. *State v. Corbin*, 16 S. C. 533, 33 L. R. A. (N. S.) 377.

The circuit courts of the United States have no appellate jurisdiction over cases properly instituted in the state courts; and cases are removable to the former courts from the latter under the acts of Congress, only where they could have been brought, in the first instance, in the courts of the United States. *State v. Davis*, 12 S. C. 528, 42 Am. Dec. 57.

Section cited in discharging a bill in equity against government officials for wrongfully seizing and holding vessel.—This section was cited in the case of *Gillam v. Parker*, 19 F. (2d) 358, in support of the ruling that a bill against government officials for unlawfully seizing a foreign vessel on the high seas, bringing her into the jurisdiction of the courts of United States and there continuing to hold her unlawfully will not lie in equity since it involves a maritime tort which is within the jurisdiction of Admiralty.

See *Smith v. Blackwell*, 115 F. (2d) 186.

(3) Trial by jury, except, etc.—trial, where.—The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

§ 3. (1) Treason defined—proof of.—Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

(2) Punishment of.—The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attained.

Article IV

§ 1. Credit to public acts, etc., of every State.—Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

U. S. Stats. 1790, 11; 1804, 56, 481.

Foreign judgments are given the force and effect that they have in the State in which they are rendered.—It will be at once seen that the framers of our Federal Constitution have, by this section, provided that while, under the law of nations, from principles of comity, the judgments of foreign countries should be respected as such in every other country, when produced, provided such foreign judgments accord with her domestic policy, etc., that it should be the duty of every state in this Union of states to give full force and effect to the judgments of any other state, when duly authenticated. Hence, if this doctrine is sound law, holders of judgments obtained in a different state have the right to produce such judgments in the courts of this state, and it is our duty to respect them, and give them the same force and effect they have in the state where rendered, as required by the Constitution of the general government. *McCreery v. Davis*, 44 S. C. 195, 22 S. E. 178, 184, 51 Am. St. Rep. 794, 53 Am. St. Rep. 183, 83 Am. St. Rep. 624, 103 Am. St. Rep. 308, 133 Am. St. Rep. 436, 28 L. R. A. 655, 59 L. R. A. 152, 166, 3 L. R. A. (N. S.) 972, 41 L. R. (N. S.) 221, Ann. Cas. 13E, 556.

In the case of *Hampton v. McConnell*, 3 Wheat. 234, 4 L. Ed. 378, decided by Chief Justice Marshall, the syllabus of the case was as follows:

"A judgment of a state court has the

same credit * * * and effect in every other court within the United States, which it had in the state where it was rendered; and whatever please would be good to a suit thereon, in such state, and none others, can be pleaded in any other court within the United States." Cited with approval in *Cline v. Southern Ry. Co.*, 231 F. 238, 241.

And a plea of statute of limitations will not be good in this State unless good where the judgment was rendered.—Under the said act passed in pursuance of this section the plea of statute of limitations to an action of debt will not be good in the courts of this state, if it would not be good in the state from which the judgment comes. *Morton & Co. v. Naylor*, 1 Hill 439, 445.

But the finding of fact by a court in Florida that appellant was a fit and proper person to administer an estate was not binding on a South Carolina court in appointing an administrator for the same estate. *Burkheim v. Pinkhussohn*, 58 S. C. 469, 36 S. E. 908, 1 L. R. A. (N. S.) 342, 48 L. R. A. (N. S.) 860, Ann. Cas. 15A, 57. See, also, *Overby v. Gordon*, 177 U. S. 214, 20 S. Ct. 603, 44 L. Ed. 741.

Nor where the appellant was appointed administrator of an estate.—Where appellant had been appointed administrator by a court in Florida, the appointment of another administrator for the same estate by a court in South Car-

olina was not in violation of this section. *Burkhim v. Pinkhussohn*, 58 S. C. 469, 36 S. E. 908, 1 L. R. A. (N. S.) 342, 48 L. R. A. (N. S.) 860, Ann. Cas. 15A, 57.

A status accorded in one state has no extraterritorial operation, and is not thereby established in another. *McCreery v. Davis*, 44 S. C. 195, 22 S. E. 178, 51 Am. St. Rep. 794, 53 Am. St. Rep. 183, 83 Am. St. Rep. 624, 103 Am. St. Rep. 308, 133 Am. St. Rep. 436, 28 L. R. A. 655, 59 L. R. A. 152, 166, 3 L. R. A. (N. S.) 972, 41 L. R. A. (N. S.) 221, Ann. Cas. 13E, 556.

Foreign divorce; alimony; support.—The question whether a judgment of divorce rendered by the court is valid in this state, and binding in the courts of this state was raised in the case of *Ex parte White*, 38 S. C. 41, 16 S. E. 286, but was not decided as its decision was not necessary to the verdict of that case.

Where divorce court of another state, which was the state of father's domicile, obtained complete jurisdiction of the marital status, it had the incidental power of determining the extent of the father's obligation to support his minor child and such determination is entitled to full faith and credit. *Yarborough v. Yarborough*, 290 U. S. 202, 78 L. Ed. 269, 54 S. Ct. 181, 90 A. L. R. 924, reversing 168 S. C. 46, 166 S. E. 877.

A South Carolina court, under the "full faith and credit clause" of the Federal Constitution and under doctrine of "comity," cannot amend or change a foreign divorce decree for alimony established in South Carolina, but the extent to which such a decree shall be enforced must be determined by the laws and usages of South Carolina, and the decree draws to itself similar equitable remedies for enforcement as are customary in enforcement of decrees for alimony in local courts. *Johnson v. Johnson*, 196 S. C. 474, 13 S. E. 2d 593.

Where foreign divorce decree for alimony was established in South Carolina, an order of reference on husband's changed financial status, made on husband's petition to reduce amount payable, and hearing had thereon could not, under the "full faith and credit clause" of Federal Constitution, modify the foreign decree as to amount of alimony, but this did not preclude the enforcement of the decree in an amount smaller than granted by the foreign court if husband proved financial inability to pay full amount, since this was a matter of enforcement exclusively for courts of South Carolina. *Johnson v. Johnson*, 196 S. C. 474, 13 S. E. 2d 593.

A citizen of South Carolina will not, in a contempt proceeding, be placed in jail because of inability to pay a foreign divorce decree awarding alimony established in South Carolina, when under similar circumstances in the enforcement

of a domestic judgment for alimony the courts would not do so. *Johnson v. Johnson*, 196 S. C. 474, 13 S. E. 2d 593.

A foreign divorce decree awarding alimony established in South Carolina, which is in force in South Carolina solely for purpose of enforcement through equitable remedies afforded by equity courts of South Carolina, occupies no higher position, for purposes of enforcement, than a domestic judgment. *Johnson v. Johnson*, 196 S. C. 474, 13 S. E. 2d 593.

If husband is seeking a modification of a divorce decree of a sister state awarding alimony by reducing amount of alimony payments because of changed financial condition, the proper procedure is to apply to courts of the sister state. *Johnson v. Johnson*, 196 S. C. 474, 13 S. E. 2d 593.

Where a foreign divorce decree was established in South Carolina and husband petitioned for reduction of amounts of alimony required to be paid monthly because of changed financial status, if, as result of the hearing, the lower court should deem it equitable to enforce payment of a smaller sum than amount directed by foreign decree, amounts paid would be credited to husband but he would still be liable for original amount fixed by foreign decree. *Johnson v. Johnson*, 196 S. C. 474, 13 S. E. 2d 593.

Foreign judgments differ from judgment recovered in a foreign country in no other respect than that of not being re-examinable on the merits nor impeachable for fraud.—And in *Hanley v. Donoghue*, 116 U. S. 1, 4, 6 S. Ct. 242, 29 L. Ed. 535, it was said: "Judgments recovered in one state of the Union, when proved in the court of another [state], differ from judgments recovered in a foreign country in no other respect than that of not being re-examinable on the merits, nor impeachable for fraud in obtaining them, if rendered by a court having competent jurisdiction of the cause and of the parties." *McCreery v. Davis*, 44 S. C. 195, 22 S. E. 178, 184, 51 Am. St. Rep. 794, 53 Am. St. Rep. 183, 83 Am. St. Rep. 624, 103 Am. St. Rep. 308, 133 Am. St. Rep. 436, 28 L. R. A. 655, 59 L. R. A. 152, 166, 3 L. R. A. (N. S.) 972, 41 L. R. A. (N. S.) 221, Ann. Cas. 13E, 556.

Though the "full faith and credit" clause of Federal Constitution places judgments of sister states on same footing in most respects as domestic judgments and grants them a general faith and credit, nevertheless, when enforcement of such a judgment is involved, no greater effect need be given to an alimony decree of a sister state than is given to a similar judgment in the state where the foreign judgment may be established. *Johnson v. Johnson*, 196 S. C. 474, 13 S. E. 2d 593.

A foreign judgment is conclusive of

everything decided by it.—Under this section and the Act of Congress, (1790) passed in pursuance thereof, a judgment of another State when properly authorized, must be regarded, in a cause in this State, as a judgment of record, conclusive of everything decided by it, and have precisely the same effect, as if the case were trying in the State where the judgment was rendered. *Morton & Co. v. Naylor*, 1 Hill 439.

And this applies to a judgment of the circuit court of the United States.—It was held in the case of *McCullough v. Hicks*, 63 S. C. 542, 41 S. E. 761, that this provision applies to a judgment of the Circuit Court of the United States. *Holstein v. Board of Com'rs*, 64 S. C. 374, 42 S. E. 180, 183.

Where the United States circuit court declares a statute authorizing townships to subscribe bonds in aid of a railroad constitutional, the Supreme Court of the state will give full faith to such judgment, and refuse to enjoin the corporate authorities of such township from carrying into effect such judgment, though such court had previously declared similar acts unconstitutional. *Holstein v. Board of Com'rs*, 64 S. C. 374, 42 S. E. 180.

A state court has no jurisdiction to enjoin the enforcement of a writ of mandamus issued by the United States Circuit Court as it is a process ancillary to a judgment in a case which the federal court originally had jurisdiction. *McCullough v. Hicks*, 63 S. C. 542, 41 S. E. 761.

And a federal court will give the same effect to a judgment of a state court that it had in the state where rendered.—Under this section a federal court gives the same effect to a judgment of a state court as it had in the state where it was rendered, and judgment which bars an action in the state where it was rendered is *res judicata* in the federal courts. *Cline v. Southern Ry. Co.*, 231 F. 238.

Matters of record must be proved by the production of the record or an authenticated copy thereof.—Matters of record must be proved by the production of the record, or that which is made, by law, of equal import with the record itself, namely: a duly authenticated copy. Matters resting in parol must be proved by parol. *Campbell v. Home Ins. Co.*, 1 S. C. 158, 165, 103 Am. St. Rep. 319, 19 L. R. A. 577, 59 L. R. A. 367, 5 L. R. A. (N. S.) 953.

Congress has not yet defined the mode of proving such matters as rest in parol.—Congress has exercised the authority as to prescribing the manner in which such acts, records and proceedings shall be proved but has not defined the mode of proving such matters as rest in parol. *Campbell v. Home Ins. Co.*, 1 S. C. 158, 165, 103 Am. St. Rep. 319, 19

L. R. A. 577, 59 L. R. A. 367, 5 L. R. A. (N. S.) 953.

But it is evident that the intent was to include such matters.—It was evidently the intent of the Constitution, as expressed by the phrase "records and judicial proceedings," to include proceedings that could not properly be described as "records," or, in other words, that could only be evidenced by matter of parol. *Campbell v. Home Ins. Co.*, 1 S. C. 158, 165, 103 Am. St. Rep. 319, 19 L. R. A. 577, 59 L. R. A. 367, 5 L. R. A. (N. S.) 953.

And they may be proved in accordance with the rules of common law.—Judicial proceedings, which, from their nature, cannot be proved in the manner prescribed by the Act of Congress, are, nevertheless, in this State, held entitled to full faith and credit under the Constitution, and are to be proved in accordance with the rules of the common law. *Lawrence v. Gaultney*, Cheves 7, 103 Am. St. Rep. 306, 5 L. R. A. (N. S.) 950; *Campbell v. Home Ins. Co.*, 1 S. C. 158, 165, 103 Am. St. Rep. 319, 19 L. R. A. 577, 59 L. R. A. 367, 5 L. R. A. (N. S.) 953.

A foreign judgment properly authenticated is prima facie evidence that it was rendered by a court of competent jurisdiction.—Under this section a foreign judgment, properly authenticated, is prima facie evidence that it was rendered by a court of competent jurisdiction, in conformity to the laws of the state in which it was rendered. *Coskery v. Wood*, 52 S. C. 516, 30 S. E. 475.

But this does not prevent an inquiry into the jurisdiction of the court which rendered such judgment.—In *Thompson v. Whiteman*, 18 Wall. 457, 21 L. Ed. 397, it was said by Mr. Justice Bradley, that: "Neither the constitutional provision that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state, nor the act of Congress passed in pursuance thereof, prevents an inquiry into the jurisdiction of the court by which a judgment offered in evidence was rendered." *McCreery v. Davis*, 44 S. C. 195, 22 S. E. 178, 184, 51 Am. St. Rep. 794, 53 Am. St. Rep. 183, 83 Am. St. Rep. 624, 103 Am. St. Rep. 308, 133 Am. St. Rep. 436, 28 L. R. A. 655, 59 L. R. A. 152, 166, 3 L. R. A. (N. S.) 972, 41 L. R. A. (N. S.) 221, Ann. Cas. 13E, 556.

And this may be done in a collateral proceeding in another state.—The want of jurisdiction of the court by which a judgment is rendered in any state may be questioned in a collateral proceeding in another state, notwithstanding the provisions of the fourth article of the Constitution and the law of 1790, and notwithstanding the averments contained in the record of the judgment itself. *McCreery v. Davis*, 44 S. C. 195, 22 S. E.

178, 184, 51 Am. St. Rep. 794, 53 Am. St. Rep. 183, 83 Am. St. Rep. 624, 103 Am. St. Rep. 308, 133 Am. St. Rep. 436, 28 L. R. A. 655, 59 L. R. A. 152, 166, 3 L. R. A. (N. S.) 972, 41 L. R. A. (N. S.) 221, Ann. Cas. 13E, 556. See also, McCullough v. Hicks, 63 S. C. 542, 41 S. E. 761; Yarborough v. Yarborough, 168 S. C. 46, 166 S. E. 877, reversed on other grounds in 290 U. S. 202, 78 L. Ed. 269.

But this objection must be made when the record is offered in evidence. — The objection that the exemplification of the record of a foreign judgment is not properly authenticated, or the court rendering it had not jurisdiction, must be made when the record is offered in evidence. *Coskery v. Wood*, 52 S. C. 516, 30 S. E. 475.

Want of jurisdiction may be shown either as to the subject matter or the person, or, proceedings in rem, as to the

thing. *McCreery v. Davis*, 44 S. C. 195, 22 S. E. 178, 184, 51 Am. St. Rep. 794, 53 Am. St. Rep. 183, 83 Am. St. Rep. 624, 103 Am. St. Rep. 308, 133 Am. St. Rep. 436, 28 L. R. A. 655, 59 L. R. A. 152, 166, 3 L. R. A. (N. S.) 972, 41 L. R. A. (N. S.) 221, Ann. Cas. 13E, 556.

And if so shown the record will be a nullity. — The record of a judgment rendered in another state may be contradicted as to the facts necessary to give the court jurisdiction, and, if it be shown that such facts did not exist, the record will be a nullity, notwithstanding it may recite that they did exist. *McCreery v. Davis*, 44 S. C. 195, 22 S. E. 178, 184, 51 Am. St. Rep. 794, 53 Am. St. Rep. 183, 83 Am. St. Rep. 624, 103 Am. St. Rep. 308, 133 Am. St. Rep. 436, 28 L. R. A. 655, 59 L. R. A. 152, 166, 3 L. R. A. (N. S.) 972, 41 L. R. A. (N. S.) 221, Ann. Cas. 13E, 556.

§ 2. (1) **Privileges of citizens of each State.**—The citizens of each State shall be entitled to all privileges and immunities of citizens in the several states.

(2) **Fugitives from justice to be delivered up.**—A person charged in any State with treason, felony or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.

(3) **Persons held to service, having escaped, to be delivered up.**—No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labour, but shall be delivered up on claim of the party to whom such service or labour may be due.

Cross reference.—As to a similar provision in The State Constitution, see art. 1, § 5.

Subdivision (1) is subject to the qualifications of subdivision (2). *State v. Anderson*, 1 Hill 327, 356, 61 Am. Dec. 163, 46 Am. St. Rep. 415, 84 Am. St. Rep. 698, 26 L. R. A. 34, 42 L. R. A. 674, 66 L. R. A. 365, 67 L. R. A. 300, 2 L. R. A. (N. S.) 731, L. R. A. 1918D, 979.

Citizenship and residence are not the same thing, nor does one include the other. *Cummings v. Wingo*, 31 S. C. 427, 435, 10 S. E. 107, 25 Am. St. Rep. 873, Ann. Cas. 13D, 576; *La Tourette v. McMaster*, 104 S. C. 501, 89 S. E. 398, 400.

Purpose of subdivision (1).—It will be observed that by the express terms of the Constitution, the purpose of this section under consideration is to secure to citizens of one state the same privileges and immunities as are enjoyed by citizens of other states, and the Supreme Court of the United States has held that the privileges and immunities thus secured are those only which grow out of citizenship. *Cummings v. Wingo*, 31 S.

C. 427, 10 S. E. 107, 110, 25 Am. St. Rep. 873, Ann. Cas. 13D, 576, citing approvingly *Conner v. Elliott*, 18 How. 591, 15 L. Ed. 497.

Its sole purpose was to declare to the several states that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction. *La Tourette v. McMaster*, 104 S. C. 501, 89 S. E. 398, 400; citing the *Slaughter-House Cases*, 83 U. S. (16 Wall.) 36, 77, 21 L. Ed. 394.

The term "privileges and immunities" mean those privileges and immunities which are in their nature fundamental. — The term "privileges and immunities" means those privileges and immunities which are in their nature fundamental, which belong of right to the citizens of all free governments, and which have at all times been enjoyed by the citizens of the several states, and includes protection by the government, the enjoy-

ment of life and liberty, the right to acquire and possess property and to pursue happiness and safety, subject to such restraints as the government may justly prescribe for the general good. *La Tourette v. McMaster*, 104 S. C. 501, 89 S. E. 398.

And this is the thought running through the constitution. — Equality in right, privilege, burdens, and protection is the thought running through the Constitution and laws of the state, and an act intentionally and necessarily creating inequality therein, based on no reason suggested by necessity or difference in condition or circumstances, is opposed to the spirit of free government, and expressly prohibited by the Constitution. *Laurens v. Anderson*, 75 S. C. 62, 55 S. E. 136, 137, 117 Am. St. Rep. 885, 129 Am. St. Rep. 258, 9 Ann. Cas. 1003.

Privileges may be granted only when they do not interfere with the rights of others. — "Privileges may be granted to particular individuals, when by so doing the rights of others are not interfered with; * * * but every one has a right to demand that he be governed by general rules, and a special statute, which without his consent singles his case out as one to be regulated by a different law from that which is applied in all similar cases, would not be legitimate legislation, but would be such an arbitrary mandate as is not in the providence of free government. Those who make the laws 'are to be governed by promulgated, established laws, not to be varied in particular cases, but to have one rule for the rich and poor, for the favorite at court and the countryman at the plough.'" *Cooley, Constitutional Limitations*, 482, cited in *Laurens v. Anderson*, 75 S. C. 62, 55 S. E. 136, 137, 117 Am. St. Rep. 885, 129 Am. St. Rep. 258, 9 Ann. Cas. 1003.

In *State v. Goodwill*, 33 W. Va. 179, 10 S. E. 285, 286, 25 Am. St. Rep. 863, 6 L. R. A. 621, 623, the court uses this language: "The rights of every individual must stand or fall by the same rule of law that governs every other member of the body politic under similar circumstances; and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by restricting the privileges of certain classes of citizens and not of others, when there is no public necessity for such discrimination, is unconstitutional and void." *Laurens v. Anderson*, 75 S. C. 62, 55 S. E. 136, 137, 117 Am. St. Rep. 885, 129 Am. St. Rep. 258, 9 Ann. Cas. 1003.

Application.—A state may, through judicial proceedings, take possession of the assets of an insolvent foreign corporation within its limits, and distribute them or their proceeds among creditors according to their respective rights, yet it cannot, under this subdivision, deny the right of

citizens of other states to participate in such distribution on equal terms with its own citizens. *Wilson v. Keels*, 54 S. C. 545, 32 S. E. 702, 706, 71 Am. St. Rep. 816, 65 L. R. A. 367.

Statute prohibiting employment of employees of enumerated manufacturing and mercantile establishments for more than 56 hours per week or 12 hours per day and exempting other businesses from its operation is unconstitutional on ground that the effect of the act would be to place certain of the regulated establishments and industries at a competitive disadvantage with certain of those businesses exempted from operation of the act. *Gasque, Inc., v. Nates*, 191 S. C. 272, 2 S.E.2d 36.

Object of subdivision (2).—The object of the Constitution was to enable a state whose laws had been violated, to secure the arrest of the person charged with such violation, even though such person might be beyond the reach of the ordinary process of such state. *Ex parte Swearingen*, 13 S. C. 74, 57 Am. Dec. 395, 68 Am. St. Rep. 130, 112 Am. St. Rep. 122, 28 L. R. A. 290, 805, 13 A. L. R. 416.

The term "flee from justice" in this subdivision includes cases where a citizen of one state commits a crime in another state and then returns to his home. *Ex parte Swearingen*, 13 S. C. 74, 57 Am. Dec. 395, 68 Am. St. Rep. 130, 112 Am. St. Rep. 122, 28 L. R. A. 290, 805, 13 A. L. R. 416.

This subdivision constitutes the fundamental law on this subject. — This subdivision constitutes the fundamental law on this subject of all the co-states. It is a part of the municipal law of each, and is to be obeyed, observed and respected by every citizen and officer. *State v. Anderson*, 1 Hill 327, 353, 61 Am. Dec. 163, 46 Am. St. Rep. 415, 84 Am. St. Rep. 698, 26 L. R. A. 34, 42 L. R. A. 674, 66 L. R. A. 365, 67 L. R. A. 300, 2 L. R. A. (N. S.) 731, L. R. A. 1918D, 979.

But it has been necessary to pass statutes prescribing the mode of carrying this clause into effect.—For several years after the adoption of the Constitution of the United States there was no legislation providing the mode by which this clause of the Constitution should be carried into effect; and as a natural consequence controversies arose between the states in regard to this matter, one of which, between Pennsylvania and Virginia, doubtless gave rise to the passage of the act of 1793, (Rev. Stat. U. S., § 5278 [U. S. Comp. St. 1913, § 10126]) prescribing the mode of carrying this clause of the Constitution into effect; for when the governor of Virginia declined to comply with the requisition from the governor of Pennsylvania, the latter sent all the papers to President Washington, calling especial attention to the objections of the authorities of the State of

Virginia based on the necessity of future legislation upon the subject, and suggesting that the matter be brought to the attention of Congress. The President referred the papers to his attorney-general, Mr. Randolph, who gave an elaborate opinion as to the proper construction of the clause of the Constitution in question, from which the necessity for further legislation was apparent. The President accordingly brought the attention of Congress to the matter by a message in November, 1792, and in the following February the act of 1793, above cited, was passed. That act, so far as it is necessary for the purpose of this case to state, in substance provides that whenever the executive authority of a state shall demand any person as a fugitive from justice of the executive authority of any state to which such person shall have fled, and shall produce a copy of an indictment found, or an affidavit made before a magistrate of any state charging the person so demanded with having committed treason, felony, or other crime in the state from which the demand proceeds, certified as authentic by the governor of the state from whence the person so charged has fled, it shall be the duty of the governor of the state to which such person has fled to cause such person to be arrested and secured and delivered to the agent of the state from which such demand proceeds. It will be observed that three things are necessary to be done by the governor of the state making the demand. 1st. He must demand the person as a fugitive from justice. 2d. He must produce a copy of an indictment found, or an affidavit made before a magistrate of a state, showing that the person demanded is charged with having committed some crime in the state from which he has fled. 3d. Such copy of the indictment, or affidavit, must be certified as authentic by the governor of the state making the demand. *Ex parte Swearingen*, 13 S. C. 74, 57 Am. Dec. 395, 68 Am. St. Rep. 130, 112 Am. St.

Rep. 122, 28 L. R. A. 290, 805, 13 A. L. R. 416.

Arrest may be made in state to which the person fled by warrant by magistrate or by private persons without a warrant.—A person may, before demand is made on the governor, be arrested in the state in which he is found, for the purpose of being surrendered to the state from whence he fled, either by warrant from a magistrate, or by private persons without a warrant, who may justify the arrest, by showing that *prima facie* a felony or other crime has been committed by the prisoner in another state, or that he there stands charged therewith; and the same rule, it seems, applies to fugitives from a nation entirely foreign. *State v. Anderson*, 1 Hill 327, 61 Am. Dec. 163, 46 Am. St. Rep. 415, 84 Am. St. Rep. 698, 26 L. R. A. 34, 42 L. R. A. 674, 66 L. R. A. 365, 67 L. R. A. 300, 2 L. R. A. (N. S.) 731, L. R. A. 1918D, 979.

And a person will not be discharged because the mandate of the governor contains no order for his arrest.—Where a prisoner is in the hands of the sheriff under a mandate issued by the governor of this state in pursuance of a requisition from the governor of Georgia, and such mandate requires the delivery of the prisoner to an agent of the governor of Georgia, the prisoner will not be discharged because the mandate contains no order for his arrest. *Ex parte Swearingen*, 13 S. C. 74, 57 Am. Dec. 395, 68 Am. St. Rep. 130, 112 Am. St. Rep. 122, 28 L. R. A. 290, 805, 13 A. L. R. 416.

And it is imperative that the prisoner should be delivered up on demand.—It is made an imperative obligation on South Carolina, that the prisoner, who was charged with murder in Georgia, should on demand be delivered up. *State v. Anderson*, 1 Hill 327, 353, 61 Am. Dec. 163, 46 Am. St. Rep. 415, 84 Am. St. Rep. 698, 26 L. R. A. 34, 42 L. R. A. 674, 66 L. R. A. 365, 67 L. R. A. 300, 2 L. R. A. (N. S.) 731, L. R. A. 1918D, 979.

§ 3. (1) Admission of new States.—New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, or parts of States, without the consent of the Legislatures of the States concerned as well as of the Congress.

(2) Power of Congress over territory and other property.—The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State.

§ 4. Republican form of government guaranteed—each State to be protected.—The United States shall guarantee to every State in this Union a

Republican form of government, and shall protect each of them against invasion; and on application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence.

Article V

Constitution—how amended.—The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the Legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress: *Provided*, that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

Article VI

(1) **Certain debts, etc., adopted.**—All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

(2) **Supremacy of Constitution, treaties, and laws of the United States.**—This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

(3) **Oath to support Constitution—by whom taken—no religious test.**—The Senators and Representatives before mentioned, and the members of the several State Legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation, to support this Constitution; but no religious tests shall ever be required as a qualification to any office or public trust under the United States.

Lien for federal income taxes cannot, without consent of Congress, be affected by exercise of state taxing power. Hence federal income tax liens were entitled to priority over subsequently acquired liens of state assessed for specific improvements to property. *United States v. City of Greenville*, 118 F. (2d) 963.

Article VII

What ratification shall establish Constitution.—The ratification of the conventions of nine States, shall be sufficient for the establishment of this Constitution between the States so ratifying the same.

Done in Convention by the unanimous consent of the States present the seventeenth day of September in the year of our Lord one thousand seven hundred and eighty-seven and of the Independence of the United States

of America the Twelfth. In Witness whereof we have hereunto subscribed our names.

Go. WASHINGTON—
Presdt. and Deputy from Virginia

New Hampshire

JOHN LANGDON,

NICHOLAS GILMAN.

Massachusetts

RUFUS KING,

NATHANIEL GORMAN.

Connecticut

WM. SAM'L. JOHNSON,

ROGER SHERMAN.

New York

ALEXANDER HAMILTON.

New Jersey

WIL. LIVINGSTON,
DAVID BREARLEY,

JONA. DAYTON.
WM. PATERSON,

Pennsylvania

B. FRANKLIN,
ROBT. MORRIS,
THO. FITZSIMONS,
JAMES WILSON,

THOMAS MIFFLIN,
GEO. CLYMER,
JARED INGERSOLL,
GOUV. MORRIS.

Delaware

GEO. READ,
JOHN DICKINSON,
JACO. BROOM,

GUNNING BEDFORD, Jun'r,
RICHARD BASSETT.

Maryland

JAMES M'HENRY,
DANL. CARROLL,

DAN. OF ST. THOS. JENIFER.

Virginia

JOHN BLAIR,

JAMES MADISON, Jr.

North Carolina

WM. BLOUNT,
HU. WILLIAMSON,

RICH'D DOBBS SPAIGHT.

South Carolina

J. RUTLEDGE,
CHARLES PINCKNEY,

CHARLES COTESWORTH PINCKNEY,
PIERCE BUTLER.

Georgia

WILLIAM FEW,

ABR. BALDWIN.

Attest:

WILLIAM JACKSON, *Secretary.*

AMENDMENTS

ARTICLES IN ADDITION TO, AND AMENDMENT OF, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, PROPOSED BY CONGRESS, AND RATIFIED BY THE LEGISLATURE OF THE SEVERAL STATES PURSUANT TO THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION.

Article I

Religious establishment prohibited—freedom of speech, of the press, and right to petition.—Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The provisions of this amendment, which prohibit the establishment of any one denomination of Christians, protect each and all in the peaceable enjoyment of their own mode of worship; instead

of renouncing all religious denominations, they protect all. *Magee v. O'Neill*, 19 S. C. 170, 45 Am. Rep. 765, 63 Am. St. Rep. 258, 25 A. L. R. 1524.

Article II

Right to keep and bear arms.—A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

Article III

No soldier to be quartered in any house, unless, etc.—No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

Article IV

Right of search and seizure regulated.—The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Admission of evidence procured by search with consent is proper.—Where defendant, when his automobile was stopped by officers, admitted he had whisky therein, and voluntarily gave the officers the key to the rear compartment in which he had whisky, evidence of his confession and of the results of the search was admissible, and did not violate his constitutional rights under this and the following amendment, relating to unreasonable search and compelling defendant to testify against himself. *State v. Guest*, 118 S. C. 130, 110 S. E. 112, 27 A. L. R. 716, 737.

Amendment applies only to action by federal government.—This and the following amendment apply only to federal

officers and do not protect the citizens against unreasonable searches by the state government and its agencies. *Kanellos v. United States*, 282 F. 461, and the cases there cited; *State v. Harley*, 107 S. C. 304, 92 S. E. 1034, 19 A. L. R. 645, 24 A. L. R. 1413; *State v. Atkinson*, 40 S. C. 363, 18 S. E. 1021, 42 Am. St. Rep. 877, 94 Am. St. Rep. 346, 97 Am. St. Rep. 799, 101 Am. St. Rep. 329, 136 Am. St. Rep. 141, 59 L. R. A. 470, 19 A. L. R. 645, 24 A. L. R. 1413.

In prosecution for having possession of and transporting intoxicating liquor, evidence obtained by a state constable by a search made without a search warrant against defendant's protest is competent, notwithstanding this amendment, and

Amend. 18, § 2, giving to Congress and to the several states concurrent power to enforce the prohibition amendment by appropriate legislation. *Kanellos v. United States*, 282 F. 461.

A committee appointed by the General Assembly to examine the books of a county dispenser, in acting under such authority, is not violating the provisions of this amendment, and the state Constitution, that the right of the people to be secure in their persons and property against unreasonable searches and seizures shall not be violated. *State v. Farnum*, 73 S. C. 165, 53 S. E. 83.

Petition for return of property unlawfully seized must show violation of constitutional rights.—Petitions for return of property seized in alleged unlawful search are properly denied, where they contain no allegation that the property is the property of petitioners, and do not allege in what respect its possession by the government affects the interests of petitioners, nor anything tending to show that its continued possession by the government, or the manner in which it was obtained, violates the constitutional rights of the petitioners. *Chicco v. United States*, 284 F. 434.

No constitutional right of petitioner is invaded by the seizure of papers taken from premises as to which he disclaims connection or relationship. *Chicco v. United States*, 284 F. 434.

Taking of keys unlawfully in petitioner's possession is not violation of amendment.—Petitioner cannot complain that he had been obliged, on demand by

federal officers, to deliver to them keys which he testified he had surreptitiously and unlawfully had made to enable him to occupy premises to which he had no right for the storage of liquor, although, by using such keys, his liquor was found in such premises, for the prohibition of unlawful search and seizure in Const. Amends. 4, 5, can only be invoked by the owner of the premises, and not by one clandestinely occupying them. *Chicco v. United States*, 284 F. 434.

Warrant must describe things to be seized with particularity.—An affidavit for a warrant to search for property held in fraud of the revenue of the United States, which is substantially in the language of Rev. St., § 3462 (Comp. St., § 6364), authorizing such search warrant, but which does not particularly describe the persons or things to be seized, does not conform to the requirements of this amendment, and a warrant issued thereon and following its language is void. *Woods v. United States*, 279 F. 706.

An accused, when legally placed under arrest, can be searched to discover and seize the fruits or evidences of crime. *Woods v. United States*, 279 F. 706.

Commissioners entitled to fees for affidavits upon which warrants are issued.—United States commissioners are entitled to fees for drawing and filing affidavits upon which warrants are issued, where such affidavits are by the laws of the state and this amendment necessary to the issuance of the warrants. *In re Gourdin*, 45 F. 842.

Article V

Provisions concerning prosecutions, trials and punishments—private property not to be taken for public use, without, etc.—No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

This section is intended solely as a limitation on the federal power and does not apply to the power of the states. *State v. Harley*, 107 S. C. 304, 92 S. E. 1034, 19 A. L. R. 645, 24 A. L. R. 1413; *Jackson v. Breeland*, 103 S. C. 184, 88 S. E. 128; *Riley v. Charleston Union Station Co.*, 71 S. C. 457, 51 S. E. 485, 110 Am. St. Rep. 579, 10 L. R. A. (N. S.) 909, 11 L. R. A. (N. S.) 942, 22 L. R. A. (N. S.) 8, 36, 47, 75, 87, 123, Ann. Cas. 15A, 83; *State v. Atkinson*, 40 S. C. 363, 18 S. E. 1021, 42

Am. St. Rep. 877, 94 Am. St. Rep. 346, 97 Am. St. Rep. 799, 101 Am. St. Rep. 329, 136 Am. St. Rep. 141, 59 L. R. A. 470, 19 A. L. R. 645, 24 A. L. R. 1413; *Ex parte Schmidt*, 24 S. C. 363, 110 Am. St. Rep. 156, 33 L. R. A. 43, 17 L. R. A. (N. S.) 66; *State v. Shirer*, 20 S. C. 392, 98 Am. Dec. 126, 87 Am. St. Rep. 22, 33, 17 L. R. A. 484; *State v. Shumpert*, 1 S. C. 85, 72 Am. Dec. 649, 36 L. R. A. (N. S.) 258, Ann. Cas. 12A, 889, Ann. Cas. 16A, 1188.

City may take property in exercise of

police power.—Act 1830, amending the charter of the city of Charleston, authorizing the city to fill up low lots declared to be a public nuisance by the board of health, and to recover the cost from the landowner, if it does not exceed one half the value of the lot, is a valid exercise of the police power, not violative of this Amendment, and the General Assembly has the right to delegate such power to the city authorities. *City Council v. Werner*, 38 S. C. 488, 17 S. E. 33, 37 Am. St. Rep. 776, 47 Am. St. Rep. 544, 702, 53 Am. St. Rep. 572, 80 Am. St. Rep. 215, 30 L. R. A. (N. S.) 709.

But taking either by "requisition" or "condemnation" requires compensation.—Any attempted distinction between requisition or condemnation of property by the United States is largely technical in ordinary parlance, the word "requisition" being more often used with reference to the taking of personal property, and the word "condemnation" to the taking of real estate; but, whether the taking is by requisition or condemnation, this amendment requires just compensation to be made. *Filbin Corp. v. United States*, 266 F. 911.

The flooding and injuring of property by the negligent impounding of a natural water course is a "taking" under the constitutional provision. *Chick Springs Water Co. v. State Highway Department*, 178 S. C., 415; 183 S. E., 27.

Erection of transmission line by state rural electrification authority under legislative act along highway, for which farmer had given easement for highway purposes to state does not, in light of modern invention and progress, impose additional servitude or constitute taking of private property for public use without just compensation. *Lay v. State Rural Electrification Authority*, 182 S. C. 32, 188 S. E. 368.

Statutes fixing procedure for condemning rights of way for state highways valid hereunder. *Jennings v. Sawyer*, 182 S. C. 427, 189 S. E. 746.

One who files income tax return under oath is a "witness" within the meaning of this amendment, and such an act amounts to self-incrimination, if disclosing the commission of a crime. *Sullivan v. United States*, 15 F. (2d) 809.

Thus the requirement of the revenue law that one whose income is derived from violation of law must make a return is unconstitutional. *Sullivan v. United States*, 15 F. (2d) 809.

Witness in bankruptcy proceedings protected from self-incrimination.—The provision of this amendment, that no person shall be compelled in any criminal case to be a witness against himself, may be invoked by a witness under examination in bankruptcy proceedings, *Bankr. Act. 1898*, § 7, providing that no testimony given by bankrupt on exami-

nation concerning conduct of his business shall be offered in evidence against him in any criminal proceeding, being a protection only against use of his testimony in a prosecution in a federal court. *In re Nachman*, 114 F. 995.

Evidence procured under void warrant will not be admitted.—To admit evidence procured from defendant under a void search warrant would in effect compel him to become a witness against himself in violation of this amendment, and will therefore not be admitted. *Woods v. United States*, 279 F. 706.

But admission of evidence procured by search with consent is proper. See this catchline under Amend. 4.

As is evidence of search where officer sees offense committed. See this catchline under Amend. 4.

And questions as to prior convictions are admissible.—Where accused admits prior arrests for other offenses and service on the chain gang, the overruling of objections to questions put to him as to convictions of prior offenses, on the ground that they went into the details of prior offenses, is not prejudicial to accused, as compelling him to testify against himself within the meaning of this amendment. *State v. Hilton*, 87 S. C. 434, 69 S. E. 1077, Ann. Cas. 12B, 1057, Ann. Cas. 16A, 555, 18 A. L. R. 377.

Statute providing that officer, who receives public funds, and does not account for them, that a presumption arises that such funds unaccounted for were fraudulently appropriated, does not violate this provision. *State v. Brown*, 178 S. C. 294; 182 S. E. 838.

In habeas corpus proceeding by witness before legislative investigating committee, who was adjudged in contempt for refusal to testify on ground that answers might incriminate him, provision of Federal Constitution against compelling any person to be a witness against himself was not involved. *In Re Hearing Before Joint Legislative Committee*, 187 S. C. 1, 196 S. E. 164.

The constitutional provision that no person shall "be compelled in any criminal case to be a witness against himself", adopted to conform to the similar provision of Federal Constitution, has same effect as prior provision that no person shall "be compelled to accuse or furnish evidence against himself." *In Re Hearing Before Joint Legislative Committee*, 187 S. E. 1; 196 S. E. 164.

Notwithstanding this amendment, in an action for admeasurement of dower, demandant has no right to submit to the jury the entire case, but only special issues, the action not being one to recover possession of specific real or personal property, or for the recovery of money only. *Frierson v. Jenkins*, 75 S. C. 471, 55 S. E. 890.

Applied, as to double jeopardy under

Prohibition Enforcement Act and preexisting revenue laws, in *United States v. Windham*, 264 F. 376.

Article VI

Further provisions respecting criminal prosecutions.—In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

This amendment is a limitation only on federal powers.—*Ex parte Schmidt*, 24 S. C. 363, 110 Am. St. Rep. 156, 33 L. R. A. 43, 17 L. R. A. (N. S.) 66.

One day in which to obtain counsel sufficient.—The court, in vacating the conditions of suspended sentence imposed on defendant and ordering it to become

immediately effective, may fix the time within which defendant is required to make return to rule to show cause so as to leave him legally only one day in which to prepare case without violating the provisions of this amendment as to right to counsel. *State v. Stauss*, 114 S. C. 445, 103 S. E. 769.

Article VII

Right of trial by jury secured.—In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Section applies only to federal government.—This amendment, relating to the right of trial by jury, applies only to courts sitting under the authority of the United States. *Xepapas v. Richardson*, 149 S. C. 52, 146 S. E. 686.

Action by subcontractor on contractor's bond must be before jury.—An action by a subcontractor on the bond given by a government contractor is an action at law, in which the parties are entitled to a trial by jury, under this amendment, where more than \$20 is involved. *Arnold v. United States*, 280 F. 338, 339.

Trial by jury will not be impaired by

unnecessary resort to equity. *Pacific Mut. Life Ins. Co. v. Parker*, 71 F. (2nd), 872.

Landowner is not deprived of any constitutional or statutory rights by failure of condemnor to commence condemnation proceeding by service of summons and complaint, since condemnation proceeding is not an "action," but special proceeding. *Jennings v. Sawyer*, 182 S. C. 427; 189 S. E. 746.

Statutes fixing procedure for condemning rights of way for state highways valid hereunder. *Jennings v. Sawyer*, 182 S. C. 427; 189 S. E. 746.

Article VIII

Bail, fines and punishments.—Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Article IX

Rule of construction.—The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Article X

Powers of States.—The powers not delegated to the United States by the

Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

States surrendered only incidents of sovereignty enumerated in art. 1.—Under this amendment, the federal government possesses no powers but such as are expressly given to it, or necessarily incident to those given, and the states in the formation of this government, surrendered none of the incidents of sovereignty, except such as are enumerated in the 10th section of the 1st article of the Constitution, which they are expressly prohibited from exercising. *State v. Antonio*, 2 Tread. 776, 779.

Exercise of power by state inconsistent with grant to federal government is not proper.—Although the states retain all

powers not taken away, yet, when a power is granted to the national government, the exercise by the states of which would be inconsistent with the grant, that power is constructively withheld from the states. *State v. Billis*, 2 McC. 12, 9 Am. St. Rep. 750, 40 L. R. A. (N. S.) 974, 50 L. R. A. (N. S.) 966.

But such grant is to be strictly construed.—Every grant to the government of the United States by the Constitution is limited to the powers expressed in the terms of such grant, or arising therefrom by necessary implication. *State v. Davis*, 12 S. C. 528, 42 Am. Dec. 57.

Article XI

Judicial power of United States.—The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

Consent of state to be sued does not give federal court jurisdiction.—The waiver by the state of its immunity from suit, under this amendment, and consent to be sued in its own courts, does not constitute a consent to be sued in Federal Court. *Southern Ry. Co. v. Query*, 21 F. (2d) 333, 334.

Citizen of foreign state may sue corporation of which state is a member.—Notwithstanding this amendment, a citizen of one state can sue a corporation which has been created by, and transacts its business in, another state, (the suit being brought in the latter state,) although some of the members of the corporation are not citizens of the state in which the suit is brought, and although the state itself may be a member of the corporation. *Louisville, etc., R. Co. v. Letson*, 43 U. S. 497, 11 L. Ed. 353.

Suit against state railroad commission for relief against unjust rates is not suit against state.—A proceeding by receivers of a railroad against state railroad commissioners for relief against alleged unjust and unreasonable rates for freight transportation established by such commissioners, is not a proceeding against the state, within this amendment, inhibiting the exercise of jurisdiction by federal courts in suits brought against one of the United States by citizens of another state. *Clyde v. Richmond, etc., R. Co.*, 57 F. 436.

The fact that the act authorizing state railroad commissioners to fix rates requires actions to recover penalties for disregarding them to be brought in the name of the state, and for its benefit,

does not make the state in any sense a party or privy to the record. *Clyde v. Richmond, etc., R. Co.*, 57 F. 436.

And it is immaterial that state has a pecuniary interest in such rates.—That the state has a material interest in a proceeding concerning unjust rates for the shipping of certain commodities as a large, and perhaps the only, shipper of those commodities, does not make it a party to the proceedings, so as to preclude the federal court from exercising jurisdiction. *Clyde v. Richmond, etc., R. Co.*, 57 F. 436.

State is necessary party to suit against state dispensary.—Where county dispensary board purchases supplies for the sale of intoxicating liquor, the title to such supplies vests in the state, so that, the board having paid the proceeds of sales to other designated officers of the state as required by law, an action by a creditor, having furnished supplies, to recover therefor on a quasi contract, is one to which the state is a necessary party, within the prohibition of this amendment. *Carolina Glass Co. v. Murray*, 206 F. 635.

But suit against commission appointed to wind up affairs of state dispensary is not suit against state.—A suit to compel the state dispensary commission appointed to wind up the affairs of the state dispensary under Sess. Laws 1907, p. 335, No. 402, to pay a dispensary creditor from the trust funds held by the commission for the liquidation of dispensary indebtedness, is not a suit against the state within this amendment. *Fleischman Co. v. Murray*, 161 F. 152, 153.

Commissioners appointed to wind up the affairs of the "state dispensary" are not officers of the state, performing for it any functions of government, but merely agents for converting the property of the dispensary into cash and paying its debts; they hold the fund realized therefrom as trustees for the benefit primarily of the creditors; and a suit in a federal court by such creditors against them to have the amounts due determined and paid from the fund is not one against the state, of which the court is without jurisdiction under this amendment—the state having no interest, except in the surplus remaining after the debts are paid. *Murray v. Wilson Distilling Co.*, 164 F. 1; *Fleischman Co. v. Murray*, 161 F. 152.

In such case, the creditors could maintain a suit in equity to enforce the carrying out of the trust by the commission, on its refusal to pay their claims from funds in its hands, and for an injunction and the appointment of a receiver in aid of such relief, and to such a suit the state is not a necessary party. *Murray v. Wilson Distilling Co.*, 164 F. 1.

Actions against highway department to recover auto license fees paid under

protest.—Actions by Federal Land Bank and Federal Intermediate Credit Bank to recover auto license fees paid under protest were "actions against state" and not maintainable without legislative authority. *Federal Land Bank of Columbia, v. State Highway Department, et al.*, 172 S. C. 174, 173 S. E. 284.

But Federal Land Bank was authorized to maintain suit against state highway department to enjoin collection of automobile license fees from bank, since no adequate remedy at law was available. *Ibid.*

Federal Land Bank's automobile used in conduct of its business is an "instrumentality of the United States" not subject to state license fees. *Ibid.*

Action against Governor as officer of State.—Original actions by highway commissioners against Governor as officer of the state to set aside Governor's orders suspending commissioners from office on ground Governor exceeded his statutory authority were not "suits against state" and hence could be maintained without consent of state. *Dacus v. Johnston, Governor*, 180 S. C. 329, 185 S. E. 491.

Article XII

Manner of choosing President and Vice-President.—The electors shall meet in their respective States, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the Government of the United States, directed to the President of the Senate; the President of the Senate shall, in presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted. The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of

electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President should be eligible to that of Vice-President of the United States.

Article XIII

§ 1. Slavery abolished.—Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

§ 2. Enforcement.—Congress shall have power to enforce this Article by appropriate legislation.

Employer of servant who has broken contract is not responsible to his master.—As this and the following amendment abolish all involuntary servitude except for crime, one who hires a servant who has already broken his contract of service with knowledge of the breach is not responsible to the master despite the common-law holding to that effect, for, if any one who engaged a servant breaking his contract of employment would be liable to the master, the servant would practically be compelled to remain in the service until the expiration of his contract and thus be reduced to a state of involuntary servitude. *Shaw v. Fisher*, 113 S. C. 287, 102 S. E. 325.

This amendment does not affect social distinctions.—This and the two following amendments do not in any way affect the social distinctions subsisting between the white and the negro race at the time of their enactment. *Flood v. News & Courier Co.*, 71 S. C. 112, 50 S. E. 637, 36 L. R. A. (N. S.) 974, Ann. Cas. 13B, 1156.

So publication of white man as a negro is still a libel.—This and the two following amendments have not destroyed the law of the State making the publication of a white man as a negro a libel. *Flood v. News & Courier Co.*, 71 S. C. 112, 50 S. E. 637, 36 L. R. A. (N. S.) 974, Ann. Cas. 13B, 1156.

Article XIV

§ 1. Who are citizens—privileges.—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 2. Apportionment of representation—basis of representation.—Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the

proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

§ 3. Political disabilities—removal of political disabilities.—No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State Legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

§ 4. Validity of public debt—debts of the rebellion or for slaves invalid.—The validity of public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

§ 5. Power of Congress to enforce.—The Congress shall have power to enforce by appropriate legislation, the provisions of this Article.

See notes to art. I, sect. 5 and sect. 10, S. C. Constitution of 1895.

I. General Considerations.

II. Applications of the Amendment.

A. Acts Not Violating the Amendment.

B. Acts Violating the Amendment.

I. GENERAL CONSIDERATIONS.

Constitutional question may be raised only by party prejudiced.—The defendant in a criminal case cannot raise the question that the exclusion of woman from jury duty violated this amendment, since he is not a member of the alleged excluded class. *State v. Mittle*, 120 S. C. 526, 113 S. E. 335.

The unconstitutionality of an act authorizing a legislative committee to punish witnesses cannot be predicated on the assumption that the legislative committee will act unconstitutionally thereunder. *Robertson v. Peeples*, 120 S. C. 176, 115 S. E. 300.

A party affected by an ordinance is entitled to show that it is so unreasonable as to amount to a confiscation of property under the guise of regulation, in violation of this section. *State v. Earle*, 66 S. C. 194, 44 S. E. 781, L. R. A. 1915F, 1197, Ann. Cas. 14B, 204.

Allegation raising question under this amendment gives federal court jurisdiction.—In a suit by foreign railroad cor-

poration against town to recover amount of paving assessment paid under protest, an allegation in the bill that enforcement and collection of assessment constituted a taking of plaintiff's property without due process of law and denial of equal protection of the laws under this amendment, gives the federal district court jurisdiction. *Carolina, etc., Ry. Co. v. Clover*, 34 F. (2d) 480.

And federal court may declare void state legislation in conflict with this amendment.—When a right guaranteed under this amendment, and under corresponding sections of the state Constitution has been violated, the federal court is not only vested with the power, but is charged with the duty of protecting that right, even to the extent of declaring unconstitutional an enactment of the state legislature. *Southern Bell Tel., etc., Co. v. Calhoun*, 287 F. 381.

Amendment should be liberally construed.—In view of the importance of this amendment, guaranteeing a citizen against being deprived of his property without due process of law, to protect the citizens against arbitrary governmental action, it should be liberally construed. *Southern Bell Tel., etc., Co. v. Calhoun*, 287 F. 381.

But federal equity court may not consider question under this amendment

where there is an adequate remedy at law.—The equity jurisdiction of the federal courts cannot take cognizance of a suit by a colored person, on behalf of himself and others similarly situated, against the officers of the state of which he and such others are citizens, to restrain such officers from acting under a statute of that state, claimed to violate this and the following amendment, by abridging or denying his right to vote, since he has an adequate remedy at law. *Gowdy v. Green*, 69 F. 865.

Purpose of amendment is to secure privileges of citizenship to negroes.—The leading purpose in the adoption of this and the following amendments to the Constitution of the United States is to secure to persons of African descent the full enjoyment of the privileges of citizenship, including the right to vote; and the courts of the United States have jurisdiction of a suit by such a person against officers of a state to restrain them from acting under a state statute, claimed to violate said amendments to the Constitution by abridging or denying such privileges. *Mills v. Green*, 67 F. 818.

But it does not affect social distinctions. See this catchline under the preceding amendment.

Scope as to police power.—In 6 R. C. L. the following language is used in reference to this amendment: "The Fourteenth Amendment to the Constitution of the United States does not interfere with the proper exercise of the police power of the several states. Accordingly, the provisions of this amendment prohibiting a state from depriving any person of life, liberty, or property without due process of law, do not operate as a limitation upon the police power of the state to pass and enforce such laws as, in its judgment, will inure to the health, morals, and general welfare of the people," which was quoted with approval in *Shealy v. Southern Ry. Co.*, 127 S. C. 15, 120 S. E. 561.

This amendment does not prevent the state from exercising very extensive power in the regulation, taxation, and policing of the business of a corporation, but permits a single foreign corporation to be expelled from the state by a special act, and permits classification for the purposes of taxation to be resorted to. *Southern Bell Tel., etc., Co. v. Calhoun*, 287 F. 381, 382.

In the matter of police regulation, the powers of the state are exceedingly broad, and laws enacted for that purpose may be impolitic, harsh, and oppressive without contravening this amendment. *Southern Bell Tel., etc., Co. v. Calhoun*, 287 F. 381, 382.

A state legislature cannot single out a corporation, any more than a natural person, and subject it to burdens and

liabilities which are not cast on others similarly situated, without contravening the limitations of this amendment. *Southern Bell Tel., etc., Co. v. Calhoun*, 287 F. 381, 382.

"Due process" where litigants afforded hearing before final judgment.—"Due process of law," as provided for in this amendment, is afforded litigants given opportunity to be heard at any time before entry of final judgment. *Shealey v. Seaboard, etc., R. Co.*, 131 S. C. 144, 126 S. E. 622.

Where a railroad company has been notified, has appeared, and has contested a matter before the railroad commission, an order of such commission requiring it to stop certain trains at a station is not depriving such railroad company of its property without due process of law within the meaning of this section. *Railroad Com'rs v. Atlantic, etc., R. Co.*, 71 S. C. 130, 50 S. E. 641, 14 L. R. A. (N. S.) 293, L. R. A. 1918E, 306, Ann. Cas. 17B, 1218.

Federal judge may not release by habeas corpus party committed under state practice to state jail as without "due process."—Where a person is arrested on a peace-warrant from one state judge, and committed to jail after hearing before another judge acting within his jurisdiction and proceeding in accordance with state practice, he cannot be released by the federal district court on habeas corpus, as being deprived of his liberty without due process of law, contrary to this amendment. In *re Enslow*, 45 F. 351.

An act providing the conditions on which a license to do business in the state may be issued to the agent of a foreign insurance company, and that the warrant of his appointment required to be filed with the comptroller general shall continue valid and irrevocable until another agent has been substituted, so that the company shall always have in the state an agent on whom process may be served, confers no right on the company to continue business in the state after its license has expired, so as to entitle it to the protection of this amendment, providing that the state shall not deny to any person within its jurisdiction the equal protection of its laws. *State v. McMaster*, 84 S. C. 495, 66 S. E. 877, 878, 40 L. R. A. (N. S.) 282, Ann. Cas. 13C, 813.

II. APPLICATIONS OF THE AMENDMENT.

A. Acts Not Violating the Amendment.

Prohibiting monopolies.—§ 6620, prohibiting trusts or combinations with a view to lessen or which tend to lessen full and free competition, is an exercise of a police power in defining, limiting, governing, or destroying trusts and monopolies, and not in violation of this amendment. *State v. Virginia-Carolina*

Chemical Co., 71 S. C. 544, 51 S. E. 455, Ann. Cas. 16D, 36, 24 A. L. R. 787.

Statute providing for second lien on automobile for personal injuries. — § 8785 providing that, when a motor vehicle is operated in violation of the law or negligently or carelessly, and when any one receives personal injuries thereby, or when any property is damaged thereby, such damages shall be a lien on such motor vehicle, next in priority to the lien for state and county taxes, recoverable in any court of competent jurisdiction, with the right to attach such vehicle as provided by law for attachment, does not violate the due process of law provisions of this amendment. Merchants', etc., Bank v. Brigman, 106 S. C. 362, 91 S. E. 332, L. R. A. 1917E, 925, 4 A. L. R. 363.

Arrest without warrant. — An act authorizing arrest without warrant for freshly committed crime, is not a taking of liberty without due process, where persons are arrested after being discovered in act of violating law. State v. Quinn, 111 S. C. 174, 97 S. E. 62, 1 A. L. R. 589, 3 A. L. R. 1500, 1517.

Imprisonment for receiving stolen goods. — It is not a denial of due process of law or of equal protection of the laws for the legislature by § 1161 to make the penalty for receiving stolen goods imprisonment without the alternative of a fine, though differing in that respect from other offenses. State v. Johnson, 119 S. C. 55, 110 S. E. 460.

Discretion placed in hands of insurance commissioner whether foreign company shall deposit bond or securities. — That the insurance commissioner in the exercise of the discretion given him under § 7967, providing that, before licensing an insurance company, he may require it to deposit an approved bond, or approved securities, in his discretion, and that, before granting a license, he shall be satisfied that the applicant is qualified, safe, and solvent, requires one applicant to deposit an approved bond and another to deposit approved securities, is not a denial of the equal protection of the law guaranteed by this amendment. State v. McMaster, 94 S. C. 379, 77 S. E. 401.

Granting right to condemn lands for union depot. — An act granting a corporation the right to condemn lands for union depot purposes, is not a violation of the Fourteenth Amendment of the Federal Constitution; the condemnation being for public use, and the statute having made ample provision for the protection of property owners and compensation for property condemned. Riley v. Charleston Union Station Co., 71 S. C. 457, 51 S. E. 485, 110 Am. St. Rep. 579, 10 L. R. A. (N. S.) 909, 11 L. R. A. (N. S.) 942, 22 L. R. A. (N. S.) 8, 36, 47, 75, 87, 123, Ann. Cas. 15A, 83.

Provision that all work on certain roads be done by residents of county. —

A statute providing, relative to the construction of highways in Richland county, that whether the construction be by contract or otherwise, it shall be provided that all laborers and employees, except officers, superintendents, or skilled mechanics, who cannot be obtained in the county, shall be actual inhabitants of such county as far as practicable, is merely suggestive or directory, in the absence of any penalty to enforce it, and even if mandatory, does not violate this amendment, or Const. S. C. art. 1, § 5, as the legislature, in directing the use or disposition of the public property or funds of the state or a county, raised by taxation upon the people of either, has the power to limit the benefits to be derived therefrom to the residents of the state or county. Lillard v. Melton, 103 S. C. 10, 87 S. E. 421, L. R. A. 1916D, 572, L. R. A. 1917E, 468, 5 A. L. R. 761, 24 A. L. R. 941.

Tax on places of amusement. — § 2531, imposing a tax on places of amusement, is not invalid as a taking of property without due process of law in violation of Const. S. C. art. 1, § 5, or of this amendment. Curdts v. South Carolina Tax Comm., 131 S. C. 362, 127 S. E. 438.

Giving new corporations exclusive powers. — § 7787, giving corporations, organized under the article, power to construct railroads and canals for their own use, and to effect a crossing with any existing railroad or public road, but with no power to condemn lands, except for crossing existing railroads or public roads, is not in violation of this amendment, as denying equal protection of the laws, in that it denies to existing railroads the right to condemn crossing over tramroads, electric railways, turnpikes, and canals. Alderman & Sons Co. v. Wilson Lumber Co., 77 S. C. 165, 57 S. E. 756.

Leasing public lands. — An act, leasing land theretofore used as public square for erection of building to contain offices of county and home demonstration agents and other county offices or auditorium for public assemblage, free of rent, is not violative of this amendment, prohibiting the taking of property without due process of law. Antonakas v. Anderson Chamber of Commerce, 130 S. C. 215, 126 S. E. 35, the court also citing State Const., art. 1, § 5.

Prohibiting stringing of electric cables over roofs of buildings. — Where the evidence shows that the stretching of electric wires over and upon the roofs of buildings is extremely dangerous, both as being liable to originate fires and as obstructions to the extinguishment of fires otherwise originated, a city ordinance absolutely prohibiting the practice is a valid exercise of the police power,

and not without due process under this amendment. *Electric Imp. Co. v. San Francisco*, 45 F. 593.

Making issuance by corporation of "order" as wages unlawful.—§ 7035 declaring it unlawful for any corporation, person, or firm to issue or circulate for payment of wages any order, check, memorandum, or evidence of indebtedness payable otherwise than in lawful money of the United States, unless the same is negotiable in cash or in goods, at the option of the holder, at the store of such firm, etc., does not violate this amendment, guaranteeing equal protection of the laws. *Johnson, etc., Co. v. Spartan Mills*, 68 S. C. 339, 47 S. E. 695, 1 Ann. Cas. 409.

Municipality forbidding operation of pool rooms.—An act of a municipality in pursuance of § 6339, relating to operation of billiard and pool rooms, and providing that the act shall not authorize operation in any town or city, where forbidden by ordinances, prohibiting the operation of billiard rooms, is not violative of this amendment as a taking of property without due process of law. *Fowler v. Anderson*, 131 S. C. 471, 128 S. E. 410.

Tax on documents mailed outside of state.—§ 2521 laying tax on documents is not in violation of this amendment, though applied to notes mailed outside of state with right of revocation. *Graniteville Mfg. Co. v. Query*, 44 F. (2d), 64, 65.

Making carrier agent of connecting carrier.—§ 7168, making each carrier the agent of its connecting carrier from whom it receives freight, and liable for neglect of its connecting carrier, is not a violation of this amendment, as denying to the carrier the equal protection of the law. *Venning v. Atlantic, etc., R. Co.*, 78 S. C. 42, 58 S. E. 983, 125 Am. St. Rep. 768, 12 L. R. A. (N. S.) 1217, 31 L. R. A. (N. S.) 24, 73, 91, 101, 52 L. R. A. (N. S.) 870. This section was declared unconstitutional as to interstate commerce, in the above case, as a restraint on such commerce.—Ed. note.

Imposing liability for fires on railroad company.—§ 8362, making every railroad company liable for the property of persons injured by fire from its locomotives, but allowing it to insure any such property, is not a taking of property from a railroad without due process of law, or a denial of equal protection, within this amendment. *Mobile Ins. Co. v. Columbia, etc., R. Co.*, 41 S. C. 408, 19 S. E. 858, 44 Am. St. Rep. 725, 99 Am. St. Rep. 504, 100 Am. St. Rep. 791, 105 Am. St. Rep. 334, 35 L. R. A. (N. S.) 1017, 26 A. L. R. 432. See, also, *McCandless v. Richmond, etc., R. Co.*, 38 S. C. 103, 16 S. E. 429, 62 Am. St. Rep. 171, 18 L. R. A. 440, 21 L. R. A. 790, 25 L. R. A. 161, 35 L. R. A. (N. S.) 1017; *Brown v. Carolina*

Midland Ry. Co., 67 S. C. 481, 46 S. E. 283, 100 Am. St. Rep. 756.

Requiring railroad company to be responsible for unauthorized acts of its servants.—The exception: "To allow the plaintiff, after alleging a joint and concurrent tort by the railway company and its servants, to recover without evidence of such joint and concurrent tort, but simply on evidence of a negligent act of the servant, in which the master did not participate, and which he neither authorized nor ratified, would deprive the defendant railway company of its property without due process of law, contrary to this amendment, for this reason: It would deprive said company of the right of reimbursement from the defaulting servant, which would otherwise exist," is not well taken. *Carson v. Southern Ry. Co.*, 68 S. C. 55, 46 S. E. 525, 528, 6 L. R. A. (N. S.) 986, 8 L. R. A. (N. S.) 91, 12 L. R. A. (N. S.) 671, 13 L. R. A. (N. S.) 1155, 20 L. R. A. (N. S.) 475, 25 L. R. A. (N. S.) 348, 30 L. R. A. (N. S.) 406, Ann. Cas. 13B, 352, 23 A. L. R. 316; *Dagnall v. Southern Ry. Co.*, 69 S. C. 110, 48 S. E. 97, 4 L. R. A. (N. S.) 506, 48 L. R. A. (N. S.) 43, L. R. A. 1918A, 782; *Reeves v. Southern Ry.*, 68 S. C. 89, 46 S. E. 543, 8 L. R. A. (N. S.) 881, 48 L. R. A. (N. S.) 44.

An act allowing punitive damages in actions for negligence of a railroad company, is not unconstitutional as a taking of property without due process of law. *Osteen v. Southern Ry.*, 76 S. C. 368, 57 S. E. 196, 41 L. R. A. (N. S.) 195, L. R. A. 1915E, 1111.

Section 7165, providing a penalty on common carriers for failure to pay or refusal to pay damages on freight within a certain time, is not in violation of this amendment, as denying equal protection of law. *Porter v. Charleston, etc., Ry. Co.*, 63 S. C. 169, 41 S. E. 108, 90 Am. St. Rep. 670, 15 L. R. A. (N. S.) 983; *Seegers Bros. v. Seaboard, etc., Ry.*, 73 S. C. 71, 52 S. E. 797, 121 Am. St. Rep. 921, 125 Am. St. Rep. 767, 42 L. R. A. (N. S.) 106.

Section 8377, changing the common law rule as to contributory negligence in actions involving accidents at railroad crossings, is not in violation of this amendment, prohibiting the deprivation of life, liberty, or property without due process of law; for the right to have one's controversies determined by the existing rules of evidence is not a vested right, and reasonable changes may be made. *Drennan v. Southern Ry.*, 91 S. C. 507, 75 S. E. 45, 46, L. R. A. 1915E, 504, 524, 534.

Section 7161, imposing a penalty on railroad companies for delay in transporting freight, does not contravene this amendment. *Thweet v. Atlantic, etc., R. Co.* (S. C.), 67 S. E. 15; *McCutchen v. Atlantic, etc., R. Co.*, 81 S. C. 71, 61 S.

E. 1108, 20 L. R. A. (N. S.) 127.

Acts, creating a school district, and authorizing the levy of a tax for school purposes by a board of trustees, on petition of 20 taxpayers, are not in violation of this amendment, as depriving petitioner of his property without due process of law, nor as denying the equal protection of the laws, since the legislature has power to delegate its taxing powers for specified purposes to the electors of subdivisions of the state without violation of such provisions. *Martin v. School Dist.*, 57 S. C. 125, 35 S. E. 517, 14 L. R. A. (N. S.) 851.

Prohibiting the carrying on of the business of emigrant agent without a license, is not in violation of this amendment, as abridging the privileges of citizens. *State v. Napier*, 63 S. C. 60, 41 S. E. 13, 129 Am. St. Rep. 282, 2 L. R. A. (N. S.) 860.

Section 8553, authorizing actions against telegraph companies for mental anguish caused by negligence in transmitting or delivering messages, is not in violation of this amendment, as class legislation. *Simmons v. Western Union Tel. Co.*, 63 S. C. 425, 41 S. E. 521, 57 L. R. A. 607, 30 L. R. A. (N. S.) 1133, 49 L. R. A. (N. S.) 211, 280, 339, Ann. Cas. 13C, 866.

Section 7701, providing that the acceptance of benefits by an injured employe of an employer maintaining a relief department for employes shall not bar a recovery for the injuries sustained, is not an unreasonable interference with the right of contract, and is not violative of this amendment or of the State Const. of 1895, art. 1, § 5. *Miller v. Atlantic, etc.*, R. Co., 90 S. C. 249, 73 S. E. 71, 72, 48 L. R. A. (N. S.) 445, 12 A. L. R. 488.

Section 8538, providing for the construction of telephone lines on the rights of way of railroad companies, is not unconstitutional as not furnishing due process of law, in that it does not provide for making all persons having an interest in the land parties, nor does it provide that the telephone company shall, after construction, help to maintain the right of way. *South Carolina, etc., R. Co. v. American Tel., etc., Co.*, 65 S. C. 459, 43 S. E. 970, 42 L. R. A. (N. S.) 232, Ann. Cas. 17B, 694.

Section 2437, placing a graduated tax on incomes, is not unconstitutional as denying equal protection of the laws required by this amendment, since the state legislature has the right to make reasonable classifications of persons and property for public purposes, provided it bears reasonable relation to the purposes to be affected; and, if the constituents of each class are all treated alike under similar circumstances and conditions, the rule of equal protection of the law is satisfied. *Alderman v. Wells*, 85 S. C. 507, 67 S. E. 781, 27 L. R. A. (N. S.) 864,

21 Ann. Cas. 193, Ann. Cas. 13C, 1001, 11 A. L. R. 314.

Section 8713, providing that no chattel mortgage shall be valid unless the property mortgaged shall be described in writing or typewriting, but not printed, on the face of the mortgage, is not unconstitutional and in violation of this amendment, and State Const. of 1895, art. 1, § 5, as an unreasonable restraint of the liberty of citizens to contract. *Rose v. Harlee*, 69 S. C. 523, 48 S. E. 541.

Section 8770, providing that a contractor may be imprisoned for failure to pay his subcontractors, does not violate this amendment. *State v. Hertzog*, 92 S. C. 14, 75 S. E. 374, L. R. A. 1915B, 649.

Act permitting condemnor to enter upon and use land upon payment or deposit of amount awarded by referee in condemnation proceedings, is not violative of this section, since condemnor retains legal title and has equitable lien until payment of amount set by jury's verdict. *Oakland Club v. South Carolina Public Service Authority*, 110 F. (2d) 84.

That state is not liable for debts of South Carolina Public Service Authority, and that project might fail and condemnor be required to take back his land after it had been rendered worthless, does not make unconstitutional provision of South Carolina Eminent Domain Act permitting condemnor to enter upon and use land upon paying or depositing amount awarded by referee, pending jury's verdict on value. *Oakland Club v. South Carolina Public Service Authority*, 110 F. (2d) 84.

Railroad crossing statute, making failure to give signal negligence, does not contravene this section. *Atlantic Coast Line R. Co. v. Ford*, 287 U. S. 502, 77 L. Ed. 457, 53 S. Ct. 249.

Electric power tax upheld as not denying equal protection. *Broad River Power Co. v. Query*, 288 U. S. 178, 77 L. Ed. 685, 53 S. Ct. 326.

"The Street Car Cases."—Construction by South Carolina Supreme Court of charters of public utility requiring it to maintain transportation, gas and electric service, even though the transportation service does not pay, does not violate this section, especially where it was found as fact that utility made no real effort to make transportation pay. *Broad River Power Co. v. South Carolina, ex rel. Daniel*, 282 U. S. 187, 75 L. Ed. 287, 51 S. Ct. —, on rehearing, affirming former opinion in 281 U. S. 537, 74 L. Ed. 1023, 50 S. Ct. 401, which affirmed 157 S. C. 1, 153 S. E. 537.

State documentary stamp tax may be required on promissory notes executed within the state, though payable elsewhere. *Graniteville Mfg. Co. v. Query*, 283 U. S. 376, 75 L. Ed. 1126, 51 S. Ct. 515.

Slot machines may be summarily destroyed, where found by magistrate to be gambling devices, without violating due process clause. *Durant v. Bennett*, 54 F. (2d) 634; *State v. Kizer*, 164 S. C. 383, 162 S. E. 444.

Statute limiting load and width of trucks using highways of state not so unreasonable as to amount to undue restraint on interstate commerce or as to violate 14th amendment. *South Carolina State Highway Department v. Barnwell Bros., et al.*, 303 U. S. 177, 82 L. Ed. 735, 58 S. Ct. 511.

Commerce clause of Federal Constitution merely inhibits regulations of motor vehicles which result in discrimination against motor vehicles used in interstate commerce, and does not restrict state from making regulations in exercise of its police power in respect to weight and size of motor vehicles, so long as such regulations apply equally. *State v. John P. Nutt Co., et al.*, 180 S. C. 19, 185 S. E. 25.

Statute requiring manufacturers of fertilizers to affix to each container a tag disclosing amount in pounds of each material used therein is within the police power of the state. In requiring disclosure of secret formulas, it does not take property without due process, even as applied to products manufactured before its enactment. *National Fertilizer Ass'n, Inc., v. Bradley, et al.*, 301 U. S. 178, 81 L. Ed. 990, 57 S. Ct. 747.

Statute providing that wholesalers delivering goods to retailers in any municipality shall not be charged a business license unless wholesaler maintains a warehouse within the municipality is not unconstitutional on ground that classification of wholesalers based on maintaining warehouse within municipality is arbitrary, capricious or unreasonable and denies "equal protection of the law." *Ponder v. City of Greenville*, 196 S. C. 79, 12 S. E. (2d) 851.

Statute providing for condemnation proceedings by municipality for sewerage purposes is exclusive, and provides "due process" of law for damages from municipality's discharge of raw sewerage into creek. *Oates v. City of Easley*, 182 S. C. 91, 188 S. E. 504.

Statute authorizing action against resident of state or domestic corporation operating as motor carrier in any county through which carrier operates and action against non-resident or foreign corporation in any county of state is not unconstitutional as making arbitrary or unreasonable classification or denying equal protection of law by discriminating between individuals and corporations operating as such carriers and others making same or similar use of highways, but not operating as motor carriers for hire. *Windham v. Pace*, 192 S. C. 271, 6

S. E. 2d 270.

The Legislature has power to subject different classes of persons or corporations to different rules as to venue of actions against them, where classification is reasonable and not arbitrary. *Ibid.*

An ordinance of the city of Columbia providing for maintenance of parking meters which automatically register expiration of time limit for parking for which fee is charged is not invalid as violating "due process" clause of Federal Constitution, or as denying traveler or abutting owner "equal protection of laws" under State Constitution. *Owens v. Owens*, 193 S. C. 260, 8 S. E. 2d 339.

Statute imposing license tax of \$15 per year per machine on machines dispensing music but imposing tax of only \$10 per year per machine on machines dispensing tangible articles of merchandise and exempting machines which require a deposit of less than five cents for their operation is not arbitrary and does not contravene constitutional provisions guaranteeing to citizen due process of law and equal protection of laws. *Carolina Music Co. v. Query*, 192 S. C. 309, 6 S. E. 2d 473.

The statute imposing license tax of \$15 per year on each machine which plays music or merely affords amusement upon the deposit of 5 cents or more is not invalid on ground that tax is confiscatory and would destroy business of operating music vending machines. *Ibid.*

To assess license tax under §§ 2681, 2690-A, and 2690-1 on part of capital stock of domestic corporation which is represented by the Georgia investment and wholly beyond borders of this state is not burden to interstate commerce and is not in violation of this amendment. *Pacolet Mfg. Co. v. Query*, 174 S. C., 359; 177 S. E., 653. See § 2681 hereof.

All one is guaranteed by this amendment is the preservation of his substantial right to redress by some effective procedure. *Gibbes v. Zimmerman*, 290 U. S. 326, 78 L. Ed. 342, 54 S. Ct., 140.

Due process of law requires that a person shall have a reasonable opportunity to be heard before a legally appointed and qualified impartial tribunal before any binding decree, order, or judgment can be made affecting his rights to life, liberty, or property. *State v. Brown*, 178 S. C., 294; 182 S. E., 838.

Statute imposing tax of 5% on all dividends and interest in excess of \$1.00 received by individuals is not in violation hereof. *Marshall v. South Carolina Tax Commission*, 178 S. C., 57; 182 S. E., 96.

Statutes fixing procedure for condemning rights of way for state highways valid hereunder. *Jennings v. Sawyer*, 182 S. C. 427; 189 S. E. 746.

Ordinance governing keeping of cows within town limits, imposing requirements with respect to space, stabling, drainage, watering, bedding, disinfecting, tuberculin testing, and removal of manure valid hereunder. *Ward v. Town of Darlington*, 183 S. C. 263; 190 S. E. 826.

Whether state highway department should have taken into consideration probability of occurrence of floods in reconstructing highway alleged to have deflected flood waters so as to inundate plaintiff's property and deprive him thereof held for jury, as against contention that flood waters were an act of God over which highway department had no control. *Baynham v. State Highway Department of South Carolina*, 181 S. C. 435; 187 S. E. 528.

The legislature has power to make a classification of its citizens so that laws may be passed which, if applicable alike to all persons belonging to a given class are not violative of provisions of constitution forbidding a denial to any person of equal protection of the law, but that classification must rest upon some difference which bears a reasonable and just relation to act in regard to which the classification is proposed. *State v. Ross*, 185 S. C. 472; 194 S. E. 439.

Act regulating occupation of hairdressers and cosmetologists is not invalid. *State v. Ross*, 185 S. C. 472; 194 S. E. 439.

The imposition of assessment for municipal improvements did not violate due process clause of Federal Constitution. *Town of Cheraw v. Turnage*, 184 S. C. 76; 191 S. E. 831.

See generally. *Hicklin v. Coney*, 168 S. C. 440, 167 S. E. 674, 54 S. Ct., 142; *Atlantic Coast Line R. Co. v. Ford*, 169 S. C. 41, 168 S. E. 143, 53 S. Ct., 249; *Broad River Power Co. v. Guery*, 53 S. Ct., 326.

B. Acts Violating the Amendment.

Involved registration laws inhibiting voting power of negro race.—Where the registration laws are so involved that they are with difficulty complied with by the more ignorant members of the white race, and virtually not at all by the negro race, they are unconstitutional as infringing the provisions as to citizenship and suffrage contained in this and the following amendment. *Mills v. Green*, 67 F. 818. See also *Butler v. Ellerbe*, 44 S. C. 256, 22 S. E. 425, 108 Am. St. Rep. 841, 8 L. R. A. (N. S.) 124, 44 L. R. A. (N. S.) 201, L. R. A. 1915D. 185.

Requiring one telephone company to maintain exchanges in certain town without requiring other companies to do so.—An Act requiring the Southern Bell Telephone & Telegraph Company to construct and maintain telephone exchanges in two designated towns, when there were numerous other telephone

companies in the state, and the designated company was not obliged by its charter, franchise, or contract to construct such exchanges, deprives the company of its property without due process of law, and is void. *Southern Bell Tel., etc., Co. v. Calhoun*, 287 F. 381, 382.

Requiring railroad to build connecting track without establishing necessity therefor.—The Railroad Commission cannot require railroads to build connecting track, under § 8331, unless it is established at a hearing, at which the railroads are given an opportunity to be heard, that the connection is necessary for the public good, and that the amount of expenditure will not be confiscatory, since otherwise the order would constitute the taking of private property without due process, in violation of this amendment. *Shealey v. Seaboard, etc., Ry. Co.*, 131 S. C. 144, 126 S. E. 622.

Exempting certain lands from stock laws.—Complainant owned a tract of land which was valuable solely for grazing purposes, and after he acquired it, the legislature passed an act exempting this land, with other tracts, from the provisions of the law requiring owners to keep their cattle fenced in, the effect of which was to require complainant either to fence his whole tract against cattle, or to submit to have it trespassed upon, without redress, by any cattle whose owners chose to let them run at large. The act was held not to be within the police power of the state, and violated this amendment, inasmuch as it deprived complainant of his property without due process of law. *Smith v. Bivens*, 56 F. 352.

But the practitioner is referred to a later decision of the state court in which it was held that an act exempting a certain portion of a named county from the operation of the general stock law between certain dates in each year, does not violate State Const., art. 1, § 5, and this amendment, by denying the equal protection of the laws, in that it imposes on citizens in said exempt section the burden of fencing the cultivated lands, when the same burden is not required of other citizens of the county. *Brown v. Tharpe*, 74 S. C. 207, 54 S. E. 363, 6 A. L. R. 223.—Ed. Note.

Emptying sewage without compensation to prejudiced property owners.—Under this amendment a municipality is prohibited from emptying sewer pipes into a river to the detriment of property owners outside the city limits without compensation. *Matheny v. Aiken*, 68 S. C. 163, 47 S. E. 56, 20 L. R. A. (N. S.) 1055.

Arbitrary paving assessment.—A paving assessment, if plainly arbitrary or unreasonably discriminatory, denies due process and equal protection, and will not be upheld. *Carolina, etc., Ry. Co. v. Clover*, 46 F. (2d) 395.

An act providing that railroad companies shall build side tracks connecting industrial enterprises with their main lines for the delivery and receipt of freight, costs to be paid by the enterprises, and repaid by the companies in annual installments of 20 per cent. of the freight collected, is a violation of this amendment, as authorizing the taking of private property for private use. *Mays v. Seaboard, etc., Ry.*, 75 S. C. 455, 56 S. E. 30, the court also citing art. 1, §§5, 17 of the State Constitution.

An ordinance of a town, purporting to authorize the closing of a street, in view of contract between a municipality and a railroad, purporting to require the municipality to close certain streets and the railroad and to open others, violates this amendment, prohibiting the taking of private property without just compensation or without due process, and the town is liable to a property owner for damages caused by the closing of the street. *Houston v. West Greenville*, 126 S. C. 484, 120 S. E. 236, the court also citing art. 1, §§ 5, 17, of the State Constitution.

An act permitting one person to bring an action against the state for damages to his automobile is in effect a granting of a special privilege to one citizen of state in violation of the equal protection of law clauses of this amendment and State Const., art. 1, § 5, notwithstanding art. 17, § 2 of the State Constitution providing that the General Assembly may direct in what manner claims against the state may be established and adjusted. *Sirrine v. State*, 132 S. C. 241, 128 S. E. 172.

The South Carolina dispensary act, not being an exercise of police power, the section contravenes the interstate commerce act and the Fourteenth Amendment, and is void. *In re Langford*, 57 F. 570. This act has since been repealed.—Ed. Note.

Calling out militia to oust highway commissioners.—State highway commissioners charged by Governor with declining to vacate their offices at Governor's order, are entitled to have question thus made by Governor decided by courts, and hence Governor's attempting to substitute other commissioners, and calling out militia proclaiming existence of insurrection in connection with highway department was unauthorized and violated due process clauses of state and federal constitutions. *Hearon v. Calus*, 178 S. C. 381, 183 S. E. 13.

Governor's orders indefinitely suspending state highway commissioners from office without hearing are void. *Dacus v. Johnston*, 180 S. C. 329, 185 S. E. 491.

Statutory provision that action against resident of state or domestic corporation operating as motor vehicle carrier may be brought in any county through which carrier operates but that action against nonresident or foreign corporation may

be brought in any county of state, is unconstitutional as denying equal protection of law by making arbitrary classification, not based on real, substantial difference reasonably related to subject matter. *Windham v. Pace*, 192 S. C. 271, 6 S.E.2d 270.

The imposition of an inheritance tax in state of debtor's domicile in respect of a debt due a non-resident decedent, not having a business situs in the state, violates due process clause of 14th amendment. The indebtedness of a corporation to a non-resident majority stockholder for cash advances and dividends declared has no such business situs in the state in which the corporation is domiciled as to render it subject to inheritance tax in such state. *Beidler v. S. C. Tax Commission*, 282 U. S. 1, 75 L. Ed. 131, 51 S. Ct. 54.

Act imposing one-year limitation on action by state or county officer or employee for salary, fees, or other obligation for services, or six-month limitation if cause of action accrued prior to effective date of act, which act does not apply to counties having population of over 85,000, violates "equal protection of law" and "due process of law" clauses of State and Federal Constitutions with respect to claims accruing on or before passage of the Act. *Gillespie v. Pickens County*, 197 S. C. 217, 14 S.E.2d 900.

The Legislature, without violation of guaranties of "due process of law", may reduce period in which actions may be brought and may make such reductions applicable to existing causes of action, subject to conditions that it may not entirely take away right to sue, nor so unreasonably shorten period for bringing suit as practically to take away all remedy. *Ibid.*

A municipal ordinance making it unlawful to erect and maintain billboard facing on public street or other public place without permit from city council was invalid for failure to establish rule by which impartial enforcement could be secured.

An ordinance which on its face restricts a property right not according to any general or uniform rule, but so as to make due enjoyment of property depend on arbitrary will of governing authorities, is unconstitutional. *Schloss Poster Advertising Co. v. City of Rock Hill*, 190 S. C. 92, 2 S.E.2d 392.

Municipal ordinances placing restrictions on lawful conduct or lawful use of property must specify rules and conditions to be observed and admit of exercise of privilege by all citizens alike who will comply with rules and conditions, and must not admit of exercise of opportunity of arbitrary discrimination by municipal authorities. *Ibid.*

Statute prohibiting employment of employees of enumerated manufacturing

and mercantile establishments for more than 56 hours per week or 12 hours per day and exempting from its provisions certain businesses is invalid on ground that attempted classification is arbitrary and without reasonable basis and constitutes illegal discrimination amounting to impairment of employer's rights under constitutional provisions prohibiting impairment of contracts, the taking of life, liberty, or property without due process, and equal protection clause. *Gasque, Inc., v. Nates*, 191 S. C. 272, 2 S.E.2d 36.

There are certain classes of employment and certain classes of employees with regard to which it is not only proper but necessary for the state government in the protection of the health, morals, and general welfare of the people, to legislate as to hours of labor, but a general regulation of hours of labor in private industry, where there is no direct relation to the public health, welfare, or morals, is not a proper exercise of police power, and is violative of the constitutional protection of the individual. *Ibid.*

Where it was not shown that it was dangerous to health or safety of employees or the public for an employee to work more than 56 hours in any one week in enumerated manufacturing and mercantile establishments, the statute prohibiting employment of employees in such establishments for more than 56 hours per week or 12 hours per day could not be sustained as a proper exercise of

the police power and was violative of constitutional provisions prohibiting impairment of contracts, taking of life, liberty, or property without due process and the equal protection clause. *Ibid.*

Statute purporting to deprive county treasurer of fees theretofore earned on tax executions held unconstitutional as depriving county treasurer of property without due process of law and impairing obligations of contract. *Salley v. McCoy*, 182 S. C. 251; 189 S. E. 196.

Ordinance prohibiting operation of a barbecue stand located in any residential area of city during certain hours, and defining "residential area" as any section of city where two or more houses used for residential purposes are located on abutting property, unconstitutional. *Fincher v. City of Union*, 186 S. C. 232; 196 S. E. 1.

In engineer's action for disability benefits under railroad employees' relief fund contract which was made and subject to performance in North Carolina, exclusion of decision of North Carolina Supreme Court on ground of statute requiring as condition precedent to right of foreign corporation to do business in state that place of making and performance of contract whereby consideration was received from citizen of state be deemed to be within state, held error as depriving railroad of due process. *Livingston v. Atlantic Coast Line R. Co.*, 176 S. C. 385; 180 S. E. 343.

Article XV

§ 1. Right to vote not abridged by race, color, or previous condition.—The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

§ 2. Enforcement.—The Congress shall have power to enforce this Article by appropriate legislation.

Involved registration laws inhibiting voting power of Negro race.—See this catchline under the preceding amendment, analysis line, II, B.

Amendment applies only to action by federal government.—See this catchline under Amend. 4, as to unreasonable searches and seizures.

Article XVI

Income tax.—The Congress shall have power to levy and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

Ratified 25th February, 1913.

Article XVII

Senate—members—terms—vote—electors.—The Senate of the United

States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislatures.

Vacancy.—When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the Legislature of any State may empower the executive thereof to make temporary appointment until the people fill the vacancies by election as the Legislature may direct.

Incumbents.—This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

Ratified May 31st, 1913.

Article XVIII

§ 1. Intoxicating liquors — manufacture — sale — transportation.—After one year from the ratification of this Article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

§ 2. Enforcement.—The Congress and the several States shall have concurrent power to enforce this Article by appropriate Legislation.

§ 3. Time effective.—This Article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the Legislature of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Ratified January 29, 1919.

Repealed by 21st amendment.

ARTICLE XIX

§ 1. Sex not bar right vote.—The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

§ 2. Enforcement.—Congress shall have power, by appropriate legislation, to enforce the provisions of this Article.

Amendment prohibits discrimination, leaving states to confer right. — This amendment, providing that the right to vote shall not be denied on account of sex, does not itself confer the right of suffrage upon women, but merely prohibits discrimination, leaving the states to confer the right. *State v. Mittle*, 120

S. C. 526, 113 S. E. 335.

And does not given women right to serve as jurors.—Even if this amendment granted the right of suffrage to women, it does not thereby give them the right to serve as jurors. *State v. Mittle*, 120 S. C. 526, 113 S. E. 335.

Article XX

§ 1. Time terms of President, Vice-President, Senators and Representatives end and start.—The terms of the President and Vice-President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3rd day of January, of the years in which

such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

§ 2. Congress assemble annually.—The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3rd day of January, unless they shall by law appoint a different day.

§ 3. President—vacancy.—If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

§ 4. President—vacancy—Vice President—vacancy.—The Congress may by law provide for the case of death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

§ 5. Time §§ 1 and 2 hereof effective.—Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

§ 6. Time effective.—This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several states within seven years from the date of its submission.

Effective October 15, 1933.

Article—XXI

§ 1. Eighteenth amendment repealed.—The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

§ 2. Intoxicating liquors—traffic in—possession.—The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

§ 3. Time effective.—This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Effective December 5, 1933.

Ratifications of the United States Constitution

The Constitution was adopted by a Convention of the States September 17, 1787, and was subsequently ratified by the several States, in the following order, viz.:

Delaware, December 7, 1787.
 Pennsylvania, December 12, 1787.
 New Jersey, December 18, 1787.
 Georgia, January 2, 1788.
 Connecticut, January 9, 1788.
 Massachusetts, February 6, 1788.
 Maryland, April 28, 1788.
 South Carolina, May 23, 1788.

New Hampshire, June 21, 1788.
 Virginia, June 26, 1788.
 New York, July 26, 1788.
 North Carolina, November 21, 1789.
 Rhode Island, May 29, 1790.

The State of Vermont, by convention, ratified the Constitution on the 10th of January, 1791, and was, by an Act of Congress of the 18th of February, 1791, "received and admitted into this Union as a new and entire member of the United States of America."

Ratifications of the Amendments to the United States Constitution

The first ten of the preceding articles of amendment (with two others which were not ratified by the requisite number of States) were submitted to the several State Legislatures by a resolution of Congress which passed on the 25th of September, 1789, at the first session of the First Congress, and was ratified by the Legislatures of the following States:

New Jersey, November 20, 1789.
 Maryland, December 19, 1789.
 North Carolina, December 22, 1789.
 South Carolina, January 19, 1790.
 New Hampshire, January 25, 1790.
 Delaware, January 28, 1790.
 Pennsylvania, March 10, 1790.
 New York, March 27, 1790.
 Rhode Island, June 15, 1790.
 Vermont, November 3, 1791.
 Virginia, December 15, 1791.

The Acts of the Legislatures of the States ratifying these amendments were transmitted by the Governors to the President, and by him communicated to Congress. The Legislatures of Massachusetts, Connecticut and Georgia do not appear by the record to have ratified them.

The eleventh article was submitted to the Legislatures of the several States, by a resolution of Congress passed on the 5th of March, 1794, at the first session of the Third Congress; and on the 8th of January, 1798, at the second session of the Fifth Congress, it was declared by the President, in a message to the two Houses of Congress, to have been adopted by the Legislatures of three-fourths of the States, there being at that time sixteen States in the Union.

The twelfth article was submitted to the Legislatures of the several States, there being then seventeen States, by a resolution of Congress passed on the 12th of December, 1803, at the first session of the Eighth Congress; and was ratified by the Legislatures of three-fourths of the States in 1804, according to a proclamation of the Secretary of State dated the 25th of September, 1804.

The thirteenth article was submitted

to the Legislatures of the several States, there being then thirty-six States, by a resolution of Congress passed on the 1st of February, 1865, at the second session of the Thirty-eighth Congress, and was ratified, according to a proclamation of the Secretary of State dated December 18, 1865, by the Legislatures of the following States:

Illinois, February 1, 1865.
 Rhode Island, February 2, 1865.
 Michigan, February 2, 1865.
 Maryland, February 3, 1865.
 New York, February 3, 1865.
 West Virginia, February 3, 1865.
 Maine, February 7, 1865.
 Kansas, February 7, 1865.
 Massachusetts, February 8, 1865.
 Pennsylvania, February 8, 1865.
 Virginia, February 9, 1865.
 Ohio, February 10, 1865.
 Missouri, February 10, 1865.
 Indiana, February 16, 1865.
 Nevada, February 16, 1865.
 Louisiana, February 17, 1865.
 Minnesota, February 23, 1865.
 Wisconsin, March 1, 1865.
 Vermont, March 9, 1865.
 Tennessee, April 7, 1865.
 Arkansas, April 20, 1865.
 Connecticut, May 5, 1865.
 New Hampshire, July 1, 1865.
 South Carolina, November 13, 1865.
 Alabama, December 2, 1865.
 North Carolina, December 4, 1865.
 Georgia, December 9, 1865.
 The following States not enumerated in the proclamation of the Secretary of State also ratified this amendment.
 Oregon, December 11, 1865.
 California, December 20, 1865.
 Florida, December 28, 1865.
 New Jersey, January 23, 1866.
 Iowa, January 24, 1866.
 Texas, February 18, 1870.

The fourteenth article was submitted to the Legislatures of the several States, there being then thirty-seven States, by a resolution of Congress passed on the 16th of June, 1866, at the first session of the Thirty-ninth Congress; and was rati-

fied, according to a proclamation of the Secretary of State dated July 28, 1868, by the Legislatures of the following States:

Connecticut, June 30, 1866.
 New Hampshire, July 7, 1866.
 Tennessee, July 19, 1866.
 New Jersey, September 11, 1866.
 Oregon, September 19, 1866.
 Vermont, November 9, 1866.
 New York, January 10, 1867.
 Ohio, January 11, 1867.
 Illinois, January 15, 1867.
 West Virginia, January 16, 1867.
 Kansas, January 18, 1867.
 Maine, January 19, 1867.
 Nevada, January 22, 1867.
 Missouri, January 26, 1867.
 Indiana, January 29, 1867.
 Minnesota, February 1, 1867.
 Rhode Island, February 7, 1867.
 Wisconsin, February 13, 1867.
 Pennsylvania, February 13, 1867.
 Michigan, February 15, 1867.
 Massachusetts, March 20, 1867.
 Nebraska, June 15, 1867.
 Iowa, April 3, 1868.
 Arkansas, April 6, 1868.
 Florida, June 9, 1868.
 North Carolina, July 4, 1868.
 Louisiana, July 9, 1868.
 South Carolina, July 9, 1868.
 Alabama, July 13, 1868.
 Georgia, July 21, 1868.

The States of Delaware, Maryland, Kentucky, and Texas rejected the amendment.

The State of Virginia ratified this amendment on the 8th of October, 1869, subsequent to the date of proclamation of the Secretary of State.

The fifteenth article was submitted to the Legislatures of the several States, there being then thirty-seven States, by

a resolution of Congress passed on the 27th of February, 1869, at the first session of the Forty-first Congress; and was ratified, according to a proclamation of the Secretary of State dated March 30, 1870, by the Legislatures of the following States:

Nevada, March 1, 1869.
 West Virginia, March 3, 1869.
 North Carolina, March 5, 1869.
 Louisiana, March 5, 1869.
 Illinois, March 5, 1869.
 Michigan, March 8, 1869.
 Wisconsin, March 9, 1869.
 Massachusetts, March 12, 1869.
 Maine, March 12, 1869.
 South Carolina, March 16, 1869.
 Pennsylvania, March 26, 1869.
 Arkansas, March 30, 1869.
 New York, April 14, 1869.
 Indiana, May 14, 1869.
 Connecticut, May 19, 1869.
 Florida, June 15, 1869.
 New Hampshire, July 7, 1869.
 Virginia, October 8, 1869.
 Vermont, October 21, 1869.
 Alabama, November 24, 1869.
 Missouri, January 10, 1870.
 Mississippi, January 17, 1870.
 Rhode Island, January 18, 1870.
 Kansas, January 19, 1870.
 Ohio, January 27, 1870.
 Georgia, February 2, 1870.
 Iowa, February 3, 1870.
 Nebraska, February 17, 1870.
 Texas, February 18, 1870.
 Minnesota, February 19, 1870.

The State of New Jersey ratified this amendment on the 21st of February, 1871, subsequent to the date of the proclamation of the Secretary of State.

The States of California, Delaware, Kentucky, Maryland, Oregon and Tennessee rejected this amendment.

¹New Jersey withdrew her consent to the ratification in April, 1868.

²Oregon withdrew her consent to the ratification October 15, 1868.

³Ohio withdrew her consent to the ratification in January, 1868.

⁴North Carolina, South Carolina, Georgia and Virginia had previously rejected the amendment.

⁵New York withdrew her consent to the ratification January 5, 1870.

⁶Ohio had previously rejected the amendment May 4, 1869.

⁷New Jersey had previously rejected the amendment.

INDEX

UNITED STATES CONSTITUTION

ACCOUNTS

Treasury, Art. I, § 9.

ALCOHOLIC LIQUORS

Manufacture, transportation, etc. Amendments, Art. XVIII, 21.

ADJOURNMENTS

Adjournments, Art. I, § 5.

ADMIRALTY

Jurisdiction, Art. III, § 2.

ADMISSION OF NEW STATES

Admission of new States, Art. IV, § 3.

AGE OF PRESIDENT

Age of President, Art. II, § 1.

AGE OF REPRESENTATIVES

Age of Representatives, Art. I, § 2.

AGE OF SENATOR

Age of Senator, Art. I, § 3.

ALIENS

Jurisdiction, Art. III, § 2.

AMBASSADORS

Appointment, Art. II, § 2.

Jurisdiction, Art. III, § 2.

Original jurisdiction of Supreme Court, Art. III, § 2.

President to receive ambassadors, Art. II, § 3.

AMENDMENTS

How constitution amended, Art. V.

Application of the Legislatures of two-thirds of the States, Art. V.

Equal suffrage in the Senate, Art. V.

Proposal by two-thirds of both houses, Art. V.

Ratification by Legislature of three-fourths of the several States, Art. V.

APPEAL AND ERROR

Appellate jurisdiction of Supreme Court, Art. III, § 2.

APPORTIONMENT

Apportionment of representation, Amendments, Art. XIV, § 2.

Representatives and direct taxes, Art. I, § 2.

Taxation, Art. I, § 9.

APPROPRIATIONS

Necessity of appropriations, Art. I, § 9.

ARMS

Right to keep and bear arms, amendments, Art. II.

ARMY AND NAVY

Appropriation not to be for longer term than two years, Art. I, § 8.

Militia:

See "Militia."

No soldier to be quartered in any house, unless, etc., amendments, Art. III.

Power of Congress to raise and support armies, Art. I, § 8.

Power of States to maintain, Art. I, § 10.

Power to make rules for the government and regulation of land and naval forces, Art. I, § 8.

Power to provide and maintain navy, Art. I, § 8.

President Commander-in-Chief, Art. II, § 2.

Right to indictment, Amendments, Art. V.

ARREST

Privileged from arrest, Art. I, § 6.

ARSENALS

Power of Congress, Art. I, § 8.

ASSEMBLY

Right of, Amendments, Art. I.

ATTAINDER

Attainder, Art. I, § 9.

Bill of:

Power of States, Art. I, § 10.

Treason, Art. III, § 3.

ATTORNEY

Assistance of counsel, Amendments, Art. VI.

AUTREFOIS, ACQUIT AND CONVICT

Jeopardy, Amendments, Art. V.

BAIL

Excessive bail, amendments, Art. VIII.

BANKRUPTCY

Power of Congress, Art. I, § 8.

BILLS

See "Statutes."

Veto:

See "Veto."

BILLS OF ATTAINDER

Bills of attainder, Art. I, § 9.

Power of States, Art. I, § 10.

BRIBERY

Impeachment, Art. II, § 4.

CAPITATION TAX

Capitation tax, Art. I, § 9.

CAPTURES

Captures, Art. I, § 8.

CENSUS

Census, Art. I, § 2.

CESSION

District of Columbia, Art. I, § 8.

CHIEF JUSTICE

Presides when President is tried, Art. I, § 3.

CITIZENS

Controversies between a State and citizens of another State, Art. III, § 2.

Controversies between a State, or the citizens thereof, and foreign States, citizens or subjects, Art. III, § 2.

Controversies between citizens of the same State, Art. III, § 2.

Privileges and immunities, Amendments, Art. XIV, § 1.

Privileges of citizens of each State, Art. IV, § 2.

Who are citizens, Amendments, Art. XIV, § 1.

COMMERCE

Commercial preferences, Art. I, § 9.

Power to regulate commerce, Art. I, § 8.

Vessels of one State not to pay duties in another, Art. I, § 9.

COMMON DEFENSE

Common defense, Art. I, § 8.

COMPACT BETWEEN THE STATES

Compact between the States, Art. I, § 10.

COMPENSATION

Taking private property, Amendments, Art. V.

COMPENSATION OF MEMBERS

Compensation of members, Art. I, § 6.

CONGRESS

Adjournments, Art. I, § 5.

Compelling attendance of members, Art. I, § 5.

Compensation, Art. I, § 6.

Consent of each house to adjournment for more than three days, Art. I, § 5.

Death, resignation or inability of both President and Vice President, Art. II, § 1.

Debate, Art. I, § 6.

Disqualification to hold office, Art. I, § 6.

Expulsion, Art. I, § 5.

Free speech, Art. I, § 6.

House of Representatives:

See "House of Representatives."

Journal, Art. I, § 5.

Legislative powers, Art. I, § 1.

Membership, Art. I, § 5.

One session in each year, Art. I, § 4.

Powers of Congress:

See "Powers of Congress."

Privilege from arrest, Art. I, § 6.

Qualification, Art. I, § 6.

Quorum, Art. I, § 5.

Rules, Art. I, § 5.

CONGRESS (Cont'd)

Senate:

See "Senate."

Sessions, Art. I, § 4; Amendments, Art. XX.

Time of adjournment limited, Art. I, § 5.

CONSTITUTION

Amendment:

See "Amendments."

Oaths:

Oath to support constitution, by whom taken, Art. VI.

Ratification:

What ratification shall establish constitution, Art. VII.

Rule of construction, Amendments, Art. IX.

Supremacy of constitution, treaties, and laws of the United States, Art. VI.

CONSTRUCTION OF CONSTITUTION

Enumeration of certain rights, Amendments, Art. IX.

Judicial power, Amendments, Art. XI.

Powers not delegated to the United States, Amendments, Art. X.

Reservation of powers by States, Amendments, Art. X.

Suits against the State, Amendments, Art. XI.

CONSULS

Appointment, Art. II, § 2.

Jurisdiction, Art. III, § 2.

COPYRIGHT

Power of Congress, Art. I, § 8.

COUNSEL

Assistance of counsel, Amendments, Art. VI.

COUNTERFEITING

Power of Congress, Art. I, § 8.

COURTS

See "Judges."

Judicial power, Art. III, § 1.

See "Judicial Power."

Power of Congress to constitute tribunals inferior to Supreme Court, Art. I, § 8.

CRIMES

All civil offices forfeited for certain crimes, Art. II, § 4.

Provisions concerning prosecutions, trials and punishments, Amendments, Art. V.

Speedy and public trial, Amendments, Art. VI.

CRUEL AND UNUSUAL PUNISHMENT

Cruel and unusual punishment, Amendments, Art. VIII.

DEBTS

Legal tender, Art. I, § 10.

Of the United States prior to the adoption of the constitution proclaimed valid, Art. VI.

Power of Congress to pay debts, Art. I, § 8.

Power to borrow money on credit of United States, Art. I, § 8.

Validity of public debt—debts of the rebellion or for slaves invalid, Amendments, Art. XIV, § 4.

DIRECT TAX

Direct tax, Art. I, § 9.

Apportionment, Art. I, § 2.

DISTRICT OF COLUMBIA

Power of Congress, Art. I, § 8.

DOCK YARDS

Power of Congress, Art. I, § 8.

DUE PROCESS OF LAW

Not to be deprived of life, liberty, or property without due process of law, Amendments, Art. V.

Property, Amendments, Art. V.

State not to deprive any person of life, liberty, or property, Amendments, Art. XIV, § 1.

DUTIES

See "Taxation."

ELECTIONS

Elections, Art. I, § 4.

See "House of Representatives."

Each house shall be the judge of election returns, Art. I, § 5.

House of Representatives:

See "House of Representatives."

ELECTIONS (Cont'd)

Manner of holding, Art. I, § 4.

Place, Art. I, § 4.

Power of State, Art. I, § 4.

President and Vice President:

Balloting of electors, Art. II, § 1.

Certificates, Art. II, § 1.

Election by house, Art. II, § 1.

Electors to vote on same day, Art. II, § 1.

How electors chosen, Art. II, § 1.

Majority of the whole number of electors, Art. II, § 1.

Manner of choosing President and Vice President, Amendments, Art. XII.

Meeting of electors, Art. II, § 1.

Member of House of Representatives, Art. II, § 1.

Number of electors, Art. II, § 1.

Officer of United States as elector, Art. II, § 1.

President of Senate to count votes, Art. II, § 1.

Qualifications of electors, Art. II, § 1.

Senate to choose Vice President in case of failure of election, Art. II, § 1.

Senator as elector, Art. II, § 1.

Where no person has majority, Art. II, § 1.

Regulations by Congress, Art. I, § 4.

Right to vote not abridged by race, color, or previous condition, Amendments, Art. XV, § 1.

Senate:

See "Senate."

Time, Art. I, § 4.

ELECTORS

See "Senate."

EMINENT DOMAIN

Private property:

Not to be taken for public use without just compensation, Amendments, Art. V.

EQUAL PROTECTION OF THE LAWS

Equal protection of the laws, Amendments, Art. XIV, § 1.

EXCESSIVE BAIL

Excessive bail, Amendments, Art. VIII.

EXCESSIVE FINES

Excessive fines, Amendments, Art. VIII.

EXCISES

See "Taxation."

EXPORT DUTY

Export duty, Art. I, § 9.

EXPORTS

See "Taxation."

EX POST FACTO LAWS

Ex post facto laws, Art. I, § 9.

Power of States, Art. I, § 10.

EXPULSION

Expulsion, Art. I, § 5.

EXTRADITION

Extradition, Art. IV, § 2.

FINES

Excessive fines, Amendments, Art. VIII.

FOREIGN LAWS

Full faith and credit clauses, Art. IV, § 1.

FOREIGN STATES

Jurisdiction, Art. III, § 2.

FORMER JEOPARDY

Former jeopardy, Amendments, Art. V.

FORM OF GOVERNMENT

Republican form of government guaranteed, Art. IV, § 4.

FREEDOM OF SPEECH

Freedom of Speech, Art. I, § 6; Amendments, Art. I.

FREEDOM OF THE PRESS

Freedom of the Press, Amendments, Art. I.

FREE SPEECH

Free speech, Art. I, § 6; Amendments, Art. I.

FUGITIVES FROM JUSTICE

Fugitives from justice, Art. IV, § 2.

FULL FAITH AND CREDIT CLAUSE

Full faith and credit clause, Art. IV, § 1.

GENERAL WELFARE

General welfare, Art. I, § 8.

GOVERNOR

Appointment for senators, Art. I, § 3.

Protection against domestic violence, Art. IV, § 4.

GRAND JURY

Necessity for presentment or indictment, Amendments, Art. V.

HABEAS CORPUS

Suspension, Art. I, § 9.

HIGH SEAS

Offenses upon, Art. I, § 8.

HOUSE OF REPRESENTATIVES, Art. I, § 2.

Adjournment's, Art. I, § 5.

Age of representative, Art. I, § 2.

Apportionment, Art. I, § 2.

Apportionment of representation, Amendments, Art. XIV, § 2.

Basis of representation, Amendments, Art. XIV, § 2.

Census, Art. I, § 2.

Choosing President in case of failure to elect, Art. II, § 1.

Compelling attendance of members, Art. I, § 5.

Compensation, Art. I, § 6.

Consent of each house to adjournment for more than three days, Art. I, § 5.

Debate, Art. I, § 6.

Disqualification to hold office, Art. I, § 6.

Election:

See "Elections."

Expulsion, Art. I, § 5.

Free speech, Art. I, § 6.

House to originate all revenue bills, Art. I, § 7.

How and by whom chosen, Art. I, § 2.

Impeachment, Art. I, § 2.

Journal, Art. I, § 5.

Membership, Art. I, § 5.

Number of representatives, Art. I, § 2.

Oath of senators, Art. VI.

Political disabilities:

Removal of political disabilities, Amendments, Art. XIV, § 3.

Power of choosing officers, Art. I, § 2.

Power to punish, Art. I, § 5.

Privilege from arrest, Art. I, § 6.

Qualification, Art. I, § 6.

Each house judge of qualifications of members, Art. I, § 5.

Qualifications of electors, Art. I, § 2.

Qualifications of representatives, Art. I, § 2.

Quorum, Art. I, § 5.

Representative as elector, Art. II, § 1.

Rules, Art. I, § 5.

Term, time commence, Amendments, Art. XX.

Time of adjournment limited, Art. I, § 5.

Vacancies, Art. I, § 2.

When chosen, Art. I, § 2.

IMMIGRATION

Provision as to migration or importation of certain persons, Art. I, § 9.

IMPAIRING THE OBLIGATION OF CONTRACTS

Impairing obligation of contracts, Art. I, § 10.

IMPEACHMENT

All civil officers forfeited for certain crimes, Art. II, § 4.

Bribery, Art. II, § 4.

Chief Justice presides when President is tried, Art. I, § 3.

High crimes and misdemeanors, Art. II, § 4.

House of Representatives, Art. I, § 2.

Indictment, Art. I, § 3.

Judgment, Art. I, § 3.

Pardon, Art. II, § 2.

Power of House of Representatives, Art. I, § 2.

Power of Senate to try impeachments, Art. I, § 3.

Sentence, Art. I, § 3.

Treason, Art. II, § 4.

Treason, bribery or other high crimes and misdemeanors, Art. II, § 4.

IMPORTS

See "Taxation."

INCOMES

Incomes, Congress may tax, Amendments, Art. XVI.

INDIANS

Power to regulate commerce with Indian tribes, Art. I, § 8.

INDICTMENT

Impeachment, Art. I, § 3.

Right to indictment, Amendments, Art. V.

INSURRECTIONS

Insurrections, Art. I, § 8.

INTERNAL REVENUE

See "Taxation."

INTERNATIONAL LAW

Power of Congress, Art. I, § 8.

INTERSTATE COMMERCE

Power to regulate, Art. I, § 8.

INTOXICATING LIQUORS

Intoxicating liquors, manufacture, transportation, etc., Amendments, Art. XVIII, Art. XXI.

INVASIONS

Invasions, Art. I, § 8.

Protection of States, Art. IV, § 4.

INVOLUNTARY SERVITUDE

Involuntary servitude, Amendments, Art. XIII.

JOURNAL

Journal, Art. I, § 5.

Objections of President, Art. I, § 7.

Yeas and nays:

See "Yeas and Nays."

JUDGES

Compensation, Art. III, § 1.

Compensation not to be diminished during their continuance in office, Art. III, § 1.

Term of office, Art. III, § 1.

JUDGMENTS AND DECREES

Full faith and credit clause, Art. IV, § 1.

Impeachment, Art. I, § 3.

JUDICIAL POWER

See "Supreme Court."

Admiralty, Art. III, § 2.

Ambassadors, Art. III, § 2.

Appellate jurisdiction of Supreme Court, Art. III, § 2.

Cases in law and equity arising under the Constitution, Art. III, § 2.

Cases in law and equity arising under the laws of the United States, Art. III, § 2.

Compensation, Art. III, § 1.

Consuls, Art. III, § 2.

Controversies between a State, or the citizens thereof, and foreign States, citizens or subjects, Art. III, § 2.

Controversies between citizens of different States, Art. III, § 2.

Controversies between citizens of the same State, Art. III, § 2.

Maritime jurisdiction, Art. III, § 2.

Original jurisdiction of Supreme Court, Art. III, § 2.

Place of trial, Art. III, § 2.

Suits against State, Amendments, Art. XI.

Tenure, Art. III, § 1.

To what cases it extends, Art. III, § 2.

Treaties, Art. III, § 2.

Trial by jury, Art. III, § 2.

Where vested, Art. III, § 1.

JURISDICTION

See "Judicial Power."

United States, jurisdiction over District of Columbia, forts, arsenals, etc., Art. I, § 8.

JURY

Right of trial by jury, Art. III, § 2.

Right of trial by jury secured, Amendments, Art. VII.

Right to impartial jury, Amendments, Art. VI.

JUST COMPENSATION

Just compensation, Amendments, Art. V.

LAW OF NATIONS

Power of Congress, Art. I, § 8.

LAWS

See "Statutes."

LEGAL TENDER

Power of States, Art. I, § 10.

LEGISLATIVE POWERS

Legislative powers, Art. I, § 1.

LETTERS OF MARQUE AND REPRISAL

Letters of marque and reprisal, Art. I, § 8.
States prohibited, Art. I, § 10.

LITERARY PROPERTY

Power of Congress, Art. I, § 8.

MAGAZINES

Power of Congress, Art. I, § 8.

MARITIME JURISDICTION

Maritime jurisdiction, Art. III, § 2.

MILITIA

Appointment of officers, Art. I, § 8.
Calling forth militia, Art. I, § 8.
Commander-in-Chief, Art. II, § 2.
Employment in service of United States, Art. I, § 8.
Insurrections, Art. I, § 8.
Invasions, Art. I, § 8.
Organizing, arming, and disciplining, Art. I, § 8.
Power of Congress, Art. I, § 8.
Right to indictment, Amendments, Art. V.
Right to keep and bear arms, Amendments, Art. II.
Training, Art. I, § 8.

MONEY

See "Debts."
Foreign coin, Art. I, § 8.
Power to coin money, Art. I, § 8.
States not to coin money or emit bills of credit, Art. I, § 10.
States not to make anything but gold and silver money, Art. I, § 10.

NATURALIZATION

Power of Congress, Art. I, § 8.

OATHS

Constitution:
Oath to support constitution—By whom taken, Art. VI.
Oath of senators, Art. VI.
Officers, Art. VI.
President, Art. II, § 1.
Test oath, Art. VI.

OFFICERS

Accepting presents:
Officers or titles from foreign State, Art. I, § 9.
Advice and consent of Senate, Art. II, § 2.
All civil offices forfeited for certain crimes, Art. II, § 4.
Appointment, Art. II, § 2.
Electors, Art. II, § 1.
Members holding office, Art. I, § 6.
Nomination by President, Art. II, § 2.
Oath, Art. VI.
Office created or emoluments increased, Art. I, § 6.
Political disabilities:
Removal of political disabilities, Amendments, Art. XIV, § 3.
Senate, Art. II, § 2.
Vacancies:
See "Vacancies."

PAROON

Impeachment, Art. II, § 2.
President, Art. II, § 2.

PETITION, RIGHT TO

Petition, right to, Amendments, Art. I.

PIRACY

Power of Congress, Art. I, § 8.

PLACE OF TRIAL

See "Venue."

POST OFFICES

Power of Congress to establish, Art. I, § 8.

POST ROADS

Power of Congress, Art. I, § 8.

POWERS OF CONGRESS

See "Congress."
Appropriation for army, Art. I, § 8.
Army, Art. I, § 8.
Arsenals, Art. I, § 8.
Bankruptcy, Art. I, § 8.
Borrowing money, Art. I, § 8.
Captures on land and water, Art. I, § 8.
Coining money, Art. I, § 8.
Common defense, Art. I, § 8.
Copyright, Art. I, § 8.

POWERS OF CONGRESS (Cont'd)

Counterfeiting, Art. I, § 8.
Courts, Art. I, § 8.
District of Columbia, Art. I, § 8.
Dock Yards, Art. I, § 8.
Duties, Art. I, § 8.
Enumeration, Art. I, § 8.
Excises, Art. I, § 8.
Felonies on high seas, Art. I, § 8.
Foreign coin, Art. I, § 8.
Forts, Art. I, § 8.
General welfare, Art. I, § 8.
Imposts, Art. I, § 8.
Insurrections, Art. I, § 8.
International law, Art. I, § 8.
Invasion, Art. I, § 8.
Letters of marque and reprisal, Art. I, § 8.
Magazines, Art. I, § 8.
Militia, Art. I, § 8.
Money, Art. I, § 8.
Naturalization, Art. I, § 8.
Navy, Art. I, § 8.
Over territory and other property, Art. IV, § 3.
Payment of debts, Art. I, § 8.
Piracies, Art. I, § 8.
Post offices, Art. I, § 8.
Post roads, Art. I, § 8.
Regulation of commerce, Art. I, § 8.
Rules for the government and regulation of the land and naval forces, Art. I, § 8.
Statutes, Art. I, § 8.
Taxation, Art. I, § 8.
To declare war, Art. I, § 8.
To enforce fourteenth amendment, Amendments, Art. XIV, § 5.
To enforce thirteenth amendment, Amendments, Art. XIII.
To punish, Art. I, § 5.
Tribunals inferior to Supreme Court, Art. I, § 8.
Weights and measures, Art. I, § 8.

PRESENTMENT

Necessity for presentment, Amendments, Art. V.

PRESIDENT, Art. II, § 1.

Adjourn Congress, Art. II, § 3.
Age, Art. II, § 1.
All civil offices forfeited for certain crimes, Art. II, § 4.
Commander-in-Chief, Art. II, § 2.
Compensation, Art. II, § 1.
Congress may provide in case of inability of both President and Vice President, Art. II, § 1.
Convene Congress, Art. II, § 3.
Death, Art. II, § 1.
Disabilities, Art. II, § 1.
Elections:
See "Elections."
Electors:
See "Elections."
Execute laws, Art. II, § 3.
Filling vacancies, Art. II, § 2.
Impeachment:
Chief justice to preside when President is tried, Art. I, § 8.
Inability to discharge powers and duties of office, Art. II, § 1.
Manner of choosing President and Vice President, Amendments, Art. XII.
Nomination of officers, Art. II, § 2.
Oath, Art. II, § 1.
Pardon, Art. II, § 2.
President's Communications to Congress, Art. II, § 3.
Qualifications of President, Art. II, § 1.
Receive ambassadors, Art. II, § 3.
Removal, Art. II, § 1.
Removal from office on impeachment, Art. II, § 4.
Reprieve, Art. II, § 2.
Requiring opinions of heads in departments, Art. II, § 2.
Resignation, Art. II, § 1.
Statutes:
See "Statutes."

Succession to, Amendments, Art. XX.
Term, time start, Amendments, Art. XX.
Treaty-making power, Art. II, § 2.
Vacancy, Art. II, § 1.
Veto:
See "Veto."
When chosen by house, Art. II, § 1.

PRESIDENT PRO TEM OF SENATE

President pro tem of Senate, Art. I, § 3.

PRIVATEERING

Power of Congress, Art. I, § 8.
States prohibited, Art. I, § 10.

PRIVILEGE FROM ARREST

Privilege from arrest, Art. I, § 6.

PRIVILEGES AND IMMUNITIES

Privileges and immunities, Art. IV, § 2; Amendments, Art. XIV, § 1.

PROPERTY

Due process of law, Amendments, Art. V.
Power of Congress, Art. IV, § 3.
Private property not to be taken for public use without just compensation, Amendments Art. V.

PUBLIC OFFICERS

See "Officers."

PUBLIC TRIAL

Public trial, Amendments, Art. VI.

PUBLIC USE

Private property not to be taken for public use without just compensation, Amendments, Art. V.

PUNISHMENT

Cruel and unusual punishment, Amendments, Art. VIII.

QUALIFICATIONS

See "House of Representatives;" "Senate."

RATIFICATION

Amendments, Art. V.
What ratification shall establish constitution, Art. VIII.

RECORDS

Full faith and credit clause, Art. IV, § 1.

RELIGION

Religious establishment prohibited, Amendments, Art. I.

RELIGIOUS LIBERTY

Religious liberty, Amendments, Art. I.

REPRESENTATIVES

See "House of Representatives."

REPRIEVE

President, Art. II, § 2.

REPUBLICAN FORM OF GOVERNMENT GUARANTEED

Republican form of government guaranteed, Art. IV, § 4.

RESERVATIONS

Power of Congress, Art. I, § 8.

REVENUE

See "Taxation."

RIGHT OF ASSEMBLY

Right of assembly, Amendments, Art. I.

RIGHT OF TRIAL BY JURY

Right of trial by jury, Amendments, Art. VII.

RIGHT TO PETITION

Right to petition, Amendments, Art. I.

SEARCHES AND SEIZURES

Right of search and seizure regulated, Amendments, Art. IV.

SELF-CRIMINATION

Self-crimination, Amendments, Art. V.

SENATE, Art. I, § 3.

Adjournments, Art. I, § 5.
Appointment of officers, Art. II, § 2.
Choosing Vice President in case of failure to elect, Art. II, § 1.
Compelling attendance of members, Art. I, § 5.
Compensation, Art. I, § 6.
Composition of Senate, Art. I, § 3.
Consent of each house to adjournment for more than three days, Art. I, § 5.
Debate, Art. I, § 6.
Disqualification to hold and office, Art. I, § 6.
Elections:
 See "Elections."
Expulsion, Art. I, § 5.
Free speech, Art. I, § 6.
How and by whom senators chosen, Art. I, § 3.
Impeachment, Art. I, § 3.
Journal, Art. I, § 5.
Membership, Art. I, § 5.

SENATE (Cont'd)

No State to be deprived of equal suffrage in the Senate, Art. V.
Oath of senators, Art. VI.
Officers, Art. II, § 2.
Officers of Senate, Art. I, § 3.
Political disabilities:
 Removal of political disabilities, Amendments, Art. XIV, § 3.
Power to punish, Art. I, § 5.
President of the Senate, Art. I, § 3.
President pro tem, Art. I, § 3.
Privilege from arrest, Art. I, § 6.
Qualifications, Art. I, §§ 3, 6.
 Each house judge of qualifications of members, Art. I, § 5.
Quorum, Art. I, § 5.
Resignation, Art. I, § 3.
Revenue bills, Art. I, § 7.
Right of Vice President to vote, Art. I, § 3.
Rules, Art. I, § 5.
Senator as elector, Art. II, § 1.
Sentences in cases of imprisonment, Art. I, § 3.
State executive to make temporary appointments, Art. I, § 3.
Temporary appointments, Art. I, § 3.
Term of office, Art. I, § 3.
Time start, Amendments, Art. XX.
Time of adjournment limited, Art. I, § 5.
Vacancy, Art. I, § 3.
Vice President as President of the Senate, Art. I, § 3.

SENATORS

Senators, elected by people, Amendments, Art. XVII.

SENTENCE

Impeachment, Art. I, § 3.

SESSIONS OF CONGRESS

Sessions of Congress, Art. I, § 4.

SHIPS AND SHIPPING

Tonnage duties, Art. I, § 10.
Vessels of one State not to pay duties in another, Art. I, § 9.

SLAVERY

Abolition, Amendments, Art. XIII.
Importation, Art. I, § 9.

SPEAKER

Speaker, Art. I, § 2.

SPEEDY TRIAL

Speedy trial, Amendments, Art. VI.

STATE EXECUTIVE

See "Governor."

STATES

Admission of new States, Art. IV, § 3.
Citizens:
 See "Citizens."
Controversies between a State and citizens of another State, Art. III, § 2.
Controversies between a State, or the citizens thereof, and foreign States, citizens or subjects, Art. III, § 2.
Controversies between two or more States, Art. III, § 2.
Credit to public acts of every State, Art. IV, § 1.
Each State to be protected against invasion and domestic violence, Art. IV, § 4.
Invasion:
 See "Invasion."
Not to be deprived of equal suffrage in the Senate, Art. V.
Original jurisdiction of Supreme Court, Art. III, § 2.
Prohibited from certain powers, Art. I, § 10.
Agreements, Art. I, § 10.
Alliance, Art. I, § 10.
Army, Art. I, § 10.
Bill of attainder, Art. I, § 10.
Coining money, Art. I, § 10.
Compact with another State or foreign power, Art. I, § 10.
Confederation, Art. I, § 10.
Duty of tonnage, Art. I, § 10.
Emitting bills of credit, Art. I, § 10.
Ex post facto laws, Art. I, § 10.
Import or duties on imports or exposts, Art. I, § 10.

STATES (Cont'd)

- Import or duties on imports or exports (Cont'd)
- Inspection laws, Art. I, § 10.
- Law impairing the obligation of contracts, Art. I, § 10.
- Legal tender, Art. I, § 10.
- Letters of marque and reprisal, Art. I, § 10.
- Prohibited from certain powers (Cont'd)
- Navy, Art. I, § 10.
- Ships of war, Art. I, § 10.
- Tender, Art. I, § 10.
- Title of nobility, Art. I, § 10.
- Treaties, Art. I, § 10.
- Troops, Art. I, § 10.
- War, Art. I, § 10.
- Republican form of government guaranteed, Art. IV, § 4.
- Reservation of powers, Amendments, Art. X.
- Suits against State, Amendments, Art. XI.

STATUTES

- Congress to legislate land under jurisdiction of United States, Art. I, § 8.
- Full faith and credit clauses, Art. IV, § 1.
- House to originate all revenue bills, Art. I, § 7.
- Laws that may be included by congress, Art. I, § 8.
- Power of Congress, Art. I, § 8.
- President:
 - Approval of bill, Art. I, § 7.
 - Bill becoming law upon President's approval, Art. I, § 7.
 - Bill not returned by President within ten days, Art. I, § 7.
 - Bill to be presented to President, Art. I, § 7.
 - Objections to be entered on journal, Art. I, § 7.
 - Orders and resolutions to be presented to President, Art. I, § 7.
 - Return of objections, Art. I, § 7.
 - Veto:
 - See "Veto."
 - Supremacy of constitution, treaties, and laws of the United States, Art. VI.
 - Veto:
 - See "Veto."

SUPREMACY

- Supremacy of constitution, treaties, and laws of the United States, Art. VI.

SUPREME COURT

- See "Judges."
- Appellate jurisdiction, Art. III, § 2.
- Appointment of judges, Art. II, § 2.
- Judicial power:
 - See "Judicial Power."
- Judicial power of, Art. III, § 2.
- Original jurisdiction, Art. III, § 2.

SUPREME LAW OF THE LAND

- Supreme law of the land, Art. VI.

TAXATION

- All duties, imposts and excises shall be uniform, Art. I, § 8.
- Appointment, Art. I, § 9.
- Commercial preferences, Art. I, § 9.
- Direct taxes:
 - Apportionment, Art. I, § 2.
 - Export duty, Art. I, § 9.
- House to originate all revenue bills, Art. I, § 7.
- Power of Congress to levy and collect taxes, duties, imposts and excises, Art. I, § 8.
- States not to lay impost or duties on imports or exports, Art. I, § 10.
- Uniformity, Art. I, § 8.
- Vessels of one State not to pay duties in another, Art. I, § 9.

TERRITORIES

- Power of Congress, Art. IV, § 3.

TEST OATH

- Test oath, Art. VI.

TITLES OF NOBILITY

- Titles or nobility, Art. I, §§ 9, 10.

TONNAGE DUTIES

- Tonnage duties, Art. I, § 10.

TREASON

- Attainder, Art. III, § 3.
- Confession, Art. III, § 3.

TREASON (Cont'd)

- Corruption of blood, Art. III, § 3.
- Definition, Art. III, § 3.
- Forfeiture, Art. III, § 3.
- Impeachment, Art. II, § 4.
- Overt act, Art. III, § 3.
- Proof of, Art. III, § 3.
- Punishment, Art. III, § 3.
- Two witnesses, Art. III, § 3.

TREASURY

- Accounts, Art. I, § 9.
- Necessity of appropriations, Art. I, § 9.

TREATIES

- Jurisdiction, Art. III, § 2.
- Power of States, Art. I, § 10.
- States prohibited, Art. I, § 10.
- Supremacy of constitution, treaties, and laws of the United States, Art. VI.
- Treaty-making power, Art. II, § 2.

TRIAL

- Trial, Amendments, Arts. V, VI.
- Right of trial by jury, Amendments, Art. VII.

TWICE IN JEOPARDY

- Twice in jeopardy, Amendments, Art. V.

UNITED STATES

- Controversies to which the United States shall be a party, Art. III, § 2.

VACANCIES

- House of representatives, Art. I, § 2.
- President, Art. II, § 1.
- When President may fill vacancy, Art. II, § 2.

VENUE, Amend., Art. V.

- Place of trial, Art. III, § 2.

VESSELS

- See "Ships and Shipping."

VETO, Art. I, § 7.

- Bill may be passed by two-thirds of each house, notwithstanding veto, Art. I, § 7.
- Return of objections, Art. I, § 7.
- Right of President to veto, Art. I, § 7.
- Yeas and nays, Art. I, § 7.

VICE PRESIDENT, Art. II, § 1.

- Disability, death, resignation, etc., of Vice President, Art. II, § 1.

Elections:

- See "Elections."

Electors:

- See "Elections."

Manner of choosing President and Vice President, Amendments, Art. XII.

- President of the Senate, Art. I, § 3.
- Term, time commence, Amendments, Art. 20.
- Succession to, Amendments, Art. 20.
- When chosen by Senate, Art. II, § 1.

VOTE

- Right to not abridged by sex, Amendments, Art. XIX.

WAR

- Power of Congress to declare war, Art. I, § 8.
- Power of States, Art. I, § 10.

WARRANTS

- No warrants to issue but upon probable cause, Amendments, Art. IV.

WEAPONS

- Right to keep and bear arms, Amendments, Art. II.

WEIGHTS AND MEASURES

- Power of Congress to fix standards of weights and measures, Art. I, § 8.

WITNESSES

- Compulsory process for obtaining, Amendments, Art. VI.
- Right to be confronted with witnesses, Amendments, Art. VI.
- Self-crimination, Amendments, Art. V.
- Witness against himself, Amendments, Art. V.

WOMEN

- Women to vote, Amendments, Art. XIX.

YEAS AND NAYS

- Yeas and nays, Art. I, §§ 5, 7.

FOREWORD

Constitution of the State of South Carolina, 1895 in this code is not an official version thereof. The text of said constitution as herein stated is based on the original manuscript, provisions of same as stated in the 1932 Code, certain amendments not in the 1932 Code as stated in ratifying provisions, and as said constitution was amended since same was published in the 1932 Code as stated in enactments ratifying amendments thereto. In many instances the provisions of the amendment as ratified are not the same as the provisions proposed. Also there are instances in which the provisions of the constitution as stated when amended vary from the provisions stating the particulars whereby same is amended. The practitioner and other parties interested in construing amendments to this constitution should consult the vehicles proposing and ratifying amendments to this constitution. The historical references for such vehicles are given usually following provisions amended.

Constitution

of the

State of South Carolina 1895

ARTICLE I

SEC. DECLARATION OF RIGHTS

1. Political power in people.
2. Apportionment of Representatives.
3. Meeting of General Assembly.
4. Religious worship. Freedom of speech. Petition.
5. Equal protection of laws.
6. Taxation.
7. No taxation without consent.
8. Bill of attainder. Ex post facto law.
9. Right of suffrage protected.
10. Elections free and open.
11. Qualifications of electors. Term of office. Dueling.
12. Residence.
13. Suspension of laws.
14. Departments of government separate.
15. Courts public.
16. Searches. Seizures.
17. Grand jury. Not tried twice. Private property.
18. Criminal prosecutions.
19. Bail. Corporal punishment. Contempt.
20. Right to bail.
21. Prosecutions for libel.
22. Treason.
23. Habeas corpus.
24. Imprisonment for debt.
25. Trial by jury.
26. Military subordinate to civil. Quartering soldiers.
27. Martial law.
28. Navigable waters.
29. Provisions of Constitution.

ARTICLE II

RIGHT OF SUFFRAGE

1. Elections by ballot.
2. Elector eligible to office. Two offices.
3. Elector defined.
4. Qualifications of electors; (a) Residence; (b) Registration; (c) Read or understand Constitution; (d) Read and write, or \$300; (f) Certificate of registration.
5. Appeal.
6. Disqualification.
7. Residence.
8. Registration. Holding elections.
9. Polling precincts.
10. Primary elections.
11. Closing registration books.
12. Municipal electors.
13. Election for bonded debt.
14. Arrest of electors.
15. Right of suffrage unmolested.

ARTICLE III

SEC. LEGISLATIVE DEPARTMENT

1. Legislative power.
2. Members House of Representatives.
3. Number of Representatives.
4. Assignment.
5. Apportionment.
6. Members of Senate.
7. Qualification of Senators.
8. First election.
9. Sessions. Place of meeting.
10. Terms of office.
11. Judge of elections.
12. Officers. Rules.
13. Imprisonment of members.
14. Members protected.
15. Bills for revenue.
16. Style of laws.
17. One subject.
18. Read three times.
19. Compensation.
20. Elections "viva voce."
21. Adjournments.
22. Journals. "Ayes" and "Nays."
23. Doors open.
24. Two offices.
25. Vacancies.
26. Oath of office.
27. Removal of officers.
28. Homestead.
29. Assessment.
30. Extra compensation.
31. Sale of lands.
32. Salary of deceased officers. Pensions.
33. Marriage—white and negro. Age of consent.
34. Special laws.
35. Lands held by aliens.

ARTICLE IV

EXECUTIVE DEPARTMENT

1. Chief Magistrate.
2. Election of Governor.
3. Qualifications for office of Governor.
4. Returns of election for Governor. Result.
5. Lieutenant Governor.
6. Vote of Lieutenant Governor.
7. President pro tempore of Senate.
8. Senator acting Governor or Lieutenant Governor.
9. Vacancy.
10. Commander-in-Chief.
11. Pardons. Board of pardons.
12. Execution of laws.
13. Compensation.
14. Officers and boards report.
15. Communications to General Assembly.

SEC.

16. Convene or adjourn General Assembly.
17. Commission officers.
18. Seal of State.
19. Grants and commissions.
20. Oath of office.
21. Residence of Governor.
22. Removal of officers.
23. Signature of Governor. Veto.
24. Other state officers.

ARTICLE V

JUDICIAL DEPARTMENT

1. Judicial power.
2. Supreme Court
3. Present justices. Fourth justice.
4. Powers of Supreme Court.
5. Times of holding.
6. Judge disqualified. Vacancy filled.
7. Clerk and reporter.
8. Judgments.
9. Compensation.
10. Qualification.
11. Vacancies.
12. Three justices pronounce judgment. Circuit judges.
13. Circuits.
14. Interchange of circuits.
15. Jurisdiction of common pleas.
16. Held twice in each county.
17. Decisions.
18. Jurisdiction of general sessions.
19. Court of probate.
20. Magistrates.
21. Jurisdiction of magistrates.
22. Trial by jury. Jurors.
23. Action cognizable by magistrates.
24. Compensation for officers.
25. Powers at chambers.
26. Charging juries.
27. Clerk of court.
28. Attorney general.
29. Solicitor.
30. Sheriff and coroner.
31. Writs and processes.
32. Publication of decisions.
33. Labor on highways.
34. Matters now pending.

ARTICLE VI

JURISPRUDENCE

1. Arbitration.
2. Change of venue.
3. Pleading.
4. Statutes.
5. Codification of laws.
6. Lynching.

ARTICLE VII

COUNTIES AND COUNTY GOVERNMENT

1. New counties.
2. Petition for new counties.
3. Population, property, area.
4. Old county. Area. Property.
5. Eight mile limit.
6. Indebtedness.
7. County lines.
8. County seat.
9. Election district.
10. Consolidation.
11. Townships.
12. County boundaries.

SEC.

13. Judicial and Congressional Districts.
14. County lines in towns.

ARTICLE VIII

MUNICIPAL CORPORATIONS AND
POLICE REGULATIONS

1. Municipal corporations.
2. Organizations of cities and towns.
3. Restriction of powers.
4. Street railways, etc.
5. Waterworks, etc.
6. Taxation.
7. Bonded debt.
8. Manufactories.
9. Armed police force.
10. Boards of health.
11. Alcoholic liquors.
12. Prize fighting.
13. Municipal ice plants.
14. City limits of Greenville extended.

ARTICLE IX

CORPORATIONS

1. Corporation defined.
2. Charter.
3. Common carrier defined.
4. Local agent.
5. Discrimination.
6. Intersection. Transportation.
7. Parallel lines.
8. Domestic charter.
9. Banking corporations.
10. Stocks and bonds.
11. Election officers.
12. Business of corporation.
13. Trusts, etc.
14. The Public Service Commission.
15. Injuries to employees.
16. Existing charters.
17. Forfeit of franchise.
18. Liability of stockholders.
19. Controlling interest in another corporation.
20. Right-of-way.
21. Provisions to be enforced.

ARTICLE X

FINANCE AND TAXATION

1. Assessment and taxation.
2. Expenses.
3. Tax levied.
4. Exemptions.
5. Taxes for corporate purposes. Bonded debt.
6. Credit of State.
7. State indebtedness.
8. Receipts and expenditures.
9. Payment of money.
10. Fiscal year.
11. Increase of public debt.
12. Account of public money. Embezzlement.
13. All taxes based on state levy.
- 13-A. Assessments for improvements of highways and bridges, Beaufort County.
- 14 thru 19. Assessments in certain cities, counties and towns on abutting property.
20. Assessments in Florence County for highway improvement.

ARTICLE XI

EDUCATION

SEC.

1. Superintendent of education.
2. State board.
3. School officers.
4. Salaries.
5. School age. School district.
6. Enrollment—trustees. Supplementary tax.
7. Separate schools.
8. South Carolina University.
9. Sectarian institutions.
10. Gifts for educational purposes.
11. Gifts. Escheated property. Direct taxes.
12. Profit from sale of liquors.

ARTICLE XII

CHARITABLE AND PENAL INSTITUTIONS

1. Insane. Blind, deaf and dumb.
2. Officers and employees.
3. County poor.
4. Directors.
5. Officers of penitentiary.
6. Convicts.
7. Juvenile reformatory.
8. Vacancies.
9. Control of penitentiary.

ARTICLE XIII

MILITIA

1. Militia age.
2. Arrest.
3. Call out.
4. Adjutant general. Staff officers.
5. Pensions.

ARTICLE XIV

EMINENT DOMAIN

1. Jurisdiction of State.
2. Title to lands.
3. Lands revert.

ARTICLE XV

SEC.

IMPEACHMENTS

1. Power of impeachment.
2. Court of impeachments.
3. Officers liable to.
4. Removal of officers.

ARTICLE XVI

AMENDMENT AND REVISION

1. Amendment.
2. Two or more amendments.
3. Constitutional convention.

ARTICLE XVII

MISCELLANEOUS MATTERS

1. Qualification of officers.
2. Claims against the State.
3. Divorces.
4. Denying Supreme Being.
5. Public printing.
6. Removal of cases.
7. Lotteries.
8. Gambling and betting.
9. Property of married woman.
10. Laws now of force.
11. Schedule: First—Laws now of force. Ordinances.
Second—Writs, etc.
Third—Present laws.
Fourth—Fines, penalties, etc.
Fifth—Actions, prosecutions, etc.
Sixth—Officers elected.
Seventh—Elections.
Eighth—Constitution in force and effect.
Ninth—Repeal of Constitution of 1868.

EXECUTION

DELEGATES.

ARTICLES OF AMENDMENTS

1. Drainage.
2. Highways, road duty, drainage.

THE STATE OF SOUTH CAROLINA:

At a Convention of the people of the State of South Carolina begun and holden at Columbia on the Tenth day of September, in the year of our Lord One Thousand Eight hundred and Ninety-five, and thence continued by divers adjournments to the Fourth day of December in the year of our Lord One Thousand Eight hundred and Ninety-five.

CONSTITUTION OF THE STATE OF SOUTH CAROLINA

We, the people of the State of South Carolina, in Convention assembled, grateful to God for our liberties, do ordain and establish this Constitution for the preservation and perpetuation of the same.

The Constitution "is a form of government delineated by the mighty hand of the people."—Grier v. Taylor, 4 McC. 206, 12 Am. Dec. 607, 17 Am. Dec. 731, 111 Am. St. Rep. 942.

Its object is to lay down the fundamental principles and limit the powers of government.—Ex parte Lynch, 16 S. C. 32, 16 L. R. A. (N. S.) 269, Ann. Cas. 12B, 788.

It should be construed as a whole.

—Smith v. McConnell, 44 S. C. 491, 494, 22 S. E. 721, 50 L. R. A. (N. S.) 339; Norton v. Bradham, 21 S. C. 375, 383, 70 Am. St. Rep. 112, 4 L. R. A. (N. S.) 370, Ann. Cas. 12B, 261.

The courts must determine the constitutionality of a statute. — Byrne v. Stewart, 3 Desaus. 466, 37 Am. St. Rep. 584; White v. Kendrick, 1 Brev. 469.

And weight should be given a contemporaneous construction. — State v.

Williams, 40 S. C. 373, 19 S. E. 5, 27 L. R. A. 595, 35 L. R. A. 566, 43 L. R. A. 47, 58, 77, 45 L. R. A. 155; Simpson v. Willard, 14 S. C. 191, 195, 50 L. R. A. (N. S.) 346.

But they will not declare a statute unconstitutional unless clearly so. — Columbia, etc., R. Co. v. Gibbes, 24 S. C. 60; Pelzer, etc., Co. v. Campbell, 15 S. C. 581, 582, 4 Am. Rep. 705, 84 Am. St. Rep. 443, 12 L. R. A. (N. S.) 1123, Ann. Cas. 17B, 602; State v. Aiken, 42 S. C. 222, 20 S. E. 221, 73 Am. St. Rep. 104, 78 Am. St. Rep. 253, 26 L. R. A. 345, 53 L. R. A. 764, 61 L. R. A. 125, 150, 1 L. R. A. (N. S.) 640, 15 L. R. A. (N. S.) 916, 927, 947, L. R. A. 1915D, 186; McCullough v. Brown, 41 S. C. 220, 19 S. E. 458, 23 L. R. A. 410, 53 L. R. A. 764, 61 L. R. A. 125, 150, 67 L. R. A. 70, 8 L. R. A. (N. S.) 126, 14 L. R. A. (N. S.) 1157, 15 L. R. A. (N. S.) 922, 933, 948, L. R. A. 1915D, 186, 3 A. L. R. 1485, 14 A. L. R. 1153; Mauldin v. Greenville, 42 S. C. 293, 20 S. E. 842, 46 Am. St. Rep. 723, 27 L. R. A. 284, 58 L. R. A. 355, 28 L. R. A. (N. S.) 1168; Feldman & Co. v. City Council, 23 S. C. 57, 55 Am. Rep. 6, 98 Am. Dec. 668, L. R. A. 1915A, 924.

And where there are other grounds upon which the case can be disposed of. — Butler v. Ellerbe, 44 S. C. 256, 257, 22 S. E. 425, 108 Am. St. Rep. 841, 8 L. R. A. (N. S.) 124, 44 L. R. A. (N. S.) 201, L. R. A. 1915D, 185; Scottish American Mtg. Co. v. Deas, 35 S. C. 42, 14 S. E. 486, 28 Am. St. Rep. 832, 57 Am. St. Rep. 173; Ex parte Board of Com'rs, 43 S. C. 11, 20 S. E. 794.

The unconstitutionality of an act must be raised by exceptions. — Frazee v. Beattie, 26 S. C. 348, 2 S. E. 125.

And must state the article and section or principle which it conflicts with. — State v. Washington, 55 S. C. 372, 33 S. E. 453.

It is not necessary in raising a constitutional question that the section and article infringed be stated in the pleadings and proceedings; it is sufficient to state the principle. Porter v. Charleston, etc., Ry. Co., 63 S. C. 169, 41 S. E. 108, 90 Am. St. Rep. 670, 15 L. R. A. (N. S.) 983.

It cannot for the first time be raised on appeal. — Tompkins v. Augusta, etc., R. Co., 21 S. C. 420, 421, 2 L. R. A. 780. As to who may question, see State v. Porterfield, 47 S. C. 75, 25 S. E. 39, 15 L. R. A. (N. S.) 947, L. R. A. 1917A, 233, 250, Ann. Cas. 13D, 511.

Constitutional questions not raised in or passed on by the Circuit Court will not be considered on appeal. Burnett v. Southern Ry. Co., 62 S. C. 281, 40 S. E. 679; Hunter v. Bamberg County, 63 S. C. 149, 41 S. E. 26; Key v. C. & N. W. Ry. Co. (S. C. 1931) on appeal to U. S. Supreme Court.

This constitution does not affect bonds issued by a city after its adoption under a act passed prior thereto. — McCreight v. Zemp, 49 S. C. 78, 26 S. E. 984, 37 L. R. A. (N. S.) 1099.

The State will not be permitted to deny her liability for the salaries of her registration and election officers for services rendered by her direction on the plea that the registration law was unconstitutional; and therefore the court of equity will not, at the instance of a citizen and tax payer of the state, enjoin the fiscal officers of the state from paying the appropriation made by the Legislature for such purpose. Butler v. Ellerbe, 44 S. C. 256, 257, 22 S. E. 425, 108 Am. St. Rep. 841, 8 L. R. A. (N. S.) 124, 44 L. R. A. (N. S.) 201, L. R. A. 1915D, 185.

A court of equity, in action to enjoin the payment of appropriations made by the Legislature for registration and election officers, will not grant the relief demanded, nor consider the constitutionality of the registration laws, where the petition does not show that the petitioner, or any other person entitled, has been denied his rights of registration and voting. *Id.*

Case presenting two questions. — Where a case presents two questions, one of which is a constitutional question, and the other is not, if the view taken by the court below on the latter question is decisive of the case, and the Supreme Court is divided on the question of public policy, and not the constitutional question, there is no ground for a rehearing. Johnson v. Charleston, etc., Ry. Co., 55 S. C. 152, 155, 178, 32 S. E. 2, 33 S. E. 174, 44 L. R. A. 645, 10 L. R. A. (N. S.) 200, 11 L. R. A. (N. S.) 189, Ann. Cas. 12A, 1152, 12 A. L. R. 488.

Waiver of objection to constitutionality of acts. — Goodale v. Sowell, 62 S. C. 516, 40 S. E. 970, 6 A. L. R. 223; State v. Faile, 43 S. C. 52, 20 S. E. 798, 89 Am. St. Rep. 709, 56 L. R. A. 365, 381, 397, Ann. Cas. 12C, 482; Ex parte Hilton, 64 S. C. 201, 41 S. E. 978, 92 Am. St. Rep. 800, 5 A. L. R. 1590.

Validation of existing laws. — Cohen v. Hoff, 3 Brev. 500, L. R. A. 1916E, 838.

ARTICLE I.

Declaration of Rights.

Section I. Political power in people.—All political power is vested in and derived from the people only, therefore they have the right at all times to modify their form of government.

See Const. 1868, I, 1.

Section II. Apportionment of Representatives.—Representation in the House of Representatives shall be apportioned according to population.

See Const. 1868, I, 34.

Section III. Meeting of General Assembly.—The General Assembly ought frequently to assemble for the redress of grievances and for making new laws, as the common good may require.

See Const. 1868, I, 27.

Section 4. Religious worship—freedom of speech—petition.—The General Assembly shall make no law respecting an establishment of religion or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble and to petition the Government or any department thereof for a redress of grievances.

See Const. 1868, I, 6, 7, 9 and 10.

A state or municipality may not by statute or ordinance wholly disbar the right to preach or to disseminate religious views. *City of Gaffney v. Putnam*, 197 S. C. 237, 75 S. E. (2d) 130.

Section 5. Privileges and immunities—protection of laws.—The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty or property without due process of law, nor shall any person be denied the equal protection of the laws.

See Const. 1868, I, 12.

- I. General Consideration.
- II. Due Process of Law.
- III. Equal Protection of Laws.
- IV. Privileges and Immunities.

Cross Reference.

For a treatment of the above provisions in the United States Constitution, see notes to the 14th amendment.

I. GENERAL CONSIDERATION.

The object of this section is to prevent discriminatory legislation. *Porter v. Charleston, etc., Ry. Co.*, 63 S. C. 169, 41 S. E. 108, 90 Am. St. Rep. 670, 15 L. R. A. (N. S.) 983.

But the language must be construed with reference to principles of the common law. *State v. Rector*, 158 S. C. 212, 155 S. E. 385.

The legislature cannot, without violating this section, arbitrarily deprive one of his fundamental rights appertaining to life, liberty, and property. *Simmons v. Western Union Tel. Co.*, 63 S. C. 425,

41 S. E. 521, 57 L. R. A. 607, 30 L. R. A. (N. S.) 1133, 49 L. R. A. (N. S.) 211, 280, 339, Ann. Cas. 13C, 866.

Thus one demanding but refused right to be tried only upon indictment presented by legal grand jury, where such indictment is required, is "deprived of life, liberty or property" under this section. *State v. Rector*, 158 S. C. 212, 155 S. E. 385.

And while the Legislature is empowered to alter or amend the charter of a corporation, it is imperative upon it to respect the property of the corporation under the guaranties of this section in so doing. *Mays v. Seaboard, etc., Ry.*, 75 S. C. 455, 56 S. E. 30.

But the Legislature has the inherent police power to pass any law it judges fit for the protection and welfare of its people in traveling over the public highways of the state, and it is a matter within the discretion of the Legislature of the

state to determine what interests the public requires, and to adopt such measures and means as are reasonably necessary for the protection of such interests, and to make reasonably safe the traveling public. *Merchants', etc., Bank v. Brigman*, 106 S. C. 362, 91 S. E. 332, L. R. A. 1917E, 925, 4 A. L. R. 363.

For example it may pass laws regulating the substance of contracts. — This section does not forbid the General Assembly to pass laws regulating the substance of contracts, the form in which they shall be made, and the manner of execution and attestation, if the regulation tends to protect the public or a class of individuals from fraud or unfair dealing. *Rose v. Harlee*, 69 S. C. 523, 48 S. E. 541; *Miller v. Atlantic, etc., R. Co.*, 90 S. C. 249, 73 S. E. 71, 48 L. R. A. (N. S.) 445, 12 A. L. R. 488.

An act providing that description of property conveyed by chattel mortgage should be in writing or typewriting, is not an arbitrary or unreasonable restraint on the right to contract. *Id.* See § 8713.

The Supreme Court will not consider the provisions of this section where they were not raised below. *Burnett v. Southern Ry. Co.*, 62 S. C. 281, 40 S. E. 679.

The word "deprived" connotes want of consent. *Sandel v. State*, 115 S. C. 168, 104 S. E. 567, 13 A. L. R. 1268, 1280, 23 A. L. R. 676.

As to provisions in the former constitution, see *State v. Williams*, 32 S. C. 583, 10 S. E. 551, 21 L. R. A. (N. S.) 242; *Town Council v. Pressley*, 33 S. C. 56, 11 S. E. 545, 25 Am. St. Rep. 885, 26 Am. St. Rep. 659, 47 Am. St. Rep. 547, 8 L. R. A. 854, 14 L. R. A. 583, 36 L. R. A. 602; *Sanders v. Venning*, 38 S. C. 502, 17 S. E. 134, 6 A. L. R. 223; *McCullough v. Brown*, 41 S. C. 220, 19 S. E. 458, 23 L. R. A. 410, 53 L. R. A. 764, 61 L. R. A. 125, 150, 67 L. R. A. 70, 8 L. R. A. (N. S.) 126, 14 L. R. A. (N. S.) 1157, 15 L. R. A. (N. S.) 922, 933, 948, L. R. A. 1915D, 186, 3 A. L. R. 1485, 14 A. L. R. 1153; *State v. Mitchell*, 2 Bail. 225, 12 Am. Dec. 607, 111 Am. St. Rep. 937, Ann. Cas. 14A, 138.

II. DUE PROCESS OF LAW.

"Due process of law" means the law of the land; and the law of the land means that which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial. *South Carolina, etc., R. Co. v. American Tel., etc., Co.*, 65 S. C. 459, 43 S. E. 970, 42 L. R. A. (N. S.) 232, Ann. Cas. 17B, 694.

For other definitions of "due process of law" see *State v. Brown*, 178 S. C. 294, 182 S. E. 838.

And involves an opportunity to defend and enforce legal rights. — "Due process of law" as a general rule, involves an opportunity before a proper

tribunal under established procedure to make contest in defending or enforcing a legal right. *Simmons v. Western Union Tel. Co.*, 63 S. C. 425, 41 S. E. 521, 57 L. R. A. 607, 30 L. R. A. (N. S.) 1133, 49 L. R. A. (N. S.) 211, 280, 339, Ann. Cas. 13C, 866.

If litigants have an opportunity to be heard at any time before final judgment is entered. — *Shealey v. Seaboard, etc., R. Co.*, 131 S. C. 144, 126 S. E. 622.

It must be pursued in the ordinary mode adopted by law.—By "due process of law" is meant a process which following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and, whenever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of judgment sought. The clause in question means, therefore, that there can be no proceeding against life, liberty, or property which may result in the deprivation of either, without the observances of those general rules established in our system of jurisprudence for the security of private rights. *State v. Earle*, 66 S. C. 194, 44 S. E. 781, L. R. A. 1915F, 1197, Ann. Cas. 14B, 204.

Including the common law and the statute law existing in the state at adoption of constitution.—"Due process of law" means the common law and the statute law existing in this state at the adoption of the Constitution. Altogether they constitute the body of the law, prescribing the course of justice to which a freeman is to be considered amenable in all times to come. *Stehmeyer v. City Council*, 53 S. C. 259, 31 S. E. 322, 78 Am. St. Rep. 236, 271, 61 L. R. A. 55, 3 L. R. A. (N. S.) 819, 28 L. R. A. (N. S.) 1133, Ann. Cas. 16B, 527.

The impounding of water by power company behind unfinished dam, which was released during "high" water by power company to save the dam, thereby injuring the land of plaintiff below the dam was a taking of plaintiff's property without due process of law. *Taylor v. Lexington Water Power Co.*, 165 S. C. 120, 163 S. E. 137.

Admissibility of incompetent evidence where accused has no attorney does not deny "due process of law." — The admission of incompetent testimony on the trial of a defendant who is not represented by counsel does not amount to a denial of due process of law, within the meaning of this section. *State v. Owens*, 124 S. C. 220, 117 S. E. 536.

Fair trial.—Accused in murder trial could not complain if counsel assisting solicitor took an active part in the trial, where it was not shown the solicitor, who was present and performed his duties, re-

linquished the management of the case for the prosecution. If accused thought they were being deprived of substantial rights by failure of solicitor to perform his duties as such officer, they should have called the matter to the attention of the trial judge. *State v. Gregory*, 172 S. C. 329, 174 S. E. 10.

Act requiring Supreme Court clerk to notify penitentiary superintendent of dismissal of appeal suspending execution of death sentence. *Ex parte Howell*, 168 S. C. 198, 167 S. E. 230.

Nor does an act imposing a tax on places of amusement deny "due process of law."—*Curdts v. South Carolina Tax Comm.*, 131 S. C. 362, 127 S. E. 438. See § 2531.

Nor an act authorizing sewer district bonds without hearing of property owners.—*Rutledge v. Greater Greenville Sewer Dist.*, 139 S. C. 188, 137 S. E. 597.

Legislature directing the issuance of bonds, does not violate due process clause. *Fripp v. Coburn*, 101 S. C. 312, 85 S. E. 774; *Evans v. Beattie*, 137 S. C. 496, 135 S. E. 538.

A tax on the net income of a foreign corporation arising from interstate operations within the State.—*Western Union Tel. Co. v. Query*, 144 S. C. 234, 142 S. E. 509.

An act which creates a school district and authorizes the levy of a tax for school purposes by a board of trustees.—*Martin v. School Dist.*, 57 S. C. 125, 35 S. E. 517, 14 L. R. A. (N. S.) 851.

An act for financing state highway construction through gasoline tax though no hearing is provided on benefits.—*State v. Moorer*, 152 S. C. 455, 150 S. E. 269.

An act which imposes a tax on soft drink retailers.—*Wingfield v. South Carolina Tax Comm.*, 147 S. C. 116, 144 S. E. 846.

An ordinance not providing for hearing by board of health of property owner notified to connect with sewer as required thereby.—*Columbia v. Shaw*, 131 S. C. 462, 127 S. E. 722.

An act allowing damages against telegraph companies for mental anguish.—*Simmons v. Western Union Tel. Co.*, 63 S. C. 425, 41 S. E. 521, 57 L. R. A. 607, 30 L. R. A. (N. S.) 1133, 49 L. R. A. (N. S.) 211, 280, 339, *Ann. Cas.* 13C, 866.

Statute construed as creating rebuttable presumption that failure to give railroad crossing signals was proximate cause of crossing collision. *Ford v. Atlantic Coast Line R. Co. et al.*, 169 S. C. 41, 168 S. E. 143.

An act allowing punitive damages in actions for negligence of a railroad company.—*Osteen v. Southern Ry.*, 76 S. C. 368, 57 S. E. 196, 41 L. R. A. (N.

S.) 195, L. R. A. 1915E, 1111.

The state warehouse act providing for the storage of no commodity other than lint cotton.—*State v. McCown*, 92 S. C. 81, 75 S. E. 392, 42 L. R. A. (N. S.) 222, *Ann. Cas.* 13C, 1231, *Ann. Cas.* 16D, 25, 34, 14 A. L. R. 1156, 23 A. L. R. 1481.

An act providing for the condemnation of lands necessary for proper drainage of swamp lands.—*Jackson v. Bree-land*, 103 S. C. 184, 88 S. E. 128.

Statutes fixing procedure for condemning right of way for state highways.—*Jennings v. Sawyer*, 182 S. C. 427, 189 S. E. 746.

An act providing for the arrest without a warrant of occupants of an automobile in which whiskey is discovered.—*State v. Quinn*, 111 S. C. 174, 97 S. E. 62, 1 A. L. R. 589, 3 A. L. R. 1500, 1517.

An act leasing the state's lot for erection of buildings.—*Antonakas v. Anderson Chamber of Commerce*, 130 S. C. 215, 126 S. E. 35, in which the question of dedication was before the court.

An act providing for the connection of railroad tracks.—*Shealey v. Seaboard, etc.*, R. Co., 131 S. C. 144, 126 S. E. 622.

An act empowering railroad commission to fix proportion of cost of connecting tracks without providing for notice.—*Shealey v. Seaboard, etc.*, R. Co., 131 S. C. 144, 126 S. E. 622.

An act making a motor vehicle which inflicts an injury liable for damages and providing for attachment of same.—*Merchants', etc., Bank v. Brigman*, 106 S. C. 362, 91 S. E. 332, L. R. A. 1917E, 925, 4 A. L. R. 363.

An ordinance providing for maintenance of parking meters. *Owens v. Owens, Mayor, et al.*, 193 S. C. 261, 8 S. E. (2d) 339.

But a railroad commission's order requiring a railroad company to restore certain trains is confiscatory.—*Blease v. Charleston, etc.*, R. Co., 146 S. C. 496, 144 S. E. 233.

As likewise an act requiring railroad companies to build industrial sidetracks to connect industrial enterprises with their main line.—*Mays v. Seaboard, etc.*, Ry., 75 S. C. 455, 56 S. E. 30.

But statute purporting to deprive county treasurer of fees theretofore earned on tax executions held unconstitutional as depriving county treasurer of property without due process of law and impairing obligations of contract. *Salley v. McCoy*, 182 S. C. 251, 189 S. E. 196.

Whether State Highway Department should have taken into consideration probability of occurrence of floods in reconstructing highway alleged to have deflected flood waters so as to inundate plaintiff's property and deprive him thereof held for jury, as against con-

tention that flood waters were an act of God over which highway department had no control. *Baynham v. State Highway Department of South Carolina*, 181 S. C. 435; 187 S. E. 528.

Unconstitutional.—Act imposing one year limitation on action by state or county officer or employee for salary, fees, or other obligation for services, on six-month limitation if cause of action accrued prior to effective date of act, which act does not apply to counties having population of over 85,000. *Gillespie v. Pickens County*, 197 S. C. 217, 14 S. E. (2d) 900.

Governor's orders indefinitely suspending state highway commissioners from office without leaving. *Dacus v. Johnston, Governor*, 180 S. C. 329, 185 S. E. 491.

State highway commissioners charged by Governor with declining to vacate their offices at Governor's order were entitled to have the question thus made by Governor decided by courts, and hence Governor's attempting to substitute other commissioners, and calling out militia and proclaiming existence of insurrection in connection with highway department was unauthorized and violated due process clauses of both State and Federal Constitution. *Hearon v. Claus*, 178 S. C. 383, 183 S. E. 13.

Statute authorizing contracts fixing minimum resale prices for trade-marked goods, and making sale at less than agreed price actionable unfair competition does not violate this section. *Miles Laboratories, Inc. v. Seignions*, 30 F. S. 549.

To require landowner to pay taxes on land between date he lost possession in condemnation and date he received payment therefor would violate due process clause. In re S. C. Public Service Authority, 37 F. S. 28.

III. EQUAL PROTECTION OF LAWS.

The "equal protection" clause in this section means that no person or class of persons shall be denied the protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances. *Harrison v. Caudle*, 141 S. C. 407, 139 S. E. 842.

The equal protection of the laws guaranteed by this section is not violated where there is a classification which rests upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed. *Harrison v. Caudle*, 141 S. C. 407, 139 S. E. 842; *Laurens v. Anderson*, 75 S. C. 62, 55 S. E. 136, 117 Am. St. Rep. 885, 129 Am. St. Rep. 258, 9 Ann. Cas. 1003.

And this is complied with if the classification bears reasonable relation to the purpose sought to be effected.—Requirement of equal protection of the

laws is fully complied with, if legislative classification bears reasonable relation to legislative purpose sought to be effected. *Duke Power Co. v. Bell*, 156 S. C. 299, 152 S. E. 865.

And if constituents of each class are treated alike under similar circumstances.—*Duke Power Co. v. Bell*, 156 S. C. 299, 152 S. E. 865; *Alderman & Sons Co. v. Wilson Lumber Co.*, 77 S. C. 165, 57 S. E. 756.

And if the classification has some reasonable basis.—A classification having some reasonable basis does not offend against this section, merely because it is not made with mathematical nicety, or because in practice it results in some inequality. *State v. Hertzog*, 92 S. C. 14, 75 S. E. 374, L. R. A. 1915B, 649.

The Legislature may make classification of its own citizens.—This section cannot be so construed as to deprive the law making department of the government of the power to make a classification of its citizens; so that laws may be passed which, if applicable alike to all persons, natural or artificial, belonging to a given class, are not violative of the provisions of the constitution forbidding a denial to any person of the equal protection of the laws. *Porter v. Charleston, etc., Ry. Co.*, 63 S. C. 169, 41 S. E. 108, 111, 90 Am. St. Rep. 670, 15 L. R. A. (N. S.) 983; *McCandless v. Richmond, etc., R. Co.*, 38 S. C. 103, 16 S. E. 429, 62 Am. St. Rep. 171, 18 L. R. A. 440, 21 L. R. A. 790, 25 L. R. A. 161, 35 L. R. A. (N. S.) 1017, and *Blum v. Richland County*, 38 S. C. 291, 17 S. E. 20, 39 L. R. A. 55, 2 A. L. R. 723; *Brown v. Carolina Midland Ry. Co.*, 67 S. C. 481, 46 S. E. 283, 100 Am. St. Rep. 756.

And the legislature has power to make a classification of persons or property for public purposes, provided such classification is not arbitrary, and bears reasonable relation to the purpose to be effectuated, and that the equality clause is not violated, when all within the designated class are treated alike. *Simmons v. Western Union Tel. Co.*, 63 S. C. 425, 41 S. E. 521, 57 L. R. A. 607, 30 L. R. A. (N. S.) 1133, 49 L. R. A. (N. S.) 211, 280, 339, Ann. Cas. 13C, 866; *Ex parte Hollman*, 79 S. C. 9, 60 S. E. 19, 21 L. R. A. (N. S.) 242, L. R. A. 1915B, 646, L. R. A. 1918D, 1008, 14 Ann. Cas. 1105, Ann. Cas. 15B, 498. *Gasque, Inc. v. Nates*, 191 S. C. 271, 2 S. E. (2d) 36.

Equal protection clauses admit of exercise of wide scope of discretion and avoid legislative enactments only when they are without any reasonable basis. *Witt v. Peoples State Bank of South Carolina et al.*, 166 S. C. 2, 164 S. E. 306.

Legislation is not unequal if it is limited to a particular class.—Legislation is not unequal nor discriminatory, in the sense of the equality clause of the

constitution, merely because it is special or limited to a particular class. *Simmons v. Western Union Tel. Co.*, 63 S. C. 425, 41 S. E. 521, 57 L. R. A. 607, 30 L. R. A. (N. S.) 1133, 49 L. R. A. (N. S.) 211, 280, 339, Ann. Cas. 13C, 866; *Porder v. City of Greenville*, 196 S. C. 79, 12 S. E. (2d) 851.

For example building contractors are usually of a much less financial responsibility than railroad and paving contractors. *State v. Hertzog*, 92 S. C. 14, 75 S. E. 374, L. R. A. 1915B, 649.

Thus an act dealing with all landlords as a class is constitutional. — *State v. Elmore*, 68 S. C. 140, 46 S. E. 939, 119 Am. St. Rep. 126.

As likewise an act exempting certain portions of a county from the general stock law.—*Utsey v. Hiott*, 30 S. C. 360, 365, 9 S. E. 338, 14 Am. St. Rep. 910, 21 Am. St. Rep. 787, Ann. Cas. 16D, 12, 27, 36, 6 A. L. R. 223; *Goodale v. Sowell*, 62 S. C. 516, 40 S. E. 970, 6 A. L. R. 223; *Brown v. Tharpe*, 74 S. C. 207, 54 S. E. 363, 6 A. L. R. 223.

Statute providing for court for portion of Oconee County not invalid under terms of this section. *Glymph v. Smith*, 170 S. C. 486; 170 S. E. 913.

An act providing a penalty on common carriers for failure to pay damages on freight within a certain time. — *Porter v. Charleston, etc., Ry. Co.*, 63 S. C. 169, 41 S. E. 108, 90 Am. St. Rep. 670, 15 L. R. A. (N. S.) 983; *Seegers Bros. v. Seaboard, etc., Ry.*, 73 S. C. 71, 52 S. E. 797, 121 Am. St. Rep. 921, 125 Am. St. Rep. 769, 42 L. R. A. (N. S.) 106. See § 7165.

Act regulating motor carriers but exempting farmers or dairymen hauling dairy or farm products. *State ex rel Coney et al. v. Hicklin*, 168 S. C. 440, 167 S. E. 674.

Non-resident license tax.—Ordinance requiring "bakeries with established place of business out of city, and selling or delivering their products within city" pay higher license tax than bakeries within city valid, as nothing was shown higher license was unreasonable, capricious, or confiscatory. *Am. Bakeries Co. v. City of Sumter*, 173 S. C., 94, 174 S. E., 919.

Statute providing that wholesalers delivering goods to retailers in any municipality shall not be charged a business license unless wholesalers maintain a warehouse within municipality. *Pouder v. City of Greenville*, 196 S. C. 79, 12 S. E. (2d) 851.

Statute providing for construction and operation of hydroelectric and navigation project by state authority. *Clarke v. South Carolina Public Service Authority*, 177 S. C. 427, 181 S. E. 481.

An act making each carrier the agent of its connecting carrier and liable for

the neglect of same.—*Venning v. Atlantic, etc., R. Co.*, 78 S. C. 42, 58 S. E. 983, 125 Am. St. Rep. 768, 12 L. R. A. (N. S.) 1217, 31 L. R. A. (N. S.) 24, 73, 91, 101, 52 L. R. A. (N. S.) 870; *Glenn v. Atlantic, etc., R. Co.*, 96 S. C. 357, 80 S. E. 898. See § 7168.

An act requiring one insurance company to deposit an approved bond and another approved securities.—*State v. McMaster*, 94 S. C. 379, 77 S. E. 401.

An act providing that all laborers in constructing a highway in a certain county to be actual inhabitants of that county.—*Lillard v. Melton*, 103 S. C. 10, 87 S. E. 421, L. R. A. 1916D, 572, L. R. A. 1917E, 468, 5 A. L. R. 761, 24 A. L. R. 941.

Act authorizing city to construct stadium, and exempting from taxation bonds issued therefor. *Cathcart v. City of Columbia et al.*, 170 S. C. 362, 170 S. E. 435.

Statute imposing annual license tax of \$15 on each machine dispensing music but only \$10 on each machine dispensing merchandise and exempting machines requiring deposit of less than five cents. *Carolina Music Co., Inc. et al. v. Query et al.*, 192 S. C. 309, 6 S. E. (2d) 473.

A municipal regulation requiring heads of families maintaining a sanitary closet to pay annual "sanitary tax" of \$3, and keepers of boarding, lodging or rooming house to pay \$6.00. *Town of Marion v. Baxley*, 192 S. C. 4, 5 S. E. (2d) 573.

An act imposing a vehicle license tax in only one county. — *State v. Touchberry*, 121 S. C. 5, 113 S. E. 345.

An act for appropriation of gasoline and motor vehicle tax for payment of indebtedness of highway districts. — *State v. Moorer*, 152 S. C. 455, 150 S. E. 269.

An act imposing a penalty on any railroad failing to transport goods within a reasonable time.—*Sanford v. Seaboard, etc., Ry.*, 79 S. C. 519, 61 S. E. 74, 20 L. R. A. (N. S.) 128.

Statute penalizing any "person" intentionally violating usury laws was held to include corporations and therefore is not unconstitutional. *State v. Riddle*, 160 S. C. 477, 158 S. E. 833.

An act entitled "pay-as-you-go" authorizing a levy of gasoline and automobile license tax.—*Briggs v. Greenville County*, 137 S. C. 288, 135 S. E. 153; *Standard Oil Co. v. Spartanburg*, 66 S. C. 37, 44 S. E. 377, 19 Am. St. Rep. 270.

But an act discriminating in the punishment between landlord and laborer is unconstitutional.—*State v. Williams*, 32 S. C. 123, 10 S. E. 876, 25 Am. St. Rep. 880, 14 L. R. A. 584, 21 L. R. A. (N. S.) 242.

As likewise an act authorizing the confiscation of goods offered for sale on Sunday not applying to corporation.—

Xepapas v. Richardson, 149 S. C. 52, 146 S. E. 686. But see State v. Hondros, 100 S. C. 242, 84 S. E. 781.

And an act exempting soldiers and sailors of Confederate States from paying license for carrying on business.—Laurens v. Anderson, 75 S. C. 62, 55 S. E. 136, 117 Am. St. Rep. 885, 129 Am. St. Rep. 258, 9 Ann. Cas. 1003.

And an act discriminating in certain citizens in fishing in Colleton and Berkeley Counties.—State v. Higgins, 51 S. C. 51, 28 S. E. 15, 78 Am. St. Rep. 247, 93 Am. St. Rep. 112, 38 L. R. A. 561.

And an act prohibiting employment of employees in certain enumerated merchantile and manufacturing establishments for more than 56 hours per week or 12 hours per day. Gasque, Inc. v. Nates, 191 S. C. 271, 2 S. E. (2d) 36.

Statute imposing license tax of \$15 per year on machines dispensing music but imposing tax of only \$10 per year per machine or machines dispensing tangible articles of merchandise and exempting machines which require a deposit of less than five cents for their operation is not arbitrary and does not contravene these constitutional provisions. Carolina Music Co. v. Query, 192 S. C. 308, 6 S. E. (2d) 473.

Hydro-electric tax does not deny equal protection. Duke Power Co. v. Query, 10 F. S. 669.

The privileges, immunities, and liberties protected by this section, include the rights of parents to the custody of children given them by law, as well as the liberty of the children from illegal restraint or custody after the parent has forfeited the right of custody, and a statute authorizing the father to convey the custody of his children to another during minority against the mother's wishes, without permitting any judicial investigation by habeas corpus or equitable proceedings as to the rights of the mother and the children as to their custody, would be a deprivation of liberty without due process of law. Tillman v. Tillman, 84 S. C. 552, 66 S. E. 1049, 26 L. R. A. (N. S.) 781, 41 L. R. A. (N. S.) 586, 42 L. R. A. (N. S.) 1018, Ann. Cas. 13B, 887, Ann. Cas. 14A, 744, 755.

And it includes the right of the citizen to be free in the enjoyment of all his facilities.—The liberty guaranteed in this section, and in the like provision of the fourteenth amendment of the Constitution of the United States, means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any live-

lihood or avocation, and for that purpose to enter into all contracts which may be proper. Tillman v. Tillman, 84 S. C. 552, 66 S. E. 1049, 26 L. R. A. (N. S.) 781, 41 L. R. A. (N. S.) 586, 42 L. R. A. (N. S.) 1018, Ann. Cas. 13B, 887, Ann. Cas. 14A, 744, 755.

Because no human being can be placed under the arbitrary power of any other human being.—The guaranty of personal liberty expressed in this section means, above all else, that no human being, under the protection of the Constitution, can be placed under subjection to the arbitrary power of disposition and control of any other human being. Tillman v. Tillman, 84 S. C. 552, 66 S. E. 1049, 26 L. R. A. (N. S.) 781, 41 L. R. A. (N. S.) 586, 42 L. R. A. (N. S.) 1018, Ann. Cas. 13B, 887, Ann. Cas. 14A, 744, 755.

The emigrant agent's act does not abridge the privileges of citizens.—The emigrant agent's act, prohibiting the carrying on of the business of emigrant agent without a license, is not in violation of this section as abridging the privileges of citizens. State v. Napier, 63 S. C. 60, 41 S. E. 13, 129 Am. St. Rep. 286, 2 L. R. A. (N. S.) 860.

But an act permitting one person to sue the State for a damaged automobile is a special privilege to one citizen.—Sirrime v. State, 132 S. C. 241, 128 S. E. 172, 173.

Ordinance giving council absolute control, in so far as buildings are concerned, of all real estate within city limits within two hundred feet of all railroad crossings unconstitutional. Henderson v. City of Greenwood, 172 S. C., 16; 172 S. E., 689.

The Constitution prohibits passage of laws or ordinances as will interfere with the legal use and enjoyment of property. Henderson v. City of Greenwood, 172 S. C., 16; 172 S. E., 689.

The general assembly may enact retrospective legislation, unless it has effect of impairing obligation of a contract, or divesting vested rights of property. Muldrow v. Caldwell, 173 S. C., 243, 175 S. E. 501.

Vested rights may be divested by forfeiture, but the legislature has no power to transfer property from one to another directly or indirectly. Muldrow v. Caldwell, 175 S. E., 501; 173 S. C., 243.

Where on a person's death, the rights of his heirs, devisees, or legatees have thereby become vested, these rights may not be impaired by subsequent legislation. Muldrow v. Caldwell, 173 S. C., 243, 175 S. E., 501.

And ordinance prohibiting operation of a barbecue stand located in any residential area of city during certain hours, and defining "residential area" as any section of city where two or more houses used for residential purposes are located

on abutting property, unconstitutional. *Fincher v. City of Union*, 186 S. C. 232; 196 S. E. 1.

Act regulating occupation of hairdressers and cosmetologists. *State v. Ross*, 185 S. C. 472; 194 S. E. 439.

Ordinance governing keeping of cows

within town limits, imposing requirements with respect to space, stabling, drainage, watering, bedding, disinfecting, tuberculin testing, and removal of manure. *Ward v. Town of Darlington*, 183 S. C. 263; 190 S. E. 826.

Section 6. Taxation.—All property subject to taxation shall be taxed in proportion to its value.

See Const. 1868, I, 37.

Cross reference.—As to taxing property without due process of law, see art. 1, § 5. As to requirement that all land-owners remove trash, etc., from streams, see § 1215.

Taxes distinguished from assessments.—Taxes, in the strict sense of the word, are imposed upon all property, both real and personal, for the maintenance of the government, or some division thereof, while assessments are laid only on the property to be benefited by the proposed improvements. *Jackson v. Breeland*, 103 S. C. 184, 88 S. E. 128, 130.

This section does not apply to property expressly reserved to the General Assembly.—*Duke Power Co. v. Bell*, 156 S. C. 299, 152 S. E. 865.

An official assessment is prerequisite to constitute a legal tax.—Taxes are not to be laid upon taxable property merely, nor upon its actual value, but

upon its actual value as ascertained by an assessment made for the purpose of laying such tax. It is thus clear that an official valuation for taxation is essential to constitute a tax, which must not only be certain in amount, but must be justly apportioned. *State v. Cheraw, etc.*, R. Co., 54 S. C. 564, 32 S. E. 691, 694.

A special assessment based upon benefits to be received is unconstitutional.—A system of special assessment by a municipal corporation, whereby the owners of property abutting on the streets through which water mains are to be laid, not in accordance to its valuation, but inasmuch as it is to result in a benefit to the land owners whose land abuts on the streets, is unconstitutional. *Stehmeyer v. City Council*, 53 S. C. 259, 31 S. E. 322, 78 Am. St. Rep. 236, 271, 61 L. R. A. 55, 3 L. R. A. (N. S.) 819, 28 L. R. A. (N. S.) 1133, Ann. Cas. 16B, 527.

Section 7. No tax without consent.—No tax, subsidy, charge, impost tax or duties shall be established, fixed, laid or levied, under any pretext whatsoever, without the consent of the people or their representatives lawfully assembled.

See Const. 1868, I, 36.

Statute providing for court for portion of Oconee County not invalid hereunder.

Glymph v. Smith, 170 S. C., 486; 170 S. E., 913.

Section 8. Attainder—ex post facto law.—No bill of attainder, *ex post facto* law, law impairing the obligation of contracts, nor law granting any title of nobility or hereditary emolument, shall be passed, and no conviction shall work corruption of blood or forfeiture of estate.

See Const. 1868, I, 4, 21.

- I. Impairment of Contracts.
- II. Ex Post Facto Laws.
- III. Forfeiture of Estates.

Cross Reference.

As to compensation rendered public officers for services on contracts, see art. 3, § 30. See also notes under § 10, art. 1, Constitution of United States.

I. IMPAIRMENT OF CONTRACTS.

Any deviation from terms of contract impairs its obligation.—Any deviation from the terms of a contract by imposing conditions not expressed therein or dispensing with performance of those expressed impairs its obligation, however

minute or apparently immaterial in their effect on the contract they may be. *Martin v. Saye*, 147 S. C. 433, 145 S. E. 186.

The objection to a law as "impairing obligation of a contract" does not depend on extent of change which law effects in contract, but any deviation from its terms by postponing or accelerating performance which it prescribes, imposing conditions not expressed in contract, or dispensing with performance of those expressed however minute or apparently immaterial, impairs contract obligations. *Henry v. Alexander et al.*, 186 S. C. 17, 194 S. E. 649.

Any law which in its operation amounts to denial, or obstruction of rights accruing by a contract, though professing to act on the remedy, is directly obnoxious to constitutional provisions prohibiting "impairing obligation of contract." *Federal Land Bank of Columbia v. Garrison*, 185 S. C. 255; 193 S. E. 308.

For example an act authorizing the road commission to use all unexpended balances realized from bond issue for hard-surface roads impairs obligation of contract with bondholders. *Martin v. Saye*, 147 S. C. 433, 145 S. E. 186.

And where the Columbia Canal, its lands and appurtenances, were exempt from all taxes except for state purposes under a contract made by the state with the purchaser of such canal under Act December 24, 1890, a levy and collection of county taxes on said property by a state officer is in violation of this section, as an impairment of the obligation of a contract. *Columbia Water Power Co. v. Campbell*, 75 S. C. 34, 54 S. E. 833.

An act providing for appraisal of mortgaged property after foreclosure sale, and providing that deficiency judgment shall be measured by difference between true value of property as of time of sale and judgment indebtedness, which act is not limited in duration to emergency, "impairs obligation of contracts" in violation of state and federal constitutions, as respects mortgages existing when the act was passed. *Federal Land Bank of Columbia v. Garrison*, 185 S. C. 255; 193 S. E. 308.

Statute respecting preferences in cases of insolvent banks does not impair obligation of contracts as affecting depositors. *Witt v. Peoples State Bank of South Carolina et al.*, 166 S. C. 1, 164 S. E. 306, 83 A. L. R. 1068.

So where bonds are issued, there arises a contract between the purchaser and seller, the obligation of which cannot be impaired. *Dove v. Kirkland*, 92 S. C. 313, 75 S. E. 503, Ann. Cas. 15A, 532; *Welch v. Getzen*, 85 S. C. 156, 67 S. E. 294, 37 L. R. A. (N. S.) 1108.

Statute purporting to deprive county treasurer of fees theretofore earned on tax executions held unconstitutional as depriving county treasurer of property without due process of law and impairing obligations of contract. *Salley v. McCoy*, 182 S. C. 251; 189 S. E. 196.

Fees earned by county treasurer for issuing tax executions before payment of his salary are vested rights, which cannot be impaired or defeated by allowing county to set off salary paid against such fees. *Smith v. Greenville County*, 189 S. C. 395, 1 S. E. (2d) 502.

But an act changing highway administrative officers does not impair obligation of contract.—An act abolishing the Bogansville township highway commis-

sion, and devolving all of their duties on the advisory board and the county engineer, does not conflict with this section, forbidding the enactment of a law impairing the obligations of a contract, as every obligation issued or incurred lawfully by the commission will have to be paid by the authorities on whom the commission's duties have devolved. *Askew v. Smith*, 126 S. C. 159, 119 S. E. 378.

Statute changing time for procuring automobile license does not impair obligation of contract since "license" is not contract, but is merely privilege to do what otherwise would be unlawful. *Heslep v. State Highway Department*, 171 S. C. 186, 171 S. E. 913.

Statute making highway department employees' negligent failure to erect and maintain caution signs, necessary in departments discretion, a misdemeanor, would be unconstitutional if construed as retroactive. *McCoy v. State Highway Department*, 169 S. C. 456, 169 S. E. 174.

Nor does an act leasing land previously used as a public square for erection of buildings.—An act leasing land theretofore used as public square for erection of building to contain offices of county and home demonstration agents and other county offices or auditorium for public assemblage, free of rent, is not violative of this amendment prohibiting taking of property without due process of law. *Antonakas v. Anderson Chamber of Commerce*, 130 S. C. 215, 126 S. E. 35.

Or a joint resolution requiring the state treasurer to write off the books, as obligations of the state, certain past-due bonds, is not a law impairing the obligations of contracts. *Smith v. Jennings*, 67 S. C. 324, 45 S. E. 821, L. R. A. 1915B, 1060, 2 A. L. R. 1593.

And the Act of 1883, providing that contingent remainders cannot be barred by deed of feoffment with livery of seisin, is neither unconstitutional nor retroactive, when applied to a power vested before, but not executed until after the enactment of the statute, and is not violative of this section. *People's Loan, etc., Bank v. Garlington*, 54 S. C. 413, 32 S. E. 513, 71 Am. St. Rep. 800.

See also *Gasque, Inc. v. Nates*, 191 S. C. 272, 2 S. E. (2d) 36.

II. EX POST FACTO LAWS.

"Ex post facto law" is law having retroactive effect. *McCoy v. State Highway Department*, 169 S. C. 436, 169 S. E. 174.

An act changing the manner of inflicting the death penalty from hanging to electrocution, is not disadvantageous to one committing a crime for which the penalty is death prior to the enactment of the law, and therefore the law is not ex post facto as applied to him. *State v. Vaughn*, 95 S. C. 455, 79 S. E. 312.

III. FORFEITURE OF ESTATES.

Legal execution of insured is no defense to action on life policy containing incontestability clause.—The legal execution of insured for a crime committed by him is no defense to an action which had been in force more than 2 years

on a life policy, fixed by an incontestability clause, in view of this section, providing that no convictions shall work a forfeiture. *Weeks v. New York Life Ins. Co.*, 128 S. C. 223, 122 S. E. 586, 35 A. L. R. 1482.

Section 9. Suffrage.—The right of suffrage, as regulated in this Constitution, shall be protected by law regulating elections and prohibiting, under adequate penalties, all undue influences from power, bribery, tumult or improper conduct.

See notes to art. 2, section 4, this constitution.

Statute imposing mandatory duty on county board of education for Chesterfield County to immediately appoint

school trustees elected at election conducted according to regulations applicable to primary elections was invalid. *State et al. v. Huntly et al.*, 167 S. C. 476, 166 S. E. 637.

Section 10. Elections free and open.—All elections shall be free and open, and every inhabitant of this State possessing the qualifications provided for in this Constitution shall have an equal right to elect officers and be elected to fill public office.

See Const. 1868, I, 31.

See notes to art. 2, section 4, and art. 1, section 9 this constitution.

The statute which limits the right of voting at an election for school boards in Greenville County to qualified electors who had returned real or personal

property for taxation violates constitutional provisions defining an elector and regulating exercise of right of suffrage. *Cothan v. West Dunklin Public School Dist. No. 1-C et al.*, 189 S. C. 85, 200 S. E. 95.

Section 11. Property qualifications—term of office—dueling.—No property qualification, unless prescribed in this Constitution, shall be necessary for an election to or the holding of any office. No person shall be elected or appointed to office in this State for life or during good behavior, but the terms of all officers shall be for some specified period, except Notaries Public and officers in the militia. After the adoption of this Constitution any person who shall fight a duel or send or accept a challenge for that purpose, or be an aider or abettor in fighting a duel, shall be deprived of holding any office of honor or trust in this State, and shall be otherwise punished as the law shall prescribe.

See Const. 1868, I, 32.

The purpose of this section is to make office holders more amendable to the elective or appointive power.—There is no inconsistency in this section and § 20, art. 5. Prior to the adoption of the Constitution of 1895, offices in this state might be held during good behavior. The purpose of this section was to change this rule, and make the term a limited one so as to make office holders more amendable to the elective or appointive power. *State v. Bowden*, 92 S. C. 393, 75 S. E. 866, 872, 46 L. R. A. (N. S.) 1204, L. R. A. 1916E, 846.

The convention could not have meant to prohibit itself and the General Assembly from doing that which it later in

the same Constitution actually did in providing that the Governor and the Justices of the Supreme Court should hold their offices for the number of years mentioned, and until their successors should be elected and qualified, and that magistrates should hold their offices for two years and until their successors should be appointed and confirmed, and should qualify. *Id.*

As to surety company refusing to issue another bond on an officer succeeding himself for another term, see *State v. Mason* (S. C.) 120 S. E. 367.

The term "office" as used in this section means a public station permanent in character, and the term "officer" means

a person holding such a station. *Evans v. Beattie*, 137 S. C. 496, 135 S. E. 538, 554.

"Some specified period" does not prohibit legislative provision against inconvenience arising from vacancies in public office.—It would be most unreasonable to impute to the constitutional convention a purpose to give to the expression, "some specified period," a meaning so narrow as to prohibit any legislative provision against the inconvenience arising from vacancies in public office, which would occur if the incumbent could not be allowed to hold until the appointment or election and qualification of his successor. Such a construction of this section is impossible. *State v. Bowden*, 92 S. C. 393, 75 S. E. 866, 872, 46 L. R. A. (N. S.) 1204, L. R. A. 1916E, 846.

This section does not require that the term of every officer shall be fixed by direct legislative enactment. The specified period may be inferred from the nature of the office and the duties of the officer. For example, when an inferior office is created, the tenure may be implied to be the same as that of the superior office to which the inferior is an adjunct. Such an implication is especially strong when the inferior officer is charged with minor matters; the general supervision and responsibility devolving on the superior officer. *Sanders v. Belue*, 78 S. C. 171, 58 S. E. 762, 764, L. R. A. 1915E, 582, Ann. Cas. 14B, 525.

An act creating a highway commission is not void as providing for appointment to public office for unlimited period.—An act of the General Assembly authorizing a county bond issue, and creating a highway commission, does not violate this section, on the ground that the tenure of office holders shall be four years, or until their successors are appointed and qualify, or until the provisions of the act are completely carried out. *Graham v. Erwin*, 114 S. C. 419, 103 S. E. 750.

The provision of 29 St. at Large, p. 493, that the commission thereby created to have charge of the improvement of highways in Richland county shall serve for a term of three years, or until the provisions of that act are completely carried out, does not violate this section, as the term is for the specified period of three years, and the further provision merely restricts the term to the completion of the work, if completed within

that time, and does not extend the term beyond such period without reappointment. *Lillard v. Melton*, 103 S. C. 10, 87 S. E. 421, L. R. A. 1916D, 572, L. R. A. 1917E, 468, 5 A. L. R. 761, 24 A. L. R. 941.

Police chief cannot claim that new charter removed limit of term.—In view of this section, providing that the terms of all officers shall be for some definite period, the chief of police of a city which had adopted the commission form of government by a charter not limiting the term of such officer cannot enjoin the installation of a successor on the ground that the new charter repealed the former provision limiting the term of office to two years, since either that maximum was continued in force, or the office was destroyed, and in either event plaintiff is not concerned with what became of the office. *Richardson v. Blalock*, 118 S. C. 438, 110 S. E. 678.

The appointment of certain individuals to perform duties in connection with the construction of a single specified public improvement is not within this section. *Evans v. Beattie*, 137 S. C. 496, 135 S. E. 538, 554.

An officer who holds over for another term without qualification is entitled to office until qualification of successor.—Where county treasurer, who had taken oath of office and given bond and had served for several terms, was nominated for another term, but did not receive the commission from the Governor, nor take oath nor give bond, but continued to act until a successor was appointed and had qualified, he was county treasurer during such time, even though he had not given the bond and taken the oath. *State v. Mason*, 118 S. C. 171, 110 S. E. 128.

An act providing for committee for poorhouse not specifying term of office is void.—*State v. Lemon*, 148 S. C. 98, 145 S. E. 704.

A subordinate officer cannot be appointed for a longer term than those by whom he was appointed.—The county board of commissioners are by law made responsible for the general supervision of the poorhouse and farm of the county, and it was never intended that the subordinate officer appointed by them for the superintendence of the institution should have a longer term than those by whom he was appointed. *Sanders v. Belue*, 78 S. C. 171, 58 S. E. 762, 764, L. R. A. 1915E, 582, Ann. Cas. 14B, 525.

Section 12. Residence.—Temporary absence from the State shall not forfeit a residence once obtained.

See Const. 1868, I, 35.

Section 13. Suspension of laws.—The power of suspending the laws or the execution of the laws shall only be exercised by the General Assembly

or by its authority in particular cases expressly provided for by it.

See Const. 1868, I, 24.

Governor declaring state in insurrection and calling out militia.—See §§ 1390 and 3098 and notes thereto.

Section 14. Departments separate.—In the government of this State the legislative, executive and judicial powers of the Government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other.

See Const. 1868, I, 24.

Cross reference. — As to waiver of right to raise constitutional question under this section, see § 781.

In general.—This section assumed the existence of an organized society, and when it vested the judicial power in the courts, it had reference to the judicial power then existing, and such as the people then understood to be vested in and exercised by the courts. *Carolina Glass Co. v. State*, 87 S. C. 270, 69 S. E. 391, 44 L. R. A. (N. S.) 198, Ann. Cas. 16D, 62.

The three departments under this section are co-ordinate and independent, and each is supreme as to matters within its own sphere of action, subject alone to the limitations, checks, and balances provided in the Constitution. *State v. Ansel*, 76 S. C. 395, 57 S. E. 185, 32 L. R. A. (N. S.) 356, 39 L. R. A. (N. S.) 789, 11 Ann. Cas. 613, Ann. Cas. 13B, 789.

Thus an executive officer cannot be restrained, coerced, or controlled by the judicial department. *State v. Ansel*, 76 S. C. 395, 57 S. E. 185, 32 L. R. A. (N. S.) 356, 39 L. R. A. (N. S.) 789, 11 Ann. Cas. 613, Ann. Cas. 13B, 789.

But the courts may compel the performance of an official duty which is plainly ministerial. — But as applied to members of the executive department, other than the chief executive, jurisdiction is generally asserted by the courts to compel the performance of an official duty imposed by law, which is plainly ministerial, and involves no discretion. *State v. Ansel*, 76 S. C. 395, 57 S. E. 185, 32 L. R. A. (N. S.) 356, 39 L. R. A. (N. S.) 789, 11 Ann. Cas. 613, Ann. Cas. 13B, 789.

Mandamus will not lie to compel the Governor to perform an executive duty.—The weight of authority and reason are in favor of the view that mandamus should not lie against the Governor to compel performance of an executive duty, whether ministerial or not, since there may be no good ground for a distinction between an executive duty which is ministerial and an executive duty which is not ministerial. *State v. Ansel*, 76 S. C. 395, 57 S. E. 185, 32 L. R. A. (N. S.) 356, 39 L. R. A. (N. S.) 789, 11

Ann. Cas. 613, Ann. Cas. 13B, 789.

But certiorari will lie, if the Governor is invested by the Legislature with some judicial function. *State v. Ansel*, 76 S. C. 395, 57 S. E. 185, 32 L. R. A. (N. S.) 356, 39 L. R. A. (N. S.) 789, 11 Ann. Cas. 613, Ann. Cas. 13B, 789.

The result of an election whether a new county should be established is a judicial power.—The hearing and deciding a question by the Legislature as to the result of an election, to decide whether a new county should be established, is an exercise of judicial power, and as such is unconstitutional under this section. *Segars v. Parrott*, 54 S. C. 1, 31 S. E. 677, 865, Ann. Cas. 14C, 626.

And the determination of the right to custody of minor children and their illegal restraint is a judicial question; so that a statute authorizing the father to convey the custody of the children during minority against the mother's wishes, without permitting any judicial investigation of the rights of the mother and children as to their custody, would violate this section. *Tillman v. Tillman*, 84 S. C. 552, 66 S. E. 1049, 26 L. R. A. (N. S.) 781, 41 L. R. A. (N. S.) 586, 42 L. R. A. (N. S.) 1018, Ann. Cas. 13B, 887, Ann. Cas. 14A, 744, 755.

The Legislature may properly engage in the discharge of nonlegislative functions only so far as is reasonably incidental to full and effective exercise of legislative powers. *Spartanburg County v. Miller*, 135 S. C. 348, 132 S. E. 673; *Ruff v. Boulware*, 133 S. C. 420, 131 S. E. 29.

And the Legislature may investigate any subject by committee.—The Legislature has the power to investigate any subject, which power may be exercised by a committee, and, where there is a legitimate use that the Legislature can make of the information sought, an ulterior purpose in the investigation cannot be imputed, nor can an improper use of the information, when secured, be presumed. *Robertson v. Peeples* (S. C.), 115 S. E. 300.

But it cannot confer on a commission the power to pass a final judgment.—An act conferring powers on the dispensary

commission is invalid in so far as it confers on the commission power to pass final judgment on the claim of the state against a claimant for materials furnished a dispensary. *Carolina Glass Co. v. State*, 87 S. C. 270, 69 S. E. 391, 44 L. R. A. (N. S.) 198, Ann. Cas. 16D, 62.

Act regulating occupation of hairdressers and cosmetologists is not unconstitutional as delegating power or attempting to delegate legislative powers to board of cosmetic art examiners, since the act was complete when it left hands of lawmakers and the only duty resting upon board is to make reasonable rules and regulations. *State v. Ross*, 185 S. C. 472, 194 S. E. 439.

Act requiring Supreme Court clerk to notify penitentiary superintendent of dismissal of appeal suspending execution of death sentence was not unconstitutional as against the objection that it imposes judicial duties on executive officer. *Ex parte Howell*, 168 S. C. 198, 167 S. E. 230.

A statute which authorized Greenville county to issue bonds and to borrow money from the United States for highway construction and improvement, but which left the amount of the bonds to be issued, the method of issuance, the amount of money to be borrowed, and the roads upon which funds were to be expended to the discretion of the Greenville county legislative delegation was void under this section. *Bramlette v. Stringer et al.*, 186 S. C. 134, 195 S. E. 257.

But an act authorizing the board of county commissioners of Richland county to borrow not exceeding \$360,000 for purpose of improving certain roads in the county and to provide for the payment thereof, specifying particular roads

to be surface treated, was not violative of this section. *Reese v. Hinnant*, 187 S. C. 474, 198 S. E. 403.

The Beaufort county supply bill providing that the county board of directors should, on written request of the senator and members of the house of representatives of Beaufort county, convey to the South Carolina State Commission of Forestry or National Park Service all interest of county in certain part of Hunting Island, was not unconstitutional for conferring executive powers on members of the legislature. *DeLoach v. Scheper et al.*, 188 S. C. 21, 198 S. E. 409.

The appointment of a special judge to preside over the special or regular court is not essentially an executive function, within the classification of legislative, executive, and judicial powers, under this section, but may be regulated by statute. *State v. Davis*, 88 S. C. 204, 70 S. E. 417.

Provisions of the appropriation acts for the years 1930 to 1936 inclusive, providing for financing of redemption of defaulted bonds of Chesterfield county by having the highway department purchase bonds from holders and hold them as an obligation of the county were not invalid. *Chesterfield County v. State Highway Dept.*, 191 S. C. 19, 3 S. E. (2d) 686.

And the supervision of public work is not an inherent function of the executive department and the Legislature has the power to have the work done by and through such agencies as it sees fit. *Little v. Willimon*, 103 S. C. 50, 87 S. E. 435.

Section 15. Courts—remedy.—All Courts shall be public, and every person shall have speedy remedy therein for wrongs sustained.

See Const. 1868, I, 15.

Construing statute pertaining to "amendments of course" as not permitting amendment of pleading which previously had been amended as of course held not in violation of constitution prohibiting judiciary from discharging duties of legislature. *First Carolinas Joint Stock Land Bank of Columbia v. Stuckey*, 170 S. C. 87, 169 S. E. 843.

Statutes authorizing condemnation board to make award of damages to owner of property condemned for state highway valid hereunder. *Jennings v. Sawyer*, 182 S. C. 427; 189 S. E. 746.

Statute authorizing Governor to remove certain officers. (See this catchline under Art. 1, § 25.)

This section extends to inhabitants of this state access to the courts for redress of any wrongs received.—It is very

manifest that the object of this section was, not to so extend the jurisdiction of the courts of this state as to throw open their doors to any person, from any quarter of the globe, to demand redress for injuries received anywhere, but simply to secure to the inhabitants of the state, for which the Constitution was made, access to the courts for redress of any wrongs which they may have received. *Central R., etc., Co. v. Georgia Constr., etc., Co.*, 32 S. C. 319, 11 S. E. 192, 203, 25 Am. St. Rep. 873, 85 Am. St. Rep. 914, 14 L. R. A. 583, 17 L. R. A. 87, 70 L. R. A. 544, Ann. Cas. 17C, 877.

And the word "wrongs" is here used in its broadest legal sense, embracing every injury to or impairment of legal rights of person or property. *Davis v. Whitlock*, 90 S. C. 233, 73 S. E. 171, 173,

L. R. A. 1915E, 46, 102, L. R. A. 1916C, 714, Ann. Cas. 13D, 538, Ann. Cas. 14C, 1296.

Thus one sustains a legal wrong when his rights of person and property are impaired, when he is restrained from marrying and lives in doubt as to the most solemn and important legal obligations and duties affecting both his person and his property. *Davis v. Whitlock*, 90 S. C. 233, 73 S. E. 171, 173 L. R. A. 1915E, 46, 102, L. R. A. 1916C, 714, Ann. Cas. 13D, 538, Ann. Cas. 14C, 1296.

A coroner's inquest is within the spirit of this section, requiring all courts to be public. *State v. Griffin*, 98 S. C. 105, 82 S. E. 254, Ann. Cas. 16D, 392.

Section 16. Searches and seizures.—The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized.

See Const. 1868, I, 22.

The provision of this section was adopted to save a citizen's person and his house from invasion by some sort of force, except when the invasion is had in the most guarded way. *State v. Quinn*, 11 S. C. 174, 97 S. E. 62, 64, 1 A. L. R. 589, 3 A. L. R. 1500, 1517.

And it imposes on officers the duty of issuing search warrants with careful discretion and executing them with reasonable caution and promptness. *Farmer v. Sellers*, 89 S. C. 492, 72 S. E. 224, 226, L. R. A. 1918B, 1126, Ann. Cas. 16D, 953, 3 A. L. R. 1220, 7 A. L. R. 313.

It requires a warrant to seize only in those instances where the seizure is assisted by a necessary search. *State v. Quinn*, 111 S. C. 174, 97 S. E. 62, 64, 1 A. L. R. 589, 3 A. L. R. 1500, 1517.

It does not prohibit a seizure without warrant where there is no need of a search, and where the contraband subject-matter is fully disclosed and open to the eye and hand. *State v. Quinn*, 111 S. C. 174, 97 S. E. 62, 64, 1 A. L. R. 589, 3 A. L. R. 1500, 1517.

And the word "search" implies invasion and quest, and that implies some sort of force, actual or constructive, much or little. *State v. Quinn*, 111 S. C. 174, 97 S. E. 62, 64, 1 A. L. R. 589, 3 A. L. R. 1500, 1517.

An act providing that books of cotton buyers shall be open to public inspection, is not unconstitutional as permitting unreasonable searches and seizures. *Parks v. Laurens Cotton Mills*, 75 S. C. 560, 56 S. E. 234, 23 A. L. R. 1481.

A committee appointed by the General Assembly to examine the books of a county dispenser, in acting under authority, is not violating the provisions of

Lax observance of regulations governing perfection of appeals is denial of speedy remedy.—A lax observance of the very reasonable regulations prescribed by statute and the rules of court for perfecting appeals can but lead to unnecessary delay in the final disposition of causes in courts, and thus work infringement of the Constitutional guaranty under this section. *Rylee v. Maret*, 121 S. C. 366, 113 S. E. 483, 487.

Amendment of pleading.—To permit amendment of pleading which was previously amended as of course would violate this provision. *First Carolinas Joint Stock Land Bank v. Stuckey*, 170 S. C. 86, 169 S. E. 844.

this section. *State v. Farnum*, 73 S. C. 165, 53 S. E. 83.

Nor an act authorizing a magistrate to arrest one committing a misdemeanor in his presence without a warrant.—*State v. Byrd*, 72 S. C. 104, 51 S. E. 542, 33 L. R. A. (N. S.) 144, 38 L. R. A. (N. S.) 1099, 1 A. L. R. 587.

Or where whiskey is seized without a warrant in an automobile.—Where police officers discover unconcealed whiskey in an automobile without making a search therefor and the whiskey is being unlawfully transported, a seizure of the whiskey without a warrant to seize, is not violative of this section. *State v. Quinn*, 111 S. C. 174, 97 S. E. 62, 1 A. L. R. 589, 3 A. L. R. 1500, 1517.

And liquor seized without a warrant is admissible in evidence.—In a prosecution for unlawfully transporting intoxicating liquor that the arresting officer, without a warrant, seized certain liquor in defendant's possession, did not prevent such liquor from being introduced in evidence. *State v. Kanellos*, 122 S. C. 351, 115 S. E. 636.

Though evidence may have been illegally taken from possession of the party against whom it is offered or otherwise unlawfully obtained, such fact does not render it inadmissible. *State v. Prescott*, 125 S. C. 22, 117 S. E. 637.

Where an officer saw defendant sell liquor no search warrant is necessary to make evidence obtained by a search of the premises admissible. *State v. Maes*, 127 S. C. 397, 120 S. E. 576.

But a warrant not supported by oath or affirmation is illegal.—A warrant under which a defendant was arrested, which was not supported either by oath

or affirmation, made the arrest illegal, and the sheriff had no lawful authority to retain him in custody, as such warrant was unconstitutional, null and void.

State v. Higgins, 51 S. C. 51, 54, 28 S. E. 15, 16, 78 Am. St. Rep. 247, 93 Am. St. Rep. 112, 38 L. R. A. 561.

Section 17. Presentment of grand jury—not tried twice—private property.—No person shall be held to answer for any crime where the punishment exceeds a fine of one hundred dollars or imprisonment for thirty days, with or without hard labor, unless on a presentment or indictment of a grand jury of the County where the crime shall have been committed, except in cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or liberty, nor shall be compelled in any criminal case to be a witness against himself. Private property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made therefor.

See Const. 1868, I, 17, 18, 23.

- I. Private Property.
- II. Compelled to Be a Witness.
- III. Former Jeopardy.
- IV. Indictment.

I. PRIVATE PROPERTY.

Power of eminent domain resides in state of right and by necessity, and constitution merely affirms power and limits its exercise. *Jennings v. Sawyer*, 182 S. C. 427, 189 S. E. 746.

General Consideration.—As to police power pertaining to lots in city, see *City Council v. Werner*, 38 S. C. 488, 17 S. E. 33, 37 Am. St. Rep. 776, 47 Am. St. Rep. 544, 702, 53 Am. St. Rep. 572, 80 Am. St. Rep. 215, 30 L. R. A. (N. S.) 709.

For law as to liability of railroads for fires, see § 8362. See also *McCandless v. Richmond*, etc., R. Co., 38 S. C. 103, 16 S. E. 429, 62 Am. St. Rep. 171, 18 L. R. A. 440, 21 L. R. A. 790, 25 L. R. A. 161, 35 L. R. A. (N. S.) 1017; *Mobile Ins. Co. v. Columbia*, etc., R. Co., 41 S. C. 408, 19 S. E. 858, 44 Am. St. Rep. 725, 99 Am. St. Rep. 504, 100 Am. St. Rep. 791, 105 Am. St. Rep. 334, 35 L. R. A. (N. S.) 1017, 26 A. L. R. 432.

As to acquirement of right of way by railway company, see *Tompkins v. Augusta*, etc., R. Co., 37 S. C. 382, 16 S. E. 149.

As to right under former Constitution to deprive individual of property for great national purposes, see *Stark v. McGowen*, 1 N. & McC. 387, 9 Am. Dec. 712, 65 Am. Dec. 543, 17 L. R. A. 839, 37 L. R. A. 713, 59 L. R. A. 529, 549.

As to compensation under former Constitution, see *Lindsay v. Commissioners*, 2 Bay 38, 111 Am. St. Rep. 941, 17 L. R. A. 839; *Patrick v. Commissioners*, 4 McC. 541, 17 L. R. A. 839.

As to requirement of railway company to restore certain trains, see *Blease v. Charleston*, etc., R. Co., 146 S. C. 496, 144

S. E. 233.

As to question of easement, see *Brasington v. Williams*, 143 S. C. 223, 141 S. E. 375.

An easement once abandoned cannot be viewed by re-entry without new contract or compliance with constitutional provisions for paying compensation. *Keenan et al. v. Broad River Power Co.*, 163 S. C. 135, 161 S. E. 330.

Landowner is not deprived of any constitutional or statutory rights by failure of condemnor to commence condemnation proceeding by service of summons and complaint, since condemnation proceeding is not an "action," but special proceeding. *Jennings v. Sawyer*, 182 S. C. 427, 189 S. E. 746.

The provision of this section relating to private property is self-executing.—*Chick Springs Water Co. v. State Highway Dept.*, 159 S. C. 481, 157 S. E. 842.

No act of the General Assembly is needed for suit against state, or any of its subdivisions, to recover compensation for private property taken for public purpose. *Reeves v. City of Easley*, 167 S. C., 231; 166 S. E. 120.

And it was inserted for the purpose of maintaining the sanctity of private property.—*Ex parte Bacot*, 36 S. C. 125, 15 S. E. 204, 64 Am. St. Rep. 75, 86, 79 Am. St. Rep. 468, 88 Am. St. Rep. 931, 102 Am. St. Rep. 825, 16 L. R. A. 586, 51 L. R. A. 66, 55 L. R. A. 839, 35 L. R. A. (N. S.) 648; *Leitzsey v. Columbia Water-Power Co.*, 47 S. E. 464, 25 S. E. 744, 86 Am. St. Rep. 511, 513, 34 L. R. A. 215, 61 L. R. A. 858, 14 A. L. R. 1100.

But it must be considered with §§ 1, 2 and 20 of Art. 9.—*Boyd v. Winnsboro Granite Co.*, 66 S. C. 433, 45 S. E. 10.

The framers of the Constitution certainly did not intend that this section should alone be considered in determin-

ing the right to take private property for private use, otherwise there would have been no necessity for inserting § 20, art. 9. Id.

The word "taken" is broad enough to include physical injury to property.—The word "taken" in this section is not limited in its meaning and application to cases in which there is an actual physical seizure and holding of property, but is broad enough to include cases in which there is such physical injury to property as results in destruction or substantial impairment of its usefulness. *White v. Southern R. Co.*, 142 S. C. 284, 140 S. E. 560, 57 A. L. R. 634. See also *Gasque v. Town of Conway*, 194 S. C. 16, 8 S. E. (2d) 817.

Flooding and injuring of property by negligent impounding of natural water course is "taking" within constitutional provision requiring just compensation. *Chick Springs Water Co. v. State Highway Dept.*, 159 S. C. 481, 157 S. E. 842; 178 S. C. 415, 183 S. E. 27.

Thus abutting owners are entitled to compensation for injuries resulting from changing grade of highway.—Where change of grade in highway is made by or for benefit of railroad, abutting owners are entitled to compensation for resulting injuries, and the fact that change is made with consent of municipality or state does not relieve railroad from liability for injuries arising therefrom. *White v. Southern R. Co.*, 142 S. C. 284, 140 S. E. 560, 57 A. L. R. 634.

The word "property" does not include services performed under a contract. *Harris v. Fulp*, 178 S. C., 332; 183 S. E., 158.

Condemnation of land for highways by State Highway Department.—See generally *Howell v. State Highway Department*, 167 S. C., 217; 166 S. E., 129.

The statute providing that any person interested may appeal to Court of Common Pleas from decision of the board of condemnation in condemnation proceedings by State Highway Department does not violate constitutional provision that private property shall not be taken for public use without just compensation being first made therefor. *Headdon v. State Highway Dept.*, 197 S. C. 118, 14 S. E. (2d) 586.

Erection of transmission line by state rural electrification authority under legislative act along highway, for which farmer had given easement for highway purposes to state, does not, in light of modern invention and progress, impose additional servitude or constitute taking of private property for public use without just compensation. *Lay v. State Rural Electrification Authority*, 182 S. C. 32, 188 S. E. 368.

That state highway department is agency of state and may not be sued

without its consent does not render inadequate county's remedy against highway department for failure to surrender for cancellation bonds issued by county to provide funds to be paid to department for construction of highways through county, so as to authorize issuance of mandamus, since if state had taken compensation therefor, county could maintain its action thereon without an enabling statute. *Chesterfield County v. State Highway Department*, 181 S. C. 323, 187 S. E. 548.

Whether fill erected by state highway department on highway was a participating factor in depriving plaintiff of property inundated by flood waters allegedly deflected from their natural course by presence of fill held for jury. *Baynham v. State Highway Department of South Carolina*, 181 S. C. 435, 187 S. E. 528.

Action to enjoin state highway department from interfering with plaintiff's operation of automobiles without license plate cannot be maintained under this section. *Baker v. State Highway Department*, 166 S. C. 481, 165 S. E. 197.

Statute changing time for procuring automobile license does not take property without compensation in violation of this section. *Heslep v. State Highway Department*, 171 S. C. 186, 171 S. E. 913.

The fact that the state condemned right of way for highway through land of owner and paid condemnation awards did not preclude owner from maintaining action subsequently for damage to other land of the owner resulting from obstruction of natural flow of surface waters caused by the state's raising of the grade of the highway roadbed, where construction plans did not accompany notices of condemnation and the award was not intended to and did not include compensation for damages occasioned to the other land. *Milhou v. State Highway Department*, 194 S. C. 23, 8 S. E. (2d) 852.

For injuries resulting from construction of private telephone line.—Use of street for construction of a private telephone line, other than by city for its own purposes and that of its inhabitants, is not a proper street use, and hence entitles property owner to compensation for any injury to his property. *Benton v. Yarborough*, 128 S. C. 481, 123 S. E. 204, 34 A. L. R. 402.

But changing the grade of a street after it has been once established, is not "a taking" of property within the meaning of this section. *Garraux v. City Council*, 53 S. C. 575, 31 S. E. 597. See also *Mauldin v. City Council*, 42 S. C. 293, 20 S. E. 842, 843, 46 Am. St. Rep. 723, 27 L. R. A. 284, 58 L. R. A. 355, 28 L. R. A. (N. S.) 1168; *Columbia v. Melton*, 81 S. C. 356, 62 S. E. 245; *Kendall v. City Council*, 74 S. C. 539, 54 S. E. 777.

And a statute authorizing noxious act

is no defense when individual suffers injury peculiar to him.—If a noxious act results in an injury peculiar to plaintiff or some special inconvenience or discomfort not experienced by the public at large, defendant cannot invoke the protection of any statute purporting to authorize it, in view of the constitutional provision forbidding the taking of private property for a public use without just compensation. *Belton v. Wateree Power Co.*, 123 S. C. 291, 115 S. E. 587.

The right of the state to condemn property may be delegated to a city.—The right of the state to condemn a water works, rests in eminent domain, vested in the state and limited in its exercise by this section, which the Legislature may delegate to a city. *Paris Mountain Water Co. v. Greenville*, 110 S. C. 36, 96 S. E. 545.

But a city, under this section, has no right to enter into a contract for the purchase of waterworks and light plant to be paid for by a scheme of taxation to be laid on lot owners whose lots abut the streets in which the water pipes are laid. *Stehmeyer v. City Council*, 53 S. C. 259, 31 S. E. 322, 78 Am. St. Rep. 236, 271, 61 L. R. A. 55, 3 L. R. A. (N. S.) 819, 28 L. R. A. (N. S.) 1133, Ann. Cas. 16B, 527.

In an action against a municipal corporation hereunder for taking of private property for public use without compensation, it is not necessary to allege or offer proof that such municipal corporation has negligently established, maintained, or operated that which has caused damages amounting to a taking, and if there has been a taking without compensation, it is immaterial if the taking was due to the negligence of such municipal corporation.

Resident on creek into which municipality discharged raw sewerage who elected to proceed against municipality on cause of action in tort for damages resulting from alleged nuisance could not amend complaint so as to limit action to cause of action for nuisance without prejudice to maintain condemnation proceedings. *Oates v. City of Easley*, 182 S. C. 91, 188 S. E. 504. *Sheriff v. City of Easley*, 178 S. C., 504; 183 S. E., 311.

If a municipal corporation has taken private property without compensation, and there has been denial of compensation it is immaterial if that the taking was due to the negligence of such municipal corporation. *Sheriff v. City of Easley*, 178 S. C. 504, 183 S. E. 311.

A housing authority in carrying out a slum clearance and low-cost housing project in city, could exercise power of eminent domain, if necessary, in acquiring property for slum clearance or low-cost housing, and such acquisition would not constitute a "taking of property for

private purposes" within constitutional provision. *McNulty v. Owens, Mayor, et al.*, 188 S. C. 377, 199 S. E. 425.

Power delegated to a corporation.—Property shall not be taken for private use without the consent of the owner, except in cases where this power is conferred upon corporations by the General Assembly, and only then in the manner prescribed by § 20 of art. 9. *Wilson v. Alderman & Sons Co.*, 69 S. C. 176, 48 S. E. 81; *Boyd v. Winnsboro Granite Co.*, 66 S. C. 433, 45 S. E. 10.

Land condemned for union passenger station by corporation formed by statute, is for a public use. *Riley v. Charleston Union Station Co.*, 71 S. C. 457, 51 S. E. 485, 110 Am. St. Rep. 579, 10 L. R. A. (N. S.) 909, 11 L. R. A. (N. S.) 942, 22 L. R. A. (N. S.) 8, 36, 47, 75, 87, 123 Ann. Cas. 15A, 83.

Such as a power company.—The charter of a power company, providing that it shall sell or furnish power to any person or corporation makes it a public corporation, and the Legislature may empower it to condemn land of private persons for erection of a dam. *McMeekin v. Central, etc., Power Co.*, 80 S. C. 512, 61 S. E. 1020, 124 Am. St. Rep. 605, 128 Am. St. Rep. 885, 19 L. R. A. (N. S.) 727, 38 L. R. A. (N. S.) 767, Ann. Cas. 13E, 52.

But the legislature cannot fix the limit of compensation.—Constitution having provided for just compensation for private property taken for public use, it is not in power of Legislature to fix limit of compensation. *Chick Springs Water Co. v. State Highway Dept.*, 159 S. C. 481, 157 S. E. 842.

And no act of the General Assembly is needed for suit against State to recover just compensation for private property taken for public purpose. *Chick Springs Water Co. v. State Highway Dept.*, 159 S. C. 481, 157 S. E. 842.

Because immunity from suit does not extend to either the commonwealth or its political subdivisions, where act complained of constitutes taking of private property without just compensation. *Chick Springs Water Co. v. State Highway Dept.*, 159 S. C. 481, 157 S. E. 842.

But the right to compensation may be waived.—The right to compensation for property taken for public use being personal to the owners of the property, they can waive this objection to the constitutionality of the act under which it was taken. *Goodale v. Sowell*, 62 S. C. 516, 40 S. E. 970, 6 A. L. R. 223. See also *Brown v. Tharpe*, 74 S. C. 207, 54 S. E. 363, 6 A. L. R. 223.

And compensation may be secured by deposit of money.—Condemnor need not actually pay compensation before entering on lands condemned for dam, provided compensation is secured by deposit

of money. *Lexington Water Power Co. v. Wingard*, 150 S. C. 418, 148 S. E. 366.

An act requiring telephone company to construct and maintain exchanges takes property without compensation. — A joint resolution requiring a named telephone company to construct and maintain telephone exchanges at two designated towns, which it was not required to maintain by any provision of its charter or franchise, or by any contract, takes the property of the corporation without just compensation. *Southern Bell Tel., etc., Co. v. Calhoun*, 287 F. 381.

As likewise an act authorizing the location of a private way. — An act authorizing the location of a private way to the highway from the land of one surrounded on all sides by private land, and without any such right of way, violates this section. *Beaudrot v. Murphy*, 53 S. C. 118, 30 S. E. 825.

The drainage laws do not permit taking of property for private use without consent of the owner, nor for public use without compensation. *Jackson v. Bree-land*, 103 S. C. 184, 88 S. E. 128.

Property of railroad company cannot be taken for private use. — Though a railroad corporation is a quasi public corporation, the property of the railroad is private property and cannot be taken for private use. *Mays v. Seaboard, etc., Ry.*, 75 S. C. 455, 56 S. E. 30.

And this applies to remaindermen. — *Cureton v. South-Bound R. Co.*, 59 S. C. 371, 37 S. E. 914, 28 L. R. A. (N. S.) 970.

But an ordinance compelling the removal of a fence, which was not subject to the public easement, was illegal, as a taking of property without just compensation. *Riley v. Greenwood*, 72 S. C. 90, 51 S. E. 532, 110 Am. St. Rep. 592, 111 Am. St. Rep. 961, 7 L. R. A. (N. S.) 65.

As likewise an act providing that railroad companies shall build industrial sidetracks. — An act providing that railroad companies shall build industrial sidetracks to connect industrial enterprises with their main lines, is void as authorizing taking of private property for a private use. *Mays v. Seaboard, etc., Ry.*, 75 S. C. 455, 56 S. E. 30.

The mere refusal of a town to permit plaintiff to build and operate a gasoline filling station did not constitute a "taking" of property for "public use" within constitutional prohibition, where town made no entry on plaintiff's lot and did not subject lot to any burden or easement, and there was no showing that lot had been subjected to any public use or that town had derived any benefit or advantage from denial of permit. *Gasque v. Town of Conway*, 194 S. C. 16, 8 S. E. (2d) 871.

And an act providing that the residents of a section of a county exempted from the general stock law must build a fence

is unconstitutional, because for a private purpose, and taking the property of those upon whose land the fence was required to be built without compensation, and without their consent. *Goodale v. Sowell*, 62 S. C. 516, 40 S. E. 970, 6 A. L. R. 223.

Owner of land taken by county for highway could recover as damages actual value of land taken only as reduced by special benefits; "compensation," as used in this section meaning balancing of benefits against loss and damage. *Wilson v. Greenville County*, 110 S. C. 321, 96 S. E. 301.

Interest on award allowed under this section. — Where a considerable time elapsed between an award in condemnation proceedings and the taking of the property by the condemnor, the property owner was entitled to interest on the award under this section, and art. 9, § 20. *Haig v. Wateree Power Co.*, 119 S. C. 319, 112 S. E. 55.

A statutory provision that amount of taxes accruing on land between date of taking of possession in condemnation case and date of payment therefor should be deducted from value of land would violate this section. In re South Carolina Public Service Authority, 37 F. S. 28.

II. COMPELLED TO BE A WITNESS.

In general. — As to privilege of defendant to testify, see § 1011. See also *State v. Howard*, 35 S. C. 197, 14 S. E. 481; *State v. Williamson*, 65 S. C. 242, 43 S. E. 671, 6 A. L. R. 1609; *State v. Barwick*, 89 S. C. 153, 71 S. E. 838, L. R. A. 1918A, 731.

Statute providing that officer, who receives public funds, and does not account for them, that a presumption arises that such funds unaccounted for were fraudulently appropriated, does not violate this provision. *State v. Brown*, 178 S. C. 294, 182 S. E. 838.

Hereunder no person shall "be compelled to accuse or furnish evidence against himself." In Re Hearing Before Joint Legislative Committee, 187 S. C. 2, 196 S. E. 164.

The constitutional provision against compelling any person to be a witness against himself is applicable to examinations before any tribunal or other body that has power to subpoena and compel attendance of witnesses, including hearing before a legislative investigating committee that has been given plenary powers to compel testimony. In Re Hearing Before Joint Legislative Committee, 187 S. C. 2, 196 S. E. 164.

In joint resolution creating legislative investigating committee, and giving committee plenary powers to compel testimony, immunity provision that no testimony should be used as evidence in any criminal proceeding against witness, except in a prosecution for perjury, did not satisfy constitutional guaranty against

compelling any person to be a witness against himself, since witness was not exempted from any prosecution on account of any transaction to which he might testify. In *Re Hearing Before Joint Legislative Committee*, 187 S. C. 2, 196 S. E. 164.

Defendant cannot be compelled to testify against himself under any circumstances.—Under this section defendant in a criminal case cannot be compelled to testify against himself under any circumstances; the line of cleavage being whether proposed evidence is defendant's testimony, or evidence in itself, unaided by any statement of defendant. *State v. Griffin*, 129 S. C. 200, 124 S. E. 81, 35 L. R. A. 1227.

Although defendant raises no objections to testifying. *Town Council v. Owens*, 61 S. C. 22, 39 S. E. 184.

But comparing defendant's shoes with tracks does not violate this section.—To compel an accused to give up his shoes for the purpose of comparison with tracks made near the scene of the murder and the admission of the result of the comparison do not violate this section. *State v. McIntosh*, 94 S. C. 439, 78 S. E. 327, L. R. A. 1915B, 837, L. R. A. 1918B, 850, Ann. Cas. 17D, 238.

In prosecution for violation of prohibition law, cross-examination of defendant with respect to willingness to exhibit his feet does not show that he was compelled to give testimony against himself. *State v. Harrell*, 142 S. C. 24, 140 S. E. 258.

Nor does a sheriff's testimony as to comparison of shoe with track.—Sheriff's testimony that he compared defendant's shoe with certain tracks, and that it fitted, is not violative of defendant's constitutional privilege of immunity from testimonial compulsion, under this section, though sheriff forced defendant to remove her shoe, and made adjustment himself. *State v. Griffin*, 129 S. C. 200, 124 S. E. 81, 35 A. L. R. 1227.

But sheriff's testimony as to defendant's refusal to put her foot in track is inadmissible.—Sheriff's testimony that he compelled defendant to put her foot in a certain track, and that she would not do it in the right way, is inadmissible. *State v. Griffin*, 129 S. C. 200, 124 S. E. 81, 35 A. L. R. 1227.

Defendant may be asked if he had been indicted for perjury.—For the purpose of testing the credibility of defendant in a criminal case as witness for himself, he may be asked on cross examination if he had not been indicted for perjury, without production of record. *State v. Williamson*, 65 S. C. 242, 43 S. E. 671, 6 A. L. R. 1609.

And if he is maintaining a statutory nuisance.—Requiring one by rule on petition to answer under oath whether he is maintaining a statutory nuisance, which

is made a crime by statute, does not require respondent to testify against himself. *State v. Riddock*, 78 S. C. 286, 58 S. E. 803.

And as to certain testimony given before the mayor's court.—In the trial of a police officer for homicide, wherein he claimed that decedent was shot by a man pursued by the officer, it was proper to ask accused on cross-examination if he did not give certain testimony before the mayor's court showing that the pursued man could not have hit decedent, the evidence not being improper, as in effect compelling accused to testify against himself in violation of this section. *State v. Barwick*, 89 S. C. 153, 71 S. E. 838, L. R. A. 1918A, 731.

III. FORMER JEOPARDY.

In general.—The effect of this section was a re-establishment of the principle of the common law recognized in our state up to the time of the adoption of the Constitution of 1868. *State v. Stephenson*, 54 S. C. 234, 237, 32 S. E. 305, 11 L. R. A. (N. S.) 178; *State v. Bilton*, 156 S. C. 324, 153 S. E. 269.

This section governs in trials subsequent to it for offenses previously committed. *State v. Richardson*, 47 S. C. 166, 25 S. E. 220, 135 Am. St. Rep. 72, 35 L. R. A. 238, L. R. A. 1917D, 1148.

As a general rule one is in jeopardy when a legal jury is sworn and impaneled to try him upon a valid indictment in a competent court, unless the jury, before reaching a verdict, be discharged with the prisoner's consent, or upon some ground of legal necessity, or the verdict, if rendered, be set aside according to law. *State v. Stephenson*, 54 S. C. 234, 32 S. E. 305, 11 L. R. A. (N. S.) 178; *State v. Bilton*, 156 S. C. 324, 153 S. E. 269.

There is quite a distinction between *autrefois acquit* and "former jeopardy." *Autrefois acquit* is a plea made by a defendant that he has been formerly tried and acquitted of the same offense. *State v. Bilton*, 156 S. C. 324, 153 S. E. 269.

And in sustaining plea of former jeopardy, defendant's innocence is not involved, but court simply declares he cannot be again tried for same crime. *State v. Bilton*, 156 S. C. 324, 153 S. E. 269.

But unless the defendant expressly consents thereto, he is not put in jeopardy when tried before a jury of eleven men, as the Constitution requires a jury of twelve men. *State v. Coleman*, 54 S. C. 282, 32 S. E. 406, 40 L. R. A. (N. S.) 1214, L. R. A. 1917A, 240, 12 A. L. R. 1007.

And a trial which results in the dismissal of the jury for failure to agree is not former jeopardy, where there was no abuse of discretion in dismissing the jury. *State v. Stephenson*, 54 S. C. 234, 32 S. E. 305, 11 L. R. A. (N. S.) 178.

Mistrial for inability of jury to agree

operates to prevent plea of former jeopardy. *State v. Bilton*, 156 S. C. 324, 153 S. E. 269.

Trial judge, under circumstances other than jury's failure to agree, may declare mistrial without giving defendant right to legally assert former jeopardy. *Id.*

See also *State v. Rector*, 166 S. C. 335, 164 S. E. 865.

Plea of former acquittal of murder is not good as to separate indictment for another killing at same time. —

Where accused, having killed three persons in one affray, was separately indicted for murder for each killing, and, on trial upon one indictment, was acquitted, such acquittal was not a bar to prosecution upon one of the other indictments, the accused having committed a separate act against each one killed, nor could accused's claim that his act constituted but one offense be sustained even if the three homicides were a single act on his part, as more than one offense may follow from a single act, and, in any event, this section prohibits double jeopardy "for the same offense," and not for the same act. *State v. Corbett*, 117 S. C. 356, 109 S. E. 133, 20 A. L. R. 328.

And where defendant is indicted for murder and convicted of manslaughter he may again be tried for murder. *State v. Gillis*, 73 S. C. 318, 53 S. E. 487, 114 Am. St. Rep. 95, 5 L. R. A. (N. S.) 571, 6 Ann. Cas. 993.

Provided the verdict is set aside on his own motion and a new trial granted. *State v. Gillis*, 73 S. C. 318, 53 S. E. 487, 114 Am. St. Rep. 95, 5 L. R. A. (N. S.) 571, 6 Ann. Cas. 993.

This section repeals and supercedes the common law, and where a conviction of murder is set aside on appeal, the accused may be again tried upon the same charge. *State v. Wise*, 33 S. C. 582, 12 S. E. 556, 28 Am. St. Rep. 954, 82 Am. St. Rep. 37, 52, 135 Am. St. Rep. 76, 45 L. R. A. 689, 3 L. R. A. (N. S.) 543, 14 L. R. A. (N. S.) 708, Ann. Cas. 16A, 277.

And a conviction for murder does not bar a prosecution for arson. —

Where accused, after shooting a person in his dwelling house and striking him on the head with an axe, set fire to the dwelling house, his conviction for murder, under an indictment charging a killing with a pistol and an axe, did not bar a prosecution for arson, under this section. *State v. Rodgers*, 100 S. C. 77, 84 S. E. 304.

And if defendant is tried for burglary and larceny he may on a new trial be tried again for both offenses. — Where one indicted for burglary and larceny, and convicted of larceny, after the solicitor announced that he would not ask for a conviction for burglary on the ground of the insufficiency of the testimony, and the court had stated that it

would direct a verdict of "not guilty" as to burglary obtained a new trial, he might be tried under a new indictment for burglary and larceny, and such trial was not in violation of this section. *State v. Hamilton*, 80 S. C. 435, 61 S. E. 965, 128 Am. St. Rep. 881.

But an acquittal of an attempted arson is a bar to an indictment for attempting to burn the same building. — An acquittal on an indictment charging an attempt to commit arson, in attempting to burn a storehouse within the curtilage, is a bar to an indictment under the same section for attempting to burn the same storehouse, as the evidence necessary to support the second indictment would have been sufficient to support a legal conviction on the first. *State v. Switzer*, 65 S. C. 187, 43 S. E. 513.

But it must appear that the offense charged in the subsequent indictment is substantially the same as that charged in the prior indictment. *State v. Switzer*, 65 S. C. 187, 43 S. E. 513.

And an acquittal of breaking and entering another's premises is a bar to an offense on account of the same entry. — Accused, having been acquitted of the offense of breaking and entering another's premises in the nighttime, with intent to steal, cannot thereafter be put on trial and convicted on account of the same entry for the offense of entering without breaking, with intent to steal. *State v. Mitchell*, 98 S. C. 474, 82 S. E. 676.

IV. INDICTMENT.

The provisions of § 995 are meant to carry this section into effect. *State v. Brock*, 61 S. C. 141, 39 S. E. 359, 13 L. R. A. (N. S.) 813, Ann. Cas. 17D, 830, 19 A. L. R. 1484.

The right of a party to be tried in a county where the crime was committed is jurisdictional, and hence defendant can not be lawfully convicted in L. county for selling a mortgaged mule in C. county. *State v. McCoy*, 98 S. C. 133, 82 S. E. 280.

The venue of prosecution for being accessory before fact to uttering forged check by inciting, procuring, counseling, and commanding another in certain county and at points outside state to commit such offense in that county was properly laid therein. *State v. Fanne*, 190 S. C. 75, 1 S. E. (2d) 912.

But an act requiring magistrates to hold preliminary examinations in cases beyond their jurisdictions, does not oust the grand jury of their ancient right under the Constitution to find bills of indictment where there has been no previous examination before a magistrate. *State v. Bowman*, 43 S. C. 108, 20 S. E. 1010, 28 L. R. A. 327, Ann. Cas. 12D, 146; *State v. Bullock*, 54 S. C. 300, 313, 32 S. E. 424. And this rule has been applied to

an act requiring magistrates to hold a preliminary investigation on the issue of a warrant charging a crime at the demand of the defendant. *State v. Brown*, 62 S. C. 374, 40 S. E. 776, Ann. Cas. 12D, 143.

A conviction and sentence based upon an indictment by a void grand jury cannot stand, unless the defendant has waived his right by not interposing his objection in proper time. *State v. Edwards*, 68 S. C. 318, 47 S. E. 395.

Indictment to be preferred by grand jury, as required by this section, must be one returned by legal grand jury. *State v. Rector*, 158 S. C. 212, 155 S. E. 385.

When defendant insists at proper time, he is entitled, as matter of constitutional right, to have grand jury, which indicts him, composed only of persons which Constitution has plainly declared may act thereon. *Id.*

A grand jury returning murder indictment was not legally qualified, and defendant would be granted new trial, where five members of grand jury were not legally registered electors due to the

fact that their certificates of registration were not signed by two members of county board of registration but merely by clerk in office of board placing signatures of members thereon at direction of members. *State v. Bibbs*, 192 S. C. 231, 6 S. E. (2d) 276.

But a grand jury, which was duly drawn by lawfully authorized officers for court term at which indictment was found, was duly organized and sworn, and acted on indictment in regular and usual manner, had legal existence, so that indictment was not void on ground of grand jurors' disqualification, expressly waived by defendant, because of statutory irregularity in issuance of voters' registration certificates to grand jurors, each of whom was qualified to receive proper certificate. *State v. Hann*, 196 S. C. 211, 12 S. E. (2d) 720.

Nor an amendment of an indictment substituting an entirely different offense for the one charged. *State v. Sowell*, 85 S. C. 278, 284, 67 S. E. 316, 7 A. L. R. 1543.

Section 18. Trial by jury—witnesses.—In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury, and to be fully informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to be fully heard in his defence by himself or by his counsel or by both.

See Const. 1868, I, 13.

- I. Right to Be Fully Heard.
- II. Compulsory Process.
- III. Right to Be Confronted with Witnesses.
- IV. Nature and Cause of Accusation.
- V. Trial by Impartial Jury.

I. RIGHT TO BE FULLY HEARD.

Statute authorizing the governor to remove certain officers. (See this catchline under Art. 1, § 25)

In general.—Where evidence offered by a defendant in a criminal case is excluded on the ground that it is merely cumulative, the trial court's exercise of discretion in that regard is to be tested by the fundamental principle of criminal jurisprudence that an accused is entitled "to be fully heard in his defense." *State v. Lyle*, 125 S. C. 406, 118 S. E. 803, 814.

Remark of court to defendant's attorney is not prejudicial.—A remark by the court to defendant's attorney, after the latter had engaged in a colloquy with the solicitor, to the effect that, if defendant's attorney could not conduct his argument in a more orderly manner, the court would require him to take his seat and appoint other counsel to conduct the case for defendant, did not prejudicially affect the rights of defendants. *State v. Bigham*, 119 S. C. 368, 112 S. E. 332.

And dictaphone evidence is not prejudicial.—Where defendants in prosecution for murder were put together in cell of jail a few days prior to trial, testimony as to their conversation, overheard by officers and detectives through dictaphone, was not inadmissible as taking away defendants' right to be fully heard, within provisions of this section. *State v. Hester*, 148 S. C. 360, 146 S. E. 116.

See generally. *State v. Atkinson*, 40 S. C. 363, 18 S. E. 1021, 42 Am. St. Rep. 877, 94 Am. St. Rep. 346, 97 Am. St. Rep. 799, 101 Am. St. Rep. 329, 136 Am. St. Rep. 141, 59 L. R. A. 470, 19 A. L. R. 645, 24 A. L. R. 1413.

II. COMPULSORY PROCESS.

A bench warrant issued for the arrest of a witness is sufficient.—This section is sufficiently complied with where accused was awarded compulsory process, under which a witness was bound over under recognizance to appear and where a bench warrant was subsequently issued for the arrest of the witness. *State v. Pope*, 78 S. C. 264, 58 S. E. 815.

And refusal of a bench warrant for defendant's witnesses duly subpoenaed is error.—Where defendant's witnesses, who had been duly subpoenaed, left the court without defendant's knowledge or

consent, the refusal of the court to issue a bench warrant to secure their presence and to postpone the trial until they could be present, on the sole ground that there would not be time to procure their presence before the adjournment of the term, was a denial of the right of accused under this section, to have compulsory process for obtaining witnesses in his behalf, and a new trial will be awarded for such refusal, where the testimony of the absent witnesses was material to the defense. *State v. Dodgens*, 120 S. C. 239, 113 S. E. 77.

But this section does not require the court to issue compulsory process for any one the accused may designate as a witness, and there must be a showing that the person wanted is a witness in favor of accused, and that his testimony will be material. *State v. Pope*, 78 S. C. 264, 58 S. E. 815.

As where the witness is a resident of another state.—It is not error, in a prosecution for a felony, to refuse to issue a compulsory process for a witness who is shown to be a resident of another state, and beyond the court's jurisdiction. *State v. Murphy*, 48 S. C. 1, 25 S. E. 43, 82 Am. St. Rep. 28, L. R. A. 1918E, 527, Ann. Cas. 13C, 433, Ann. Cas. 16A, 1067.

And no liability is created on the part of the county to pay for serving subpoenas for the defendant's witnesses. *Whittle v. Saluda County*, 59 S. C. 554, 38 S. E. 168, 8 L. R. A. (N. S.) 509.

And the county is not liable for the fees of defendant's witnesses on trial for a misdemeanor. *Henderson v. Evans*, 51 S. C. 331, 29 S. E. 5, 40 L. R. A. 426.

See generally.—*State v. Sanders*, 68 S. C. 192, 194, 47 S. E. 55, 31 L. R. A. (N. S.) 708.

III. RIGHT TO BE CONFRONTED WITH WITNESSES.

Personal presence of witness is required so that accused may cross-examine.—*State v. Bigham*, 133 S. C. 491, 131 S. E. 603.

But court's failure to require witnesses to answer questions on cross-examination which had already been answered, was not error, where defendant's counsel did not insist upon answer or request court order witnesses answer such questions. *State v. McGee*, 185 S. C. 184, 193 S. E. 303.

Thus the testimony of a witness taken by affidavit cannot be used against defendant. — Under this section, unless a defendant in a criminal cause consents thereto, the testimony of a witness against him, taken by affidavit, cannot be used in the trial, even if the witness is sick or dead or beyond the jurisdiction of the court. *State v. Hester*, 137 S. C. 145, 134 S. E. 885.

Under this section, if the solicitor should give notice to the attorney for the

defendant that he expected to take the evidence of a state's witness by deposition and invited defendant's counsel to appear and cross-examine the witness, the testimony so taken could not be used against the defendant in his trial, unless the defendant freely consented to allow this to be done. *Id.*

In criminal cases, a commission to take the testimony of a witness in another state on behalf of a defendant can only be issued by consent of the state's solicitor, which cannot be compelled by the court. *State v. Murphy*, 48 S. C. 1, 25 S. E. 43, 82 Am. St. Rep. 28, L. R. A. 1918E, 527, Ann. Cas. 13C, 433, Ann. Cas. 16A, 1067.

And the judgment in an equitable proceeding to enjoin a liquor nuisance, rendered on ex parte affidavits and default is not admissible on a criminal prosecution of the same person for maintaining the nuisance, as to hold the judgment the basis of res judicata or estoppel would annul the rule that in criminal prosecutions the state must establish defendant's guilt beyond a reasonable doubt before a jury, and admitting the affidavits as part of the record would violate this section, guaranteeing defendant the right to be confronted with the witnesses against him. *State v. Weil*, 83 S. C. 478, 65 S. E. 634, 26 L. R. A. (N. S.) 461.

And the record of alimony proceedings between defendant and his wife is improper.—In a prosecution for the murder of his mother-in-law, where defendant introduced some affidavits offered in an alimony proceeding brought by his wife, the entire record, which contained the wife's verified complaint, was not admissible though where one party introduces part of a record the other party ordinarily has the right to introduce the whole, for the introduction of such record would deprive defendant of the right given by this section to confront witnesses. *State v. Bramlett*, 114 S. C. 389, 103 S. E. 755.

And court's consideration of information received in chambers in absence of defendant violates his right.—It is a violation of defendant's rights under this section, for the court in determining sentence to consider information concerning defendant received in chambers and in absence of defendant or his counsel. *State v. Simms*, 131 S. C. 420, 127 S. E. 840.

And a conversation between judge and jury foreman when defendant was absent is prejudicial error.—A telephone conversation between the trial judge and the jury foreman while the jury was out, and when neither defendant nor his counsel was present, was prejudicial error, in view of this section, guaranteeing a public trial. *State v. Ashley*, 121 S. C. 15, 113 S. E. 305, 22 A. L. R. 262.

But defendant's leaving the court room while a witness was testifying is not necessarily prejudicial.—A conviction will not be set aside because while the witness was testifying defendant left the court room for a moment, his counsel being advised of the fact, and it not being called to the attention of the court until after the verdict, under the provisions of this section. *State v. Bramlett*, 114 S. C. 389, 103 S. E. 755.

Nor is it prejudicial if defendant is absent when evidence already given is read over to the jury.—The fact that defendant in a murder trial was absent from the court room when evidence already given was read over to the jury at their request, after they had retired to make up their verdict, does not violate this section. *State v. Haines*, 36 S. C. 504, 15 S. E. 555, 129 Am. St. Rep. 44.

Or where the jury viewed the place of the crime.—Defendant is not, by the viewing by the jury of the place of the crime, deprived of the right to be confronted with or to cross-examine any witness in the case. *State v. Suber*, 89 S. C. 100, 71 S. E. 466.

In the absence of the judge.—It cannot reasonably be supposed that defendant's rights would in any respect be prejudiced by the absence of the judge when the jury merely viewed the place of the crime. *State v. Suber*, 89 S. C. 100, 71 S. E. 466.

And defendant need not be present at hearing on motion for change of venue and continuance when represented by counsel.—Where a defendant, indicted for murder, was represented by counsel, it was not essential that he be personally present at the hearing of motions for change of venue and continuance, either at common law or under this section, as the trial did not commence until after the motions were disposed of. *State v. Faries*, 125 S. C. 281, 118 S. E. 620.

IV. NATURE AND CAUSE OF ACCUSATION.

Cross reference.—As to sufficiency of indictment for murder, see § 1007.

General note as to sufficiency of indictment. — An indictment charging the defendant on a certain day with unlawfully soliciting emigrants to labor without the state, without having obtained a license therefor, states a crime with sufficient definiteness, though it does not specify the specific acts of hiring or soliciting, as it charges sufficiently a continuation or succession of acts. *State v. Napier*, 63 S. C. 60, 41 S. E. 13, 129 Am. St. Rep. 286, 2 L. R. A. (N. S.) 860.

An act authorizing a conviction under the charge in an indictment of a sale "to divers other persons," is unconstitutional. *State v. Couch*, 54 S. C. 286, 32 S. E. 408.

An indictment for selling intoxicating

liquors which charges a complete offense is not invalid because, in addition thereto, it charges sales to divers other persons unknown to the grand jury, such averment being surplusage, which may either be stricken or disregarded. *State v. Jeffcoat*, 54 S. C. 196, 32 S. E. 298, Ann. Cas. 18C, 551.

This section refers to the trial of the accused, and not to his arrest for the crime of which he may be accused. *Mayesville v. Clamp*, 149 S. C. 346, 147 S. E. 455.

Thus an accused may be arrested on a warrant that does not fully inform him of the nature and cause of the accusation. *Mayesville v. Clamp*, 149 S. C. 346, 147 S. E. 455.

But when he is brought to trial he may demand the information to which he is entitled. *Mayesville v. Clamp*, 149 S. C. 346, 147 S. E. 455.

And the trial judge, in passing sentence, may secure information in open court in presence of defendant, without violating defendant's rights, under this section. *State v. Rickenbacker*, 138 S. C. 24, 135 S. E. 651; *State v. Bolin*, 149 S. C. 84, 146 S. E. 695, 696.

And in some cases the judge may refuse defendant sufficient time to obtain counsel and witnesses. — Where the judge vacates conditions of suspended sentence and orders it to become effective immediately, is not error as a matter of law to refuse defendant sufficient time to obtain counsel and witnesses, under this section, by fixing time within which defendant is required to make return, leaving him only one day to prepare his case. *State v. Stauss*, 114 S. C. 445, 103 S. E. 769.

Defendant may waive his right in open court. *State v. Faile*, 43 S. C. 52, 20 S. E. 798, 89 Am. St. Rep. 709, 56 L. R. A. 365, 381, 397, Ann. Cas. 12C, 482.

A conviction in mayor's court of offense of driving an automobile while intoxicated was a nullity, where court lacked jurisdiction of defendant because prosecution was commenced without issuance of a warrant. *Town of Honea Path v. Wright*, 194 S. C. 462, 9 S. E. (2d) 924.

V. TRIAL BY IMPARTIAL JURY.

Cross reference.—As to right to jury trial, see § 25 of this article, and § 22, art. 5.

Fair trial.—See this title under article 1, § 5, hereof.

A large crowd of people hostile to the accused may deprive him the right of trial by impartial jury. — Where a large crowd of people intensely hostile to the accused crowded the courthouse during their trial for murder and filled the space within the bar immediately around the judge, the jury, and the witnesses, so that counsel for accused did not see the jury, until he addressed them, be-

cause of the crowd, and the crowd's intrusion into that part of the courtroom was calculated to overawe the jury, and it was not so safeguarded against extraneous influences as to allow the defendants the right of trial by an impartial jury, guaranteed by this section, the defendants, upon conviction, were entitled to a new trial. *State v. Weldon*, 91 S. C. 29, 74 S. E. 43, 39 L. R. A. (N. S.) 667, Ann. Cas. 13E, 801.

Motion for continuance in order after failure to first move for change of venue.—A defendant in a criminal case is not precluded from asking for a continuance of his case, when public feeling is so aroused against him as to deny him a fair and impartial trial, by his failure to move first for a change of venue. The

trial court should grant a continuance when it appears that conditions are such as to deprive either the state or the defendant from obtaining fair and impartial trial. *State v. Rasor*, 168 S. C. 221, 167 S. E. 396.

Conclusions and opinions of defense counsel not sufficient to continue case on ground of adverse public sentiment. *State v. Rasor*, 168 S. C. 221, 167 S. E. 396.

Accused not estopped to raise objection to disqualified juror, who sat on his case, unless it be clearly shown accused did not exercise due diligence in selecting jurors. This rule applied with more leniency where human life concerned. *State v. Parsons*, 171 S. C. 449 172 S. E. 424; *State v. Elliott*, 169 S. C. 208, 168 S. E. 546.

Section 19. Excessive bail—corporal punishment—contempt.—Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted, nor shall witnesses be unreasonably detained. Corporal punishment shall not be inflicted. The power to punish for contempt shall not in any case extend to imprisonment in the State penitentiary.

See Const. 1868, I, 38.

Cross reference.—As to sentence to hard labor, see § 1035.

The Legislature may constitutionally vest courts with discretionary power in determining amount of fine imposed as penalty for crime, where statute prescribes no limit, subject to constitutional limitation that fine shall not be excessive. *Singletary v. Wilson*, Superintendent of Penitentiary, 191 S. C. 153, 3 S. E. (2d) 802.

A sentence of six months to county chaingang and six months at hard labor in penitentiary is not excessive.—Sentence to county chaingang for period of six months and for a like period at hard labor in the state penitentiary, on conviction for transporting intoxicating liquor, is not unjust, unreasonable, or excessive, in violation of this section. *State v. Harrell*, 142 S. C. 24, 140 S. E. 258.

Nor is sentence to twelve months imprisonment where six months is suspended.—Sentence to twelve months' imprisonment, six months of which time was suspended, for unlawful possession of intoxicating liquor, being within limitation prescribed by law, is not violative of this section, as unjust, unreasonable, or excessive. *State v. Harrell*, 142 S. C. 24, 140 S. E. 258.

Nor sentence to two years' imprisonment, sixteen months of which was suspended upon the service of eight months, for unlawfully possessing and storing alcoholic liquors contrary to statute authorizing imprisonment of not less than three months nor more than two years,

was not unconstitutional as being excessive, unreasonable and unduly severe. *State v. Phillips*, 193 S. C. 274, 8 S. E. (2d) 626.

Or twelve months at hard labor where nine months is suspended.—In prosecution for storing and possessing intoxicating liquor, sentence to 12 months at hard labor on public works, or for like period in state penitentiary, 9 months thereof being suspended during good behavior, is not abuse of good discretion, as violating this section. *State v. Quick*, 141 S. C. 442, 140 S. E. 97.

Or concurrent sentences of eight and twelve months respectively.—Concurrent sentences of 8 and 12 months, respectively, on each of two counts, for possessing and transporting liquor, is not excessive. *State v. Martin*, 155 S. C. 495, 152 S. E. 738.

Or a fine of one hundred dollars.—In a prosecution for violation of a town ordinance by storing and selling intoxicants, fines of \$100 for the selling and of a like amount for the storing were not an abuse of the trial court's discretion. *Belton v. Campbell*, 103 S. C. 424, 88 S. E. 30.

Or a fine imposed by mayor within the limits prescribed by an ordinance.—Where a fine imposed by a mayor is within the limits prescribed by charter and ordinance, there is no error of law in imposing a fine within those limits, and the matter is exclusively within the discretion of the mayor. *Greenville v. Kemmis*, 58 S. C. 427, 36 S. C. 727, 78 Am. St. Rep. 272, 50 L. R. A. 725, 62 L.

R. A. 973, 1 L. R. A. (N. S.) 384, 17 L. *C. 537, 23 S. E. 865, 55 Am. St. Rep. 785,
 R. A. (N. S.) 66. 87 Am. St. Rep. 180, 31 L. R. A. 678, 35
 See generally, Ex parte Keeler, 45 S. L. R. A. 577.

Section 20. Right of bail—Sureties.—All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great.

See Const. 1868, I, 16.

Section 21. Libel.—In all indictments or prosecutions for libel, the truth of the alleged libel may be given in evidence, and the jury shall be the judges of the law and the facts.

See Const. 1868, I, 8.

This section does not apply to civil actions. Duncan v. Record Pub. Co., 145 S. C. 196, 143 S. E. 31.

Judge should declare law to jury applicable to libel. — It is not only the right, but the duty, of the presiding judge, upon the trial of such indictments, to declare to the jury the law applicable

thereto, and, if he has erred in so doing, such errors may be reviewed on appeal by the accused just as in any other case. State v. Syphrett, 27 S. C. 29, 2 S. E. 624, 13 Am. St. Rep. 615, 42 Am. St. Rep. 290, 104 Am. St. Rep. 117, 33 L. R. A. (N. S.) 208, Ann. Cas. 15D, 1263, 19 A. L. R. 1534.

Section 22. Treason.—Treason against the State shall consist alone in levying war or in giving aid and comfort to enemies against the State. No person shall be held guilty of treason, except upon testimony of at least two witnesses to the same overt act, or upon confession in open Court.

Section 23. Habeas corpus.—The privilege of the writ of *habeas corpus* shall not be suspended unless when, in case of insurrection, rebellion or invasion, the public safety may require it.

See Const. 1868, I, 17.

Governor declaring state of insurrection and calling out militia.—See §§ 1390 and 3098 and notes thereto.

Section 24. Imprisonment for debt.—No person shall be imprisoned for debt except in cases of fraud.

See Const. 1868, I, 24.

As to selling property under lien. See § 1277.

The term "debt," within the meaning of this section embraces obligations arising out of contract, and excludes liability for tort and for fines imposed for crime. Ex parte Hollman, 79 S. C. 9, 60 S. E. 19, 21 L. R. A. (N. S.) 242, L. R. A. 1915B, 646, L. R. A. 1918D, 1008, 14 Ann. Cas. 1105, Ann. Cas. 15B, 498.

Debt is that which is due from one person to another, whether money, goods, or services, and whether payable at present or at a future time. *Id.*

A judgment in an action of tort is not a "debt" within the meaning of this section. Ex parte Berry, 85 S. C. 243, 67 S. E. 225, L. R. A. 1915B, 646, 20 Ann. Cas. 1344.

An act providing for prosecution for breach of farm-labor contracts is in violation of this section. — Ex parte

Hollman, 79 S. C. 9, 60 S. E. 19, 21 L. R. A. (N. S.) 242, L. R. A. 1915B, 646, L. R. A. 1918D, 1008, 14 Ann. Cas. 1105, Ann. Cas. 15B, 498, which in effect overrules State v. Williams, 32 S. C. 583, 10 S. E. 551, 21 L. R. A. (N. S.) 242; State v. Chapman, 56 S. C. 420, 34 S. E. 961, 76 Am. St. Rep. 557, 78 Am. St. Rep. 243, 21 L. R. A. (N. S.) 242; State v. Easterlin, 61 S. C. 71, 39 S. E. 250, 21 L. R. A. (N. S.) 242.

But an act providing for contractors to pay laborers employed out of money received for contract does not violate this section. — State v. Hertzog, 92 S. C. 14, 75 S. E. 374, L. R. A. 1915B, 649.

Enforcement by fine or imprisonment of municipal ordinance imposing "sanitary tax" to cover inspection services in respect to sanitary toilets and privies does not violate this provision. Town of Marion v. Baxley, 192 S. C. 112, 5 S. E.

(2d) 573.

Nor does an act authorizing imprisonment of husband for failure to support wife.—An act, making it a misdemeanor for a husband to abandon his wife and to fail to support her without just cause, punishable by imprisonment, does not violate this section, prohibiting imprisonment for debt, since the imprisonment is not for any "debt," but for failure to obey the statute obligations incident to the marriage contract or relation. *State v. English*, 101 S. C. 304, 85 S. E. 721, L. R. A. 1915F, 977, Ann. Cas. 16A, 857; *State v. Redmond*, 150 S. C. 452, 148 S. E. 474; *State v. Nesmith*, 185 S. C. 341, 194 S. E. 160.

Section 25. Trial by jury.—The right of trial by jury shall be preserved inviolate.

In general. — Where a defendant demurs to an indictment charging misdemeanor, and it is overruled, he is entitled to plead thereto, and be tried by a jury. *State v. Bardin*, 64 S. C. 206, 41 S. E. 959, L. R. A. 1915B, 649.

Rule of Court requiring copy of indictment for felony to be obtained by order of the Judge who tried it before an action for malicious prosecution shall be commenced is no abridgement of right to jury trial. *Burton v. Watkins*, 2 Hill 674, Ann. Cas. 14B, 1185.

The right to a trial by jury in a judicial magistrate's court in the city of Charleston, is not waived by failure of defendant to pay the costs of summoning and paying jurors. *Pinckney v. Green*, 67 S. C. 309, 45 S. E. 202.

This section only preserves jury trials in those cases where they were allowed at time of adoption of the Constitution. *Commissioners v. Seabrook*, 2 Strob. 560, 563, 48 Am. Dec. 186; *State v. Gibbes*, 109 S. C. 135, 95 S. E. 346.

For example at the time of the adoption of the first Constitution by the State of South Carolina, neither party to a proceeding in quo warranto had a right, under existing law or prevailing practice, to demand a jury trial of issues of fact. *State v. Gibbes*, 109 S. C. 135, 95 S. E. 346.

This section applies to civil and criminal cases.—*Best v. Barnwell County*, 114 S. C. 123, 103 S. E. 479.

Statutes fixing procedure for condemning rights of way for state highways

is not for any "debt," but for failure to obey the statute obligations incident to the marriage contract or relation. *State v. English*, 101 S. C. 304, 85 S. E. 721, L. R. A. 1915F, 977, Ann. Cas. 16A, 857; *State v. Redmond*, 150 S. C. 452, 148 S. E. 474; *State v. Nesmith*, 185 S. C. 341, 194 S. E. 160.

valid hereunder. *Jennings v. Sawyer*, 182 S. C. 427; 189 S. E. 746.

A person charged with a capital felony cannot be tried by any other than a jury of twelve men. — In view of this section one charged with a capital felony who has demanded a trial by jury cannot be tried by any other than a jury of 12 men, and his attorney cannot consent to a trial by 11 men, notwithstanding that accused remains silent and testifies before the 11 men. *State v. Hall* (S. C.) 101 S. E. 662.

A statutory nuisance may be declared by the court to be maintained by one, without trial and conviction by a jury, and such adjudication by the Court does not deprive the individual of the right to trial by jury. *State v. Riddock*, 78 S. C. 286, 58 S. E. 803.

The mode of forming and empanelling jury may be changed. *State v. Boatwright*, 10 Rich. 407, 43 L. R. A. 39; *State v. Clayton*, 11 Rich. 581, 27 L. R. A. 779, 846, 28 L. R. A. 35, Ann. Cas. 12C, 30.

Statute authorizing governor to remove certain officers, and permitting the officers to appeal to the resident circuit judge is valid. *State v. Pridmore*, 163 S. C., 97, 161 S. E. 340.

An act authorizing confiscation and sale of goods offered or exposed for sale on Sunday does not deny right to jury trial.—*Xepapas v. Richardson*, 149 S. C. 52, 146 S. E. 686.

Special verdict for carrying concealed weapons.—See note to § 1008.

Section 26. Keep and bear arms—General Assembly may maintain armies—how soldiers quartered.—A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed. As in times of peace armies are dangerous to liberty, they shall not be maintained without the consent of the General Assembly. The military power of the State shall always be held in subordination to the civil authority and be governed by it. No soldier shall in time of peace be quartered in any house without the consent of the owner, nor in time of war but in the manner to be prescribed by law.

See Const. 1868, I, 28, 29.

Governor's action in declaring existence of insurrection may not be enjoined or reviewed by courts. *Hearon et al. v. Calus et al.*, 178 S. C. 381, 183 S. E. 13.

After proclamation declaring existence of insurrection, governor's acts lawfully done in suppression of insurrection are

immune from judicial interference, but are open to judicial inquiry and control if exceeding governor's constitutional and statutory authority, and if injurious to citizens' personal liberty and property rights. *Ibid.*

Section 27. Martial law.—No person shall in any case be subject to martial law or to any pains or penalties by virtue of that law, except those employed in the army and navy of the United States, and except the militia in actual service, but by the authority of the General Assembly.

See Const. 1868, I, 25.

When governor proclaimed existence of insurrection in connection with state highway department and called out militia and suspended habeas corpus, gov-

ernor in effect declared martial law and therefore exceeded his authority. *Hearn v. Calus*, 178 S. C. 381, 183 S. E. 13.

Section 28. Navigable waters free—no tax for use of wharf.—All navigable waters shall forever remain public highways free to the citizens of the State and the United States without tax, impost or toll imposed; and no tax, toll, impost or wharfage shall be imposed, demanded or received from the owners of any merchandise or commodity for the use of the shores or any wharf erected on the shores or in or over the waters of any navigable stream unless the same be authorized by the General Assembly.

See Const. 1868, I, 40.

In general.—Except for the imposition of toll, this section hardly more than sanctioned the common-law rights of the public in navigable water, and a street railway, light, and power company and the city of Columbia, acting under a contract with it, were not only bound by the common law not to obstruct the Columbia Canal, but the company expressly contracted to keep it open for navigation, and the city could have no higher right than the company which could not escape its obligations. *State v. Columbia Water Power Co.*, 82 S. C. 181, 63 S. E. 884, 129 Am. St. Rep. 876, 131 Am. St. Rep. 758, 22 L. R. A. (N. S.) 435, 23 L. R. A. (N. S.) 691, 31 L. R. A. (N. S.) 895, L. R. A. 1917F, 789, 17 Ann. Cas. 343, 7 A. L. R. 752, 784.

One sustaining special injuries from the obstruction of a navigable stream may recover therefor without proof of negligence. *Drews v. Burton & Co.*, 76 S. C. 362, 57 S. E. 176, 38 L. R. A. (N. S.) 764.

Navigation, health betterment, flood control and the reforestation of watersheds are public purposes in which the state is interested and may engage. 45 C. J., 421; 29 C. J., 242; 36 C. J., 997; 59 C. J., 163; *Clarke v. South Carolina Public Service Authority et al.*, 177 S. C., 427; 181 S. E., 481; *Carolina Power & Light Co. v. South Carolina Public Service Authority*, 20 F. S. 854.

Land which was conveyed for purpose of construction of canal was not subject to navigation trust imposed by constitution on all navigable waters. *State v. Broad River Power Co.*, 177 S. C. 240, 181 S. E. 41.

The remedy for a public nuisance is by indictment, unless the person instituting civil proceedings can show special damages differing in kind from that to which all others in common with him are exposed. *McMeekin v. Central Carolina Power Co.*, 80 S. C. 512, 61 S. E. 1020, 124 Am. St. Rep. 605, 128 Am. St. Rep. 885, 19 L. R. A. (N. S.) 727, 38 L. R. A. (N. S.) 767, Ann. Cas. 13E, 52.

An obstruction of any highway is a public nuisance, which, ordinarily, can only be redressed by indictment. *South Carolina Steamboat Co. v. Wilmington, etc., R. Co.*, 46 S. C. 327, 24 S. E. 337, 339, 57 Am. St. Rep. 688, 69 Am. St. Rep. 278, 107 Am. St. Rep. 198, 251, 33 L. R. A. 541, 59 L. R. A. 81, 65 L. R. A. 931, 3 L. R. A. (N. S.) 1127, 38 L. R. A. (N. S.) 765.

Erection of dam across navigable stream will not be enjoined merely because it will be a public nuisance.—*McMeekin v. Central Carolina Power Co.*, 80 S. C. 512, 61 S. E. 1020, 124 Am. St. Rep. 605, 128 Am. St. Rep. 885, 19 L. R. A. (N. S.) 727, 38 L. R. A. (N. S.) 767, Ann. Cas. 13E, 52.

Section 29. Provisions of Constitution.—The provisions of the Constitution shall be taken, deemed and construed to be mandatory and prohibitory, and not merely directory, except where expressly made directory or permissive by its own terms.

Under this section the determination whether a general law can be applied so as to exclude special laws is a judicial

question. *Carolina Gro. Co. v. Burnet*, 61 S. C. 205, 39 S. E. 381, 98 Am. St. Rep. 882, 58 L. R. A. 687, 853.

ARTICLE II.

Right of Suffrage.

Section 1. Elections by ballot.—All elections by the people shall be by ballot, and elections shall never be held or the ballots counted in secret.

See Const. 1868, VIII, 1.

Cross references.—As to specific section covering counting of ballots in state elections, see § 2308, and note thereto.

Secrecy of the ballot is absolutely essential to a valid election. *Corn v. Blackwell*, 191 S. C. 183, 4 S. E. (2d) 254.

Where tickets used in election were printed and numbered regularly from number "one" on up to hundreds and number was not perforated so that it could be torn from the ticket and all but a few of the tickets voted had numbers on them which corresponded to the numbers opposite the name of the voter, so that it was easy to determine how each man voted, secrecy of the ballot was violated and votes were invalid. *Corn v. Blackwell*, 191 S. C. 183, 4 S. E. (2d) 254.

This section implies that the voting shall not be secret and viva voce. *State v. State Board*, 78 S. C. 461, 59 S. E. 145, 14 L. R. A. (N. S.) 850, Ann. Cas. 16E, 413.

An election is the expression of a choice by the voters of a body politic. *State v. State Board*, 78 S. C. 461, 59 S. E. 145, 146, 14 L. R. A. (N. S.) 850, Ann. Cas. 16E, 413.

And every expression of choice by

voters of a body politic is included, and embrace local option elections. *State v. State Board*, 78 S. C. 461, 59 S. E. 145, 147, 14 L. R. A. (N. S.) 850, Ann. Cas. 16E, 413.

And the provisions of this section apply to municipal as well as state elections. *Darling v. Brunson*, 94 S. C. 207, 77 S. E. 860, 861, L. R. A. 1917A, 234, Ann. Cas. 15A, 527.

But not to laying of tax in special tax districts.—The requirements of this section need not apply to the ascertainment of the will of the people in territorial subdivisions or special tax districts, as to laying a tax for themselves instead of by the general assembly. *Martin v. School District*, 57 S. C. 125, 35 S. E. 517, 519, 14 L. R. A. (N. S.) 851.

Counting votes of primary election in building, door to which was securely fastened, and which only six persons were permitted to enter was not substantial compliance with law. *McKnight v. Smith et al.*, 182 S. C. 378, 189 S. E. 361.

The claimed correctness of the court of the votes at a primary election is not a defense as justification for the counting of the votes in secret. *Ibid.*

Section 2. Qualification for office—two officers.—Every qualified elector shall be eligible to any office to be voted for, unless disqualified by age, as prescribed in this Constitution. But no person shall hold two offices of honor or profit at the same time: *Provided*, That any person holding another office may at the same time be an officer in the Militia or a Notary Public: *Provided, further*, That the limitation above set forth "But no person shall hold two offices of honor or profit at the same time," shall not apply to the Circuit Judges of the State under the circumstances hereinafter stated, but that whenever it shall appear that any or all of the Justices of the Supreme Court shall be disqualified or be otherwise

prevented from presiding in any cause, or causes, for the reasons set forth in Section 6 of Article V of the Constitution, the Chief Justice or in his stead the Senior Associate Justice shall when available designate the requisite number of Circuit Judges for the hearing and determination thereof.

See Const. 1868, VIII, 2; XIV, 1.

Amended by a joint resolution and an act: 1930 (36) 1251; 1931 (37) 107. See FOREWORD on page 1159 of this volume.

Registration is an essential element to constitute one a qualified elector. State v. Mittle, 120 S. C. 526, 113 S. E. 335, 338.

And one not registered cannot serve as juror.—The term "qualified elector," as used above, means "registered elector," and one who has not been registered as an elector in the county when the court sits is not qualified to serve as a juror in said court. Mew v. Charleston, etc., Ry. Co., 55 S. C. 90, 95, 32 S. E. 828, 17 L. R. A. (N. S.) 175, 20 L. R. A. (N. S.) 482, 50 L. R. A. (N. S.) 976, Ann. Cas. 14D, 46.

As to specific section relating to qualifications of jurors, see Const. of 1895, art. 5, § 22, and note thereto.

The prohibition against holding two offices under this section is not limited to state offices, but applies to municipal offices. Darling v. Brunson, 94 S. C. 207, 77 S. E. 860, 862, L. R. A. 1917A, 234, Ann. Cas. 15A, 527.

The Supreme Court has no power at the instance of a citizen and taxpayer, who had no other interest, to correct alleged violations of this provision. Culbertson v. Blatt, et al., 194 S. C. 105, 9 S. E. (2d) 218.

Effect of holding one office of trust or profit and being appointed to another such office.—In State v. Buttz, 9 S. C., 156, it was held that, where a person holding one office of trust or profit is elected or appointed to another such office, and qualifies in the latter capacity, he thereby vacates the first office to which he was elected or appointed, and lawfully holds the second office as an officer de jure. In addition, it was subsequently held in State v. Coleman, 54 S. C. 282, 32 S. E. 406, that the officer attempting to exercise the dual capacities of two offices is at least a de facto officer in respect to the office vacated under the rule declared in State v. Buttz, so long as he is performing the duties of the office. Walker v. Harris, 170 S. C. 242; 170 S. E. 270.

Membership in the sinking fund com-

mission is not an "office." State v. Blease, 95 S. C. 403, 79 S. E. 247, L. R. A. 1917A, 232 Ann. Cas. 15A, 526.

The office of intendant of a town is an "office of honor." State v. Coleman, 54 S. C. 282, 32 S. E. 406, 407, 40 L. R. A. (N. S.) 1214, L. R. A. 1917A, 240, 12 A. L. R. 1007.

And office of clerk of circuit court is an "office of profit." State v. Coleman, 54 S. C. 282, 32 S. E. 406, 407, 40 L. R. A. (N. S.) 1214, L. R. A. 1917A, 240, 12 A. L. R. 1007.

But position of grand juror is not office "of honor and profit." State v. Graham, 79 S. C. 116, 60 S. E. 431, L. R. A. 1917A, 240.

But one elected as clerk is de facto officer upon accepting office of intendant.

—One elected, qualified, and commissioned clerk of court, and who is in possession of the office, discharging its duties, without anyone claiming it, is a de facto clerk, though he has accepted the office of intendant of a town. State v. Coleman, 54 S. C. 282, 32 S. E. 406, 407, 40 L. R. A. (N. S.) 1214, L. R. A. 1917A, 240, 12 A. L. R. 1007.

And same is true of appointment of member of township board as school trustee.—A member of a township board of assessors who continues to act as such after his appointment as a trustee of a school district, is a de facto trustee of the school district under the provisions of this section. Dove v. Kirkland, 92 S. C. 313, 75 S. E. 503, 507, Ann. Cas. 15A, 532.

But office of postmaster and notary public may be held at same time.—A person may hold the office of postmaster and notary public at the same time, as the office of notary public is not incompatible with any other office. Ex parte Ware Furniture Co., 49 S. C. 20, 27 S. E. 9.

Act governing incorporation of "resort communities" held unconstitutional. Thomas v. Macklen, 186 S. C. 290, 195 S. E. 539.

Section 3. Electors.—Every male citizen of this State and of the United States twenty one years of age and upwards, not labouring under the disabilities named in this Constitution and possessing the qualifications required by it, shall be an elector.

See Const. 1868, VIII, 2.

Proposed bond issue invalid where electors do not possess qualifications.—A proposed county bond issue is invalid, under this section, where the voters fail to produce registration certificates or tax receipts at election at which issue was approved. *Dial v. Watts*, 138 S. C. 468, 136 S. E. 891, 892.

As to specific sections providing for holding of general elections, see §§ 2298, 2307, and notes thereto.

Since this section does not provide that a voter must be a freeholder and taxpay-

er, a grand juror cannot be disqualified because he is not such. *State v. Williams*, 35 S. C. 344, 14 S. E. 819, 27 L. R. A. 846, 28 L. R. A. 35, 198, 43 L. R. A. 39, Ann. Cas. 12C, 31.

As to specific section relating to qualifications of jurors, see Const. art. 5, § 22, and note thereto.

Person without registration certificate not entitled to be appointed tax collector.—See notes under § 2849-4 hereof.

See generally. *Wright v. State Board*, 76 S. C. 574, 57 S. E. 536.

Section 4. Qualifications for suffrage.—The qualifications for suffrage shall be as follows:

(a) **Residence.**—Residence in the State for two years, in the County one year, in the polling precinct in which the elector offers to vote four months: *Provided*, That ministers in charge of an organized church and teachers of public schools shall be entitled to vote after six months' residence in the State, otherwise qualified.

Amended by a joint resolution and an act: 1929 (36) 695; 1931 (37) 105, 246. See FOREWORD on page 1159 of this volume.

(b) **Registration.**—Registration, which shall provide for the enrollment of every elector once in ten years, and also an enrollment during each and every year of every elector not previously registered under the provisions of this Article.

(c) **Qualification for registration up to January, 1898—list of registered voters.**—Up to January 1st, 1898, all male persons of voting age applying for registration who can read any section in this Constitution submitted to them by the registration officer, or understand and explain it when read to them by the registration officer, shall be entitled to register and become electors. A separate record of all persons registered before January 1st, 1898, sworn to by the registration officer, shall be filed, one copy with the Clerk of Court and one in the office of the Secretary of State, on or before February 1st, 1898, and such persons shall remain during life qualified electors unless disqualified by the other provisions of this Article. The certificate of the Clerk of Court or Secretary of State shall be sufficient evidence to establish the right of Said Citizens to any subsequent registration and the franchise under the limitations herein imposed.

(d) **Qualification for registration after January, 1898.**—Any person who shall apply for registration after January 1st, 1898, if otherwise qualified, shall be registered: *Provided*, That he can both read and write any Section of this Constitution submitted to him by the registration officer, or can show that he owns, and has paid all taxes collectible during the previous year on, property in this State assessed at three hundred dollars (\$300) or more.

(e) **Payment of taxes necessary for voting.**—Managers of election shall require of every elector offering to vote at any election, before allowing him to vote, proof of the payment thirty days before any election of any poll tax then due and payable. The production of a certificate or of the receipt of the officer authorized to collect such taxes shall be conclusive proof of the payment thereof.

Amended by a joint resolution and an act: 1929 (36) 695; 1931 (37) 105, 246. See FOREWORD on page 1159 of this volume.

(f) **Certificate of registration.**—The General Assembly shall provide for issuing to each duly registered elector a certificate of registration, and shall provide for the renewal of such certificate when lost, mutilated or destroyed, if the applicant is still a qualified elector under the provisions of this Constitution, or if he has been registered as provided in subsection (c).

See Const. 1868, VIII, 2.

Cross references.—As to specific section providing for registration of qualified electors, see Const. art. 2, § 8, and note thereto.

This section prescribes the qualifications for an elector, as suffrage is the right to vote, and not the act of voting. *Mew v. Charleston, etc., Ry. Co.*, 55 S. C. 90, 32 S. E. 828, 829, 17 L. R. A. (N. S.) 775, 20 L. R. A. (N. S.) 482, 50 L. R. A. (N. S.) 976, Ann. Cas. 14D, 46.

The statute requiring certificate of registration issued to voter by county board of registration to be signed by members of board is mandatory. *State v. Bibbs*, 192 S. C. 231, 6 S. E. (2d) 276.

The county board of registration does not have authority to issue "duplicate" certificates of registration. *Ibid.*

Showing insufficient to raise question of validity of this section. *Franklin v. South Carolina*, 218 U. S. 161, 30 S. Ct. 640, 54 L. Ed. 980.

Residence of a person being a mixed question of law and fact, his intention is the controlling element. *Clarke v. McCown*, 107 S. C. 209, 92 S. E. 479, 480.

And intention of a voter may be proved by his acts and declarations or other circumstances. *Clarke v. McCown*, 107 S. C. 209, 92 S. E. 479, 480.

And voting in another county is inconsistent with intention to retain residence.—If a person votes at an election in another county, his act being inconsistent with an intention to retain his residence, he is not entitled to vote in the county. *Clarke v. McCown*, 107 S. C. 209, 92 S. E. 479, 480.

Act governing incorporation of "resort communities" held unconstitutional. *Thomas v. Macklen*, 186 S. C. 290, 195 S. E. 539.

Provision as to payment of poll taxes applies to all elections whether general or special. *Clarke v. McCown*, 107 S. C. 209, 92 S. E. 479, 481; *Abernathy v. Wolfe*, 117 S. C. 545, 109 S. E. 275, 276.

The statute which limits the right of voting at an election for school bonds in Greenville county to qualified electors who has returned real or personal property for taxation violates constitutional provisions defining an elector and regulating exercise of right of suffrage. *Cothran v. West Dunklin Public School Dist.* No. 1-C et al., 189 S. C. 85, 200 S. E. 95.

May vote if poll taxes paid within legal

time less than 30 days before election.—Electors who paid their poll taxes within time permitted by law may vote in election held less than thirty days from time poll taxes were paid. *McAlhaney v. Elliott*, 168 S. C. 418; 167 S. E. 656.

Where enough voters were permitted to vote, without having paid the poll tax required under this section, to have changed the result of the election, the whole election was void, where the poll could not have been purged of such illegal votes. *Clarke v. McCown*, 107 S. C. 209, 92 S. E. 479, 481.

Persons residing in district but registered at polling places outside, but in precinct, are "qualified voters."—Persons signing a petition opposing the consolidation of a school district, residing within the district but registered at polling places outside of the district but within the same polling precinct, are "qualified voters." *Aatson v. Spartanburg*, 141 S. C. 347, 139 S. E. 775, 776.

As to what constitutes a polling precinct, and where an elector may vote, see §§ 2295 and 2284, and notes thereto.

Elector may register at any time during tenth year.—The correct view is that the elector has the right to re-register at any time during the tenth year, and is eligible for jury duty, provided otherwise qualified. *Veronee v. Charleston Consol. Ry., etc., Co.*, 152 S. C. 178, 149 S. E. 753, 755.

And persons who were registered electors when drawn are not disqualified from jury duty.—This provision is not intended to disqualify persons as jurors who were registered electors when drawn, but had not registered immediately at the expiration of the ten year period before the trying of the case. *Veronee v. Charleston Consol. Ry., etc., Co.*, 152 S. C. 178, 149 S. E. 753, 754.

As to specific section providing for qualification of jurors, see Const. art. 5, § 22, and note thereto.

Irregularities in issuance of voters' registration certificates to grand jurors because of registration boards' failure to observe statutory requirements are sufficient to warrant motion to quash indictment found by such jurors, but not sufficient to entitle defendant, expressly waiving such irregularities, to new trial, after being found guilty at a fair and im-

partial trial, on theory that he had no power to waive such irregularities. *State v. Hann*, 196 S. C. 211, 12 S. E. (2d) 720.

A grand jury returning murder indictment was not legally qualified, and defendant would be granted new trial, where five members of grand jury were not legally registered electors due to the fact that their certificates of registration were not signed by two members of county board of registration but merely by clerk in office of board placing signatures of members thereon at direction of members. *State v. Bibbs*, 192 S. C. 231, 6 S. E. (2d) 276.

Elector must present to the managers of the election a registration certificate, and prove the payment of taxes for the previous year. *Wright v. State Board*, 76 S. C. 574, 57 S. E. 536, 539.

"Subsequent registration" as used under this section, includes any registration after the first prior to January 1, 1898. *State v. State Board*, 78 S. C. 461, 59 S. E. 145, 146, 14 L. R. A. (N. S.) 850, Ann. Cas. 16E, 413.

And certificate of clerks as to registration prior to 1898 is not substitute for registration certificate required. — A clerk's certificate of the registration of a voter prior to January 1, 1898 was not a substitute for a registration certificate required to entitle the voter to vote at a subsequent election, but only evidence of his right to register and obtain the necessary certificate. *State v. State Board*, 78 S. C. 461, 59 S. E. 145, 146, 14 L. R. A. (N. S.) 850, Ann. Cas. 16E, 413.

But registration by proper officer is conclusive as to qualifications until set aside. — This subsection was cited in *Rawl v. McCown*, 97 S. C. 1, 81 S. E. 958,

961, Ann. Cas. 15A, 1010, Ann. Cas. 16E, 408, in support of the proposition that registration by the proper officers is conclusive, until reversed or set aside in the manner prescribed, as to qualifications of the elector at the time of registration although his vote might be challenged on other grounds. See also *Hunter v. West Greenville*, 146 S. C. 338, 144 S. E. 62, 64.

This provision is mandatory and a failure of the managers to comply with it renders an election void. *Gunter v. Gayden*, 84 S. C. 48, 65 S. E. 948, 949.

And the provisions of this subsection apply to special as well as general elections. *Abernathy v. Wolfe*, 117 S. C. 545, 109 S. E. 275, 276.

And a special school district election held without requiring the voters to produce tax receipts or other authorized evidence of the payment of taxes, is void. *State v. Cooper*, 116 S. C. 216, 107 S. E. 924. See also, *Abernathy v. Wolfe*, 117 S. C. 545, 109 S. E. 275, 276; *Riser v. Blume*, 159 S. C. 438, 157 S. E. 615, 616.

As to specific code section covering payment of poll taxes, see § 2267, and note thereto.

Statute making it mandatory on county board of education to appoint trustees elected in election held according to regulations applicable to primary elections held to dispense with requirements for suffrage provided by the constitution and substitutes therefor the requirements and regulations applicable to primary elections. *State v. Huntley*, 167 S. C. 476; 167 S. E. 637.

Person without registration certificate not entitled to be appointed tax collector.—See notes under section 2849-4 hereof.

Section 5. Appeal—crimes against election laws.—Any person denied registration shall have the right to appeal to the Court of Common Pleas, or any Judge thereof, and thence to the Supreme Court, to determine his right to vote under the limitations imposed in this Article, and on such appeal the hearing shall be *de novo*, and the General Assembly shall provide by law for such appeal, and for the correction of illegal and fraudulent registration, voting, and all other crimes against the election laws.

Cross reference.—As to specific code section providing for appeals from denial of right to vote, see § 2275, and note thereto.

Effect of section is to declare registration of voter conclusive until set aside.—This section has the effect of declaring that registration by the proper officers is conclusive, until reversed or set aside in the manner prescribed as to qualifications of electors at the time of registration. *Rawl v. McCown*, 97 S. C. 1, 81 S.

E. 958, 961, Ann. Cas. 15A, 1010, Ann. Cas. 16E, 408; *Hunter v. West Greenville*, 146 S. C. 338, 144 S. E. 62, 64.

As to specific section providing for registration of voter, see Const. art. 2, § 4.

The state is not a necessary party and the question of qualification of an elector is always within the jurisdiction of the courts. *Rawl v. McCown*, 97 S. C. 1, 81 S. E. 958, Ann. Cas. 15A, 1010, Ann. Cas. 16E, 408.

Section 6. Persons disqualified from voting.—The following persons are disqualified from being registered or voting:

First, Persons convicted of burglary, arson, obtaining goods or money under false pretenses, perjury, forgery, robbery, bribery, adultery, bigamy, wife-beating, house-breaking, receiving stolen-goods, breach of trust with fraudulent intent, fornication, sodomy, incest, assault with intent to ravish, miscegenation, larceny, or crimes against the election laws: *Provided*, That the pardon of the Governor shall remove such disqualification.

Second, Persons who are idiots, insane, paupers supported at the public expense, and persons confined in any public prison.

See Const. 1868, VIII, 8.

As to disqualification of juror, see art. 5, § 22.

The right to serve as a juror is not a vested right, and this section applies to persons convicted before the section was passed. *Garrett v. Weinberg*, 54 S. C. 127, 31 S. E. 341, 344, 34 S. E. 70, 50 L. R. A. (N. S.) 948, 977, L. R. A. 1916E, 224, Ann. Cas. 15D, 866, Ann. Cas. 16C, 1210.

And new trial must be granted where parties did not know of conviction of juror for larceny.—This section disqualifies a citizen from being a juror who has been convicted of larceny and where none of the parties to an action, or their respective counsel, had knowledge of the conviction of the juror during the trial, a new trial must be granted. *State v. Robertson*, 54 S. C. 147, 31 S. E. 868, 50 L. R. A. (N. S.) 971.

As to the granting of new trials, see § 34 and the note thereto.

But violation of act to regulate commerce does not disqualify one from serving as grand juror.—One who has been convicted on plea of guilty of a violation of the act to regulate commerce, by making false reports of the weight of certain articles shipped, is not thereby disqualified to serve as a grand juror. *Christopoulos v. United States*, 230 F. 788, 790.

As to specific code section providing

for disqualification as juror if one accused of crime, see § 628, and note thereto.

Registration requirements of voters at municipal election.—A summary of the terms of the Constitution regarding the registration of voters for municipal elections is as follows: 1. A County Board of Registration certificate of registration must be produced. 2. Residence for four months before the election in the town or city in which he desires to vote must exist. 3. Payment of all taxes due and collectible for the preceding fiscal year must appear to have been made by the applicant for registration. 4. The General Assembly shall provide for the registration of all voters before each election in municipalities; and the General Assembly has, of its own motion, provided an additional requirement, that registration must be had for what may be called regular, as contradistinguished from special elections. *Hunter v. Senn*, 61 S. C. 44, 39 S. E. 235, 90 Am. St. Rep. 60, Ann. Cas. 12C, 1092, Ann. Cas. 16E, 408.

See generally, *McCreight v. Zemp*, 49 S. C. 78, 26 S. E. 984, 37 L. R. A. (N. S.) 1099; *Mew v. Charleston, etc., Ry. Co.*, 55 S. C. 90, 93, 32 S. E. 828, 17 L. R. A. (N. S.) 775, 20 L. R. A. (N. S.) 482, 50 L. R. A. (N. S.) 976, Ann. Cas. 14D, 46.

Section 7. Residence gained or lost.—For the purpose of voting, no person shall be deemed to have gained or lost a residence by reason of his presence or absence while employed in the service of the United States, nor while engaged in the navigation of the waters of this State, or of the United States, or of the high seas, nor while a student of any institution of learning.

See Const. 1868, VIII, 4 and 5.

Section 8. Registration provided — elections — board of registration — books of registraton.—The General Assembly shall provide by law for the registration of all qualified electors, and shall prescribe the manner of holding elections and of ascertaining the results of the same: *Provided*, At the first registration under this Constitution, and until the first of January, 1898. the registration shall be conducted by a Board of three discreet persons in each County, to be appointed by the Governor, by and with the advice and consent of the Senate. For the first registration to be provided for under this Constitution, the registration books shall be kept open for at least six consecutive weeks; and thereafter from time to time at least

one week in each month, up to thirty days next preceeding the first election to be held under this Constitution. The registration books shall be public records open to the inspection of any citizen at all times.

See Const. 1868, VIII, 3.

See Art. XI, § 8, hereof.

A "qualified elector" is an elector qualified to vote for members of the general assembly. *Mew v. Charleston, etc., Ry. Co.*, 55 S. C. 90, 32 S. E. 828, 829, 17 L. R. A. (N. S.) 775, 20 L. R. A. (N. S.) 482, 50 L. R. A. (N. S.) 976, Ann. Cas. 14D, 46.

And this section provides for registration of all qualified as electors.—This

section means that the General Assembly shall provide by law for the registration of all persons qualified for registration as electors. *Mew v. Charleston, etc., Ry. Co.*, 55 S. C. 90, 32 S. E. 828, 829, 17 L. R. A. (N. S.) 775, 20 L. R. A. (N. S.) 482, 50 L. R. A. (N. S.) 976, Ann. Cas. 14D, 46.

See generally, *Wright v. State Board*, 76 S. C. 574, 590, 57 S. E. 536.

Section 9. Polling precincts.—The General Assembly shall provide for the establishment of polling precincts in the several Counties of the State, and those now existing shall so continue until abolished or changed. Each elector shall be required to vote at his own precinct, but provision shall be made for his transfer to another precinct upon his change of residence.

Election failing to provide for voting of electors will not be enjoined where remedy at law.—The Supreme Court, on petition to enjoin an election for a new county, will not consider whether statute providing for an election is unconstitutional because it provides for election without making provision for those electors living within proposed boundaries, whose voting precincts are without, to cast their ballots; because it may be *damnum absque injuria*, and such voters have an adequate remedy at law by writ of certiorari to the State Board of Canvassers after election. *Parler v. Fogle*, 78 S. C. 570, 59 S. E. 707, 708, 40 L. R.

A. (N. S.) 580, Ann. Cas. 12A, 723, Ann. Cas. 15C, 989.

And election is not void for failure to provide for voting by electors if result would be same.—An election, in which an irregularity in the conduct of the election deprived certain voters of their rights because no provision was made for the voting of such persons in the district where they resided, is not an invalid election where the result would have been the same if they had voted. *State v. Jennings*, 79 S. C. 414, 60 S. E. 967, 968.

See generally, *Wright v. State Board*, 76 S. C. 574, 590, 57 S. E. 536.

Section 10. Primary elections.—The General Assembly shall provide by law for the regulation of party primary elections and punishing fraud at the same.

Section 11. Closing books of registration.—The registration books shall close at least thirty days before an election, during which time transfers and registration shall not be legal: *Provided*, Persons who will become of age during that period shall be entitled to registration before the books are closed.

The registration books mentioned in this section are the county registration books. *Fowler v. Town Council*, 90 S. C. 352, 73 S. E. 626, 627.

And such provisions apply to county registration books in city as well as county elections. *Fowler v. Town Council*, 90 S. C. 352, 73 S. E. 626, 627.

But city registration books are not included. *Fowler v. Town Council*, 90 S. C. 352, 73 S. E. 627.

And period of four months is an unreasonable one for closing of books.—A law providing for the closing of the reg-

istration books four months previous to a general election, is unreasonable in that the period prescribed deprives that class of citizens of the right to vote who, being otherwise qualified, have completed their term of residence in the state or county. *Butler v. Ellerbe*, 44 S. C. 256, 22 S. E. 425, 440, 108 Am. St. Rep. 841, 8 L. R. A. (N. S.) 124, 44 L. R. A. (N. S.) 201, L. R. A. 1915D, 185.

And books may be kept open during thirty days period for general registration of electors. *Gunter v. Gayden*, 84 S. C. 48, 65 S. E. 948, 949.

Section 12. Municipal elections.—Electors in municipal elections shall possess the qualifications and be subject to the disqualifications herein prescribed. The production of a certificate of registration from the registration officers of the county as an elector at a precinct included in the incorporated city or town in which the voter desires to vote is declared a condition prerequisite to his obtaining a certificate of registration for municipal elections, and in addition he must have been a resident within the corporate limits at least four months before the election and have paid thirty days before any election any poll tax then due and payable. The production of a certificate or receipt of the officer authorized to collect such tax shall be conclusive proof of the payment thereof. The General Assembly shall provide for the registration of all voters before each election in municipalities; *Provided*, That nothing herein contained shall apply to any municipal elections which may be held prior to the general election of the year 1896.

Amended by a joint resolution and acts: 1939 (41) 217; 1941 (42) 201; 1942 (42) 1431. See FOREWORD on page 1159 of this volume.

This section contains no requirement for the closing of the registration books at any time before the election. Fowler v. Town Council, 90 S. C. 352, 73 S. E. 626, 627.

A resident of a city cannot be alderman if not registered. State v. City Council, 95 S. C. 131, 78 S. E. 738. Nor mayor. State v. Williams, 157 S. C. 290, 154 S. E. 164.

Registration of voters concludes collateral inquiry into qualifications of elector therefor at time it was granted. Davis v. Saluda, 147 S. C. 498, 145 S. E. 412, 416.

Showing of county registration certificate to be made before town officer in municipal elections.—It is the intention of this section that the showing of the county registration certificate be made before a town registration officer and not before the managers of the election. Davis v. Saluda, 147 S. C. 498, 145 S. E. 412, 415.

And possession at special election of county certificate of registration does not require special registration.—Where every voter at a special election had in his possession a certificate of registration issued to him by the county board of registration, and otherwise complied with constitutional requirements, an objection that the provisions of the statute under which the election was held were unconstitutional in not providing for registration at the special election did

not affect the validity of the election. Hunter v. Senn, 61 S. C. 44, 39 S. E. 235, 243, 90 Am. St. Rep. 60 Ann. Cas. 16C, 1092, Ann. Cas. 16E, 408.

As registration for general municipal election includes registration for special. Bray v. City Council, 62 S. C. 57, 39 S. E. 810, 814.

And vote is not illegal because voting place is outside of municipality but within precinct.—A vote cast in a municipal election by a qualified voter is not illegal under this section because the county registration certificate designates his voting place outside of said municipality, but within same voting precinct. Hunter v. West Greenville, 146 S. C. 338, 144 S. E. 62, 65.

As to specific section providing for qualifications for registration in municipal elections, see § 2290, and note thereto.

It is unnecessary under this section that voters at municipal election show tax receipts at time of voting where no tax period intervened after registration. Davis v. Saluda, 147 S. C. 498, 145 S. E. 412, 415.

As to specific code section covering registration at municipal elections, see § 2288, and note thereto.

Act governing incorporation of "resort communities" held unconstitutional. Thomas v. Macklen, 195 S. E. 539; 186 S. C. 290.

Section 13. Bonded debt in municipalities.—In authorizing a special election in any incorporated city or town in this State for the purpose of bonding the same, the General Assembly shall prescribe as a condition precedent to the holding of said election a petition from a majority of the freeholders of said city or town as shown by its tax books, and at such elections all electors of such city or town who are duly qualified for voting under Sec-

tion 12 of this Article, and who have paid all taxes, State, County and municipal, for the previous year, shall be allowed to vote; and the vote of a majority of those voting in said election shall be necessary to authorize the issue of said bonds.

Provided, That the General Assembly need not prescribe any such petition as a condition precedent to the holding of any such election in the City of Columbia, where the proceeds of the bonds are authorized to be used solely for the purpose of enlarging, extending and repairing a sewerage system and plant or a waterworks system and plant, or for the purchase, building and maintenance of fire stations, fire alarm systems and fire equipment, or for any one or more of said purposes.

Amended by a joint resolution and an act: 1930 (36) 1209; 1931 (37) 109. See FOREWORD on page 1159 of this volume.

Provided, further, that the limitations imposed by this section (Art. 8, § 7) and by Section 5 of Article X of the Constitution shall not apply to any bonded indebtedness incurred by the City of Columbia, where the bonded indebtedness is authorized to be incurred for the purpose of enlarging and maintaining its fire department or for purchase, building and maintenance of fire stations, fire alarm systems or fire equipment, or for any one or more of said purposes, and when the question of incurring such bonded indebtedness is submitted to the qualified electors of said City at an election or elections to be called by the City council of said City, and a majority of those voting thereon shall vote in favor thereof; and the General Assembly need not prescribe as a condition precedent to the holding of any such election a petition from the freeholders as provided in Section 13 of Article II of the Constitution.

Amended by a joint resolution and an act: 1930 (36) 1207, 1931 (37) 110. See FOREWORD on page 1159 of this volume.

This section controls the elections provided for in §§ 5, 7, art. 8 of the State Constitution of 1895. *Paris Mountain Water Co. v. Greenville*, 110 S. C. 36, 96 S. E. 545, 548.

Provisions of section apply only to special elections in "Incorporated City or Town."—An act enlarging a school district, and authorizing the trustees of the new enlarged district to hold an election on the question of issuing bonds without requiring as a condition precedent thereto, a petition of a majority of the freeholders of the district, does not violate this section, as it applies to a special election in any "incorporated city or town." *Burriss v. Brock*, 95 S. C. 104, 79 S. E. 193, 194; *Brownlee v. Brock*, 107 S. C. 230, 92 S. E. 477.

And section does not apply to county elections. *Lillard v. Melton*, 103 S. C. 10, 87 S. E. 421, 434, L. R. A. 1916D, 572, L. R. A. 1917E, 468, 5 A. L. R. 761, 24 A. L. R. 941.

And petition for issuance of school bonds does not have to be signed by majority of freeholders.—Amendment to Const. art. 10, § 5, requiring that ques-

tion authorized thereby be submitted to qualified electors of school district, does not require that petition for election be signed by majority of freeholders as provided by this section. *McColl v. Marlboro Graded School*, 143 S. C. 120, 141 S. E. 265, 267.

And a law relating to issuance of school bonds is not unconstitutional because dispensing with freeholder's petition. *Riser v. Blume*, 159 S. C. 438, 157 S. E. 615, 616.

Registration is not required before each special election in municipalities.—It is evident from the provisions of this section that it is not the intention to require registration of the voters before each special election in municipalities. *Bray v. City Council*, 62 S. C. 57, 39 S. E. 810, 814.

Act requiring petition for election for issuance of bonds to be signed by majority of freehold "voters" is unconstitutional.—An act authorizing all cities and towns to build, equip, and operate a system of waterworks and electric lights, and to issue bonds to meet the costs of same; and providing that "before any election shall be held under the provi-

sions of this act, a majority of the freehold voters of said city or town shall petition the city council that the said election be ordered," is unconstitutional under this section, in that it requires the petition be signed by a majority of the freehold "voters." *State v. Evans*, 47 S. C. 418, 25 S. E. 216, 219, 61 L. R. A. 50.

Issuance of certificates of indebtedness for amounts past due does not require election.—An act authorizing city to issue certificates of indebtedness, evidencing amounts of past due and unpaid taxes, does not create new indebtedness without petition and election in violation of this section. *Sullivan v. City Council*, 133 S. C. 156, 130 S. E. 872, 876, 133 S. C. 189, 133 S. E. 340, 342. See also, *McCreight v. Zemp*, 49 S. C. 78, 26 S. E. 984, 989, 37 L. R. A. (N. S.) 1099.

This section does not repeal the Sp.

Act of Dec. 24, 1890, 20 Stat. 976, but merely nullifies so much of said Act as is inconsistent with the Constitution, or rather the Special Act must be read as if amended so as to prescribe for electors thereunder, the qualifications required under the Constitution, and to require a petition by a majority of the freeholders, instead of one-third. *Cleveland v. Calvert*, 54 S. C. 83, 31 S. E. 871.

As to specific code section covering powers of municipalities in regard to sewerage systems, etc., see § 7278, and note thereto.

See generally, *Dick v. Scarborough*, 73 S. C. 150, 152, 53 S. E. 86; *McCreight v. Zemp*, 49 S. C. 78, 26 S. E. 984, 37 L. R. A. (N. S.) 1099; *Hunter v. Senn*, 61 S. C. 44, 67, 39 S. E. 235, 90 Am. St. Rep. 60, Ann. Cas. 12C, 1092, Ann. Cas. 16E, 408; *Kalber v. Stokes*, Mayor et al, 194 S. C. 339, 9 S. E. (2d) 785.

Section 14. Arrests of electors.—Electors shall in all cases except treason, felony, or a breach of the peace, be privileged from arrest on the days of election during their attendance at the polls, and going to and returning therefrom.

See Const. 1868, VIII, 6.

Section 15. Right of suffrage free.—No power civil, or military, shall at any time interfere to prevent the free exercise of the right of suffrage in this State.

Court would not enjoin state officials or managers of election from allowing qualified voter to vote in general election other than single ballot containing names

of all candidates for any office, state or federal. *Gardner et al v. Blackwell, Secretary of State, et al.*, 167 S. C. 314, 166 S. E. 338.

ARTICLE III.

Legislative Department.

Section 1. Legislative power.—The legislative power of this State shall be vested in two distinct branches, the one to be styled the "Senate" and the other the "House of Representatives," and both together the "General Assembly of the State of South Carolina."

See Const. 1868, II, 1.

Scope of section.—This section confers the whole legislative power of the state in the making of laws and providing for their enforcement, not plenary however, but subject to constitutional limitations. *Massey v. Glenn*, 106 S. C. 53, 90 S. E. 321.

By the use of the language the people, in convention assembled, clothed the General Assembly with the whole legislative power capable of being exercised within our borders, subject only to such restrictions upon and regulation of such power as are embraced in the Constitution itself, or that of the United States.

See *State v. City Council*, 42 S. C. 222, 20 S. E. 221, 73 Am. St. Rep. 104, 78 Am. St. Rep. 253, 26 L. R. A. 345, 53 L. R. A. 764, 61 L. R. A. 125, 150, 1 L. R. A. (N. S.) 640, 15 L. R. A. (N. S.) 916, 927, 947, L. R. A. 1915D, 186; *Mauldin v. City Council*, 42 S. C. 293, 20 S. E. 842, 844, 46 Am. St. Rep. 723, 27 L. R. A. 284, 58 L. R. A. 355, 28 L. R. A. (N. S.) 1168.

The General Assembly has a right to pass such legislation as in its judgment may seem beneficial to the state, and to create such agencies of government as may be necessary to carry out its purpose, unless expressly prohibited by the

constitution. *Clarke v. South Carolina Public Service Authority*, 177 S. C., 427; 181 S. E. 481.

Income tax law is not an unconstitutional delegation of power to State Tax Commission. *Santee Mills v. Query*, 122 S. C. 158, 115 S. E. 202. And it is not a delegation of legislative power by attempt to adopt future federal regulations. *Id.*

Nor is an act providing for establishment of chain gang in Fairfield County.—An Act providing for establishing of chain gang in Fairfield county on unanimous written consent of legislative delegation from that county is not void as unconstitutional delegation of legislative power. *Ruff v. Boulware*, 133 S. C. 420, 131 S. E. 29.

Nor an act authorizing county boards of education to alter lines of school districts.—The provision of this section is not infringed by Act 1896, § 31, as amended in 1900, authorizing county boards of education to alter lines of school districts, such legislation not being an attempt to delegate legislative powers to the county boards of education, but merely to define their powers and duties, as authorized by § 11 providing that the General Assembly shall define the powers, duties, etc., of school officers; there being a marked distinction

between the imposition of a duty and the delegation of a legislative power. *Waterloo School Dist. v. Cross Hill School Dist.*, 106 S. C. 292, 91 S. E. 257.

See generally, as to legislative distinguished from judicial power, *Segars v. Parrott*, 54 S. C. 1, 31 S. E. 677, 865, Ann. Cas. 14C, 626; as to power under former constitutions, *State v. Williams*, 2 McC. 3 Am. St. Rep. 279, 67 L. R. A. 182, 7 A. L. R. 1517.

Applied in Clarendon County v. Sumter County, 116 S. C. 258, 108 S. E. 103; *Utsey v. Charleston, etc.*, R. Co., 38 S. C. 399, 17 S. E. 141.

Act regulating occupation of hairdressers and cosmetologists not invalid hereunder. *State v. Ross*, 185 S. C. 472; 194 S. E. 439.

Provision in act relating to state highway commission that sufficiency of revenues should be determined solely by commission before issuance of bonds held not unconstitutional as delegation of legislative authority. *State v. Lewis*, 181 S. C. 10; 186 S. E. 625.

Provision in act relating to state highway commission delegating to members of legislative delegations from state judicial circuits the right to elect district highway commissioners held not unconstitutional delegation of legislative authority. *State v. Lewis*, 181 S. C. 10; 186 S. E. 625.

Section 2. House of Representatives.—The House of Representatives shall be composed of members chosen by ballot every second year by citizens of this State, qualified as in this Constitution is provided.

See Const. 1868, II, 2.

Section 3. Number of members—enumeration of inhabitants.—The House of Representatives shall consist of one hundred and twenty-four members, to be apportioned among the several Counties according to the number of inhabitants contained in each. Each County shall constitute one election district. An enumeration of the inhabitants for this purpose shall be made in the year Nineteen hundred and One, and shall be made in the course of every tenth year thereafter, in such manner as shall be by law directed: *Provided*, That the General Assembly may at any time, in its discretion, adopt the immediately preceding United States Census as a true and correct enumeration of the inhabitants of the several Counties, and make the apportionment of Representatives among the several Counties according to said enumeration: *Provided, further*, That until the apportionment which shall be made upon the next enumeration shall take effect, the representation of the several Counties as they now exist (including the County of Saluda established by ordinance) shall be as follows: Abbeville, 5; Aiken, 3; Anderson, 5; Barnwell, 5; Beaufort, 4; Berkeley, 4; Charleston, 9; Chester, 3; Chesterfield, 2; Clarendon, 3; Colleton, 4; Darlington, 3; Edgefield, 3; Fairfield, 3; Florence, 3; Georgetown, 2; Greenville, 5; Hampton, 2; Horry, 2; Kershaw, 2; Lancaster, 2; Laurens, 3; Lexington, 2; Marion, 3; Marlboro, 3; Newberry, 3; Oconee, 2; Orangeburg, 5; Pickens, 2; Richland, 4; Saluda, 2;

Spartanburg, 6; Sumter, 5; Union, 3; Williamsburg, 3; York, 4; *Provided further*, That in the event other Counties are hereafter established, then the General Assembly shall reapportion the Representatives between the Counties.

See Const. 1868, II, 3 and 4.

See generally, *Smith v. Jennings*, 67 S. 2 A. L. R. 1593.
C. 324, 45 S. E. 821, L. R. A. 1915B, 1060,

Section 4. Assignment of Representatives.—In assigning Representatives to the several Counties, the General Assembly shall allow one Representative to every one hundred and twenty-fourth part of the whole number of inhabitants in the State: *Provided*, That if in the apportionment of Representatives any County shall appear not to be entitled, from its population, to a Representative, such County shall, nevertheless, send one Representative; and if there be still a deficiency in the number of Representatives required by Section third of this Article, such deficiency shall be supplied by assigning Representatives to those Counties having the largest surplus fractions.

See Const. 1868, II, 6.

Section 5. Apportionment takes effect.—No apportionment of Representatives shall take effect until the general election which shall succeed such apportionment.

See Const. 1868, III, 7.

Section 6. Senate.—The Senate shall be composed of one member from each County, to be elected for the term of four years by the qualified electors in each County, in the same manner in which members of the House of Representatives are chosen.

See Const. 1868, II, 8.

Section 7. Qualification of Senators and members of House.—No person shall be eligible to a seat in the Senate or House of Representatives who, at the time of his election, is not a duly qualified elector under this Constitution in the County in which he may be chosen. Senators shall be at least twenty-five and Representatives at least twenty-one years of age.

See Const. 1868, II, 10.

Section 8. Election of Senators and Representatives—classification of Senators.—The first election for members of the House of Representatives under this Constitution shall be held on Tuesday after the first Monday in November Eighteen hundred and Ninety-six, and in every second year thereafter, in such manner and at such places as the General Assembly may prescribe; and the first election for Senators shall be held on Tuesday after the first Monday in November Eighteen hundred and Ninety-six, and every fourth year thereafter, except in Counties in which there was an election for Senator in Eighteen hundred and Ninety-four for a full term, in which Counties no election for Senator shall be held until the general election to be held in Eighteen hundred and Ninety-eight, and every fourth year thereafter, except to fill vacancies. Senators shall be so classified that one-half of their number, as nearly as practicable, shall be chosen every two years. Whenever the General Assembly shall establish more than one County at

any session, it shall so prescribe the first term of the Senators from such Counties as to observe such classification.

See Const. 1868, II, 9 and 11.

Section 9. Sessions of General Assembly.—The annual session of the General Assembly heretofore elected, fixed by the Constitution of the year Eighteen hundred and Sixty-eight to convene on the fourth Tuesday of November, in the year Eighteen hundred and ninety-five, is hereby postponed, and the same shall be convened and held in the city of Columbia on the second Tuesday of January, in the year Eighteen hundred and Ninety-six. The first session of the General Assembly elected under this Constitution shall convene in Columbia on the second Tuesday in January, in the year Eighteen hundred and Ninety-seven, and thereafter annually at the same time and place. Should the casualties of war or contagious disease render it unsafe to meet at the seat of government, then the Governor may, by proclamation, appoint a more secure and convenient place of meeting. Members of the General Assembly shall not receive any compensation for more than forty days of any one session: *Provided*, That this limitation shall not affect the first four sessions of the General Assembly under this Constitution.

See Const. 1868, II, 12.

As to constitutionality of act appropriating expense money for each member of the legislature, and as to pay for mem-

bers during extra session, see notes under § 19 of this article.

Section 10. Terms of office.—The terms of office of the Senators and Representatives chosen at a general election shall begin on the Monday following such election.

See Const. 1868, II, 13.

Section 11. Election returns—quorum—absent members.—Each house shall judge of the election returns and qualifications of its own members, and a majority of each house shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may compel the attendance of absent members, in such manner and under such penalties as may be provided by law or rule.

See Const. 1868, II, 14.

Present acting quorum constitutes present house acting in all its potentiality.—A quorum possesses the power of the whole body in all matters of business wherein the action of a larger proportion of the entire membership is not clearly and expressly required. So, ordinarily, when a quorum is present acting, the House is present, acting in all its potentiality. *Smith v. Jennings*, 67 S. C. 324, 45 S. E. 821, 823, L. R. A. 1915B, 1060, 2 A. L. R. 1593.

House not invested with judicial power.—The General Assembly did not, by § 3 of the Act of 9th March, 1896, intend to invest itself with judicial power; and if it did, then that section of the Act is clearly unconstitutional, and is null and

void. That the framers of the Constitution never intended the General Assembly to exercise judicial powers is shown by this section. *Segars v. Parrott*, 54 S. C. 1, 31 S. E. 677, 865, Ann. Cas. 14 C, 626.

State board of canvassers' power to decide who received most votes for state senator is subject to senate's power to judge election returns and members qualifications. *Anderson v. Blackwell*, Secretary of State, et al., 168 S. C. 137, 167 S. E. 30.

Senate and not court is proper tribunal for determining merits of election contest for office of state senator. *Ibid*.

The qualifications of members of the state senate as senators is a matter wholly within the jurisdiction of the

senate. *Culbertson v. Blatt, et al.*, 194 S. C. 105, 9 S. E. (2d) 218.

Applied in *Williams v. Benet*, 35 S. C. 150, 14 S. E. 311, 14 L. R. A. 825, Ann.

Cas. 12A, 1254; *Ex parte Scarborough*, 34 S. C. 13, 12 S. E. 666, Ann Cas. 12C, 1259.

Section 12. Officers—rules—expulsion.—Each house shall choose its own officers, determine its rules of procedure, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member, but not a second time for the same cause.

See Const. 1868, II, 15. See note to art. 3, § 18.

Adoption by House of Representatives of act relating to state highway commission on reconsideration of vote sustaining Governor's veto did not render act unconstitutional. *State v. Lewis*, 181 S. C. 10; 186 S. E. 625.

Constitutional provision relating to legislative consideration of vetoed bills

must be construed in connection with constitutional provision authorizing each House of Legislature to determine its rules of procedure. *State v. Lewis*, 181 S. C. 10; 186 S. E. 625.

Applied in *Thompson v. Livingston*, 116 S. C. 412, 107 S. E. 581. See note to art. 3, § 18.

Section 13. Right of punishment.—Each house may punish by imprisonment during its sitting any person not a member who shall be guilty of disrespect to the house by any disorderly or contemptuous behavior in its presence, or who, during the time of its sitting, shall threaten harm to the body or estate of any member for anything said or done in either house, or who shall assault any of them therefor, or who shall assault or arrest any witness or other person ordered to attend the house in his going thereto or returning therefrom, or who shall rescue any person arrested by order of the house: *Provided*, That such time of imprisonment shall not in any case extend beyond the session of the General Assembly.

See Const. 1868, II, 16.

Act authorizing legislative committee to summon witnesses and punish by imprisonment for refusal to appear.—An act authorizing a legislative committee to summon and examine witnesses, and empowering such committee to punish by imprisonment for refusal to appear or testify, cannot be said to be a violation of this section in that it provides for

greater punishment by the committee than it is within the power of the legislature itself to impose under that section, since it cannot be assumed that a committee of co-ordinate department will perform an unconstitutional act. *Robertson v. Peeples*, 120 S. C. 176, 115 S. E. 300.

Section 14. Members protected.—The members of both houses shall be protected in their persons and estates during their attendance on, going to and returning from the General Assembly, and ten days previous to the sitting and ten days after the adjournment thereof. But these privileges shall not protect any member who shall be charged with treason, felony or breach of the peace.

See Const. 1868, II, 17.

For provision under former Constitution, see *Tillinghast v. Carr*, 4 McC. 152, 76 Am. St. Rep. 534, 23 L. R. A. 633.

An order entered during session of

General Assembly requiring legislator to pay certain amount on his note was in contravention of constitution. *Boman v. Gantt*, 167 S. C. 140, 166 S. E. 90.

Section 15. Bills for revenue—other bills.—Bills for raising revenue shall originate in the House of Representatives, but may be altered, amended or rejected by the Senate; all other Bills may originate in either house, and

may be amended, altered or rejected by the other.

See Const. 1868, II, 18.

Impeachment of an Act by journals of either house.—When an act has been signed by president of Senate and speaker of House of Representatives, approved by Governor, and filed in the office of Secretary of State, with the Great Seal of the State affixed, it cannot be impeached by the journals of either house, or by other extrinsic evidence, as respects matters pertaining to its history, governed by this section, § 17, requiring every act to relate to but one subject, expressed in its title, and § 18, requiring bills to be read three times in either house; such matters not being expressly required by Constitution to be entered on journals. *Wingfield v. South Carolina*

Tax Comm., 147 S. C. 116, 144 S. E. 846.

Act regulating trapping, shipping, and transportation of furs and providing fines for violation, is not a revenue measure invalid under this section because it did not originate in the House of Representatives. *State v. Stanley*, 131 S. C. 511, 127 S. E. 574; *State v. Mooror*, 152 S. C. 455, 150 S. E. 269.

Provision in act relating to state highway commission requiring payment of annual motor vehicle license fee did not make act a "revenue measure" within constitutional requirement that revenue bills must originate in House of Representatives. *State v. Lewis*, 181 S. C. 10; 186 S. E. 625.

Section 16. Style of laws.—The style of all laws shall be: "Be it enacted by the General Assembly of the State of South Carolina."

See Const. 1868, II, 19.

A joint resolution enacted by the words, "Be it resolved," etc., is a sufficient compliance with the mandatory pro-

vision of this section. *Smith v. Jennings*, 67 S. C. 324, 45 S. E. 821, 822, L. R. A. 1915B, 1060, 2 A. L. R. 1593.

Section 17. One subject.—Every Act or resolution having the force of law shall relate to but one subject, and that shall be expressed in the title.

See Const. 1868, II, 20.

I. General Consideration.
II. Application.

I. GENERAL CONSIDERATION.

It has no application to municipal ordinances.—*State v. Gibbes*, 60 S. C. 500, 39 S. E. 500, 39 S. E. 1, Ann. Cas. 12C, 192.

The purpose of this section is to prevent insertion of matters not germane to the general subject, and to prevent surreptitious legislation. *Furman v. Willimon*, 106 S. C. 159, 90 S. E. 700.

The purpose of this provision is to prevent hodgepodge, or log-rolling legislation; to prevent surprise or fraud upon the Legislature, by means of provisions in bills, of which the title gave no intimation, and which might therefore be overlooked, and carelessly and unintentionally adopted; and to fairly apprise the people, through such publication of legislative proceedings, as is usually made, of the subjects of legislation, that are being considered, in order that they may have opportunity, of being heard thereon, by petition or otherwise, if they shall so desire. *Southern Power Co. v. Walker*, 89 S. C. 84, 71 S. E. 356, 358, Ann. Cas. 15A, 80, Ann. Cas. 15C, 932; *DeLoach v. Scheper*, et al., 188 S. C. 21, 198 S. E. 409. See also, *Douglas v. Watson*, 186 S. C. 34, 195 S. E. 116.

It is a wise provision to be properly observed.—This section no doubt con-

tains a wise provision, and if properly observed would tend greatly to prevent confusion and doubt as to the exact meaning and intent of legislative enactments, and to this end it should be enforced by the courts in all proper cases, due care being exercised, less a too strict construction might defeat its very object and purpose by clogging legislation and loading down our statutebooks with numberless separate acts wholly unnecessary to the end. *Floyd v. Perrin*, 30 S. C. 1, 8 S. E. 14, 15, 64 Am. St. Rep. 103, 2 L. R. A. 242, Ann. Cas. 12A, 554.

And it should be liberally construed.—There has been a general disposition, to construe this section liberally, rather than to embarrass legislation by a construction, whose strictness is unnecessary to the accomplishment of the beneficial purpose for which it has been adopted. *Southern Power Co. v. Walker*, 89 S. C. 84, 71 S. E. 356, 358, Ann. Cas. 15A, 80, Ann. Cas. 15C, 932; *Floyd v. Perrin*, 30 S. C. 1, 8 S. E. 14, 15, 64 Am. St. Rep. 103, 2 L. R. A. 242, Ann. Cas. 12A, 554; *Hill v. City Council*, 59 S. C. 396, 38 S. E. 11, 17, Ann. Cas. 12D, 879, 24 A. L. R. 942; *McKiever v. Sumter*, 131 S. C. 266, 135 S. E. 60; *Plowden v. Beattie*, 185 S. C. 229, 193 S. E. 651.

Considering substance rather than form.—The restriction requiring the subject of an Act to be expressed in its title

should be reasonably construed, considering substance rather than form, to require the expression in the title of the general object but not the details or incidents, or means of effecting the object and should include the subject and not the purpose of the Act and the reasons which brought about the enactment of it by the Legislature. *Alley v. Daniel*, 153 S. C. 217, 150 S. E. 691, 692; *Plowden v. Beattie*, 185 S. C. 229, 193 S. E. 651.

And it should not be enforced in a narrow or technical spirit.—This constitutional requirement should not be enforced in any narrow or technical spirit. It was introduced to prevent certain abuses, and it should be reasonably and liberally construed on the one hand so as to guard against these abuses, and on the other hand so as not to embarrass or obstruct needed legislation. The statute should be upheld, if possible, doubtful cases being resolved in its favor, and, to justify the court in declaring it in violation of the constitutional inhibition, the objection must be serious and the conflict between the statute and the Constitution plain and unmistakable. *Alley v. Daniel*, 153 S. C. 217, 150 S. E. 691, 692.

The objection should be grave, and the conflict between the statute and the Constitution palpable, before the judiciary should disregard a legislative enactment upon the ground that it embraces more than one subject, or object, or, if it embraces but one subject or object, that it is not sufficiently expressed by the title. Where, after having applied the general principles governing the construction of constitutional provisions, a Court is still in doubt as to the constitutionality of an Act, it should sustain the same. *Alley v. Daniel*, 153 S. C. 217, 150 S. E. 691, 692.

Except where the title of an act definitely and specifically limits its object.—While this section is very liberally construed, yet when the title of an act definitely and specifically limits its object, the court must limit the operation of the act to the subject so expressed in the title. *State v. Blease*, 95 S. C. 403, 79 S. E. 247, L. R. A. 1917A, 232, Ann. Cas. 15A, 526.

An act is within this section when its provisions are germane to the title. *Barnsdale v. Laurens*, 58 S. C. 413, 36 S. E. 661, 79 Am. St. Rep. 460, 33 L. R. A. (N. S.) 1228; *Fleming v. Royall*, 145 S. C. 438, 143 S. E. 162; *Arthur v. Johnston*, 185 S. C. 324; 194 S. E. 151.

Or where the act provides means intended to facilitate accomplishment of general purpose.—This section is complied with if title expresses a general subject and if body of act provides means, methods, or instrumentalities intended to facilitate accomplishment of the general purpose. *McKiever v. Sumter*, 137 S. C. 266, 135 S. E. 60.

When an act of the Legislature expresses in its title the object of the act, the title embraces and expresses any lawful means to achieve the object, thus fulfilling the constitutional injunction that every law shall embrace but one subject, and that shall be expressed in its title. *Southern Power Co. v. Walker*, 89 S. C. 84, 71 S. E. 356, 358, Ann. Cas. 15A, 80, Ann. Cas. 15C, 932; *Means v. State Highway Dept.*, 146 S. C. 19, 143 S. E. 360; *Floyd v. Perrin*, 30 S. C. 1, 8 S. E. 14, 15, 64 Am. St. Rep. 103, 2 L. R. A. 242, Ann. Cas. 12A, 554; *Clarke v. South Carolina Public Service Authority*, 177 S. C. 427, 181 S. E. 481; *Crawford v. Johnston*, 177 S. C. 399, 181 S. E. 476.

When general subject of act is stated in title, any details of legislation which provides means, methods, or instrumentalities intended to facilitate accomplishment of general purpose and germane to the act, may be embraced in body thereof without violating this section. *State v. Moorer*, 152 S. C. 455, 150 S. E. 269.

It is not necessary that the title to an act should be an index of the contents of the statute under this section. *State v. Moorer*, 152 S. C. 455, 150 S. E. 269; *Plowden v. Beattie*, 186 S. C. 229, 193 S. E. 651; *Clarke v. South Carolina Public Service Authority et al.*, 177 S. C. 427, 181 S. E. 481; *Crawford v. Johnston*, 177 S. C. 399, 181 S. E. 476.

But the title of an act must reasonably disclose the subject matter thereof. *Wallace v. Sumter County*, 189 S. C. 395, 1 S. E. (2d) 345.

"Subject" meaning the thing legislated about.—"Subject" means the thing legislated about or the matter or matters upon which the Legislature operates to accomplish a definite object or objects reasonably related one to the other. *Poulnot v. Cantwell*, 129 S. C. 171, 123 S. E. 651; *Arthur v. Johnston*, 185 S. C. 324, 194 S. E. 151.

So that the title should not contain all provisions of act.—The title should not contain all the provisions of the act, but, under this section, must indicate the subject of the proposed legislation. *Robinson v. Columbia*, 116 S. C. 193, 107 S. E. 476.

And the generality of title is no objection.—The generality of a title is no objection to it, so long as it is not made a cover to legislation, incongruous in itself, and which, by no fair intendment, can be considered as having a necessary or proper connection. *Southern Power Co. v. Walker*, 89 S. C. 84, 71 S. E. 356, 358, Ann. Cas. 15A, 80, Ann. Cas. 15C, 932.

Nor is it objectionable that the act relates to two phases of same general subject.—Act of 1903, 24 Stat. 81, § 7164, providing penalty for failure of carrier to adjust loss or damage to freight in limited time relates to two phases of same

general subject, hence does not violate this section. *Aycock-Little Co. v. Southern Ry.*, 76 S. C. 331, 57 S. E. 27, Ann. Cas. 15A, 83.

See also, *DeLoach v. Scheper, et al.*, 188 S. C. 21, 198 S. E. 409.

The topics in body of an act should be kindred in nature and have a legitimate and natural association with the subject of the title, and, if the provisions of the act cannot be fairly construed as embraced within the title, it is in conflict with Constitution. *Douglas v. Watson*, 186 S. C. 34, 195 S. E. 116.

And this is true of a joint resolution which amends two different sections.—The fact that joint resolution relating to but one subject, viz., issuance of township bonds, amended two different sections of the Constitution, is not material, in view of the fact that the two sections amended related to the same subject. *Fleming v. Royall*, 145 S. C. 438, 143 S. E. 162.

But words omitted from title by clerical error cannot be supplied to make the title conform to the body of the act, as required by this section. *Robinson v. Columbia*, 116 S. C. 193, 107 S. E. 476.

II. APPLICATION.

Editor's Note.—Under the construction as stated in the preceding notes to this section most of the acts objected to have been held constitutional.

But an act authorizing domestic banks to forward drafts to drawee banks in other cities was held unconstitutional as broader than title. *Ex parte Wachovia Bank and Trust Co.*, 160 S. C. 104, 158 S. E. 214.

And where title of act recited that it was an act to amend named code section "by extending the application of the incontestability of a life insurance policy to agreements in the policy for indemnity for disability or other coverage," the act was unconstitutional as relating to subject not expressed in the title, as respects its amendment of former provisions affecting time when waiver of misrepresentations becomes effective. *Stewart v. Woodmen of World, Life Ins. Soc.*, 195 S. C. 365, 11 S. E. (2d) 449.

Title of act relating to practice of medicine is sufficient to include chiropractors. *State v. Barnes*, 119 S. C. 213, 112 S. E. 62.

Act authorizing county bond issue and creation of highway commission is not invalid. *Graham v. Erwin*, 114 S. C. 419, 103 S. E. 750.

An act providing for permit from Judge of Probate to import liquor and penalty for violations does not violate this section.—*Bradford v. Richardson*, 111 S. C. 205, 97 S. E. 58.

Nor does an act to prohibit the manufacture and sale of intoxicating liquors as a beverage within this state.—*Cantini v. Tillman*, 54 F. 969, 970.

Nor an act to provide punishment for

safe crackers.—*State v. O'Day*, 74 S. C. 448, 54 S. E. 607, Ann. Cas. 15A, 83.

Nor does an act to further regulate the running of motor vehicles in this state.—*Merchants', etc., Bank v. Brigman*, 106 S. C. 362, 91 S. E. 332, L. R. A. 1917E, 925, 4 A. L. R. 363.

And this is true of an act prohibiting combinations of insurers and providing a penalty.—*Henderson v. McMaster*, 104 S. C. 268, 88 S. E. 645, Ann. Cas. 18E, 481.

Act authorizing the insurance commissioner to review rates, is not unconstitutional under this section.—*Henderson v. McMaster*, 104 S. C. 268, 88 S. E. 645, Ann. Cas. 18E, 481.

Statute to further extend powers of bank receivers is sufficient to include provision to authorize receivers to collect statutory liability of stockholders. *Freeman v. Holliday*, 165 S. C. 408, 164 S. E. 20.

An act to authorize the county of Marion to issue bonds for permanent road and highway improvements.—*Johnson v. Road, etc., Com.*, 97 S. C. 205, 81 S. E. 502.

An act to prescribe the punishment for rape and assault with intent to ravish.—*State v. Butler*, 85 S. C. 45, 66 S. E. 1041.

An act, giving a right of action for the wrongful death of an illegitimate child to the mother.—*Croft v. Southern Cotton Oil Co.*, 83 S. C. 232, 65 S. E. 216, L. R. A. 1916E, 125, Ann. Cas. 16C, 720.

An act relating to the selection, drawing, and summoning of juries in circuit courts.—*State v. Franklin*, 80 S. C. 332, 60 S. E. 953, 19 L. R. A. (N. S.) 493, 33 L. R. A. (N. S.) 46.

Act requiring Supreme Court clerk to notify superintendent of dismissal of appeal suspending execution of death sentence was not unconstitutional as embracing subject not expressed in title. *Ex parte Howell*, 168 S. C. 197, 167 S. E. 230.

An act to regulate the manner in which common carriers doing business in the state shall adjust freight rates and claims for loss or damages to freight.—*McTeer v. Southern Express Co. (S. C.)* 58 S. E. 930.

Act regulating size and weight of trucks, trailers, and semitrailers not violative of this section. *State v. John P. Nutt Co.*, 180 S. C., 19; 185 S. E., 25. *Clarke v. S. C. Public Service Authority*, 177 S. C., 427; 181 S. E., 481.

Act authorizing the city of Charleston to issue bonds to pay maturing bonded debt.—*Buist v. City Council*, 77 S. C. 260, 57 S. E. 862, 12 L. R. A. (N. S.) 1159, Ann. Cas. 15A, 87, 26 A. L. R. 552.

Act relating to damages from defective highways.—*Scott v. Brookland*, 139 S. C. 321, 138 S. E. 32; *Drafts v. State Highway Dept.*, 142 S. C. 202, 140 S. E. 468.

Act authorizing cities to sell light and

ice plants.—McKiever v. Sumter, 137 S. C. 266, 135 S. E. 60.

Joint resolution for construction and operation of ferry and vehicular communication.—Poulnot v. Cantwell, 129 S. C. 171, 123 S. E. 651.

Joint resolution for purpose of amending Const. art. 10, §§ 5 and 6.—Fleming v. Royall, 145 S. C. 438, 143 S. E. 162.

Joint resolution as to bonds and certificates of stock of the state.—State v. Blease, 95 S. C. 403, 79 S. E. 247, L. R. A. 1917A, 232, Ann. Cas. 15A, 526.

An act authorizing a new issue of bonds and stocks by state sinking fund commission.—State v. Blease, 95 S. C. 403, 79 S. E. 247, L. R. A. 1917A, 232, Ann. Cas. 15A, 526.

Statute entitled "An act to establish the location of sections of state highway No. 2 in Greenville and Pickens Counties."—Means v. State Highway Dept., 146 S. C. 19, 143 S. E. 360.

Act establishing alternative state or district unit plan for financing highway construction.—State v. Moorer, 152 S. C. 455, 150 S. E. 269.

Bill providing for audit of county offices. — Spartanburg County v. Miller, 135 S. C. 348, 132 S. E. 673, 674.

Act regulating billiard and pocket billiard rooms.—Fowler v. Anderson, 131 S. C. 471, 128 S. E. 410.

Act regulating trapping. — State v. Stanley, 131 S. C. 511, 127 S. E. 574.

Act providing for forgery and offenses against the currency. — State v. Murray, 72 S. C. 508, 52 S. E. 189, 119 Am. St. Rep. 318, 8 L. R. A. (N. S.) 1176.

Pay-as-you-go act.—Briggs v. Greenville County, 137 S. C. 288, 135 S. E. 153.

The financing of the redemption of defaulted bonds of Chesterfield county by the highway department which was authorized to purchase bonds from holders and to hold them as obligations of county was incident to or promotive of the financing of the state government and the regulation of its fiscal affairs and within the scope of the general purposes of the Appropriation Acts for the years 1930, 1931, 1935, and 1936, as respects compliance with constitutional provision that every act shall relate to but one subject which shall be expressed in its title.—Chesterfield County v. State Highway Department of South Carolina, 191 S. C. 19, 3 S. E. (2d) 686.

Act which created state highway commission, provided for election of highway commissioners, directed commission to reduce its outstanding obligations, directed issuance of certificates of indebtedness and reduced annual license fee on motor vehicles is not violative of this constitutional requirement. State ex rel. Coleman v. Lewis et al., 181 S. C. 11, 186 S. E. 625.

Act as to Anderson County school bonds.—Brownlee v. Brock, 107 S. C.

230, 92 S. E. 477.

An act to amend an act to establish the Anderson school district.—Burris v. Brock, 95 S. C. 104, 79 S. E. 193.

The act providing for the levy of taxes for county, school and other purposes, for the year 1938-1939, and directing the expenditure thereof in Beaufort county and amending a joint resolution enacted in 1936, did not violate this section. DeLoach v. Scheper, et al., 188 S. C. 21, 198 S. E. 409.

An act to validate, ratify and confirm all proceedings of the trustees of a school district.—Dove v. Kirkland, 92 S. C. 313, 75 S. E. 503, Ann. Cas. 15A, 532.

Act respecting school elections in Spartanburg county. — Becknell v. Waters, 156 S. C. 77, 152 S. E. 816.

Act entitled "An act to make appropriations to meet the ordinary expenses of state government for the fiscal year beginning January 1, 1932, to provide a tax to defray same and regulate the expenditure thereof," which appropriated sums to be used to pay county auditors and treasurers, was not unconstitutional as relating to more than one subject, since payment of such salaries is ordinary expense of government. Plowden v. Beattie, 185 S. C. 229, 193 S. E. 651.

An act establishing the Spartanburg metropolitan district.—Alley v. Daniel, 153 S. C. 217, 150 S. E. 691.

Act authorizing issuance of bonds covering indebtedness of school districts.—Shelor v. Pace, 151 S. C. 99, 148 S. E. 726.

Act consolidating five existing school districts.—Walker v. Bennett, 125 S. C. 389, 118 S. E. 779.

Act authorizing suit against state.—Sandel v. State, 115 S. C. 168, 104 S. E. 567, 13 A. L. R. 1268, 1280, 23 A. L. R. 676.

But act relating to cities having commission form of government is unconstitutional for failure to express subject in title. Floyd v. Bennett, 124 S. C. 483, 117 S. E. 722.

So also an act, so far as it authorizes the redemption of Brown Consols in addition to redemption Brown Consols, violates this section. State v. Blease, 95 S. C. 403, 79 S. E. 247, L. R. A. 1917A, 232, Ann. Cas. 15A, 526.

The saving clause which was to operate if part of statute regarding collection of delinquent taxes in Chesterfield county was declared unconstitutional could not save any part of statute, where the vice of unconstitutionality pervaded the parts of the statute essential to its operation. Douglas v. Watson, 186 S. C. 34, 195 S. E. 116.

An act to provide for the collection of delinquent taxes in Chesterfield county in five annual installments violated constitution, under which every act must relate to but one subject which must be expressed in title. Douglas v. Watson,

186 S. C. 34; 195 S. E. 116.

An act to amend the criminal law for the punishment of abortion was unconstitutional.—*State v. Fields*, 68 S. C. 148, 46 S. E. 771.

Act authorizing forwarding banks to forward negotiable instruments directly to drawee banks in other cities was unconstitutional. *Ex parte Wachovia Bank & Trust Co.*, 160 S. C. 104, 158 S. E. 214.

Amendatory act making special act general is unconstitutional for failure of title to conform to body of act. *Robinson v. Columbia*, 116 S. C. 193, 107 S. E. 476.

Applied in *State v. Bradley*, 109 S. C. 411, 96 S. E. 142; *State v. Glover*, 91 S. C. 562, 75 S. E. 218, *Ann. Cas.* 16D, 12, 45, *Ann. Cas.* 17D, 280; *McKerall v. Road*, etc., *Comm.*, 91 S. C. 450, 74 S. E. 981,

Ann. Cas. 15A, 80; *Verner v. Muller*, 89 S. C. 117, 71 S. E. 654, *Ann. Cas.* 13D, 121, *Ann. Cas.* 15A, 87; *State v. Fant*, 88 S. C. 493, 70 S. E. 1027; *State v. Burley*, 80 S. C. 127, 61 S. E. 255, 16 L. R. A. (N. S.) 266; *State v. Hunter*, 79 S. C. 91, 60 S. E. 226, *Ann. Cas.* 15A, 80; *Parks v. Laurens Cotton Mills*, 75 S. C. 560, 56 S. E. 234, 23 A. L. R. 1481; *Riley v. Charleston Union Station Co.*, 71 S. C. 457, 51 S. E. 485, 110 *Am. St. Rep.* 579, 10 L. R. A. (N. S.) 909, 11 L. R. A. (N. S.) 942, 22 L. R. A. (N. S.) 8, 36, 47, 75, 87, 123, *Ann. Cas.* 15A, 83; *Wingfield v. South Carolina Tax Comm.*, 147 S. C. 116, 144 S. E. 846. See note to art. 3, § 15; *Blair v. Morgan*, 59 S. C. 52, 37 S. E. 45; *State v. Port Royal*, etc., *Ry. Co.*, 45 S. C. 413, 23 S. E. 363; *Malcomson v. Wappoo Mills*, 86 F. 192; *State v. Crosby*, 51 S. C. 247, 28 S. E. 529.

Section 18. Formalities of act.—No Bill or Joint Resolution shall have the force of law until it shall have been read three times and on three several days in each house, has had the Great Seal of the State affixed to it, and has been signed by the President of the Senate and the Speaker of the House of Representatives: *Provided*, That either branch of the General Assembly may provide by rule for a first and third reading of any Bill or Joint Resolution by its title only.

See Const. 1868, II, 21.

"Reading" contemplated is reading of bill as drafted.—*Santee Mills v. Query*, 122 S. C. 158, 115 S. E. 202.

Yea and nay vote need not be taken on each reading.—Under this section it was unnecessary for a ye and nay vote to be taken and entered on the journal upon the first readings of a joint resolution proposing a constitutional amendment and a bill ratifying the amendment, notwithstanding art. 16, § 1, there being no requirement under such constitutional provision that the ye and nay vote be taken on each reading, and it being sufficient if the two thirds vote required be taken after the second reading. *Thompson v. Livingston*, 116 S. C. 412, 107 S. E. 581.

Failure of journal to show fact that no nay votes were cast on second reading of joint resolution is not fatal.—*Thompson v. Livingston*, 116 S. C. 412, 107 S. E. 581.

Extrinsic evidence incompetent to impeach act.—Where act was duly signed by presiding officers of General Assembly and approved by Governor of state and duly enrolled in office of secretary

of state, evidence outside act itself offered to show that act had not received three readings in each of Houses on three several days as required by this section, and that act, though revenue measure, had not originated in House of Representatives, as required by § 15, and that it was improperly amended during its passage, was incompetent to impeach act. *State v. Moorer*, 152 S. C. 455, 150 S. E. 269.

Act which has been entitled and signed by president of Senate and speaker of House of Representatives is conclusively presumed by court to have been properly passed. *State v. Lewis*, 181 S. C. 10; 186 S. E. 625.

Income tax law not unconstitutional because without required reading before passage.—*Santee Mills v. Query*, 122 S. C. 158, 115 S. E. 202.

Act regulating size and weight of trucks, trailers, and semitrailers not violative of this section. *State v. John P. Nutt Co.*, 180 S. C. 19; 185 S. E., 25.

Applied in *Wingfield v. South Carolina Tax Comm.*, 147 S. C. 116, 144 S. E. 846. See note to art. 3, § 15.

Section 19. Mileage—increase of per diem—extra session.—Each member of the General Assembly shall receive five cents for every mile for the ordinary route of travel in going to and returning from the place where its sessions are held; no General Assembly shall have the power to increase the per diem of its own members; and members of the General Assembly when con-

vened in extra session shall receive the same compensation as is fixed by law for the regular session.

See Const. 1868, II, 24.

An act appropriating expense money for members of General Assembly is constitutional. — An act of the General Assembly appropriating \$260, designated as expense money for each of its members was held constitutional in *Scroggie v. Scarborough*, 162 S. C. 218, 160 S. E. 596.

Where its effect is not an increase of compensation. — But if it should be found that the effect of the appropriation was to increase the compensation of members of the General Assembly, such appropriation would be unconstitutional. *Scroggie v. Scarborough*, (S. C. 1931).

Section 9 of this article, considered with this section, clearly prohibits increasing the compensation of the members of the Legislature during their term of office. But the payment of expenses is not prohibited by these provisions. *Scroggie v. Scarborough*, 162 S. C. 218, 160 S. E. 596.

As section 30 of this article has no application to members of Legislature. — Section 30 of this article, which is a general provision relating to public officers is not applicable to members of the Legislature, under recognized rules of statutory and constitutional constructions to the effect that in legislative enactment, where a special provision is made as to a subject which would otherwise be embraced in a general provision on the same subject the special provision is held to be an exception, and not intended to be embraced in the general provision. *Scroggie v. Scarborough*, 162 S. C. 218, 160 S. E. 596.

Section 30 of this article relates to public officers generally, while § 9 and this section relate to members of the General Assembly only. Although public of-

ficers include public legislators, since the compensation and expenses of legislators are treated specifically in § 9 and this section, the members of the Legislature would not be included in the general term, "public officers" for the purposes of § 30. This view is supported by the fact that § 30 occurs, not among the 26 sections of this article which relate to the General Assembly but among the nine remaining sections which are all of general or miscellaneous character. *Scroggie v. Scarborough*, 162 S. C. 218, 160 S. E. 596.

In § 30 of this article the words "compensation," "fee" and "allowance" are used co-ordinately, and apparently it was intended that each of them should have a particular meaning. "Allowance" evidently refers to payments of whatever nature other than those covered by "compensation" and "fee." "Compensation," therefore, as used in § 30, must have its usual meaning, for if it includes other payments covered by the term "allowance," then the use of the latter term is entirely superfluous—a result foreign to the genius of statutory and constitutional construction. No good reason appears why the word "compensation" should be given one meaning in § 30 and another in § 9 of this article. From all of which, it is concluded that this word as used in § 9 refers only to payment for services rendered, and does not include the allowance for expenses. *Scroggie v. Scarborough*, 162 S. C. 218, 160 S. E. 596.

Legislator, who received \$90.00 for 9 days' service at \$10.00 per day for expenses plus travel and postage allowances for extra session, is not entitled to any more pay. *Godfrey v. Hunter*, 176 S. C., 442; 180 S. E. 468.

Section 20. Elections "viva voce."—In all elections by the General Assembly or either House thereof, the members shall vote "*viva voce*", except by unanimous consent, and their votes thus given shall be entered upon the Journal of the House to which they respectively belong.

See Const. 1868, II, 24.

Amended by a joint resolution and an act: 1918 (30) 1123; 1919 (31) 40. See FOREWORD on page 1159 of this volume.

Section 21. Adjournments.—Neither house, during the session of the General Assembly, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which it shall be at the time sitting.

See Const. 1868, II, 25.

Section 22. Journal—yeas and nays.—Each house shall keep a journal of its own proceedings, and cause the same to be published immediately

after its adjournment, excepting such parts as, in its judgment, may require secrecy; and the yeas and nays of the members of either house, on any question, shall, at the desire of ten members of the House or five members of the Senate, respectively, be entered on the journal. Any member of either house shall have liberty to dissent from and protest against any Act or resolution which he may think injurious to the public or to an individual, and have the reasons of his dissent entered on the journal.

See Const. 1868, II, 26.

Journal must be considered as a whole.—In determining from its journal what was or was not done by the Senate, the journal must be considered as a whole, as any other record would be. State v.

Tollison, 100 S. C. 165, 84 S. E. 819.

The Senate has the right and power, while in session, to correct its own journal. State v. Tollison, 100 S. C. 165, 84 S. E. 819.

Section 23. Doors open.—The doors of each house shall be open, except on such occasions as in the opinion of the House may require secrecy.

See Const. 1868, II, 27.

Section 24. Holding two offices.—No person shall be eligible to a seat in the General Assembly while he holds any office or position of profit or trust under this State, the United States of America, or any of them, or under any other power, except officers in the militia and Notaries Public; and if any member shall accept or exercise any of the said disqualifying offices or positions he shall vacate his seat.

See Const. 1868, II, 28.

The election of members of board of trustees of the University of South Carolina is a function of the Legislature exclusively, and it is beyond power of Supreme Court to direct the Legislature to perform any duty it may have in that regard.—Cuthbertson v. Blatt, 194 S. C. 105, 9 S. E. (2d) 218.

It is not within the power of the Supreme Court to impinge upon exercise of Legislature of a power vested in that body merely because in the exercise of or failure to exercise that power some constitutional provision has been violated.—Ibid.

The Supreme Court has no power at the instance of a citizen and taxpayer, who had no other interest, to correct alleged violation of constitutional provisions that no person shall be eligible to General Assembly seat while he holds

any office or position of profit or trust under the state, and that no person shall hold two offices of honor or profit at the same time, resulting from fact that certain members of the board of trustees of the University of South Carolina who were elected by the General Assembly were subsequently elected to other offices, and that other trustees were elected by the General Assembly during their term of office as State Senators. Ibid.

The traditional and constitutional division of powers among the legislative, executive, and judicial branches of the government places it beyond Supreme Court's power, on mere allegation that Legislature has violated a constitutional mandate, to issue prohibitive or other injunctive or mandatory decree which would have the effect of undoing such violation. Ibid.

Section 25. Vacancies.—If any election district shall neglect to choose a member or members on the day of election, or if any person chosen a member of either house shall refuse to qualify and take his seat, or shall resign, die, depart the State, accept any disqualifying office or position, or become otherwise disqualified to hold his seat, a writ of election shall be issued by the President of the Senate or Speaker of the House of Representatives, as the case may be, for the purpose of filling the vacancy thereby occasioned for the remainder of the term for which the person so refusing to qualify, resigning, dying, departing the State, or becoming disqualified,

was elected to serve, or the defaulting election district ought to have chosen a member or members.

See Const. 1868, II, 29.

Section 26. Oath of office.—Members of the General Assembly, and all officers, before they enter upon the duties of their respective offices, and all members of the bar, before they enter upon the practice of their profession, shall take and subscribe the following oath: "I do solemnly swear (or affirm) that I am duly qualified, according to the Constitution of this State, to exercise the duties of the office to which I have been elected, (or appointed,) and that I will, to the best of my ability, discharge the duties thereof, and preserve, protect and defend the Constitution of this State and of the United States. I do further solemnly swear (or affirm) that I have not since the first day of January, in the year Eighteen hundred and Eighty-one, engaged in a duel as principal or second or otherwise; and that I will not, during the term of office to which I have been elected (or appointed) engage in a duel as principal or second or otherwise. So help me God."

See Const. 1868, II, 30.

Section 27. Removal of officer.—Officers shall be removed for incapacity, misconduct or neglect of duty, in such manner as may be provided by law, when no mode of trial or removal is provided in this Constitution.

See Const. 1868, II, 31.

Scope of section.—This section requires that officers shall be removed in the manner provided by law for incapacity, misconduct, or neglect of duty, legally shown to the removing power, and leaves to the Legislature the discretion to provide the manner of removal, the designation of the person or tribunal which shall have the power of removal, and the procedure to ascertain the fact of incapacity, misconduct, or neglect of duty, unless a mode of trial or removal is provided in the Constitution. *McDowell v. Burnett*, 92 S. C. 469, 75 S. E. 873, Ann. Cas. 14B, 525.

The Governor has no implied power to remove an officer holding under the Constitution creating the office and fixing the tenure, unless the power is conferred by the Constitution or statute. *McDowell v. Burnett*, 92 S. C. 469, 75 S. E. 873, Ann. Cas. 14B, 525.

The only power of the Governor to remove a sheriff is after trial and conviction in the manner prescribed by the statutes enacted under this section. *State v. Hough*, 103 S. C. 87, 87 S. E. 436, L. R. A. 1918F, 1049.

Nor is such power an incident to his office.—The power of removal from office by the Governor is not an incident to his office, but exists only when conferred by the Constitution or statutes, or is implied from the conferring of the power of appointment. *State v. Rhame*,

92 S. C. 455, 75 S. E. 881, Ann. Cas. 14B, 519, Ann. Cas. 16E, 219.

But the General Assembly has power to provide for method of removal.—The General Assembly in presence of constitutional provisions, has power to provide method of removal of sheriff from office. *State v. Ballentine*, 152 S. C. 365, 150 S. E. 46, 66 A. L. R. 574.

In absence of constitutional provisions.—Public officers have no contract or property rights in their offices, and, except as provided by the Constitution, they are subject to legislative control, and the Legislature may, subject to the Constitution, fix the term of office, provide for removal, abolish the office, or reduce the term. *State v. Rhame*, 92 S. C. 455, 75 S. E. 881, Ann. Cas. 14B, 519, Ann. Cas. 16E, 219.

Except in case of appointive officers who may be removed by appointing officer.—This section does not abrogate the general rule that an appointive officer may be removed at the pleasure of the appointing power; his term of office not having been fixed by law. *Sanders v. Belue*, 78 S. C. 171, 58 S. E. 762, L. R. A. 1915E, 582, Ann. Cas. 12C, 375, Ann. Cas. 14B, 525.

Applied in *State v. Ansel*, 76 S. C. 395, 57 S. E. 185, 32 L. R. A. (N. S.) 356, 39 L. R. A. (N. S.) 789, Ann. Cas. 13B, 789.

See *Dacas v. Johnston*, 180 S. C. 332, 185 S. E. 494, under art. IV, sect. 22.

Section 28. Homestead—married woman's exemption—taxes—purchase money—waiver—husband and wife—exemption for unmarried person.—

The General Assembly shall enact such laws as will exempt from attachment, levy and sale under any mesne or final process issued from any Court, to the head of any family residing in this State, a homestead in lands, whether held in fee or any lesser estate, to the value of one thousand dollars, or so much thereof as the property is worth if its value is less than one thousand dollars, with the yearly products thereof, and to every head of a family residing in this State, whether entitled to a homestead exemption in lands or not, personal property to the value of five hundred dollars, or so much thereof as the property is worth if its value is less than five hundred dollars. The title to the homestead to be set off and assigned shall be absolute and be forever discharged from all debts of the said debtor then existing or thereafter contracted except as hereinafter provided: *Provided*, That in case any woman having a separate estate shall be married to the head of a family who has not of his own sufficient property to constitute a homestead as hereinbefore provided, said married woman shall be entitled to a like exemption as provided for the head of the family: *Provided, further*, That there shall not be an allowance of more than one thousand dollars' worth of real estate and more than five hundred dollars' worth of personal property to the husband and wife jointly: *Provided further*, That no property shall be exempt from attachment, levy or sale for taxes, or for payment of obligations contracted for the purchase of said homestead or personal property exemption or the erection or making of improvements or repairs thereon: *Provided, further*, That the yearly products of said homestead shall not be exempt from attachment, levy or sale for the payment of obligations contracted in the production of the same: *Provided, further*, That no waiver shall defeat the right of homestead before assignment except it be by deed of conveyance, or by mortgage, and only as against the mortgage debt; and no judgment creditor or other creditor whose lien does not bind the homestead shall have any right or equity to require that a lien which embraces the homestead and other property shall first exhaust the homestead: *Provided, further*, That after a homestead in lands has been set off and recorded the same shall not be waived by deed of conveyance, mortgage or otherwise, unless the same be executed by both husband and wife, if both be living: *Provided, further*, That any person not the head of a family shall be entitled to a like exemption as provided for the head of a family in all necessary wearing apparel and tools and implements of trade, not to exceed in value the sum of three hundred dollars.

See Const. 1868, II, 32.

Cross reference.—For statutes enacted pursuant to this section, see §§ 9085 et seq., and notes thereto.

Section liberally but carefully interpreted. — Constitutional and statutory provisions for homestead exemptions, while requiring a liberal interpretation and construction in order that ends sought to be accomplished should not be defeated should not receive such broad and liberal interpretation and construc-

tion as will make of them instruments of fraud and oppression. *Baker v. DeWitt*, 140 S. C. 114, 138 S. E. 626.

This section is not retroactive. *Bank v. Kohn*, 52 S. C. 120, 29 S. E. 625.

It applies only to homesteads set off since adoption of Constitution.—*Ex parte Jeter*, 64 S. C. 405, 42 S. E. 196, 95 Am. St. Rep. 915.

Homestead is exempt from execution for costs incurred in a suit upon a bond

executed before the Constitution went into effect. *National Bank v. Goodman*, 33 S. C. 601, 11 S. E. 785.

And continues no longer than death.—Widow of testator, if having right to claim homestead in property as "head of family," could not devise property so that devisee would take it free from lien of judgments against testator, since will does not take effect until death and homestead right continues to head of family no longer than death. *Dorn v. Stidham*, 139 S. C. 66, 137 S. E. 331.

As the section does not create a new estate.—This section does not create any new estate, but the title in the husband is burdened with the homestead for the enjoyment of himself and wife. *Davis v. Milady*, 92 S. C. 135, 75 S. E. 363, Ann. Cas. 14B, 267, Ann. Cas. 16C, 650.

The right to claim homestead is a personal right given by the Constitution to the head of a family residing in this state, and on his death the right dies with him, unless he leaves a widow or children, in which case it continues to them and to no others. *Dorn v. Stidham*, 139 S. C. 66, 137 S. E. 331.

Niece of testatrix is not entitled to homestead exemption in lands devised to her as against debts of testatrix, in view of history of legislation and of this section. *Dorn v. Stidham*, 139 S. C. 66, 137 S. E. 331.

Residing in this state.—A resident of state only may claim homestead exemption in his or her property as against debts, and when such exemption is claimed, claimant must bring himself or herself within the definition of "head of family" in sense that term is used in homestead laws. *Dorn v. Stidham*, 139 S. C. 66, 137 S. E. 331.

Nonresident who was sued as such could not return to South Carolina after absence of ten years and after attachment of her property as nonresident which she did not contest, and establish homestead which would be prior to attachment lien, notwithstanding that nonresident may have been the head of a family. *Bomebrake v. Morrow*, 183 S. C. 170; 190 S. E. 506.

A head of family being one who manages a house and supports some person.—The head of a family is one who controls, supervises, and manages a house and has living with him and is supporting some person whom it is either his moral or legal duty to support; and a bankrupt who was a single man, living alone, and whose parents were living, is not the head of a family and entitled to the exemption because he was at the time of his bankruptcy paying the board and expenses of a sister at a school. In re *McGowan*, 170 F. 493.

At the time of attempted levy.—The debtor need not have been the head of a family at the time the debt was con-

tracted. It is sufficient that he was such at the time of the attempted levy. *Gray v. Putnam*, 51 S. C. 97, 28 S. E. 149, L. R. A. 1915A, 424.

Who need not be a husband or father or of masculine gender.—*Dorn v. Stidham*, 139 S. C. 66, 137 S. E. 331.

A feme sole who has neither parent nor brother living in the state, and who has living with her, and entirely dependent on her for support, an invalid sister, is "the head of a family," under this section though it does not appear that she lives on the land in which the homestead is claimed. *Chamberlain v. Brown*, 33 S. C. 597, 11 S. E. 439, 70 Am. St. Rep. 113, 4 L. R. A. (N. S.) 385.

Upon death of head of family right to interpose claim of homestead exemption is transferred to widow and children.

—Upon death of a head of family who owed debts and to whom no homestead had been assigned in his lifetime, right to interpose claim of homestead exemption as against debts of deceased is transferred by homestead laws to widow or children or both. *Dorn v. Stidham*, 139 S. C. 66, 137 S. E. 331.

Under this section and statutes enacted thereunder the widow and children of the head of a family are entitled to enforce their right of homestead in property left to them under a will directing payment of testator's debts. *Ex parte Cothran*, 128 S. C. 122, 121 S. E. 556.

Even though they have separate estates in their own right.—The widow of a person in whom a right of homestead existed is entitled to exemption of homestead in lands of deceased, though she and her children have separate estates in their own right. *Brown v. Williamson*, 37 S. C. 181, 15 S. E. 926.

But widow cannot claim exemption in dower lands in addition to one allowed in husband's estate.—A widow cannot claim a homestead exemption in her dower lands in addition to a homestead exemption previously claimed and allowed in her deceased husband's estate. *Landham v. Glover*, 46 S. C. 65, 24 S. E. 49.

In other words exemption to husband or wife is limited by constitutional amount.—A married woman, having a separate estate, who becomes bankrupt, and whose husband owns personal property of the value of \$150, is entitled to claim only \$350 as the personal property exemption to be set apart to her in the bankruptcy proceedings. In re *McCutchen*, 100 F. 779.

And a statute exempting more than constitutional amount violates this section.—Section 7985, exempting proceeds of life insurance policy for benefit of married woman from claims of husband's creditors, is in violation of this section, as making an exemption allowance of husband and wife of more than \$500,

and as conflicting with Constitution, in that Constitution has occupied full domain of exemptions, so that trustee in bankruptcy would have right to surrender value of life policy. In re Cunningham, 15 F. (2d) 700.

But the South Carolina Supreme Court expressly refused to pass upon the constitutionality of section 7985, holding that by its terms it does not apply to cash surrender value of life insurance policy, to which trustee in bankruptcy would therefore be entitled. *Wilson v. Mutual Ben. Life Ins. Co. of Newark*, 182 S. C. 131, 188 S. E. 803.

But a woman is not entitled to exemption merely because a widow.—*Dorn v. Stidham*, 139 S. C. 66, 137 S. E. 331.

Or a man simply because he is a married man with children.—The homestead provided for by this section and statutes enacted pursuant thereto is not for the use of a man simply because he is a married man with children, but is for the benefit of the family, and one claiming a homestead must show that he is the head of a family. *Ex parte Sams*, 126 S. C. 245, 119 S. E. 798.

Under this section no gift or devise of property by will can defeat the right of homestead. *Ex parte Cothran*, 128 S. C. 122, 121 S. E. 556.

This section includes a devise, and prevents the alienation of the homestead, either by deed or devise, or in any other manner, unless the wife joins the husband in the disposition. *Davis v. Milady*, 92 S. C. 135, 75 S. E. 363, Ann. Cas. 14B, 267, Ann. Cas. 16C, 650.

A husband who purchased land subsequent to this section, and laid it off as a homestead, could not, without the assent of the wife, devise it during her life, so as to deprive her of the benefits of the homestead, but, after her death, a devise would be valid. *Davis v. Milady*, 92 S. C. 363, 75 S. E. 363, Ann. Cas. 14B, 267, Ann. Cas. 16C, 650.

Mere failure to give the sheriff notice of the claim of a homestead cannot impair debtor's right to same. *Gray v. Putnam*, 51 S. C. 97, 28 S. E. 149, L. R. A. 1915A, 424.

The right to exemption may be relinquished by waiver.—The word "waived" in this section, providing that a homestead set off and recorded shall not be waived by deed of conveyance, mortgage, or otherwise, unless executed by both husband and wife, does not exclude a grant or mortgage, or any other disposition which may be included in the word "otherwise", a waiver is an inten-

tional relinquishment of a known right. *Davis v. Milady*, 92 S. C. 135, 75 S. E. 363, Ann. Cas. 14B, 267, Ann. Cas. 16C, 650.

And joint execution by husband and wife is unnecessary to waive homestead, where bankrupt failed to record proceedings in bankruptcy setting aside homestead. *Baker v. De Witt*, 140 S. C. 114, 138 S. E. 626.

The mortgage of a homestead assigned before this Constitution but executed after, does not require the signature of both husband and wife, as required by such Constitution, to make it valid. *Ex parte Jeter*, 64 S. C. 405, 42 S. E. 196, 95 Am. St. Rep. 915.

A life estate in real property is not the subject of homestead exemption, and the value of such estate, and not the value of the fee simple in the same lands, must be taken as the basis of appraising the exemption. *Bank v. Gibbes*, 54 S. C. 579, 32 S. E. 690.

Money borrowed to pay purchase price of land bought from a third party is not purchase money. *McNair v. Moore*, 64 S. C. 82, 41 S. E. 829, 13 L. R. A. (N. S. 170, Ann. Cas. 17C, 997.

Mortgage bars homestead.—If one mortgage his land, he may not claim homestead in it, as against the mortgage. *Bank v. Kohn*, 52 S. C. 120, 29 S. E. 625. *Bank v. O'Shields*, 167 S. C. 296, 166 S. E. 351.

Abrogate two fund doctrine.—The constitution and § 9089 abrogate the two fund doctrine as applied in the claim of homestead. *Id.*

Homestead in land owned by debtor as tenant in common with others cannot be set off. *Waddy v. Wall, Sheriff*, 183 S. C. 229, 190 S. E. 497.

Judgment is not lien upon homestead property, and there can be no valid levy or sale of such property under execution of judgment. *Eaddy v. Wall, Sheriff*, 183 S. C. 229, 190 S. E. 497.

Purchaser of homestead property takes title free from judgment lien, whether or not homestead has been admeasured and set off, since such procedure is intended merely to designate what is exempt, and does not affect right of exemption. *Eaddy v. Wall, Sheriff*, 183 S. C. 229, 190 S. E. 497.

Where testator's realty was converted into personality under equitable doctrine of conversion, homestead allowance to parties entitled thereto limited to homestead in personality. *Sixon v. Deers*, 31 F. S. 912.

Section 29. Taxes laid upon actual value.—All taxes upon property, real and personal, shall be laid upon the actual value of the property taxed, as

the same shall be ascertained by an assessment made for the purpose of laying such tax.

See Const. 1868, II, 33.

An assessment is essential to constitute a liability for an ad valorem tax. State v. Cheraw, etc., R. Co., 54 S. C. 564, 32 S. E. 691; State ex rel. Daniel v. Textile Hall Corporation, 185 S. C. 407, 194 S. E. 66.

Applied in State v. Tucker, 56 S. C. 516, 35 S. E. 215, 1 A. L. R. 727; Martin v. School Dist., 57 S. C. 125, 35 S. E. 517, 14 L. R. A. (N. S.) 851; Stehmeyer v. City Council, 53 S. C. 259, 31 S. E. 322, 78 Am. St. Rep. 236, 271, 61 L. R. A. 55,

3 L. R. A. (N. S.) 819, 28 L. R. A. (N. S.) 1133, Ann. Cas. 16B, 527; Thomas v. Town Council, 52 S. C. 181, 29 S. E. 647; Germania Sav. Bank v. Darlington, 50 S. C. 337, 27 S. E. 846, 847, 28 L. R. A. (N. S.) 149, 29 L. R. A. (N. S.) 183, Ann. Cas. 13E, 86; In re Jager, 29 S. C. 438, 7 S. E. 605, 1029 Am. St. Rep. 268, 294, L. R. A. 1915B, 659; Charlotte, etc., R. Co. v. Gibbes, 27 S. C. 385, 4 S. E. 49, 89 Am. St. Rep. 614, 634, 52 L. R. A. 372.

See § 2569 and notes thereto.

Section 30. Extra compensation not permitted—appropriations for repelling invasion.—The General Assembly shall never grant extra compensation, fee or allowance to any public officer, agent, servant or contractor after service rendered, or contract made, nor authorize payment or part payment of any claim under any contract not authorized by law; but appropriations may be made for expenditures in repelling invasion, preventing or suppressing insurrection.

Cross reference.—As to constitutionality of act appropriating expense money for each member of the legislature, see

notes under § 19 of this article.

Applied in Lyon v. Patterson, 102 S. C. 525, 87 S. E. 306.

Section 31. Public lands.—Lands belonging to or under the control of the State shall never be donated, directly or indirectly, to private corporations or individuals, or to railroad companies. Nor shall such land be sold to corporations, or associations, for a less price than that for which it can be sold to individuals. This, however, shall not prevent the General Assembly from granting a right of way, not exceeding one hundred and fifty feet in width, as a mere easement to railroads across State land, nor to interfere with the discretion of the General Assembly in confirming the title to lands claimed to belong to the State, but used or possessed by other parties under an adverse claim.

A grant for public uses is not violative of this section.—Act General Assembly March 5, 1924 (33 St. at Large, p. 1518), leasing land theretofore used as public square for erection of building to contain offices of county and home demonstration agents and other county officers or auditorium for public assemblage, free of rent, is not violative of this section as attempt to devote public property to private corporation; the grant being for public uses. Antonakas v. Anderson Chamber of Commerce, 130 S. C. 215, 126 S. E. 35, 36.

Conveyance by city council of municipal property to private person for erection of hotel is not invalid as violative of this section, but is one for a public purpose authorized in the city's charter, and supported by a contractual consideration in the form of substantial returns

on tax revenues, and benefits to the city and its inhabitants. Haesloop v. City Council, 123 S. C. 272, 115 S. E. 596, 597.

Grant of land for construction of canal, and contract incorporated in statute which relieved successor of grantee from performance of covenants of grants, not prohibited "donation" of land, where under terms of grant and contract state had received electric power of value of \$180,000.00, benefit of moneys expended by grantee in construction and maintenance of distribution lines, and generating and property taxes, and would continue to receive such benefits in perpetuity. State v. Broad River Power Co., 177 S. C., 240; 181 S. E., 41.

Indirect benefits expected to result from improvement of land granted by state by way of promotion of public convenience, increase in value of adjacent

property, and taxes to be paid on improvements, are sufficient to keep such grant from amounting to donation. *State v. Broad River Power Co.*, 177 S. C., 240; 181 S. E. 41.

Conferring on chamber of commerce site for erection of building is not "donation of public property." *Chapman v. Greenville Chamber of Commerce*, 127 S. C. 173, 120 S. E. 584, 585.

To what lands not applicable.—Real estate, title in fee to which had been conveyed away by state in 1892, was not, at time of adoption of constitution of

1895, "lands belonging to or under the control of the state," within constitutional provision prohibiting donation of such land to private corporations or individuals. *State v. Broad River Power Co.*, 177 S. C., 240; 181 S. E. 41.

Land granted by the state under Act Aug. 13, 1873 (7 St. at Large, p. 97), to the city of Charleston in fee simple and in proprietary right, does not come under the provisions of this section; the land not having been granted for governmental purposes. *Haesloop v. City Council*, 123 S. C. 272, 115 S. E. 596.

Section 32. Salary of deceased officer—pensions.—The General Assembly shall not authorize payment to any person of the salary of a deceased officer beyond the date of his death; nor grant pensions except for military and navy service; nor retire any officer on pay or part pay. *Provided, However*, the General Assembly may provide for the care of or extend financial assistance to needy dependent children under the age of sixteen who would otherwise be deprived of support and care, and to persons who are blind, and to needy individuals who have obtained the age of sixty-five years and who, by reason of age or other infirmities, are unable to support themselves and would otherwise suffer; that any adult person making application for such assistance must show that he or she has been a resident in the State of South Carolina for at least five of the last nine years, and has resided therein continuously for one year immediately preceding the date of such application, but that no individual aided under this provision shall receive more than Thirty (\$30.00) Dollars per month from any public funds.

Amended by a joint resolution and an act: 1936 (39) 1614; 1937 (40) 52. See FOREWORD on page 1159 of this volume.

Pension for disabled firemen.—Act May 9, 1906, requiring fire insurance companies to pay annually a specified sum on premiums to create a pension fund for disabled firemen, violates this

section a pension being an annuity from the government for past services. *Aetna Fire Ins. Co. v. Jones*, 78 S. C. 445, 59 S. E. 148, 125 Am. St. Rep. 818, 13 L. R. A. (N. S.) 1147, Ann. Cas. 12C 546, 13 A. L. R. 833.

Section 33. Marriages of whites and negroes—sexual intercourse.—The marriage of a white person with a negro or mulatto, or person who shall have one-eighth or more of negro blood, shall be unlawful and void. No unmarried woman shall legally consent to sexual intercourse who shall not have attained the age of fourteen years.

Rights of child of white person and one having less than one-eighth negro blood.—The child of a union of a white person and one having less than one-eighth negro blood is entitled to exercise all the legal rights of a white man, except those arising from a proper classification, when equal accommodations are afforded. *Tucker v. Blease*, 97 S. C. 303, 81 S. E. 668, Ann. Cas. 16C, 796, L. R. A. 1915A, 828.

While the child of a white person and one having less than one-eighth negro blood is entitled to exercise the rights of a white man, in view of this section,

school trustees may, under statutory authority, upon providing a school for children of this class, distinct from both the white and negro schools, suspend such child from the white schools when for the best interest of the other white pupils, who would be withdrawn if it was allowed to remain. *Tucker v. Blease*, 97 S. C. 303, 81 S. E. 668, Ann. Cas. 16C, 796, L. R. A. 1915A, 828.

Voidable marriage of 11 year old girl is not abrogated by separation by mutual agreement four weeks later and before girl attained the age of consent, in view of this section. *State v. Sellers* 140 S. C.

66, 134 S. E. 873.

Evidence sustained finding that marriage between testator and his surviving widow was not invalid because widow had one-eighth or more Negro blood in her veins. *Bennett v. Bennett*, 195 S. C. 1, 10 S. E. (2d) 23.

Assault with intent to ravish.—An overt act amounting to assault with intent to have unlawful sexual intercourse with a female under the age of 14 years, even if she consents, under our law, is an assault with intent to ravish. *State v. Wilson*, 162 S. C., 416, 161 S. E., 104.

Rape.—The unlawful carnal knowledge * * * of a female child under the age of fourteen years, either with or without her consent," is rape. *Ibid*.

Legislature may raise age of consent to 16 years.—§ 1111, making carnal knowledge of child over 14 years of age criminal offense and raising age of consent to 16 years is not unconstitutional as conflicting with constitutional provision fixing age of consent at 14 years, since constitutional provision does not create criminal offense but operates only on question of consent, creating new rule of evidence in proof of consent and declaring certain persons incapable of consenting. *State v. Smith*, 181 S. C. 485; 188 S. E. 132.

Applied in *Holliday v. Hughes*, 54 S. C. 155, 159, 31 S. E. 867; *State v. Haddon*, 49 S. C. 308, 27 S. E. 194. See §§ 1109 and 1111 and notes thereto.

Section 34. Special laws prohibited.—The General Assembly of this State shall not enact local or special laws concerning any of the following subjects or for any of the following purposes, to wit:

- I. To change the names of persons or places.
- II. To incorporate cities, towns or villages, or change, amend or extend charter thereof.
- III. To incorporate educational, religious, charitable, social, manufacturing or banking institutions not under the control of the State, or amend or extend the charters thereof.
- IV. To incorporate school districts.
- V. To authorize the adoption or legitimation of children.
- VI. To provide for the protection of game.
- VII. To summon and empanel grand or petit jurors.
- IX. In all other cases, where a general law can be made applicable, no special law shall be enacted: *Provided*, That the General Assembly may enact local or special laws fixing the amount and manner of compensation to be paid to the County Officers of the several counties of the State, and may provide that the fees collected by any such officer, or officers, shall be paid into the treasury of the respective counties.
- X. The General Assembly shall forthwith enact general laws concerning said subjects for said purposes, which shall be uniform in their operations: *Provided*, that nothing contained in this Section shall prohibit the General Assembly from enacting special provisions in general laws.
- XI. The provisions of this Section shall not apply to charitable and educational corporations where, under the terms of a gift, devise or will, special incorporations may be required.

Provided, That the General Assembly is empowered to divide the State into as many zones as may appear practicable, and to enact legislation as may appear proper for the protection of game in the several zones.

The subdivision numbers above of this section are the same as they are in the 1912, 1922 and 1932 Codes; however the subdivision numbers hereof are different from the subdivision numbers of this

section in the original Constitution. In the original this section contained 13 subdivisions. Subdivision II in the original was repealed by a joint resolution and an act: 1904 (24, 676; 1905 (24) 959.

Subdivision IX of the original was repealed by a joint resolution and an act: 1904 (24) 676; 1905 (24) 959. Subdivision X of the original (subdivision VIII in 1912, 1922 and 1932 Codes) was repealed by joint resolutions and acts 1920 (31) 1700; 1921 (32) 191 and 1934 (38) 1623; 1935 (39) 27. Subdivision I hereof had the same number in the original; II hereof was III in the original; III hereof as IV in the original; IV hereof was V in the original; V hereof was VI in the original; VI hereof was VII in the original; VII hereof was VIII in the original; IX hereof was XI in the original; X hereof was XII in the original; XI hereof was XIII in the original. See FOREWORD on page 1159 of this volume.

- I. In General.
- II. Incorporating or Amending Charters of Cities.
- III. Incorporating or Amending Charters of Institutions Not under Control of State.
- IV. Incorporation of School Districts.
- V. Summoning and Empaneling Jurors.
- VI. Compensation of County Officers.
- VII. Where General Law Can Be Made Applicable.
- VIII. Special Provisions in General Laws.

I. IN GENERAL.

The object of this section was to place a limitation upon the power of the Legislature. The evil sought to be remedied was the great and growing evil of special and local legislation. To remedy this evil, such legislation was absolutely prohibited as to certain enumerated subjects, and conditionally prohibited as to all other subjects. In considering the effect of a constitutional limitation, it must be borne in mind that the legislative will is unlimited, unless there is in the Constitution some express or necessarily implied restriction. If the intention is not to limit the power of the Legislature, all that is necessary is for the Constitution to be silent. It must be assumed that the framers of the Constitution knew this. What, then, was the purpose of the clause under consideration? Was it to limit or restrict legislative power, or was it intended as a mere rule of caution, or as a mere matter of moral persuasion? The fact that it was placed at all in the Constitution, and in such prohibitive terms, shows that it was intended as a restriction upon legislative power, and the express declaration in art. 1, § 29, "that the provisions of the Constitution shall be construed to be mandatory and prohibitory and not merely directory, except where expressly made directory or permissive by its own terms," forbids a construction which would reduce the provision to a mere matter of legislative discretion. *State v. Hammond*, 66

S. C. 219, 44 S. E. 797, 799.

Amendment of local or special act. — The Legislature cannot, by a local Act passed after the Constitution of 1895, amend a local and special Act passed before the Constitution, when both relate to a subject prohibited by this section. *De Hay v. Com'rs*, 66 S. C. 229, 44 S. E. 790.

II. INCORPORATING OR AMENDING CHARTERS OF CITIES.

Act authorizing city to issue notes is not local law extending charter. *Sullivan v. City Council*, 133 S. C. 156, 130 S. E. 872.

Nor is an act authorizing city to issue coupon bonds. — Act authorizing the city of Charleston to issue coupon bonds to pay the present bonded debt, does not change or alter the charter of the city, and is not abnoxious to subd. 2. *Buist v. City Council*, 77 S. C. 260, 57 S. E. 862, 12 L. R. A. (N. S.) 1159, Ann. Cas. 15A, 87, 26 A. L. R. 552.

State providing for erection of county tuberculosis hospital on site determined by hospital trustees is not void as special legislation, or legislation discriminating against city. *Law v. Spartanburg*, 148 S. C. 229, 146 S. E. 12.

But an act authorizing election on abandonment of commission charter in one city is invalid. *Floyd v. Calvert*, 114 S. C. 116, 103 S. E. 82.

Act providing for incorporation of "resort communities" defining such term so as to include only one or two communities in the state, as to which nonresident freeholders exceeded resident electors in number, and providing for selection of town councils for "resort communities", is unconstitutional. *Thomas v. Macklen*, 195 S. E. 539.

Statute providing for the classification of cities desiring to adopt the commission form of government, although it contains some special provisions, is not violative of subdivisions 2 and 9 hereof. *Forde v. Owens, Mayor, et al.*, 160 S. C. 168, 158 S. E. 147.

Statute providing for automatic entry into higher class by city with commission form of government on its attaining requisite population is not violative of this section; and neither is statute making provisions for the commission form of government for cities of certain size. *Ibid.*

Applied in *Hill v. City Council*, 59 S. C. 396, 38 S. E. 11, Ann. Cas. 12D, 879, 24 A. L. R. 942.

III. INCORPORATING OR AMENDING CHARTERS OF INSTITUTIONS NOT UNDER CONTROL OF STATE.

Act authorizing township to issue bonds for hospital is not an attempt to create hospital by special law. *Battle v. Willcox*, 128 S. C. 500, 122 S. E. 516.

A statute creating the school district of Yorkville, by extending its boundaries, is

not in violation of this section, this section applying to institutions of learning, and not to school districts. *State v. McCaw*, 77 S. C. 351, 58 S. E. 145.

Provision of statute incorporating orphanage which exempts all of property of orphanage from taxation was unconstitutional, being in violation of prohibition against enactment of special or local laws. *Epworth Orphanage v. Wilson*, 185 S. C. 243; 193 S. E. 644.

Special statute incorporating orphanage could not be held unconstitutional in absence of a showing that General Assembly in passing statute did not comply with the constitutional requirement that it should have a concurrent resolution adopted by two-thirds vote of each House authorizing introduction of the bill. *Epworth Orphanage v. Wilson*, 185 S. C. 243; 193 S. E. 644.

IV. INCORPORATION OF SCHOOL DISTRICTS

A statute providing for establishment of centralized high school for five districts is not unconstitutional. *Arnette v. Ford*, 129 S. C. 526, 125 S. E. 138.

Nor is an act consolidating five existing districts into one.—An Act which attempts to incorporate a new school district, but the necessary result of which was consolidation of five existing districts into one, does not violate subd. 4, as consolidation is not incorporated. *Walker v. Bennett*, 125 S. C. 389, 118 S. E. 779.

An act amending an act creating the Anderson school district, by extending its boundaries, does not violate subd. 4, as such law does not incorporate a district but only amends a previous statute of incorporation. *Burriss v. Brock*, 95 S. C. 104, 79 S. E. 193.

A statute creating a high school district is special provision in general high school law and not invalid as local or special law. *Walpole v. Wall*, 153 S. C. 106, 149 S. E. 761.

An Act providing for division of Dillon county into high school districts, is not special legislation, in violation of this section. *Powell v. Hargrove*, 136 S. C. 345, 134 S. E. 380.

Statute directing board of education of Bamberg county to order election, restricted to electors within school district proposed to be re-established as it existed before consolidation, contemplated incorporation of new school district within prohibition of this section. *Kearse v. Lancaster*, 172 S. C. 59, 172 S. E. 767.

V. SUMMONING AND EMPANELING JURORS.

This section embraces the listing and drawing of jurors; as the object was to make the jury law uniform throughout the entire State, which can only be accomplished by interpreting the term. *Columbia v. Smith*, 105 S. C. 348, 89 S. E. 1028.

Thus the Acts under which the grand and petit jurors for the February term of 1901 of the sessions court for Laurens county were drawn were unconstitutional, as in violation of this section. *State v. Garrett*, 64 S. C. 249, 42 S. E. 108.

And an Act relating to the drawing and term of service of juries in the circuit courts, containing local and special provisions in relation to the drawing and term of service of jurors in certain counties of the state is unconstitutional, as violative of this section. *State v. Queen*, 62 S. C. 247, 40 S. E. 553.

But an Act providing for the drawing of jurors in counties containing 40,000 inhabitants or more, is an independent and general Act, and not a violation of this section. *State v. Berkeley*, 64 S. C. 194, 41 S. E. 961.

Applied in *State v. Franklin*, 62 S. E. 251, 40 S. E. 1038.

VI. COMPENSATION OF COUNTY OFFICERS.

Statutes providing a salary for county school commissioners for Berkeley county, are void; they being special Acts relating to subjects prohibited by this section. *De Hay v. Com'rs*, 66 S. C. 229, 44 S. E. 790, 791.

So also is an act fixing the salary of a clerk of court of a particular county. — An Act fixing the salary of the clerk of court of A. county on a different basis from what salaries of such clerks are fixed by general law, contravenes this section. *State v. King*, 108 S. C. 339, 94 S. E. 866.

An Act providing that the salary of the clerk of the court of Oconee county shall be \$1,350 per year, payable monthly, and that he shall collect all fees and costs and pay the same over to the county treasurer, is unconstitutional, as violating this section. *State v. Burns*, 73 S. C. 194, 52 S. E. 961.

See cases under next subdivision, catchline, "Acts abolishing right of county officers to fees."

Applied in *Nance v. Anderson County*, 60 S. C. 501, 39 S. E. 5; *Dean v. Spartanburg County*, 59 S. C. 110, 37 S. E. 226, Ann. Cas. 16D, 27, 83.

VII. WHERE GENERAL LAW CAN BE MADE APPLICABLE.

This section is not retroactive, and hence does not make void Statutes, requiring landowners in certain counties to clean out running streams on their lands during certain periods of the year. *State v. Tucker*, 54 S. C. 251, 32 S. E. 361, 93 Am. St. Rep. 107.

Whether an act is prohibited by this section is a judicial question. *Columbia v. Smith*, 105 S. C. 348, 89 S. E. 1028; *Gillespie v. Blackwell*, 164 S. C. 115, 161 S. E. 869.

Likewise the courts must decide whether a general law can be made applicable.—Whether, within this section, a

general law can be made applicable is not a question for the Legislature, but one the courts must decide. *Tisdale v. Scarborough*, 99 S. C. 377, 83 S. E. 594, 23 A. L. R. 1482.

In *Jellico v. Conner*, 83 S. C. 481, 65 S. E. 725, 728, Ann. Cas. 15A, 80, it is held that this question must be determined by the Legislature, and not by the court. But the present prevailing rule seems to be in accord with the former statement, to the effect that the court must decide the question.—Ed. Note.

Section does not apply to special legislation authorized by constitution.—This section does not apply to legislation upon those subjects as to which the General Assembly under the authority of the Constitution may legislate particularly, even though the same is special in character. *Columbia v. Smith*, 105 S. C. 348, 89 S. E. 1028.

This section does not render invalid an act authorizing a school district to issue bonds to erect a school building. *State v. Brock*, 66 S. C. 357, 44 S. E. 931.

A special act authorizing county or other political subdivision to issue bonds is not within prohibition of subd. 9, as to enactment of special laws, where general law can be made applicable. *Briggs v. Greenville County*, 137 S. C. 288, 135 S. E. 153.

Act as to Anderson county school bonds, providing for issuance of bonds to bear a rate of interest not exceeding 5 per cent. payable semiannually, does not violate subd. 9. *Brownlee v. Brock*, 107 S. C. 230, 92 S. E. 477.

Act authorizing city to issue bonds is not special law, enacted where general law could be made applicable. *Sullivan v. City Council*, 133 S. C. 156, 130 S. E. 872.

A general bond act authorizing issuance of bonds by county to advance funds to state highway commission under reimbursement agreement, is not in conflict with subd. 9, prohibiting enactment of special law, where general law can be made applicable. *Briggs v. Greenville County*, 137 S. C. 288, 135 S. E. 153.

An act undertaking to provide for free bridges across certain rivers in the state, is not a special law, in contravention of this section, since the object to be accomplished related to a corporate purpose of the township in which the bridges were to be provided, and the situation was one which could not have been dealt with by a general law. *Verner v. Muller*, 89 S. C. 545, 72 S. E. 393.

A statute requiring cars operating north of a line ten miles north of and parallel to the thirty-first meridian to be equipped with fenders, is not based upon arbitrary classification within this section when construed with reference to climatic conditions and the nature of the country. *Thomas v. Spartanburg Ry.*, etc.,

Co., 100 S. C. 478, 85 S. E. 50.

A statute providing for vehicle license tax in one county is not invalid as special law where general law can be made applicable. *State v. Touchberry*, 121 S. C. 5, 113 S. E. 345.

Statute providing for audit of particular counties, offices, and institutions is not invalid as local or special law. *Spartanburg County v. Miller*, 135 S. C. 348, 132 S. E. 673, 674.

An act providing for legislative investigation of a canal project under grant from the state, is not a violation of subd. 9, since there is no apparent scope for a general law, and there being no showing of any other grant of the state that may come under investigation. *Robertson v. Peeples*, 120 S. C. 176, 115 S. E. 300.

An act authorizing action against state is not violative of prohibition of special laws. *Sandel v. State*, 115 S. C. 168, 104 S. E. 567, 568, 13 A. L. R. 1268, 1280, 23 A. L. R. 676.

Thus an act authorizing an administrator of children alleged to have been killed by impure vaccines furnished by the State to sue the State on account of their death is not in violation of this section. *Sandel v. State*, 115 S. C. 168, 104 S. E. 567, 13 A. L. R. 1268, 1280, 23 A. L. R. 676.

But a special statute authorizing suit against state is special law, where general law could be made applicable, in contravention of Constitution. *Sirrine v. State*, 132 S. C. 241, 128 S. E. 172.

Drainage statutes are general in their operation, and are not special laws in violation of subd. 9. *Jackson v. Breeland*, 103 S. E. 184, 88 S. E. 128.

An act enlarging school districts.—Subdivision 9 does not render invalid an act enlarging a school district and authorizing the trustees to hold an election on the question of issuing bonds. *Burriss v. Brock*, 95 S. C. 104, 79 S. E. 193.

An amendment providing for appointment of school trustees, to permit their election in certain counties, is not void as special laws, since subdivision 10 permits enactment of special provisions in general laws. *State v. Meares*, 148 S. C. 118, 145 S. E. 695; *State v. Huntley*, 167 S. C. 476, 166 S. E. 637.

An act authorizing city to issue certificates of indebtedness is not special law, where general law could have been made applicable. *Sullivan v. City Council*, 133 S. C. 189, 133 S. E. 340, 133 S. C. 156, 130 S. E. 872, 876.

An act imposing tax on places of amusement is not invalid as being special law where general law would suffice. *Curdts v. South Carolina Tax Comm.*, 131 S. C. 362, 127 S. E. 438.

But a statute making it a misdemeanor not to remove at a certain time all trees and rafts from a certain creek, and confining its operation to named counties, is

void, as a special act at variance with this section. *State v. Hammond*, 66 S. C. 300, 44 S. E. 933.

So also a statute prohibiting the cutting or felling of trees in running streams of certain counties, making it a misdemeanor to fail to remove a dam out of a running stream in certain counties, is unconstitutional, as special legislation, in violation of this section. *State v. Hammond*, 66 S. C. 219, 44 S. E. 797.

A statute providing that in the counties of the Sixth circuit, on demand of either party, equity cases shall be tried in open court on testimony there offered, covers the same subject-matter as is covered by the general provision of the statute, providing that a cause may be referred on application of either party or on the court's own motion, where a long account is to be taken, and is therefore violative of this section. *Southern Nat. Bank v. Farmington Corp.*, 99 S. C. 475, 83 S. E. 637.

A separate act extending boundaries of school district already created.—Subdivision IX, must be construed in connection with § 5, of art. XI, and so construed separate act extending boundaries of school district already created may be regarded special provision in general law. *State v. McCaw*, 77 S. C. 351, 58 S. E. 145.

And an act requiring that the cotton in Bethune should be weighed by a public weigher is void, as special legislation, under this section, since a general law could have been made applicable. *Barfield v. Stevens Mercantile Co.*, 85 S. C. 186, 67 S. E. 158, 51 L. A. R. (N. S.) 732, Ann. Cas. 12C, 255, 23 A. L. R. 1479.

Statute fixing the amount of bonds of certain county officials and providing that they be executed by the officials and a surety company is violative of this section as "special law" as far as the part thereof requiring the bonds to be executed by a surety company, for a general law was applicable. *Gillespie v. Blackwell et al.*, 164 S. C. 115, 161 S. E. 869.

Statute ratifying and confirming election to annex territory to municipality held unconstitutional where the election was not held as provided by law as special legislation. *Lancaster et al. v. Town Council of Brookland*, 160 S. C., 150, 158 S. E. 233.

Subd. 9 does not apply to special provisions relating to particular counties, contained in general law. *State v. Meares*, 148 S. C. 113; 145 S. E. 695; *State v. Huntley*, 167 S. C. 476; 166 S. E. 637; *Walker v. Harris*, 170 S. C. 242; 170 S. E. 270; *Kearse v. Lancaster*, 172 S. C. 59; 172 S. E. 767.

Act regulating size and weight of trucks, trailers, and semitrailers not unconstitutional as "special law." *State v. John P. Nutt Co.*, 180 S. C. 19; 185 S. E. 25.

Statute authorizing certain state institutions to issue bonds for buildings does not violate this section. *Crawford v. Johnston*, 177 S. C. 399; 181 S. E. 476.

Act providing for county game and fish commission held unconstitutional hereunder as special legislation. *Sloan v. Fair*, 172 S. C. 485; 174 S. E. 436.

Legislature has right to designate certain roads for construction, notwithstanding constitutional prohibition against special laws where a general law can be made applicable. *State v. Lewis*, 181 S. C. 10; 186 S. E. 625.

Statute giving special advantages to Chesterfield County over other counties in matter of collection of taxes, in matter of collection of delinquent taxes in installments, in relation to redemption of property sold, in matter of delivery of deeds to property sold, and in extension of liens on delinquent lands, violated constitutional inhibition against enactment of "local" or "special law" where general law can be made applicable. *Douglas v. Watson*, 186 S. C. 34; 195 S. E. 116.

Where subject of disposal of proceeds of sale of contraband liquors was covered by general law, an act directing sheriff to sell at public auction a quantity of liquor and two automobiles seized in a particular raid and to deposit money received from sale with treasurer of York county to credit of general county fund constituted "special legislation" violative of this section. *South Carolina Tax Commission v. Moss*, 195 S. C. 321, 11 S. E. 2d 157.

The statute fixing salary to be paid master in equity of Richland county in lieu of fees is not unconstitutional on ground that general law could have been applicable. *Townsend v. Richland County*, 190 S. C. 270, 2 S.E.2d 777.

The statute creating the Cherokee County Tourist Camp Board violates the constitutional provision prohibiting special legislation and is unconstitutional, since such statute is a "special law" where a general law could be made applicable. *Sansing v. Cherokee County Tourist Camp Board*, 195 S. C. 7, 10 S. E. 2d 157.

Constitutional inhibition against special law, where general law can be made applicable, prohibits enactment of special law relating to particular county, where no peculiar local conditions require special treatment, and statute of state-wide operation on the subject is in force. *Webster v. Williams*, 183 S. C. 368; 191 S. E. 51.

Is applicable to local laws on subject of taxation. *Webster v. Williams*, 183 S. C. 368; 191 S. E. 51.

Acts abolishing right of county officers to fees.—Statutes relating to Orangeburg County only and abolishing right of county treasurer to collect fee for issu-

ance of tax execution and reducing compensation of county treasurer below amount fixed by general statutes not valid. *Salley v. McCoy*, 182 S. C. 249; 189 S. E. 196.

Statutes relating to Orangeburg County only, and providing that treasurer of county should be given salary prescribed by General Assembly in lieu of all fees, costs, compensation, and charges theretofore allowed him, and purporting to appropriate to county, tax execution fees provided for sheriffs under general law, held unconstitutional as "local" and "special legislation" where general law could be made applicable. *Salley v. McCoy*, 182 S. C. 251; 189 S. E. 196.

Constitutional prohibition of enactment of local law where general law can be made applicable apply to statute of which subject-matter is within intentment of constitutional provision authorizing General Assembly to provide such system of township government as it shall think proper in any and all counties and make special provision for municipal government. *Salley v. McCoy*, 182 S. C. 249; 189 S. E. 196.

Constitutional provision authorizing enactment of local laws relating to compensation of county officers held affirmative grant of power as exception to succeeding prohibition of enactment of special law where general law could be made applicable, and hence, on repeal of affirmative grant, general prohibition against enactment of special laws prohibited local laws relating to compensation of county officers, especially in view of amendment subsequently adopted authorizing enactment of local laws on subject. *Salley v. McCoy*, 182 S. C. 253; 189 S. E. 196.

Constitutional provision that "in all other cases" no special law shall be enacted where general law can be made applicable held applicable to special laws relating to compensation of county treasurer, notwithstanding that such subject had been expressly prohibited by preceding section, especially after section containing express prohibition had been repealed, since words "in all other cases" were not intended to limit scope of prohibition, but to extend scope of entire provision to include any subject on which general law could be made applicable. *Salley v. McCoy*, 182 S. C. 250; 189 S. E. 196.

County treasurer accepting compensation under unconstitutional special acts fixing salary in lesser amount than that to which treasurer was actually entitled under general law held not estopped from claiming legal compensation. *Salley v. McCoy*, 182 S. C. 252; 189 S. E. 196.

Repeal of constitutional prohibition of enactment of local law fixing amount of compensation of county officers held not to authorize enactment of local law on

such subject in view of general constitutional prohibition of enactment of local law, where general law could be made applicable. *Salley v. McCoy*, 182 S. C. 250; 189 S. E. 196.

In suit by county treasurer to recover unpaid salary items and tax execution fees due under statutes where the issues before the circuit court related primarily to the constitutionality of special local laws but the theory of presentation of the cause, involved the validity and applicability of the statutes under which recovery was sought and position taken by litigants was that such statutes were general laws in a constitutional sense, a proposed amended answer undertaking for the first time after a prior appeal, to challenge the validity of such statutes as being in violation of the constitutional prohibition against special laws was improperly allowed. *Salley v. McCoy*, 186 S. C. 1; 195 S. E. 132.

Statute relating to Williamsburg County only which fixed salary of sheriff and purported to deprive sheriff of fees coming into his hands to which he was entitled under general law was unconstitutional. *Williamsburg County v. Graham*, 190 S. C. 233; 196 S. E. 547.

A county sheriff's acceptance, under unconstitutional special law, of compensation in lesser amount than that to which he was actually entitled was not waiver of sheriff's right to claim compensation to which he was entitled under general law. *Williamsburg County v. Graham*, 190 S. C. 233; 196 S. E. 547.

Local act removing duties pertaining to collection of delinquent taxes in Pickens county from office of sheriff and placing such duties in hands of tax collector, was not violative of constitutional inhibition against enactment of special laws in cases where general law can be made applicable. *Craig v. Pickens County*, 189 S. C. 164, 200 S. E. 825.

In sheriff's action against Clarendon county to recover fees and costs, which county had retained under an unconstitutional statute, county was entitled to set off salary payments as payments on account of legal compensation to which sheriff was entitled by way of fees, where, if exemption of Clarendon county in statutes providing for payment of fees to sheriff was unconstitutional, then both salary provision and exemption were required to be stricken out; it being intention of Legislature that provision as to fees and salary allowance should both stand. *Gamble v. Clarendon County*, 188 S. C. 250, 198 S. E. 857.

Fees earned by county treasurer for issuing tax executions before payment of his salary are vested rights, which cannot be impaired or defeated by allowing county to set off salary paid against such fees. *Smith v. Greenville County*, 189 S. C. 424, 1 S.E.2d 502.

The Anderson County Supply Acts of 1935 and 1936, providing that county treasurer's fees should accrue to county, or, if not so accruing, should reduce treasurer's salary, and that total salary of county treasurer should be \$3,000, did not ratify 1935 Amendment to Constitution, providing that General Assembly could enact local laws fixing amount of compensation to be paid to county officers, and could provide that fees collected by officers should be paid into county treasury. *Scott v. Anderson County*, 195 S. C. 92, 10 S.E.2d 359.

A special act, providing for compensation of officers and employees of certain counties, was not authorized by constitutional amendment, striking out subsection prohibiting special laws fixing amount or manner of compensation of any county officer except by grading compensation in proportion to population and necessary service required, without changing subsection prohibiting special laws in all other cases where general law can be made applicable. *Boggs v. O'Dell*, 190 S. C. 442, 3 S.E.2d 486.

The act imposing upon tax collector for Sumter county duty of collecting delinquent taxes under supervision of county board of commissioners did not deprive county treasurer of right to receive fees collected on delinquent tax executions after date of passage of the act, where executions had been delivered by the treasurer or chief of rural police prior to the enactment of the act. *Wallace v. Sumter County*, 189 S. C. 395, 1 S.E.2d 345.

One holding office of Pickens county auditor from 1929 until 1937 was entitled to fees for entry and indorsement of deeds by him throughout such time, though constitutional amendment, authorizing special laws providing for payment of all fees collected by county officers into county treasury, was ratified in 1935, where no such law as to Pickens county was enacted until 1938. *Boggs v. O'Dell*, 190 S. C. 442, 3 S.E.2d 486.

Act imposing one-year limitation on action by state or county officer or employee for salary, fees, or other obligation for services, or six-month limitation if cause of action accrued prior to effective date of act, which act does not apply to counties having population of over 85,000, violated this section. *Gillespie v. Pickens County*, 197 S. C. 217, 14 S. E. (2d) 900.

A complaint, by holder of refunding bonds of Chesterfield county, challenging constitutionality of an act excepting Chesterfield county from general law of

state and directing county treasurer to hold all delinquent tax executions for year 1937 until first day of November, 1938, on grounds that act is local legislation and impairs bondholders' contractual rights and praying for an order requiring county treasurer to deliver all executions in his hands covering 1937 taxes to sheriff of Chesterfield county to realize funds for payment of interest on county bonds, stated a cause of action. *Kirk v. Watson*, 191 S. C. 162, 4 S.E.2d 16.

The constitutional provision for codification of general statutes does not have effect of curing all possible violations of constitutional prohibition of enactment of local law where general law can be made applicable, by expedient of passing an act declaring statutes embodied in code to be the general statutory law. *Gamble v. Clarendon County*, 188 S. C. 250, 198 S.E. 857.

VIII. SPECIAL PROVISIONS IN GENERAL LAWS.

Statute creating high school district is special provision in general high school law and not invalid as local or special law. *Walpole v. Wall*, 153 S. C. 106, 149 S. E. 761.

Statutes prescribing how cotton seed shall be sold, but excepting from its application all but three of the counties of the state, are not general laws with "special provisions" therein, authorized by this section. *Tisdale v. Scarborough*, 99 S. C. 377, 83 S. E. 594; 23 A. L. R. 1482.

Statute providing for election of school trustees is special provision in general law and may be enacted separately from the general law on the subject. *State v. Huntley*, 167 S. C. 476; 166 S. E. 637.

Statute providing for forfeited land commissioner for Florence County is an exception in the general law relating to the handling of lands sold at delinquent tax sales, etc., and is not in conflict with subd. 9. Walker, etc. v. Harris, etc., 170 S. C. 242; 170 S. E. 270.

Section of statute relating to Horry county only and providing that all fees and licenses collected by clerk of court for such county should go to general fund of county and stated salary should be paid clerk in lieu of such fees and licenses unconstitutional as local and special legislation on a prohibited subject. *Holt v. Calhoun*, 175 S. C. 481; 179 S. E. 501.

It is not valid as an amendment to general law where it was otherwise unconstitutional as local and special legislation on a prohibited subject, supra.

Applied in *Hill v. City Council*, 59 S. C. 396, 38 S. E. 11, Ann. Cas. 12D, 879, 24 A. L. R. 942; *Hodge v. Levi*, 80 S. C. 518, 61 S. E. 1009.

Section 35. Lands owned by aliens.—It shall be the duty of the General Assembly to enact laws limiting the number of acres of land which any alien or any corporation controlled by aliens may own within this State.

ARTICLE IV.

EXECUTIVE DEPARTMENT.

Section 1. Chief Magistrate.—The supreme executive authority of this State shall be vested in a Chief Magistrate, who shall be styled “The Governor of the State of South Carolina.”

See Const. 1868, III, 1.

Jurisdiction of Supreme Court to direct Writ of Certiorari to Governor. Rawlinson v. Ansel, 76 S. C. 395, 57 S. E. 185, 32 L. R. A. (N. S.) 356, 39 L. R. A. (N. S.) 789, 11 Ann. Cas. 613, Ann. Cas. 13B, 789.

Legislature need not confer on Gov-

ernor power and duty to sign bonds authorized by Legislature, notwithstanding that Constitution designates Governor as chief executive officer of state. *State v. Lewis*, 181 S. C. 10; 186 S. E. 625.

Section 2. Governor—state officers.—The Governor shall be elected by the electors duly qualified to vote for members of the House of Representatives, and shall hold his office for four years, and until his successor shall be chosen and qualified and shall be re-eligible. He shall be elected at the first general election held under this Constitution for members of the General Assembly, and at each general election thereafter, and shall be installed during the first session of the said General Assembly after his election, on such day as shall be provided by law. The other State officers⁴ elect shall at the same time enter upon the performance of their duties. *Provided*, That he shall not be eligible for re-election.

See Const. 1868, III, 2.

Amended by a joint resolution and an act: 1924 (33) 1492; 1926 (34) 960. See FOREWORD on page 1159 of this volume.

Section 3. Qualification of Governor.—No person shall be eligible to the office of Governor who denies the existence of the Supreme Being; or who at the time of such election has not attained the age of thirty years; and who shall not have been a citizen of the United States and a citizen and resident of this State for five years next preceding the day of election. No person while governor shall hold any office or other commission (except in the militia) under the authority of this State, or of any other power, at one and the same time.

See Const. 1868, III, 3.

Editor's Note.—Before the enactment of the present state intoxicating liquor laws found in §§ 1829 et seq., the dispensary act of 1895 made the Governor a member ex officio of the state board of

control. This act was held not to violate this section. See *State v. Porterfield*, 47 S. C. 75, 25 S. E. 39, 15 L. R. A. (N. S.) 947, L. R. A. 1917A, 233, 250, Ann. Cas. 13D, 511.

Section 4. Boards of canvassers transmit returns of election for Governor — returns delivered to Speaker of House of Representatives — contested elections.—The returns of every election for Governor shall be sealed up by the Board of Canvassers in the respective Counties, and transmitted, by mail, to the seat of Government, directed to the Secretary of State, who shall deliver them to the Speaker of the House of Representatives at the next ensuing session of the General Assembly; and duplicates of said returns shall be filed with the Clerks of the Court of said Counties. It shall be the duty of any Clerk of Court to forward to the Secretary of State a certified copy of said returns upon being notified that the returns previously forwarded

by mail have not been received at his office. It shall be the duty of the Secretary of State, after the expiration of seven days from the day upon which the votes have been canvassed by the County Board, if the returns thereof from any County have not been received, to notify the Clerk of the Court of said County, and order a copy of the returns filed in his office to be forwarded forthwith. The Secretary of State shall deliver the returns to the Speaker of the House of Representatives, at the next ensuing session of the General Assembly; and during the first week of the session, or as soon as the General Assembly shall have organized by the election of the presiding officers of the two Houses, the Speaker shall open and publish them in the presence of both Houses. The person having the highest number of votes shall be Governor; but if two or more shall be equal, and highest in votes, the General Assembly shall during the same session, in the House of Representatives, choose one of them Governor *viva voce*.

Contested elections for Governor shall be determined by the General Assembly in such manner as shall be prescribed by law.

See Const. 1868, III, 4.

General Assembly's power to determine election result limited to this section and art. 7, § 2.—In § 2, of art. VII, and in the above section, the General Assembly is given the right in two cases to pass on elections. In these two cases, and these only, is the General Assembly invested with the power to determine the result of

any popular election; and they are not only invested with any power to determine the result of any other election, but they are forbidden to assume or exercise such a power in any other case by the terms of § 14 of art. 1. *Segars v. Parrott*, 54 S. C. 1, 31 S. E. 677, 865, Ann. Cas. 14C, 626.

Section 5. Lieutenant Governor.—A Lieutenant Governor shall be chosen at the same time, in the same manner, continue in office for the same period and be possessed of the same qualifications as the Governor, and shall *ex officio*, be President of the Senate.

See Const. 1868, III, 5.

Section 6. Vote of Lieutenant Governor.—The Lieutenant Governor while presiding in the Senate, shall have no vote, unless the Senate be equally divided.

See Const. 1868, III, 6.

Section 7. President pro tempore of Senate.—The Senate shall, as soon as practicable after the convening of the General Assembly, choose a President pro tempore to act in the absence of the Lieutenant Governor, or when he shall fill the office of Governor.

See Const. 1868, III, 7.

Section 8. Members of Senate acting as Governor.—A member of the Senate acting as Governor or Lieutenant Governor shall thereupon vacate his seat and another person shall be elected in his stead.

See Const. 1868, III, 8.

Section 9. Vacancy in office of Governor—how filled.—In case of the removal of the Governor from office by impeachment, death, resignation, disqualification, disability, or removal from the State, the Lieutenant Governor shall then be Governor; and in case of the removal of the last named officer from his office by impeachment, death, resignation, disqualification,

disability, or removal from the State, the President *pro tempore* of the Senate shall be Governor; and the last named officer shall then forthwith, by proclamation, convene the Senate in order that a President *pro tempore* may be chosen. In case the Governor be impeached, the Lieutenant-Governor shall act in his stead and have his powers until judgment in the case shall have been pronounced. In case of the temporary disability of the Governor the Lieutenant Governor shall perform the duties of the Governor.

See Const. 1868, III, 9.

Section 10. Commander-in-Chief.—The Governor shall be Commander-in-Chief of the militia of the State, except when they shall be called into the active service of the United States.

See Const. 1868, III, 10.

Section 11. Pardons—board of pardons.—He shall have power to grant reprieves, commutations and pardons after conviction (except in cases of impeachment), in such manner, on such terms and under such restrictions as he shall think proper; and he shall have power to remit fines and forfeitures, unless otherwise directed by law. It shall be his duty to report to the General Assembly, at the next regular session thereafter, all pardons granted by him, with the report of the Board of Pardons. Every petition for pardon or commutation of sentence may be first referred by him to a Board of Pardons, to be provided by the General Assembly, which Board shall hear all such petitions under such rules and regulations as the General Assembly may provide. The Governor may adopt the recommendations of said Board, but in case he does not he shall submit his reasons to the General Assembly.

See Const. 1868, III, 11.

Cross reference.—As to the Governor's power to suspend sentence or parole prisoner see § 3099 and note thereto. As to the provisions for the Board of Pardons, their duties, powers, etc., see §§ 3431, et seq., and notes thereto.

Governor's pardoning power limited to remitting or abrogating penalties.—Though the power to pardon, conferred upon the Governor by this section is practically unrestricted, it is limited to the remitting or abrogation of penalties in whole or in part, and does not authorize the Governor to impose punishment which has not been imposed by a court of competent jurisdiction. *Crooks v. Sanders*, 123 S. C. 28, 115 S. E. 760, 2 A. L. R. 940.

Governor may grant pardon on condition that convict leave state and never return.—Under this section the Governor may grant a pardon on the condition precedent that the convict leave the state within 48 hours and never return. *State v. Barnes*, 32 S. C. 14, 10 S. E. 611, 17 Am. St. Rep. 832, 111 Am. St. Rep. 111, 6 L. R. A. 743, 5 L. R. A. (N. S.) 1064, 16 L. R. A. (N. S.) 305, L. R. A. 1915F, 544.

A condition in a pardon that the convict leave the state and never return is neither immoral, illegal, or impossible to be performed, even though the state laws do not prescribe banishment from the state as a punishment for any offense. See *State v. Barnes*, 32 S. C. 14, 10 S. E. 611, 17 Am. St. Rep. 832, 111 Am. St. Rep. 111, 6 L. R. A. 743, 5 L. R. A. (N. S.) 1064, 16 L. R. A. (N. S.) 305, L. R. A. 1915F, 544, and cases cited therein.

And on violation of condition convict may be made to serve out sentence.—A convict who has broken the condition of his pardon may be remanded to the penitentiary to serve out the balance of his sentence though the time in which he was to serve has expired. *State v. Barnes*, 32 S. C. 14, 10 S. E. 611, 17 Am. St. Rep. 832, 111 Am. St. Rep. 111, 6 L. R. A. 743, 5 L. R. A. (N. S.) 1064, 16 L. R. A. (N. S.) 305, L. R. A. 1915F, 544.

Ordinary conditional pardon merely suspends running of sentence.—An ordinary conditional pardon, conferring upon the prisoner all the rights of a free citizen on condition that for the remainder of his life he continue of good behavior, merely suspends the running of the sen-

tence, and leaves the unexpired portion thereof subject to enforcement upon breach of condition. *Crooks v. Sanders*, 123 S. C. 28, 115 S. E. 760, 28 A. L. R. 940.

But Governor may grant such a pardon without such effect.—The broad pardoning power conferred upon the Governor by this section, empowers him, if he sees fit, to grant a conditional pardon that does not have the effect of suspending or holding in abeyance the convict's sentence. *Crooks v. Sanders*, 123 S. C. 28, 115 S. E. 760, 28 A. L. R. 940.

A parole is to be construed most beneficially to prisoner.—See this and the following catchlines in note to § 1985.

The Governor and superior judicial officers are subject to impeachment.—It has generally been considered that only the superior executive and judicial of-

ficers of a state are subject to impeachment and, it seems that no officer holding by appointment nor an inferior officer of any kind is subject to impeachment. See *McDowell v. Burnett*, 92 S. C. 469, 75 S. E. 873, Ann. Cas. 14B, 525.

Governor may grant reprieve without a request from accused.—The power of the Governor under this section to grant reprieves is unlimited, notwithstanding §§ 3099 and 3436 relating to such power and to recommendations of the pardoning board, and the courts have no power to inquire into the reasons which may have actuated the Governor in granting a reprieve, and cannot, therefore, hold a reprieve invalid merely because accused did not request it. *State v. Harrison*, 122 S. C. 523, 115 S. E. 746.

Section 12. Laws executed.—He shall take care that the laws be faithfully executed in mercy.

See Const. 1868, III, 12.

Section 13. Compensation of Governor and Lieutenant Governor.—The Governor and Lieutenant Governor shall, at stated times, receive for their services compensation, which shall be neither increased nor diminished during the period for which they shall have been elected.

See Const. 1868, III, 13.

Section 14. Officers and boards report to Governor.—All officers in the Executive Department, and all Boards of public institutions, shall, when required by the Governor, give him information in writing upon any subject relating to the duties of their respective offices or the concerns of their respective institutions, including itemized accounts of receipts and disbursements.

See Const. 1868, III, 14.

Section 15. Information to Legislature.—The Governor shall, from time to time, give to the General Assembly information of the condition of the State, and recommend for its consideration such measures as he shall deem necessary or expedient.

See Const. 1868, III, 15.

Section 16. Extra sessions—Governor may adjourn General Assembly.—He may on extraordinary occasions convene the General Assembly in extra Session. Should either House remain without a quorum for five days, or in case of disagreement between the two Houses during any session with respect to the time of adjournment, he may adjourn them to such time as he shall think proper, not beyond the time of the annual Session then next ensuing.

See Const. 1868, III, 16.

Section 17. Commissions.—He shall commission all officers of the State.

See Const. 1868, III, 17.

Failure of Governor to issue commission to state officer as required by Constitution does not affect right of person duly elected to public office to discharge duties of such office. *State v. Lewis*, 181 S. C. 10; 186 S. E. 625.

Governor acts ministerially in issuing commission to state officer. *State v. Lewis*, 181 S. C. 10; 186 S. E. 625.

Provision in act relating to state highway commission permitting commissioners to exercise their duties under certificate of election pending issuance of commission by Governor not violative of constitutional provision directing Governor to commission all state officers. *State v. Lewis*, 181 S. C. 10; 186 S. E. 625.

Section 18. Seal of State.—The seal of the State now in use shall be used by the Governor officially, and shall be called “The Great Seal of the State of South Carolina.”

See Const. 1868, III, 18.

Section 19. Grants and commissions.—All grants and commissions shall be issued in the name and by the authority of the State of South Carolina, Sealed with the Great Seal, Signed by the Governor, and countersigned by the Secretary of State.

See Const. 1868, III, 19.

See section 17, *supra*, and notes thereto.

Section 20. Oath of Governor and Lieutenant Governor.—The Governor and Lieutenant Governor, before entering upon the duties of their respective offices, shall take and subscribe the oath of office as prescribed in Article III, Section 26 of the Constitution.

See Const. 1868, III, 20.

Section 21. Residence of Governor.—The Governor shall reside at the Capital of the State, except in cases of contagion or the emergencies of war; but during the sittings of the General Assembly he shall reside where its sessions are held.

See Const. 1868, III, 21.

Section 22. Suspension of officers.—Whenever it shall be brought to the notice of the Governor by affidavit that any officer who has the custody of public or trust funds, is probably guilty of embezzlement or the appropriation of public or trust funds to private use, then the Governor shall direct his immediate prosecution by the proper officer, and upon true bill found the Governor shall suspend such officer and appoint one in his stead, until he shall have been acquitted by the verdict of a jury. In case of conviction the office shall be declared vacant and the vacancy filled as may be provided by law.

Cross references.—As to the powers of the Governor to suspend Magistrates for incapacity, misconduct, or neglect of duty see § 3707 and note thereto.

As to the provisions for the indictment of certain officers guilty of misconduct of an active nature see § 1525 and note thereto.

As to provisions relating to the Governor's power of appointing and removing county officers, see § 3094, and note thereto.

As to the Governor's power of removal when the grounds are insufficient for impeachment see Const. art. 15, § 4, and note thereto.

As to the provisions for removal of an officer for incapacity, misconduct, or neglect of duty see Const. art. 3, § 27 and note thereto.

As to provisions for punishment for neglect of duty by clerk see § 1527, and note thereto; for punishment of certain officers guilty of misconduct, see § 1525,

and note thereto.

In general.—This is the only general provision in the Constitution which confers upon the Governor the power of suspending officers. *State v. Hough*, 103 S. C. 87, 87 S. E. 436, L. R. A. 1918F, 1049.

Power of suspension restricted more than power of removal.—This section is hedged about with much greater restrictions than the power of removal, both as to the number and nature of offenses and as to the circumstances and conditions under which the power may be exercised. *State v. Hough*, 103 S. C. 87, 87 S. E. 436, L. R. A. 1918F, 1049.

Legislature cannot enlarge Governor's power to suspend.—An act making subject to suspension from office by the Governor sheriffs who refused or neglected to perform the duties required by the chapter on intoxicants was held to be unconstitutional as this section negatives that it was intended that the Governor should exercise such power otherwise than provided. See *State v. Hough*, 103 S. C. 87, 87 S. E. 436, L. R. A. 1918F, 1049.

There are three prerequisites to officer's suspension.—This section prescribes three prerequisites to the Governor's power to suspend an officer: (1) The officer to be removed must have the custody of trust or public funds; (2) must be probably guilty of embezzlement; and (3) there must be a true bill on the charge of embezzlement against the officer. See *McMillan v. Bullock*, 53 S. C. 161, 31 S. E. 860.

Applies to removal of all officers except Governor.—This section applies to the removal of all officers, including magistrates, except the Governor, but is limited to the misconduct of embezzlement, and does not apply to other forms of misconduct, as incapacity, or neglect of duty. *McDowell v. Burnett*, 92 S. C. 469, 75 S. E. 873, Ann. Cas. 14B, 525.

May suspend for incapacity, misconduct, or neglect of duty on approval of Senate.—The Governor may suspend a magistrate for incapacity, misconduct, or neglect of duty, but submit the suspen-

sion to the Senate for approval or disapproval. *McDowell v. Burnett*, 92 S. C. 469, 75 S. E. 873, Ann. Cas. 14B, 525.

May not suspend without true bill and without conviction of charge less grave than embezzlement.—The conferring on the Governor by this section of the power to suspend officers for the grave offense of embezzlement, and that only on a true bill found, and providing that there shall be removal only after conviction, negatives the intention to bestow the larger power of removal without a true bill and without conviction on a charge less grave than embezzlement. *State v. Rhame*, 92 S. C. 455, 75 S. E. 881, Ann. Cas. 14B, 519, Ann. Cas. 16E, 219.

General charge of misconduct is insufficient.—In a dissenting opinion to *State v. Ballentine*, 152 S. C. 365, 150 S. E. 46, 50, 66 A. L. R. 574, Cothran, J., argues, that this section makes no provision for the removal of a sheriff upon a general charge of "incapacity, misconduct, or neglect of duty" as it provides only for a special proceeding upon a particular charge of misconduct, the embezzlement of public or trust funds.

Appointee entitled to immediate possession of books, papers, etc.—The person appointed as successor under this section is entitled to immediate possession of the books, papers, etc., belonging to the office. He is not bound to await a judgment in his favor in an action to recover the office. *McMillan v. Bullock*, 53 S. C. 161, 31 S. E. 860.

To confer jurisdiction in summary proceedings to recover possession of books, papers, etc., belonging to an office by an appointee of the Governor under this section, the application must disclose the existence of all the constitutional facts giving the Governor jurisdiction to suspend the officer. *McMillan v. Bullock*, 53 S. C. 161, 31 S. E. 860.

Suspension of officers for disbursement of funds.—See § 1592 and notes thereto.

Governor cannot effect removal of officer by arbitrarily and indefinitely suspending such officer. *Dacus v. Johnston*, 180 S. C., 329; 185 S. E., 491.

Section 23. Bill or joint resolution must be signed or vetoed by the Governor.—Every Bill or Joint Resolution which shall have passed the General Assembly, except on a question of adjournment, shall, before it becomes a law, be presented to the Governor, and if he approve he shall sign it; if not, he shall return it, with his objections, to the House in which it originated, which shall enter the objections at large on its Journal and proceed to reconsider it. If after such reconsideration two-thirds of that House shall agree to pass it, it shall be sent, together with the objections, to the other House, by which it shall be reconsidered, and if approved by two-thirds of that House it shall have the same effect as if it had been signed by the Governor; but in all such cases the vote of both Houses shall be taken by yeas

and nays, and the names of the persons voting for and against the Bill or Joint Resolution shall be entered on the Journals of both Houses respectively.

Bills appropriating money out of the Treasury shall specify the objects and purposes for which the same are made, and appropriate to them respectively their several amounts in distinct items and Sections. If the Governor shall not approve any one or more of the items or Sections contained in any Bill, but shall approve of the residue thereof, it shall become a law as to the residue in like manner as if he had signed it. The Governor shall then return the Bill with his objections to the items or Sections of the same not approved by him to the House in which the Bill originated, which House shall enter the objections at large upon its Journal and proceed to reconsider so much of said Bill as is not approved by the Governor. The same proceedings shall be had in both Houses in reconsidering the same as is provided in case of an entire Bill returned by the Governor with his objections; and if any item or Section of Said Bill not approved by the Governor shall be passed by two thirds of each House of the General Assembly, it shall become a part of said law notwithstanding the objections of the Governor. If a Bill or Joint Resolution shall not be returned by the Governor within three days after it shall have been presented to him, Sundays excepted, it shall have the same force and effect as if he had signed it, unless the General Assembly, by adjournment, prevents return, in which case it shall have such force and effect unless returned within two days after the next meeting.

See Const. 1868, III, 22.

An Act not returned by Governor within 3 days becomes law as if signed by him.—Where the Legislature passed an act and presented it to the Governor on that day, though he did not return it within three days although the Legislature continued in session passed the 3-day time limit, the act, became law as though signed on the third day after its presentation to the Governor, under this section. *Goree v. Greenwood County Supervisor*, 93 S. C. 312, 76 S. E. 705. See also *Carolina Gro. Co. v. Burnet*, 61 S. C. 205, 39 S. E. 381, 98 Am. St. Rep. 882, 58 L. R. A. 687, 853.

An appropriation for salaries in a bill having been vetoed and sustained by House is void.—Where a bill appropriating money and dividing the appropriations into several items, one of which is for salaries, which the Governor vetoed, his veto having been sustained by the House, it was held that there was no ap-

propriations for such salaries. *State v. Jones*, 99 S. C. 89, 82 S. E. 882.

Two-thirds of quorum of House may act.—Under this section two-thirds of the members of the House of Representatives present in a lawfully constituted session are sufficient to pass a joint resolution over the Governor's veto. *Smith v. Jennings*, 67 S. C. 324, 45 S. E. 821, L. R. A. 1915B, 1060, 2 A. L. R. 1593.

Adoption by House of Representatives of act relating to state highway commission on reconsideration of vote sustaining Governor's veto did not render act unconstitutional. *State v. Lewis*, 181 S. C. 10; 186 S. E. 625.

Constitutional provision relating to legislative consideration of vetoed bills must be construed in connection with constitutional provision authorizing each House of Legislature to determine its rules of procedure. *State v. Lewis*, 181 S. C. 10; 186 S. E. 625.

Section 24. Other state officers.—There shall be elected by the qualified voters of the State a Secretary of State, a Comptroller-General, an Attorney General, a Treasurer, an Adjutant and Inspector-General, and a Superintendent of Education, who shall hold their respective offices for the term of four years, and until their several successors have been chosen and qualified; and whose duties and compensation shall be prescribed by law. The compensation of such officers shall be neither increased nor diminished dur-

ing the period for which they shall have been elected.

See Const. 1868, III, 23.

Amended by a joint resolution and an act: 1924 (33) 1487; 1926 (34) 959. See FOREWORD on page 1159 of this volume.

The duties of these officers are to be set out by acts of general assembly.—The duties of the state officers directed to be elected in this section are required to be specified by law; that is, by action of the General Assembly. They of course may be added to as the General Assembly may from time to time prescribe. *Evans v. Beattie*, 137 S. C. 496, 135 S. E. 538, 557.

Coastal Highway Act, held not in violation of this section in requiring state officers to perform duties in connection with district. *Evans v. Beattie*, 137 S. C. 496, 135 S. E. 538, 539.

Statute authorizing city to construct stadium, held not in violation of this section in making the attorney general "Ex-

officio bond commissioners of the state" and in requiring him to perform certain duties in connection with the issuance of bonds thereunder. *Cathcart v. City of Columbia*, 170 S. C. 362; 170 S. E. 435.

Under this section, art. 10, § 13, and art. 11, § 4, General Assembly has power to prescribe duties and powers of county auditors, county treasurers, Comptroller General, and state tax commission. *Bank of Johnson v. Prince*, 136 S. C. 439, 134 S. E. 387; *Cathcart v. City of Columbia*, 170 S. C. 362, 170 S. E. 435.

While the office of Comptroller General is a creation of the Constitution, the duties of that official are prescribed by the General Assembly. *Bank of Johnson v. Prince*, 136 S. C. 439, 134 S. E. 387, 389.

ARTICLE V.

JUDICIAL DEPARTMENT.

Section 1. Judicial power vested in certain courts.—The judicial power of this State shall be vested in a Supreme Court, in two Circuit Courts, to wit: A Court of Common Pleas having civil jurisdiction and a Court of General Sessions with criminal jurisdiction only. The General Assembly may also establish County Courts, Municipal Courts and such Courts in any or all of the Counties of this State inferior to Circuit Courts as may be deemed necessary, but none of such Courts shall ever be invested with jurisdiction to try cases of murder, manslaughter, rape or attempt to rape, arson, common law burglarly, bribery or perjury: *Provided*, Before a County Court shall be established in any County it must be submitted to the qualified electors and a majority of those voting must vote for its establishment.

See Const. 1868, IV, 1.

"Judicial Power" referred to is that existing at time of constitution.—This section assumed the existence of an organized society, and when it vested the judicial power in the courts, it had reference to the judicial power then existing, and such as the people then understood to be vested in and exercised by the courts. *Carolina Glass Co. v. State*, 87 S. C. 270, 69 S. E. 391, 399, 44 L. R. A. (N. S.) 198, Ann. Cas. 16D, 62.

And does not include act passed by legislature creating lien on property of individual.—The judicial power vested in courts by this section includes the right to enforce and protect rights, prevent and redress wrongs, punish offenses against the public, and determine the rights, obligations, and liabilities of persons arising out of their relation to and dealings with each other, and the Legis-

lature may not, even on the fullest, fairest, and most deliberate investigation, after due notice, pass an act declaring that an individual is indebted to the state in a given amount, and by legislative fiat create a lien on his property. *Carolina Glass Co. v. State*, 87 S. C. 270, 69 S. E. 391, 44 L. R. A. (N. S.) 198, Ann. Cas. 16D, 62.

And it is manifest under this section that the Constitution has divided the judicial power of the state among certain tribunals by name. *Salinas v. Aultman & Co.*, 49 S. C. 325, 27 S. E. 385.

And in view of this section, there is but one court of common pleas for the entire state.—*Ex parte Ware Furniture Co.*, 49 S. C. 20, 27 S. E. 9, 11.

And the court of common pleas provided for is one of general jurisdiction. *Ex parte Ware Furniture Co.*, 49 S. C.

20, 27 S. E. 9, 11.

There is no provision in this section for a "court en banc." *Citizens' Bank v. Heyward*, 144 S. C. 365, 142 S. E. 651, 656.

When the Constitution confers jurisdiction upon a court, the Legislature cannot take it away. *Strickland v. Seaboard, etc., Ry. Co.*, 112 S. C. 67, 98 S. E. 853.

The Legislature is not vested with power to abolish county court without referring the matter to the qualified voters of the county. *Ansel v. Means*, 171 S. C. 432; 172 S. E. 434.

Question of abolishing county court improperly submitted to voters at primary election. *Ansel v. Means*, 171 S. C. 432; 172 S. E. 434.

Therefore the Court of Common Pleas cannot be deprived of jurisdiction except where direct appeal provided.—The Legislature cannot deprive the Court of Common Pleas of jurisdiction in any civil case, nor of appellate jurisdiction in cases within the jurisdiction of Magistrates' courts except by providing for a direct appeal from these courts to the Supreme Court. *Strickland v. Seaboard, etc., Ry. Co.*, 112 S. C. 67, 98 S. E. 853.

Creation of municipal courts not subject of general law.—It is not the intention of the Constitution to make the creation, jurisdiction, and incidents of a municipal court the subject of a "general law," which must be a law in force in every county in the state and which, while it may contain special provisions making its effect different in certain counties, cannot exempt them from its entire operation, so that the provision of an act providing a method of preparing and drawing jurors for the city of Columbia is valid. *Columbia v. Smith*, 105 S. C. 348, 89 S. E. 1028, 1031.

And city council may be given power to establish municipal courts.—Under this section, and art. 8, § 1 of the Constitution, a statute declaring that it shall be lawful for the city council of a city to establish a municipal court, is not void as an illegal delegation of powers. *Greenville v. Foster*, 101 S. C. 318, 85 S. C. 769, 770.

As to specific section providing for establishment of municipal courts, see § 7246, and note thereto.

But all municipal courts so established

are inferior courts, standing on practically the same footing as a justice court. *City Council v. Fowler*, 48 S. C. 8, 25 S. E. 900, 902, L. R. A. 1918D, 245.

The term "inferior courts," as used in this section, is to be accepted as referring to the technical language usually employed to designate it, and not to be understood as importing that it is inferior only because its judgments may be corrected by an appellate tribunal. *Grimball v. Parham Co.*, 96 S. C. 443, 81 S. E. 186, 187.

Jurisdiction given county court over magistrates' appeals cannot be exclusive.—In view of this section, and §§ 15 and 23 of this article an act creating a county court for a county and purporting to confer upon that court exclusive jurisdiction over appeals from magistrates' courts, is constitutional so far as it gives such court jurisdiction of such appeals and unconstitutional and void only so far as it attempts to make that jurisdiction exclusive. *Strickland v. Seaboard, etc., Ry. Co.*, 112 S. C. 67, 98 S. E. 853, 854.

The creation of the city court of Charleston was authorized by the provisions of this section. *City Council v. Brown*, 42 S. C. 184, 20 S. E. 56, 58.

The creation of a civil and criminal court for portion of Oconee County authorized by the provisions of this section. *Glymph v. Smith*, 170 S. C. 486; 170 S. E. 913.

And clerk's jury in eminent domain proceedings may be established as a court.—In view of the power granted by this section, a clerk's jury organized as special statutory tribunal for initial ascertainment of amount of compensation in eminent domain proceedings, may be established as a court. *Lexington Water Power Co. v. Wingard*, 150 S. C. 418, 148 S. E. 366, 369.

As to specific section providing for proceedings in eminent domain, see § 8454, and note thereto.

Magistrates, under this section, have no jurisdiction in cases where the title to land is in question, or in cases in chancery. *Lewis v. Cooley*, 81 S. C. 461, 62 S. E. 868, 870.

As to specific section providing for jurisdiction of magistrates, see § 3709 and § 257, and notes thereto.

Section 2. Supreme Court.—The Supreme Court shall consist of a Chief Justice and four Associate Justices, any three of whom shall constitute a quorum for the transaction of business. The Chief Justice shall preside, and in his absence the senior Associate Justice. They shall be elected by a joint *viva voce* vote of the General Assembly for the term of ten years, and shall continue in office until their successors shall be elected and qualified, and shall be so classified, that one of them shall go out of office every two years.

See Const. 1868, IV, 2.

Amended by a joint resolution and an act: 1910 (26) 1064; 1911 (27) 119. See FOREWORD on page 1159 of this volume.

The provisions of this section must be construed as being mandatory. *Mills v. Atlantic, etc., R. Co.*, 87 S. C. 158, 69 S. E. 91, 95.

But section did not affect operation of Supreme Court before fourth justice was elected as required.—Altho the Supreme Court consisted of a chief justice and two associate justices, two of whom constituted a quorum, when this Constitution went into effect, this section did not create a new tribunal, and the Supreme Court continued as before until the General Assembly elected the additional associate justice. *Middleton v. Taber*, 46 S. C. 337, 24 S. E. 282, 283, 58 Am. St. Rep. 91, 72 Am. St. Rep. 63, 33 L. R. A. 547, 50 L. R. A. (N. S.) 733.

Provisions as to a quorum are not restricted to temporary absences.—There is nothing in this section indicating an intention that the provision for a quorum should only apply in case of a temporary absence of one of the members of the court, and the language used is equally applicable where the failure of such member to attend is occasioned by death as where it results from some temporary cause. *McAulay v. McAulay*, 96 S. C. 86, 79 S. E. 785, 789, 48 L. R. A. (N. S.) 514.

And two associate justices constitute a quorum when chief justice dead.—Under this section, when the chief justice

is dead, the two associate justices constitute a quorum of the court, and are competent to exercise its powers. *Aultman & Co. v. Utsey*, 35 S. C. 596, 14 S. E. 351, 352. *Sullivan v. Speights*, 14 S. C. 358, Ann. Cas. 12A, 1254, followed.

And justice appointed temporarily may with other justices constitute a quorum.—When the chief justice is dead, and because of the disqualification of an associate justice by reason of his relationship to a party, the governor has appointed one to try and determine the cause, such acting justice and the other associate justice constitute a quorum of the court, and are competent to exercise its powers. *Williams v. Benet*, 35 S. C. 150, 14 S. E. 311, 312, 14 L. R. A. 825, Ann. Cas. 12A, 1254.

The General Assembly has authority under this section to declare how the judges of municipal courts shall be elected. *Thomas v. Register*, 110 S. C. 173, 96 S. E. 517, 518.

The provision of the Constitution requiring the concurrence of three justices to reverse a circuit judge, does not apply to a case decided below before the adoption of the Constitution of 1895, and argued in the Supreme Court before it was completed by election of a third associate justice, as contemplated by the Constitution. *Hunt v. Nolen*, 46 S. C. 551, 554, 24 S. E. 543.

Section 3. Present Chief Justice and associate justices.—The present Chief Justice and Associate Justices of the Supreme Court are declared to be the Chief Justice and two of the Associate Justices of said Court as herein established until the terms for which they were elected shall expire, and the General Assembly at its next session shall elect the third Associate Justice and make suitable provision for accomplishing the classification above directed.

See Const. 1868, IV, 3.

Section 4. Jurisdiction of Supreme Court.—The Supreme Court shall have power to issue writs or orders of injunction, mandamus, quo warranto, prohibition, certiorari, habeas corpus and other original and remedial writs. And said Court shall have appellate jurisdiction only in cases of chancery, and in such appeals they shall review the findings of fact as well as the law, except in chancery cases where the facts are settled by a jury and the verdict not set aside, and shall constitute a Court for the correction of errors at law under such regulations as the General Assembly may by law prescribe.

See Const. 1868, IV, 4.

Cross reference.—For code sections covering jurisdiction of Supreme Court, see § 26 and note thereto.

In South Carolina, there is no limitation on the power of the courts to settle and decree the rights of litigants, save

as prohibited by the fundamental law. *Matheson v. McCormac*, 186 S. C. 93; 195 S. E. 122.

Supreme Court may grant relief for which writs are an appropriate remedy.—In view of this section, the Supreme

Court may grant any relief for which writs are an appropriate remedy; and hence it may issue a writ of habeas corpus for the purpose of determining whether a person in custody may be admitted to bail. *State v. Farris*, 51 S. C. 176, 28 S. E. 308, 309, Ann. Cas. 13A, 157.

And under this section, the Supreme Court may entertain an original petition for mandamus and injunction. *Gilmer v. Hunnicutt*, 57 S. C. 166, 35 S. E. 521; *Carolina Gro. Co. v. Burnet*, 61 S. C. 205, 39 S. E. 381, 382, 98 Am. St. Rep. 882, 58 L. R. A. 687, 853.

And therefore may determine whether conditions for an injunction exists.—The Supreme Court may, under this section, determine whether the conditions exist which authorize the granting of an injunction, and grant the injunction if such conditions exist. *Trustees of University v. Trustees of Academy*, 85 S. C. 546, 67 S. E. 951, 954.

But writ of injunction is issuable to courts only.—The Supreme Court is without jurisdiction to issue a writ of prohibition to a town council, commanding it not to issue bonds, as the writ is issuable, under this section, to courts only. *Hunter v. Moore*, 39 S. C. 394, 17 S. E. 797, 111 Am. St. Rep. 933.

But this section does not restrict the court's power to issue writs of injunction to cases pending in such court, either in its original or appellate jurisdiction. *Salinas v. Aultman & Co.*, 49 S. C. 325, 27 S. E. 385, 386.

Power issues injunctions.—See generally *Little v. Town of Conway*, 171 S. C. 27, 171 S. E. 447.

Action to set aside Governor's orders suspending state highway commissioners from office within original jurisdiction of Supreme Court. *Dacus v. Johnston*, 180 S. C. 329, 185 S. E., 491. See notes to §427 hereof.

Governor declaring state of insurrection and calling out militia.—See §§ 1390 and 3098 and notes thereto.

And Supreme Court may restrain collection of illegal tax where no adequate remedy is provided.—The Supreme Court has power to restrain the collection of an illegal tax, notwithstanding § 2845, providing that the collection of taxes shall not be stayed or prevented by injunction, etc., where the legislature has not provided another adequate remedy for protection of the tax payer. *Ware Shoals Mfg. Co. v. Jones*, 78 S. C. 211, 58 S. E. 811, 812, 129 Am. St. Rep. 288, 44 L. R. A. (N. S.) 212, 225; *Bank of Johnston v. Prince*, 136 S. C. 439, 134 S. E. 387, 389.

But the Supreme Court has no jurisdiction under this section to hear and determine a petition for naturalization. *Ex parte McKenzie*, 51 S. C. 244, 28 S. E.

468, 48 L. R. A. 36, Ann. Cas. 15C, 428.

This section does not confer any jurisdiction upon a separate tribunal known as the "court en banc." *Citizens' Bank v. Heyward*, 144 S. C. 365, 142 S. E. 651, 656.

Appellate jurisdiction of Supreme Court.—By this section Supreme Court has appellate jurisdiction in cases of chancery, and it is given right to review fully findings of fact as well as law except where facts are settled by a jury and verdict is not set aside, and it has power to either affirm in whole, reverse in whole, or modify a decree of a circuit judge, sitting as a chancellor in an equity case. *Montgomery & Crawford v. Arcadia Mills*, 173 S. C., 464, 176 S. E. 589.

In equity causes, the Constitution has laid no restrictions upon the power of the Supreme Court to hear appeals, both as to the law and the facts. *Carolina Nat. Bank v. Homestead Bldg., etc., Ass'n*, 56 S. C. 12, 33 S. E. 781, 786.

And the word "appellate" as used in this section was intended to express the idea of full review of all phases of a case, law and fact. *Sandel v. State*, 128 S. C. 178, 122 S. E. 571, 572.

But it is no part of appellate jurisdiction to pass upon questions not passed upon by Circuit Court.—Under this section, it is no part of appellate jurisdiction, under which there is a review of findings of fact as well as the law, to undertake to pass upon questions which were never passed upon by the Circuit Court. *Green v. Green*, 50 S. C. 514, 27 S. E. 952, 957, 62 Am. St. Rep. 846, 137 Am. St. Rep. 653, Ann. Cas. 12D, 1137.

And there is no authority vested in the Supreme Court to dispose of a demurrer interposed for the first time in the Supreme Court. *Green v. Green*, 50 S. C. 514, 27 S. E. 952, 957, 62 Am. St. Rep. 846, 137 Am. St. Rep. 653, Ann. Cas. 12D, 1137.

And in reviewing the finding of facts, the court must examine all testimony to ascertain if findings of fact are warranted by the evidence. *Brown v. Newell*, 64 S. C. 27, 41 S. E. 835, 842, 21 A. L. R. 402.

And in doing so the court is not justified in being influenced by findings of Circuit Judge.—There is no law or precedent which justifies the Supreme Court in abdicating its prerogative and in avoiding its mandatory duty "to review the findings of fact as well as the law," in a chancery case, by being influenced in the slightest degree by the findings of the circuit judge. *Cogswell v. Canady*, 135 S. C. 365, 133 S. E. 834, 837.

But facts in chancery case on appeal must be decided by preponderance of evidence.—This section requires the facts of a chancery case on appeal to be decided by a preponderance of the evi-

dence; thereby abrogating the former rule that a decree will not be reversed unless it is without any testimony to support it or is manifestly against the overwhelming weight of the evidence. *Wagner v. Kirven*, 47 S. C. 347, 25 S. E. 130, 131; *Sylvester-Bleckley Co. v. Goodwin*, 51 S. C. 363, 29 S. E. 3, 4, 16 L. R. A. (N. S.) 975; *Pollock v. Carolina Interstate Bldg., etc., Ass'n*, 51 S. C. 420, 29 S. E. 77, 81, 64 Am. St. Rep. 683, 55 L. R. A. 950, 62 L. R. A. 65, 43 L. R. A. (N. S.) 877, Ann. Cas. 14C, 1308; *Finley v. Cartwright*, 55 S. C. 198, 33 S. E. 359, 360, 13 L. R. A. (N. S.) 170, Ann. Cas. 17C, 997.

Whether there was any evidence of decedent's mental incapacity to execute contract for payment of claimant from estate for services rendered and procurement of such contract by fraud or duress is law question for court, which is not bound by jury's findings on such issues. In *re Nightingale's Estate*, 182 S. C. 527; 189 S. E. 890.

But it is well settled that the court has no power to review the correct findings of fact in a trial by jury. *Stuckey v. Atlantic, etc., R. Co.*, 57 S. C. 395, 35 S. E. 550, 552.

And this section does not require the court to review the trial judge's findings of fact on conflicting evidence. *Land Mortgage, etc., Co. v. Faulkner*, 45 S. C. 503, 23 S. E. 516, 24 S. E. 288, 289.

The Supreme Court cannot reverse the findings of fact of a circuit judge in a case at law if he had before him any evidence whatever to support his findings. *Weston v. Morgan*, 162 S. C., 177, 160 S. E., 436.

The finding of a jury, unless set aside, is conclusive. *Knobelock v. Germania Sav. Bank*, 50 S. C. 259, 27 S. E. 962, 966, 2 L. R. A. (N. S.) 994, 29 L. R. A. (N. S.) 559.

But Supreme Court may consider the question whether there was any evidence tending to support the verdict. *State v. Floyd*, 174 S. C., 288; 177 S. E., 375.

The function of the Supreme Court is not to try cases on the facts, but to correct errors of law on appeal. *Whisenhunt*

v. Atlantic Coast Line Ry. Co., 195 S. C. 213, 10 S. E. (2d) 305.

Preponderance of evidence is question for jury subject to judge's approval and cannot be decided by Supreme Court. 172 S. C. 42, 172 S. E. 776.

As to specific section covering force of verdict, see § 593, and note thereto.

It is the court's duty to enforce mandatory statutory requirements as to appeal since it is for correction of errors of law.—While a liberal construction should be given the Constitution and statutes in favor of the right of appeal, it is the Supreme Court's duty to enforce mandatory statutory requirements on which the privilege of appeal may be exercised, for, under this section the Supreme Court is a court for the correction of errors of law under such regulations as the Legislature may preserve. *Rylee v. Marett*, 121 S. C. 366, 113 S. E. 483, 487.

And no error of law for court to correct where no ruling was made by trial court.—Where the record discloses that no ruling in any form was sought from or made by the trial court as to the alleged failure of evidence, no adequate basis is afforded for imputing to the trial court the commission of such error of law in that regard as the Supreme Court is bound to review or correct. *State v. Criddle*, 125 S. C. 264, 118 S. E. 424, 425.

In a capital case this court will take notice of any error apparent on the record affecting the substantial rights of accused, even though not made a ground of appeal. *State v. Floyd*, 174 S. C., 288; 177 S. E., 375.

And there is no error of law, under this section, if there is any evidence tending to support a finding by a circuit judge as to a juror's competency. *State v. Farries*, 125 S. C. 281, 118 S. E. 620, 622.

See generally, *certiorari* to Governor, *Rawlinson v. Ansel*, 76 S. C. 395, 396, 57 S. E. 185, 32 L. R. A. (N. S.) 356, 39 L. R. A. (N. S.) 789, 11 Ann. Cas. 613, 615, Ann. Cas. 13B, 789.

Section 5. Held twice a year at capital.—The Supreme Court shall be held at least twice in each year at the seat of government and at such other place or places in the State as the General Assembly may direct.

See Const. 1868, IV, 5.

Section 6. Disqualification of judges in certain cases—how vacancies filled—holding circuit courts.—No Judge shall preside at the trial of any cause in the event of which he may be interested, or when either of the parties shall be connected with him by affinity, or consanguinity, within such degrees as may be prescribed by law, or in which he may have been counsel or have presided in any inferior Court. In case all or any of the Justices of the Supreme Court shall be thus disqualified, or be otherwise pre-

vented from presiding in any cause or causes, the Court or the Justices thereof shall certify the same to the Governor of the State, and he shall immediately commission, specially, the requisite number of men learned in the law for the trial and determination thereof. The same course shall be pursued in the Circuit and inferior Courts as is prescribed in this Section for cases of the Supreme Court. The General Assembly shall provide by law for the temporary appointment of men learned in the law to hold either special or regular terms of the Circuit Courts whenever there may be necessity for such appointment.

See Const. 1868, IV, 6.

Decree rendered by judge who was related to defendant within the degree prohibited by this section, is not void, but merely voidable. *Sandel v. Crum*, 130 S. C. 317, 125 S. E. 919; *Jeffers v. Jeffers*, 89 S. C. 244, 71 S. E. 810, Ann. Cas. 12A, 1072, Ann. Cas. 14C, 972, 5 A. L. R. 1590.

And is validated by consent of such party or his attorney.—Where judge in mortgage foreclosure action was father of a defendant other than the mortgagor, and therefore related to defendant within this section, and such defendant and the plaintiff and their attorneys consented to rendition of decree by such judge, and the mortgagor, the only other party to the suit, though personally served, made default, the decree was valid. *Sandel v. Crum*, 130 S. C. 317, 125 S. E. 919.

And right to object to disqualification is waived after judgment.—Where a party to a probate proceeding knows that the judge is related to him and the other parties thereto, and makes no objection because of such relationship until after the judgment has been orally pronounced, he waives his right to object because of such disqualification. *Ex parte Hilton*, 64 S. C. 201, 41 S. E. 978, 979, 92 Am. St. Rep. 800, 5 A. L. R. 1590.

The concurrence of three justices is only necessary for a reversal of the judgment below. *McAulay v. McAulay*, 96 S. C. 86, 79 S. E. 785, 790, 48 L. R. A. (N. S.)

514.

The Supreme Court is not without power to decide a case when there is a vacancy, though its decision can only be an affirmance; there being but two judges for reversal. *McAulay v. McAulay*, 96 S. C. 86, 79 S. E. 785, 48 L. R. A. (N. S.) 514.

Power to call special term of court of general sessions is sustainable under this section. *State v. Gossett*, 117 S. C. 76, 108 S. E. 290, 16 A. L. R. 1299, 1307.

The word "judge" as used in this section is intended to include "magistrates." *Marchbanks v. Marchbanks*, 58 S. C. 92, 36 S. E. 438, 439, Ann. Cas. 18D, 990.

Where judge presiding in proceeding by ward to require former guardian to make final accounting had not yet made his final accounting nor been discharged as present guardian of such ward, judgment rendered was binding only upon ward and guardian who had waived judges disqualification because of interest in proceeding. *Lide, et al. v. Fidelity & Deposit Co. of Maryland et al.*, 179 S. C. 161, 183 S. E. 771.

See generally, *In re Mears*, 75 S. C. 482, 485, 56 S. E. 7, 49 L. R. A. (N. S.) 896, 9 Ann. Cas. 960.

Applied in *Haughton v. Order of United Commercial Travelers*, 108 S. C. 73, 93 S. E. 393.

Section 7. Reporter—clerk.—There shall be appointed by the Justices of the Supreme Court a Reporter and a Clerk of said Court, who shall hold their offices for four years, and whose duties and compensation shall be prescribed by law.

See Const. 1868, IV, 7.

Section 8. Judgment of Supreme Court.—When a judgment or decree is reversed or affirmed by the Supreme Court, every point made and distinctly stated in the cause and fairly arising upon the record of the case shall be considered and decided, and the reason thereof shall be concisely and briefly stated in writing and preserved with the record of the case.

See Const. 1868, IV, 8.

Section requires specific exceptions.—Under this section an assignment of error quoting a part of the charge at length,

and stating that the court charged on the facts, will not be considered on appeal, as the same is too general. *State*

v. Meares, 60 S. C. 527, 39 S. E. 245, 1 A. L. R. 636.

But appellant may abandon or group exceptions.—This section does not prevent the appellant from abandoning an exception, nor from grouping similar exceptions. *Wilcox v. Southern Ry. Co.*, 91 S. C. 71, 74 S. E. 122, 8 A. L. R. 1168.

And Supreme Court is not bound to formulate and classify complicated points.—Under this section, where the points involved in an appeal were not formulated and classified so as to bring

out the objections urged, but were stated in complicated divisions and subdivisions, consisting of general objections and repetition of objections, the Supreme Court was not bound to formulate them, so that it could state its reason for overruling them. *Garrett v. Weinberg*, 59 S. C. 162, 37 S. E. 51.

Applied in *Jones v. Charleston, etc., Ry. Co.*, 65 S. C. 410, 43 S. E. 884, 5 L. R. A. (N. S.) 196, 226, 238, 1 A. L. R. 1268.

Section 9. Compensation of judges and justices.—The Justices of the Supreme Court and Judges of the Circuit Court shall each receive compensation for their services to be fixed by law, which shall not be increased or diminished during their continuance in office. They shall not be allowed any fees or perquisites of office, nor shall they hold any other office of trust or profit under this State, the United States, or any other power.

See Const. 1868, IV, 9.

See notes under § 9, article 10, hereof.

An annual appropriation bill cannot reduce the compensation of a circuit judge whose salary has theretofore been fixed by a continuing statute, which statute was in effect at time of his election to office. *Grimball v. Beattie*, 174 S. C., 422; 177 S. E., 668.

The provisions hereof creating office of circuit judge, prescribing his term of office, commanding the manner of fixing his compensation, prohibiting diminution thereof during his continuance in office, and provisions of the permanent unreppealed, unmodified, operative statutes fixing the amount of his compensation,

designating time, mode, and manner of payment, directing be paid as specified in statutes for term for which he has been elected, constitute an appropriation of such salary, made by law, in accordance with constitutional requirements, payment of which by comptroller general and state treasurer from surplus funds in state treasury is a simple ministerial act compellable by mandamus. Judicial notice of economic condition existing at time of circuit judge's salary reduced, refused. *Grimball v. Beattie*, 174 S. C., 422; 177 S. E., 668.

Applied in *Stack v. Haigler*, 90 S. C. 319, 73 S. E. 354, 355, Ann. Cas. 13D, 605.

Section 10. Qualifications of.—No person shall be eligible to the office of Chief Justice, Associate Justice or Judge of the Circuit Court who is not at the time of his election a citizen of the United States and of this State, and has not attained the age of twenty six years, has not been a licensed attorney at law for at least five years, and been a resident of this State for five years next preceding his election.

See Const. 1868, IV, 10.

Section 11. Vacancies—conservators—unexpired term.—All vacancies in the Supreme Court or inferior tribunals shall be filled by elections as herein prescribed: *Provided*, That if the unexpired term does not exceed one year such vacancy may be filled by Executive appointment. All Judges, by virtue of their office, shall be conservators of the peace throughout the State; and when a vacancy is filled by either appointment or election, the incumbent shall hold only for the unexpired term of his predecessor.

See Const. 1868, IV, 11.

Vacancy in office of judge of probate.—The true intent of the proviso to this section was simply to provide an exceptional mode of filling a vacancy in an exceptional case. But for this proviso no

vacancy in the office of judge of probate could be filled by executive appointment, but must have been filled by election. The real object of the proviso, therefore, was simply to provide for an exceptional

case, and it was not intended to affect the general provisions in reference to all other cases made in the body of the section. But in addition to this, the very fact that the framers of the Constitution saw fit to make special provision for an exceptional case shows that in all other cases not falling within such exception the general provision of the Constitution that all vacancies shall be filled by election "as herein prescribed," which election carried with it the right to hold the office for the full constitutional term of four years, applies. *Smith v. McConnell*, 44 S. C. 491, 22 S. E. 721, 723, 50 L. R. A. (N. S.) 339.

The proviso to this section, "that if the unexpired term does not exceed one year the vacancy may be filled by executive appointment," does not indicate that a vacancy in the office of the probate

judge means the unexpired term of the officer by whose resignation the vacancy has been occasioned. *Smith v. McConnell*, 44 S. C. 491, 22 S. E. 721, 50 L. R. A. (N. S.) 339.

Vacancy in office of appointive officers.—This section has no application to magistrates, who are appointive officers. *McDowell v. Burnett*, 92 S. C. 469, 75 S. E. 873, 874, Ann. Cas. 14B, 525.

This section, providing that vacancies in the Supreme Court or inferior tribunals shall be filled by elections, relates to elective judicial officers only, and does not apply to the office of magistrate filled by the Governor's appointment and the Senate's confirmation. *State v. Bowden*, 92 S. C. 393 75 S. E. 866, 46 L. R. A. (N. S.) 1204, L. R. A. 1916E, 846.

Applied in *Thomas v. Register*, 110 S. C. 173, 96 S. E. 517.

Section 12. Three necessary for reversal — constitutional questions — judge shall not sit.—In all cases decided by the Supreme Court, the concurrence of three of the Justices shall be necessary for a reversal of the judgment below, subject to the provisions hereinafter prescribed. Whenever, upon the hearing of any cause or question before the Supreme Court, in the exercise of its original or appellate jurisdiction, it shall appear to the Justices thereof, or any three of them, that there is involved a question of constitutional law, or of conflict between the Constitution and Laws of this State and of the United States, or between the duties and obligations of her citizens under the same, upon the determination of which the entire Court is not agreed; or whenever the Justices of said court, or any two of them, desire it on any cause or question so before said court, the Chief Justice, or in his absence the presiding Associate Justice, shall call to the assistance of the Supreme Court all of the Judges of the Circuit Court: *Provided however*, That when the matter to be submitted is involved in an appeal from the Circuit Court, the Circuit Judge who tried the cause shall not sit. A majority of the Justices of the Supreme Court and Circuit Judges shall constitute a quorum. The decision of the Court so constituted, or a majority of the Justices and Judges sitting, shall be final and conclusive. In such case the Chief Justice, or in his absence, the presiding Associate Justice, shall preside. Whenever the Justices of the Supreme Court and the Circuit Judges meet together for the purposes aforesaid, if the number thereof qualified to sit constitute an even number, then one of the Circuit Judges must retire; and the Circuit Judges present shall determine by lot which of their number shall retire.

See Const. 1868, IV, 12.

Amended by a joint resolution and an act: 1910 (26) 1063; 1911 (27) 117. See FOREWORD on page 1159 of this volume.

In general.—In construing amendment of this section, to determine whether language of resolution declaring amendment, or language stating how section should read as amended, should control, court will endeavor to ascertain intention of legislators submitting amendment, and will of people voting favorably to it, by

considering situation and conditions prior to amendment. *Duncan v. Record Pub. Co.*, 145 S. C. 196, 143 S. E. 31, 34.

Supreme court justices and all circuit judges constitute court en banc.—*Duncan v. Record Pub. Co.*, 145 S. C. 196, 143 S. E. 31, 34.

The privilege of calling circuit judges

to aid of Supreme Court under Constitution is entirely for Supreme Court and its justices, and is not a right given litigants, and therefore the court and its justices will call the court en banc when it is deemed advisable without petition or suggestion from a party to a cause pending before it. *Darby et al. v. Southern Ry. Co.*, 194 S. C. 421, 10 S. E. (2d) 465.

A court en banc called only when it appears to three justices that constitutional law is involved.—Under this section as amended it must appear to three Justices of Supreme Court that question of constitutional law is involved in pending cause, to authorize calling of court en banc, notwithstanding that clause of resolution for amendment, stating how section should read when amended, omitted words “three;” “constitutional law” being department of law treating of Constitutions and validity of enactments, as tested by criterion of conformity to fundamental law. *Duncan v. Record Pub. Co.*, 145 S. C. 196, 143 S. E. 31, 34.

Where neither contingency occurs, the circuit judges will not be called in merely because the Supreme Court is divided, and the parties desire an authoritative determination of the question involved. *Florence v. Brown*, 49 S. C. 332, 26 S. E. 880, 27 S. E. 273, 15 L. R. A. (N. S.) 939.

Or a grave question of public concern is involved.—*Duncan v. Record Pub. Co.*, 145 S. C. 196, 143 S. E. 31, 35.

And is not a right given litigant.—Privilege of calling circuit judges to aid of Supreme Court, under this section, is entirely for court and its justices, and is not a right given litigant, so that court and justices will call court en banc when it is deemed advisable without petition or suggestion from party to pending cause; right of appeal not being vested one, but matter of grace. *Duncan v. Record Pub. Co.*, 145 S. C. 196, 143 S. E. 31, 35.

But is a consultative court acting as supreme court.—Call for court en banc, under this section, should be made while Supreme Court has pending before it, and before it has determined, cause in which assistance of circuit judges is desired, since court en banc is not independent court, but called as consultative court, and becomes for time being Supreme Court. *Duncan v. Record Pub. Co.*, 145 S. C. 196, 143 S. E. 31, 35.

Decision of supreme court sitting en banc is conclusive.—Former decision of Supreme Court, sitting with circuit court judges, as court en banc, regarding constitutionality of statute, is conclusive upon Supreme Court. *Williamson v. Richards*, 158 S. C. 534, 155 S. E. 890.

Thus, validity of bonds issued and sold in compliance with State Highway Bond Act, declared constitutional by Supreme

Court en banc, may not be considered, the former decision being binding. *Williamson v. Richards*, 158 S. C. 534, 155 S. E. 890.

Where Supreme Court sitting en banc with judges of circuit court, has filed its opinion, petition for rehearing cannot be entertained and determined, since opinion is final and conclusive under this section, as between the parties to the proceedings, notwithstanding court rule providing that a case shall not be remanded until the expiration of ten days after the filing of the opinion. *Citizens' Bank v. Heyward*, 144 S. C. 365, 142 S. E. 651.

Supreme Court sitting en banc loses jurisdiction when it has answered questions submitted by filing written decision signed by majority of justices and judges. *Citizens' Bank v. Heyward*, 144 S. C. 365, 142 S. E. 651.

Concurrence of three judges necessary for reversal.—It is necessary to have concurrence of three justices to reverse judgment below, but such judgment may be affirmed by equal division of four justices. *Hutchinson v. Turner*, 88 S. C. 318, 70 S. E. 410, 806, L. R. A. 1916B, 107, 470, 517, 586.

The Supreme Court is not without power to decide a case when there is a vacancy, though its decision can only be an affirmance; there being but two judges for reversal. *McAulay v. McAulay*, 96 S. C. 86, 79 S. E. 785, 48 L. R. A. (N. S.) 514.

The Supreme Court being divided upon a question of public policy and not upon a constitutional question, there is no ground upon which the Circuit Judges should be called to the assistance of the Supreme Court upon a re-hearing. *Johnson v. Charleston, etc., Ry. Co.*, 55 S. C. 152, 32 S. E. 2, 33 S. E. 174, 44 L. R. A. 645, 10 L. R. A. (N. S.) 200, 11 L. R. A. (N. S.) 189, Ann. Cas. 12A, 1152, 12 A. L. R. 488.

And affirmance by divided court is res judicata.—Under this section, providing that judgments shall be affirmed in the Supreme Court when the justices are divided equally in their opinions, a judgment affirmed under such conditions is res judicata of the issue involved as to the particular case. *Johnson v. Charleston, etc., Ry. Co.*, 58 S. C. 488, 36 S. E. 851, 12 A. L. R. 488.

Under this section it is not necessary to call the court en banc where the judges concur in affirming the judgment of the lower court on grounds other than the constitutional question, though the judges are evenly divided as to the constitutional question. *Sturgess v. Atlantic, etc., R. Co.*, 80 S. C. 167, 61 S. E. 261, Ann. Cas. 12A, 1153, 12 A. L. R. 488.

Where a judgment of the Circuit Court is affirmed by the Supreme Court, under this section, by an equal division of the

justices, it is binding authority in all subsequent similar cases. *Florence v. Berry*, 62 S. C. 469, 40 S. E. 871.

Applied in *Sandel v. State*, 128 S. C. 178, 122 S. E. 571; *Newton v. Woodley*, 55 S. C. 132, 32 S. E. 531, 33 S. E. 1, 33 L. R.

A. (N. S.), 302, L. R. A. 1915D, 1196, Ann. Cas. 15C, 1159; *Segars v. Parrott*, 54 S. C. 1, 31 S. E. 677, 30 S. E. 353, Ann. Cas. 14C, 626; *Middleton v. Taber*, 46 S. C. 337, 24 S. E. 282, 58 Am. St. Rep. 91, 72 Am. St. Rep. 63, 33 L. R. A. 547, 50 L. R. A. (N. S.), 733.

Section 13. Judicial circuits—election of judges—present judges.—The State shall be divided into as many Judicial Circuits as the General Assembly may prescribe, and for each Circuit a Judge shall be elected by joint *viva voce* vote of the General Assembly, who shall hold his office for a term of four years; and at the time of his election he shall be an elector of a County of, and during his continuance in office he shall reside in, the Circuit of which he is Judge. The present Judges of the Circuit Courts shall continue in office until the expiration of the term for which they were elected, and should a new division of the judicial Circuits be made, shall be the Judges of the respective Circuits in which they shall reside after said division.

See Const. 1868, IV, 13.

General Assembly has authority, under this section, to provide that county judges shall be elected by the people. *Thomas v. Register*, 110 S. C. 173, 96 S. E. 517.

The word "circuit" means a division of the county for judicial business. *State v. Mappus*, 107 S. C. 345, 92 S. E. 1053; *State*

v. Cooler, 112 S. C. 95, 98 S. E. 845.

Applied in *Truesdale v. Johnson*, 144 S. C. 188, 142 S. E. 343 (See § 25 and notes thereto); *Thomas v. Register*, 110 S. C. 173, 96 S. E. 517; *State v. Smith*, 50 S. C. 558, 27 S. E. 933, Ann. Cas. 13E, 391; *State v. Black*, 34 S. C. 194, 13 S. E. 361.

Section 14. Interchange of circuits.—Judges of the Circuit Courts shall interchange Circuits with each other, and the General Assembly shall provide therefor. .

See Const. 1868, IV, 14.

See § 25 of this article and notes thereto.

Applied in *Truesdale v. Johnson*, 144 S. C. 188, 142 S. E. 343; *State v. Thompson*,

122 S. C. 407, 115 S. E. 326; *State v. Smith*, 50 S. C. 558, 27 S. E. 933, Ann. Cas. 13E, 391; *State v. Black*, 34 S. C. 194, 13 S. E. 361.

Section 15. Jurisdiction of courts of common pleas.—The Courts of Common Pleas shall have original jurisdiction, subject to appeals to the Supreme Court, to issue writs or orders of injunction, mandamus, habeas corpus, and such other writs as may be necessary to carry their powers into full effect. They shall have jurisdiction in all civil cases. They shall have appellate jurisdiction in all cases within the jurisdiction of inferior Courts, except from such inferior Courts from which the General Assembly shall provide an appeal directly to the Supreme Court.

See Const. 1868, IV, 15.

Jurisdiction under this section.—Where the Constitution confers jurisdiction upon a court, the Legislature cannot take it away. Therefore the Legislature cannot deprive the Court of Common Pleas of jurisdiction in any civil case, nor of appellate jurisdiction in cases within the jurisdiction of magistrates' courts except by providing for a direct appeal from these courts to the Supreme Court. *Strickland v. Seaboard, etc., Ry. Co.*, 112 S. C. 67, 98 S. E. 853.

There is no limitation on the power of the courts to settle and decree the rights of litigants, save as prohibited by the fundamental law. *Matheson v. McCormac*, 186 S. C. 93; 195 S. E. 122.

Coordinate jurisdiction with other courts.—A Court of Common Pleas has equal and coordinate jurisdiction in all respects to any other like court of any other county except as to territorial jurisdiction. *Fidelity Fire Ins. Co. v. Windham*, 134 S. C. 373, 133 S. E. 35.

Concurrent jurisdiction with court of probate.—Jurisdiction of court of probate in all matters testamentary, of administration, and in business appertaining to minors, and allotment of dower, and insanity, does not necessarily exclude jurisdiction of courts of Common Pleas, under this section and § 19, which gives Common Pleas courts jurisdiction in all civil cases. *Muldrow v. Jeffords*, 144 S. C. 509, 142 S. E. 602.

Statute providing for review of issue of "will or no will" contemplates trial de novo, and practically confers jurisdiction on Court of Common Pleas in view of this section and § 19. *Muldrow v. Jeffords*, 144 S. C. 509, 142 S. E. 602.

Court of common pleas has jurisdiction of issue of "will or no will" presented upon stipulation waiving trial before probate judge in view of this section and § 19. *Muldrow v. Jeffords*, 144 S. C. 509, 142 S. E. 602.

Parties waiving trial in Probate Court and submitting issue to Court of Common Pleas could not attack jurisdiction for lack of process in view of this section and § 19. *Muldrow v. Jeffords*, 144 S. C. 509, 142 S. E. 602.

Under this section, conferring jurisdiction upon the Court of Common Pleas in "all civil cases," its jurisdiction with that of the Probate Court in suits against administrators for accounting is concurrent. *Epperson v. Jackson*, 83 S. C. 157, 65 S. E. 217, 218, Ann. Cas. 12A, 150.

Appellate jurisdiction of all cases within jurisdiction of probate court.—In the absence of legislative authority therefor, the Court of Common Pleas has appellate jurisdiction of all cases within the jurisdiction of the Probate Court. *Ex parte Gregory*, 58 S. C. 114, 116, 36 S. E. 433.

Concurrent jurisdiction with county courts.—Since the Legislature cannot deprive the court of Common Pleas of the jurisdiction in civil cases or of the appellate jurisdiction in cases within the jurisdiction of magistrates' courts, given by

this section, the legislative power, given by § 1, to establish county courts, may be exerted by conferring upon a county court established by the Legislature concurrent jurisdiction with that invested in the Court of Common Pleas, including, in view of § 23, concurrent jurisdiction over appeals from magistrates' courts. *Strickland v. Seaboard, etc., Ry. Co.*, 112 S. C. 67, 98 S. E. 853.

In view of this section and §§ 1 and 23, an Act creating a county court for Richland county, purporting to confer upon that court exclusive jurisdiction over appeals from magistrates' courts, is constitutional so far as it gives such court jurisdiction of such appeals, and unconstitutional and void only so far as it attempts to make that jurisdiction exclusive. *Strickland v. Seaboard, etc., Ry. Co.*, 112 S. C. 67, 98 S. E. 853.

Jurisdiction to declare void marriages prohibited by statutes.—*Davis v. Whitlock*, 90 S. C. 233, 73 S. E. 171, L. R. A. 1915E, 46, 102, L. R. A. 1916C, 714, Ann. Cas. 13D, 538, Ann. Cas. 14C, 1296.

Jurisdiction on claim for damages for lynching.—Claim for damages for lynching is within the jurisdiction of common pleas, and not of county board, and hence not barred by rejection by board. *Best v. Barnwell County*, 114 S. C. 123, 103 S. E. 479.

Applied in *Beatty v. National Surety Co.*, 132 S. C. 45, 128 S. E. 40; *Bush v. Aldrich*, 110 S. C. 491, 96 S. E. 922; *Hand v. Kelly*, 102 S. C. 151, 86 S. E. 382; *Greenville College v. Board of Education*, 75 S. C. 93, 55 S. E. 132; *Hughes v. School Dist.*, 66 S. C. 259, 44 S. E. 784, 5 L. R. A. (N. S.) 448, 6 L. R. A. (N. S.) 53, 65, 81; *Ex parte Evans*, 72 S. C. 547, 52 S. E. 419; *Wideman v. Patton*, 64 S. C. 408, 42 S. E. 190; *South Carolina, etc., R. Co. v. American Tel., etc., Co.*, 63 S. C. 199, 41 S. E. 307; *Ex parte White*, 33 S. C. 442, 12 S. E. 5; *Charleston v. Ashley Phosphate Co.*, 33 S. C. 25, 11 S. E. 386.

Section 16. Sit twice.—The Court of Common Pleas shall sit in each County in this State at least twice in every year at such stated times and places as may be appointed by law.

See Const. 1868, IV, 16.

Applied in *Haughton v. Order of United Commercial Travelers*, 108 S. C. 73, 93 S. E. 393; *Hardin v. Teimmier*, 30 S. C. 391, 9 S. E. 342.

Section 17. Decisions—when filed.—It shall be the duty of the Justices of the Supreme Court to file their decisions within sixty days from the last day of the Court at which the cases were heard; and the duty of the Judges of the Circuit Courts to file their decisions within sixty days from the rising of the last Court of the Circuit then being held.

See Const. 1868, IV, 17.

Delay caused by act of court does not invalidate decision.—A decision filed after the expiration of the 60 days will not be invalid, if the delay be caused by act of the court, and not by the laches of the parties. *Griffith v. Cromley*, 58 S. C. 448, 36 S. E. 738.

Jurisdiction of special judge who reserves his decision continues until he files his opinion in the cause, in spite of the provisions of this section, and judg-

ment of the circuit court filed three months after adjournment of court will not be overthrown because the record contained a statement that the whole case was heard by the judge in open court during term time. *Newbold v. McCrorey*, 103 S. C. 299, 87 S. E. 542, L. R. A. 1916D, 580, Ann. Cas. 17D, 891.

Applied in *Duncan v. Record Pub. Co.*, 145 S. C. 196, 143 S. E. 31.

Section 18. Court of general sessions.—The Court of General Sessions shall have jurisdiction in all criminal cases except those cases in which exclusive jurisdiction shall be given to inferior Courts, and in these it shall have appellate jurisdiction. It shall also have concurrent jurisdiction with, as well as appellate jurisdiction from, the inferior Courts in all cases of riot, assault and battery, and larceny. It shall sit in each County in the State at least twice in each year at such stated times and places as the General Assembly may direct.

See Const. 1868, IV, 18.

Jurisdiction of indictment for larceny.—The court of general sessions has jurisdiction of an indictment for the larceny of property where the value thereof is less than five dollars. *State v. Crosby*, 51 S. C. 247, 28 S. E. 529.

Jurisdiction of indictment for obstructing public road.—The court of sessions has concurrent jurisdiction with the magistrate court of one indicted for willfully obstructing and closing the public road by erecting a house thereon. *State v. Wolfe*, 61 S. C. 25, 39 S. E. 179.

Remitting offense to magistrate's court for trial.—Where the court of general sessions, being a court of general jurisdiction, and the magistrate's court, being a court of limited jurisdiction, have concurrent jurisdiction of the offense of carrying a concealed deadly weapon, it is not error for the court of general sessions to remit such an offense to the magistrate's court for trial. *State v. McClenton*, 59 S. C. 226, 37 S. E. 819.

Sect. 935 of this Code, providing for preliminary hearing for persons charged with crimes in court of general sessions does not contravene this section and section 21 of this article. *State v. Flintroy*, 178 S. C., 89; 182 S. E., 311.

Act requiring Supreme Court clerk to notify penitentiary superintendent of dismissal of appeal suspending execution of death-sentence was not unconstitutional as depriving court of general sessions of exclusive jurisdiction to pronounce sentence and defendant of right to make other motions. *Ex parte Howell*, 168 S. C. 197, 167 S. E. 230.

See generally, *State v. Langford*, 55 S. C. 322, 33 S. E. 370, 74 Am. St. Rep. 746, 88 Am. St. Rep. 589; *State v. Gallman*, 79 S. C. 229, 60 S. E. 682, 16 A. L. R. 1307.

Stated in *State v. Morelli*, 107 S. C. 262, 92 S. E. 475; *State v. Jenkins*, 26 S. C. 121, 1 S. E. 437; *State v. Hampton*, 106 S. C. 275, 91 S. E. 314.

Section 19. Court of probate.—The Court of Probate shall remain as now established in the County of Charleston. In all other Counties of the State the jurisdiction in all matters testamentary and of administration, in business appertaining to minors, and the allotment of dower, in cases of idiocy and lunacy, and persons non compos mentis, shall be vested as the General Assembly may provide, and until such provision such jurisdiction shall remain in the Court of Probate as now established.

See Const. 1868, IV, 20.

Jurisdiction of probate court is subject to legislative change.—The probate court is not a constitutional court in any county except Charleston, and that in any or all the other counties the Legislature may vest the jurisdiction formerly exercised by the probate court, or any

part of it, in other courts, as it may deem expedient. This power necessarily includes the power to abolish the court entirely, and consequently the power to invest it with such jurisdiction as the Legislature may see fit, not inconsistent with other provisions of the Constitu-

tion. *Bradford v. Richardson*, 111 S. C. 205, 97 S. E. 58, 60.

Even though its constitutional jurisdiction cannot be destroyed.—This section gives the probate court jurisdiction "in all matters testamentary," and its constitutional jurisdiction cannot be destroyed. *Hand v. Kelly*, 102 S. C. 151, 86 S. E. 382, 383.

Thus, acting as public guardian is a new duty imposed by the Legislature upon the judge of probate, and merely incidental to his office, and does not create a new office. *State v. Green*, 52 S. C. 526, 30 S. E. 1006; *State v. Green*, 52 S. C. 520, 30 S. E. 683, Ann. Cas. 13D, 511.

Probate court has no exclusive jurisdiction of matters testamentary.—Under this section probate court has not exclusive jurisdiction, excluding judicial inquiry by court of common pleas into matters testamentary or of administration, when subject-matter of such inquiry is not already *res judicata* by virtue of judgment of court of probate. *Beatty v. National Surety Co.*, 132 S. C. 45, 128 S. E. 40.

Provided the action is not already pending in such court.—Court of common pleas will decline to entertain jurisdiction of matters embraced in action already pending in probate court. *Beatty v. National Surety Co.*, 132 S. C. 45, 128 S. E. 40.

A probate judge can require the general guardian of a minor to give a new bond when such guardian is about to receive funds not in contemplation when the original bond was executed. *Williams*

v. Weeks, 70 S. C. 1, 48 S. E. 619, 620, 44 L. R. A. (N. S.) 176.

Failure to serve notice of inquisition upon lunatic does not affect decree appointing committee.—The validity of a decree of a probate court appointing a committee for a lunatic was not affected by the fact that the lunatic was not served with notice of the inquisition. *Cathcart v. Hopkins*, 119 S. C. 190, 112 S. E. 64, 23 A. L. R. 595, 606.

Certiorari will not lie to a judgment of the probate court declaring a person to be of unsound mind, but that appeal is the proper remedy. *Ex parte Gregory*, 58 S. C. 114, 36 S. E. 433.

Person elected to fill vacancy of probate judge entitled to full term office.—A person elected to fill a vacancy in the office of the judge of probate occasioned by the resignation of the previous incumbent is entitled to hold the office for the full term of four years. *Smith v. McConnell*, 44 S. C. 491, 22 S. E. 721, 50 L. R. A. (N. S.) 339.

The proviso in § 11 "that if the unexpired term does not exceed one year the vacancy may be filled by executive appointment," does not indicate that a vacancy in the office of the probate judge means the unexpired term of the officer by whose resignation the vacancy has been occasioned. *Smith v. McConnell*, 44 S. C. 491, 22 S. E. 721, 50 L. R. A. (N. S.), 339.

Applied in *Muldrow v. Jeffords*, 144 S. C. 509, 142 S. E. 602; *McNair v. Howle*, 123 S. C. 252, 116 S. E. 279; *Hendrix v. Holden*, 58 S. C. 495, 36 S. E. 1010; *Ex parte White*, 33 S. C. 442, 12 S. E. 5.

Section 20. Magistrates—term of office—constables—salary.—A sufficient number of Magistrates shall be appointed and commissioned by the Governor, by and with the advice and consent of the Senate, for each County, who shall hold their offices for the term of two years and until their successors are appointed and qualified. Each Magistrate shall have the power, under such regulations as may now or hereafter be provided by law, to appoint one or more Constables to execute writs and processes issued by him. The present trial Justices are declared Magistrates as herein created, and shall exercise the powers and duties of said office of Magistrate until their successors shall be appointed and qualified. Each Magistrate shall receive a salary, to be fixed by the General Assembly, in lieu of all fees in criminal cases.

See Const. 1868, IV, 21.

In general.—Trial justices were continued in office upon the adoption of the Constitution of 1895 under the name of magistrates, with all the powers and duties previously belonging to the office of trial justice. In *re Hooper*, 48 S. C. 149, 26 S. E. 466, Ann. Cas. 18D, 990.

This section is not inconsistent with section 11, art. 1. Prior to the adoption

of the Constitution of 1895, officers in this state might be held during good behavior. The purpose of § 11, art. 1, was to change this rule, and make the term a limited one so as to make office holders more amenable to the elective or appointive power. It would be most unreasonable to impute to the constitutional convention a purpose to give to the

expression, "some specified period," a meaning so narrow as to prohibit any legislative provision against the inconvenience arising from vacancies in public office, which would occur if the incumbent could not be allowed to hold office until the appointment or election and qualification of his successor. Such a construction of the Constitution is impossible. The convention could not have meant to prohibit itself and the General Assembly from doing that which it later in the same Constitution actually did in providing that the Governor and the Justices of the Supreme Court should hold their office for the number of years mentioned, and until their successors should be elected and qualified, and that magistrates should hold their offices for two years and until their successors should be appointed and confirmed, and should qualify. State v. Bowden, 92 S. C. 393, 75 S. E. 866, 872, 46 L. R. A. (N. S.) 1204, L. R. A. 1916E, 846.

Appointment must be with consent and advice of Senate.—State v. Bowden, 92 S. C. 393, 75 S. E. 866, 46 L. R. A. (N. S.) 1204, L. R. A. 1916E, 846.

Nomination of candidate for magistrate merely suggestion.—The nomination of candidate for magistrate by any party is simply a suggestion to the Governor of a suitable person to be appointed,

which suggestion may be ignored by the Governor. Young v. Sapp, 167 S. C. 364; 166 S. E. 354.

Nomination.—The nomination of a candidate for magistrate by any party is simply a suggestion to the Governor of the state of a suitable person to be appointed by him as magistrate. As a member of the nominating party, the Governor may be morally bound to recognize the suggestion of his party, but, under the provisions of the Constitution of the state, the Governor may ignore such recommendation, and make such appointment as he thinks fit and proper, subject to confirmation by the Senate. Young v. Sapp, 167 S. C. 364; 166 S. E. 354.

A magistrate may appoint a special constable for a particular occasion. Cromer v. Watson 59 S. C. 488, 38 S. E. 126.

Under constitutional provision providing that each magistrate shall receive salary to be fixed by General Assembly in lieu of all fees in criminal cases, county board in Spartanburg County had legal duty to pay claim for salary by lawful incumbent of office of magistrate of Spartanburg County in city of Spartanburg, since office was a constitutional office and salary was guaranteed by Constitution. Gaffney v. Mallory, 186 S. C. 337; 195 S. E. 840.

Applied in Columbia v. Smith, 105 S. C. 348, 89 S. E. 1028.

Section 21. Jurisdiction of magistrates—examining courts.—Magistrates shall have jurisdiction in such civil cases as the General Assembly may prescribe: *Provided*, Such jurisdiction shall not extend to cases where the value of property in controversy, or the amount claimed, exceeds one hundred dollars, or to cases where the title to real estate is in question, or to cases in chancery. They shall have exclusive jurisdiction in such criminal cases as the General Assembly may prescribe: *Provided, further*, Such jurisdiction shall not extend to cases where the punishment exceeds a fine of one hundred dollars or imprisonment for thirty days. In criminal matters beyond their jurisdiction to try, they shall sit as Examining Courts, and commit, discharge, or, except in capital cases recognize, persons charged with such offences, subject to such regulations as the General Assembly may provide. They shall also have the power to bind over to keep the peace and for good behavior for a time not to exceed twelve months.

Provided, That in the County of Sumter, jurisdiction of magistrates in civil cases shall extend to where the value of property in controversy or the amount claimed is not more than Two Hundred (\$200.00) Dollars, except in the Third Magisterial District, where the amount shall not exceed One Thousand (\$1,000.00) Dollars.

1932 (37) 1399; 1933 (38) 586.

Provided, further, That in addition to the jurisdiction conferred by this Constitution upon magistrates in Anderson County, any magistrate or magistrates residing in the City of Anderson who are licensed to practice law in this State and who have been actively engaged in the practice of law in this State for a period of five (5) years shall have the same jurisdiction as

the Court of Common Pleas and the judges thereof and concurrent therewith in all cases in law and equity, special proceedings and remedial remedies, where the value of the property in controversy or the amount claimed does not exceed the sum of One Thousand (\$1,000.00) Dollars, to issue and hear writs of habeas corpus to determine the custody of minor children: *Provided, however,* They shall not have jurisdiction in any case where the title to real estate is involved; and such magistrate or magistrates shall have jurisdiction in such criminal cases as the General Assembly may prescribe, but such jurisdiction shall not extend to cases where the punishment exceeds a fine of Five Hundred (\$500.00) Dollars and/or imprisonment for eighteen (18) months, (either or both) with or without hard labor, except, however, such jurisdiction in criminal cases may be extended by the General Assembly to include any and all violations of the laws relating to intoxicating and/or alcoholic liquors, cases charging non-support of wife and or child or children, bastardy, drawing and uttering fraudulent check, driving motor vehicle under the influence of intoxicating liquor, and disposing of property under lien, and in such cases said magistrates shall have the power to impose such sentences as are provided by law for such offenses.

See Const. 1868, IV, 22.

Amended by a joint resolution and an act: 1934 (38) 1627; 1935 (39) 341. See FOREWORD on page 1159 of this volume.

See notes to Art. V, sect. 18.

The jurisdiction of magistrates is fixed by the constitution and statutes enacted pursuant thereto. *Clemmons v. Nicholson*, 188 S. C. 124, 198 S. E. 180.

In absence of restrictions jurisdiction of magistrates extends throughout county.—As the General Assembly has not restricted territorial jurisdiction of magistrates in Greenville county as to civil actions, such jurisdiction extends throughout the county. *Baker v. Irvine*, 61 S. C. 114, 39 S. E. 252.

Against all defendants subjects to process of court or who may voluntarily appear.—*Best v. Seaboard, etc., Ry.*, 72 S. C. 479, 52 S. E. 223.

Where summons is issued to divide crop, agreement that proceeding be treated as action to recover amount of laborer's wages, measured by value of one-half of crop less laborer's debt to landlord, appearance of parties gives magistrate jurisdiction of whole matter. *Wilkie v. Murphy*, 88 S. C. 415, 70 S. E. 1028, 40 L. R. A. (N. S.) 244.

This section includes suits against corporations. *Dennis v. Atlantic, etc., R. Co.*, 86 S. C. 258, 68 S. E. 465.

Including foreign corporations.—This section gives a magistrate jurisdiction of an action against a foreign corporation having property in the State to recover a penalty by due service of summons. *Best v. Seaboard, etc., Ry.*, 72 S. C. 479, 52 S. E. 223.

Provided the action is not equitable in nature.—Where proof showed that plaintiff and defendant in an action of

claim and delivery were joint owners, their rights, equitable in nature, could not be administered in a magistrate's court in view of this section. *Driggers v. Cannon*, 107 S. C. 322, 92 S. E. 1049.

Although this section provides that the jurisdiction of magistrates shall not extend to cases in chancery, in an action in claim and delivery, to recover possession of a horse tried before a magistrate, defense of estoppel was in pais, and not equitable in its nature, and hence the magistrate had jurisdiction thereof. *Aiken v. Seabury*, 107 S. C. 376, 92 S. E. 1048.

And provided the penalty of offense is within constitutional amount.—A magistrate's court has no jurisdiction as to an obstruction of a highway or neighborhood road, an indictable offense under the common law, where the penalty therefor has not been limited. *State v. Mellette*, 106 S. C. 224, 91 S. E. 4.

A trial in a magistrate's court for housebreaking and grand larceny, both of which are felonies, is a nullity under this section, and hence is not a bar to a subsequent trial and conviction on the same charges in the court of general sessions. *State v. Rountree*, 127 S. C. 261, 121 S. E. 205.

Or amount claimed is within constitutional limit.—An action for possession of chattels of the value of \$100, and for \$75 damages, or, if they cannot be returned, for a judgment for \$175, is, under this section, in excess of the jurisdiction of a magistrate. *Reynolds v. Philips*,

72 S. C. 32, 51 S. E. 523.

In matters of contract jurisdiction being determined by amount claimed and not by amount due.—Brunson v. Furtick, 72 S. C. 579, 52 S. E. 424, 425, 5 Ann. Cas. 307, Ann. Cas. 12A, 1285.

Action on bond, required by magistrate of tenants in proceedings to dispossess tenant holding over after termination of lease under statute providing that appeal from proceedings shall operate as a stay upon the tenant entering into a bond with sufficient surety to pay landlord all damages sustained thereby, if exceeding the sum of \$100, cannot be brought before magistrate. American Oil Co. v. Cox, 182 S. C. 419; 189 S. E. 660.

Jurisdiction of magistrate to entertain actions of forcible entry and detainer is not affected by the value of the property, the possession of which is sought to be recovered, but is dependent upon the value of the possession. American Oil Co. v. Cox, 182 S. C. 419; 189 S. E. 660.

And the burden is on plaintiff to establish jurisdiction.—Stroy v. Nicpee, 105 S. C. 265, 89 S. E. 666.

So that a judgment on claim in excess of such amount is void.—Stroy v. Nicpee, 105 S. C. 265, 89 S. E. 666.

Of course plaintiff may reduce claim to bring it within jurisdiction.—It is no objection to the jurisdiction of a trial justice that plaintiff reduce his demand to bring it within the amount over which the justice has jurisdiction. Catawba Mills v. Hood, 42 S. C. 203, 20 S. E. 91, 28 L. R. A. 226, Ann. Cas. 15D, 591.

Under this section a party cannot put a fictitious value on property in order to confer jurisdiction, though he can forego a part of his claim for money. Stroy v. Nicpee, 105 S. C. 265, 89 S. E. 666.

In which case he cannot later sue on amount omitted.—Where plaintiff, in reducing his claim so as to bring it within the jurisdiction of a trial justice, leaves out an item which could be included in his cause of action, he cannot thereafter sue on such item. Catawba Mills v. Hood, 42 S. C. 203, 20 S. E. 91, 28 L. R. A. 226, Ann. Cas. 15D, 591.

If a party foregoes part of his claim to give the magistrate jurisdiction of the suit, he cannot, after judgment, sue for the amount so omitted. Stroy v. Nic-

pee, 105 S. C. 265, 89 S. E. 666.

Magistrates have jurisdiction to forfeit goods exposed for sale on Sunday.—Laws authorizing confiscation of goods offered or exposed for sale on Sunday are not invalid as extending power and authority of magistrates. Xepapas v. Richardson, 149 S. C. 52, 146 S. E. 686, 687.

As the term "punishment" does not include forfeiture.—State v. Hondros, 100 S. C. 242, 84 S. E. 781.

And a magistrate does not lose jurisdiction of a criminal case merely because title to land is incidentally involved.—State v. Holcomb, 63 S. C. 22, 40 S. E. 1017.

Or because of mere attempt to deny landlord's title.—Notwithstanding this section, mere attempt to deny landlord's title or assertion of a superior title will not oust the magistrate of jurisdiction in a summary proceeding. Stewart-Jones Co. v. Shehan, 127 S. C. 451, 121 S. E. 374.

A magistrate can commit to jail one in default of peace bond.—A magistrate has jurisdiction, on finding defendant guilty of breach of the peace, to commit him to jail in default of a peace bond conditioned for a year and a day. State v. Garlington, 56 S. C. 413, 34 S. E. 689.

Judgment will not be reversed where evidentiary basis for trial judge's finding exists, and the conclusion is correct. Stewart-Jones Co. v. Shehan, 127 S. C. 451, 121 S. E. 374.

See generally, State v. Wolfe, 61 S. C. 25, 28, 39 S. E. 179; Burekhalter v. Jones, 58 S. C. 89, 90, 36 S. E. 495, L. R. A. 1917C, 151, Ann. Cas. 14A, 1088; Dill v. Durham, 56 S. C. 423, 425, 35 S. E. 3, Ann. Cas. 12C, 615; State v. Adams, 49 S. C. 518, 27 S. E. 523; State v. Morelli, 107 S. C. 262, 92 S. E. 475; Lewis v. Cooley, 81 S. C. 461, 62 S. E. 868.

Applied in Barnes v. Charleston, etc., Ry. Co., 106 S. C. 227, 90 S. E. 1017; Mayfield v. Bessinger, 87 S. C. 369, 69 S. E. 673; Holliday v. Poston, 60 S. C. 103, 38 S. E. 449, 18 L. R. A. (N. S.) 1270; Harby v. Wells, 52 S. C. 156, 29 S. E. 563, Ann. Cas. 16A, 580; City Council v. Weller, 34 S. C. 357, 13 S. E. 628; Charleston v. Ashley Phosphate Co., 33 S. C. 25, 11 S. E. 386; State v. Jenkins, 26 S. C. 121, 1 S. E. 437.

Section 22. Trial by jury—jury in inferior courts—grand jury.—All persons charged with an offence shall have the right to demand and obtain a trial by jury. The jury in cases civil or criminal in all municipal Courts, and Courts inferior to Circuit Courts, shall consist of six. The grand jury of each County shall consist of eighteen members, twelve of whom must agree in a matter before it can be submitted to the Court. The petit jury of the Circuit Courts shall consist of twelve men, all of whom must agree to a verdict in order to render the same. Each juror must be a qualified elector under the

provision of this Constitution, between the ages of twenty-one and sixty-five years, and of good moral character.

See Const. 1868, I, II, and IV, 23.

Cross reference.—See art. 1, sect. 18, art. 2, § 5 and notes thereto.

This section is an incorporation of the law existing at the time of its adoption.

—The first clause of this section did not change the law then of force, but only made it permanent by incorporating it in the organic law of the land. *Burckhalter v. Jones*, 58 S. C. 89, 90, 36 S. E. 495, L. R. A. 1917C, 151, Ann. Cas. 14A, 1088.

And does not inhibit legislation as to cases where the right of trial by jury did not then exist.—The provision does not inhibit legislation as to cases where the right of trial by jury did not exist at its adoption, nor as to analogous cases. On the contrary, proceedings without jury, existing before the adoption of the Constitution, serve to authorize analogous proceedings by the Legislature subsequently. *Frazee v. Bratton*, 26 S. C. 348, 2 S. E. 125, 126.

Thus, a statute giving county commissioners the power to condemn land for public roads, and assess damages therefor, does not violate this section since no right to trial by jury existed in such proceedings prior to its adoption. *Gilmer v. Hunnicutt*, 57 S. C. 166, 35 S. E. 521.

And a statute providing a summary mode of ejecting tenants who either hold over after the expiration of their leases, or fail to pay rent when due, and conferring jurisdiction on justices of the peace in such cases, is not unconstitutional, as violating the right to a trial by jury guaranteed by this section for the reason that previous to the adoption of the Constitution no right to a jury trial existed in such proceeding. *Frazee v. Bratton*, 26 S. C. 348, 2 S. E. 125.

An act establishing the Greenwood county court, and providing for a jury of six, is constitutional, under this section, as applied to a conviction for violating the State prohibition law. *State v. Klugh*, 127 S. C. 429, 121 S. E. 262.

But a statute giving magistrate jurisdiction in two counties violates this section.—The act of 1887, 19 stats. 1027, providing that a magistrate shall have jurisdiction in two counties, is unconstitutional, and in violation of this section. *Dill v. Durham*, 56 S. C. 423, 425, 35 S. E. 3, Ann. Cas. 12C, 615.

Directing verdict in a criminal case does not violate this section.—In prosecution for assault and battery with intent to kill, refusal to instruct on law of simple assault and battery did not violate defendant's constitutional rights. *State v. Bush*, 156 S. C. 526, 153 S. E. 490.

And, of course, jury trial may be waived. *Belcher v. Com'rs*, 2 McC. 23.

Listing, drawing and summoning ju-

rors.—The following from *State v. Wells*, 162 S. C. 509; 161 S. E. 177, 183, quoted with approval in *State v. Rasor*, 168 S. C. 129; 167 S. E. 166:

"Our court has been liberal in holding that the provisions as to the drawing and summoning of jurors are usually directory only and not mandatory. Irregularities in the listing, drawing, and summoning of jurors may be often waived, and, even if not waived, are not in themselves acts so prejudicial as to require the quashing of a venire or to warrant the court in setting aside a judgment based upon a finding or verdict of a jury irregularly drawn."

Duty of trial judge.—It is the duty of trial judge to assure himself each member of jury is unbiased, fair, and impartial, and no one of them disqualified as a juror. *State v. Rasor*, 168 S. C. 221; 167 S. E. 396.

Statute providing for court for portion of Oconee County not invalid as depriving certain defendants of their common-law right to a trial by a common-law jury of twelve men. *Glymph v. Smith*, 170 S. C. 486; 170 S. E. 913.

This section, declaring that the grand jury of each county shall consist of 18 members, is mandatory. *State v. Powers*, 59 S. C. 200, 37 S. E. 690.

But 12 grand jurors are a sufficient number to be present when an indictment is found. *State v. Williams*, 35 S. C. 344, 14 S. E. 819, 27 L. R. A. 846, 28 L. R. A. 35, 198, Ann. Cas. 12C, 31.

And any good citizen qualified under the Constitution may be drawn to serve on the grand jury. *State v. Graham*, 79 S. C. 116, 60 S. E. 431, L. R. A. 1917A, 240.

The term "qualified elector," within constitutional provision, regarding jurors, means "registered elector." *State v. Rector*, 158 S. C. 212, 155 S. E. 385. See also, *State v. Gregory*, 171 S. C. 535, 172 S. E. 692.

A juror, grand as well as petit, must be registered elector of county in which he is called to serve. *State v. Rector*, 158 S. C. 212, 155 S. E. 385.

Court properly quashed indictment where at least 2 of 17 grand jurors who participated in finding it were not registered electors, and were disqualified to act. *State v. Rector*, 158 S. C. 212, 155 S. E. 385, 386.

A grand jury returning murder indictment was not legally qualified, and defendant would be granted new trial, where five members of grand jury were not legally registered electors due to the fact that their certificates of registration were not signed by two members

of county board of registration but merely by clerk in office of board placing signatures of members thereon at direction of members. *State v. Bibbs*, 192 S. C. 231, 6 S. E. 2d 276.

A grand jury, which was duly drawn by lawfully authorized officers for court term at which indictment was found, was duly organized and sworn, and acted on indictment in regular and usual manner, had legal existence, so that indictment was not void on ground of grand jurors' disqualification, expressly waived by defendant, because of statutory irregularity in issuance of voters' registration certificates to grand jurors, each of whom was qualified to receive proper certificate. *State v. Hann*, 196 S. C. 211, 12 S. E. (2d) 720.

Juror, duly registered in 1927 was not disqualified by failure to re-register in 1928, prior to trial of case. *Veronee v. Charleston Consol. Ry., etc., Co.*, 152 S. C. 178, 149 S. E. 753.

Jurors registered and qualified when drawn in December are not disqualified for service because not re-registering prior to service in following year. *Veronee v. Charleston Consol. Ry., etc., Co.*, 152 S. C. 178, 149 S. E. 753.

As no provision exists as to time of registration in the particular year.—It is evident from the provisions of the Constitution and statute law that a new registration is required every tenth year, but nowhere in the Constitution or in the statute is provision made for the time of the year at which this registration shall take place. All of these provisions must be construed together, to give proper force to each, and only under a strained construction could it be held that it was necessary for every elector in the State to re-register on the 1st day of January of the tenth year in order to perform jury duty, provided he was otherwise qualified. *Veronee v. Charleston Consol. Ry., etc., Co.*, 152 S. C. 178, 149 S. E. 753, 755.

Disqualification of jurors must be proved.—Under federal statutes requiring jurors in United States courts to have the same qualifications as jurors in the highest court of the State, this section requiring each juror to be a qualified elector of good moral character, and art. 2, § 6, disqualifying persons convicted of certain named offenses, one who had been convicted on plea of guilty of a violation of the act to regulate commerce by making false reports of the weight of certain articles shipped was not thereby disqualified to serve as a grand juror. The commission of that offense does not show that the juror was not a man of good moral character, since such character is presumed, unless the want of it is shown by conviction of a disqualifying crime, or is made to appear by evidence

outside the record. *Christopoulos v. United States*, 230 F. 788.

Accused, seeking a new trial on the ground of the disqualification of a juror, must show the disqualification, that it was unknown before the verdict, and that he was not negligent in failing to discover the disqualification before verdict. *State v. Jones*, 90 S. C. 290, 73 S. E. 177, 50 L. R. A. (N. S.) 954, 973, Ann. Cas. 13A, 893, 18 A. L. R. 1289.

As motion to quash indictment on ground of juror's disqualification will be denied in absence of proof thereof.—*State v. Bazen*, 89 S. C. 260, 71 S. E. 779.

But the disqualification of a single grand juror does not invalidate an indictment, unless the grand jury was composed of only 12 men. *State v. Bazen*, 89 S. C. 260, 71 S. E. 779.

Though one charged with capital felony cannot be tried by a jury of less than 12 men, though his attorney consented to trial by 11 men, notwithstanding the accused remains silent and testifies before the 11 men. *State v. Hall* (S. C.), 101 S. E. 662.

Disqualification for failure to register must be established before trial.—A party in a civil action is not entitled to a new trial because a juror was not registered, though such fact was unknown to the party during the trial, since it could have been known by a search of the registration books, which are public records. *Mew v. Charleston, etc., Ry. Co.*, 55 S. C. 90, 32 S. E. 828, 17 L. R. A. (N. S.) 775, 20 L. R. A. (N. S.) 482, 50 L. R. A. (N. S.) 976, Ann. Cas. 14D, 46.

So also disqualification because of age.—Where the trial court, on motion for new trial on the ground of the disqualification of a juror because over 65 years old, found that the jurors had been drawn for 14 days, that their names had been published in the county papers a week or ten days before the court convened, that the juror was well known in the community, and that the slightest inquiry would have made known the fact that he was over age, a finding of failure to exercise diligence in discovering the disqualification before trial was justified. *State v. Jones*, 90 S. C. 290, 73 S. E. 177, 50 L. R. A. (N. S.) 954, 973, Ann. Cas. 13A, 893, 18 A. L. R. 1289.

Or because of service on former trial.—Where a defendant fails to use the means afforded by law to ascertain the qualifications of jurors, it is not error to refuse a new trial based on the alleged ground that a juror had served on a former trial of the case, which fact was unknown to defendant or his counsel until after the trial. *State v. Robertson*, 54 S. C. 147, 31 S. E. 868, 50 L. R. A. (N. S.) 971.

Failure to pay taxes for current year does not disqualify juror.—Under this

section requiring each juror to be a qualified elector, it was not necessary that the juror should have paid taxes during the current year, which is an essential to his right to vote at any particular election, but not essential to his being a qualified elector registered as such, and who may vote at any election upon showing he has paid his taxes at any time before the election. *State v. Mittle*, 120 S. C. 526, 113 S. E. 335.

There is no distinction between the qualifications to be possessed by a grand and petit juror. *State v. Williams*, 35 S. C. 344, 14 S. E. 819, 27 L. R. A. 846, 28 L. R. A. 35, 198, Ann. Cas. 12C, 31.

And determination of circuit judge that juror is competent cannot be reviewed.—Where a juror is examined on a voir dire, and after such examination the circuit judge determines that he is a competent juror, such determination, being on a question of fact, cannot be reviewed. *State v. Robertson*, 54 S. C. 147, 31 S. E. 868, 50 L. R. A. (N. S.) 971.

Women are not permitted to serve as jurors.—Under this section, providing, that the petit jury of the criminal courts shall consist of 12 men, women are not permitted to serve as jurors, notwithstanding the further provision that each juror shall be a qualified elector, which does not mean that every qualified elector shall be a qualified juror. *State v. Mittle*, 120 S. C. 526, 113 S. E. 335.

Person convicted of larceny cannot serve as juror.—A verdict rendered by a jury, one of whom is disqualified to serve on account of having been convicted of larceny, is void. *Garrett v. Weinberg*, 54 S. C. 127, 31 S. E. 341, 34 S. E. 70, 50 L. R. A. (N. S.) 948, 977, L. R. A. 1916E, 224, Ann. Cas. 15D, 866, Ann. Cas. 16C, 1210.

Right to serve as a juror is not a vested right, and therefore this section and art. 2, § 6, providing that persons

convicted of larceny shall be disqualified, applies to persons convicted before the constitutional provision was passed. *Garrett v. Weinberg*, 54 S. C. 127, 31 S. E. 341, 34 S. E. 70, 50 L. R. A. (N. S.) 948, 977, L. R. A. 1916E, 224, Ann. Cas. 15D, 866, Ann. Cas. 16C, 1210.

A person convicted of larceny is disqualified from sitting as a juror, and where such a person is drawn and it is a fact that none of the parties to the action had knowledge of the conviction, his disqualification entitled defendants to a new trial. *Garrett v. Weinberg*, 54 S. C. 127, 31 S. E. 341, 34 S. E. 70, 50 L. R. A. (N. S.) 948, 977, L. R. A. 1916E, 224, Ann. Cas. 15D, 866, Ann. Cas. 16C, 1210.

A juror regularly drawn cannot have substituted in his place another, without the consent of defendant, and where such was the case a new jury was properly drawn. *State v. Coleman*, 54 S. C. 232, 285, 32 S. E. 406, 40 L. R. A. (N. S.) 1214, L. R. A. 1917A, 240, 12 A. L. R. 1007.

Members of defendant's race need not be on jury in absence of discrimination.—Refusal to quash an indictment, or to sustain a challenge to the array of grand and petit jurors, because no member of the race to which defendant belonged was on the grand jury which found the bill of indictment, is not error, no discrimination against defendant's race being shown. *State v. Brownfield*, 60 S. C. 509, 39 S. E. 2, 66 L. R. A. 369.

See generally, *Columbia v. Smith*, 105 S. C. 348, 89 S. E. 1028; *In re Hooper*, 48 S. C. 149, 150, 26 S. E. 466, Ann. Cas. 18D, 990.

Applied in *Columbia v. Smith*, 105 S. C. 348, 89 S. E. 1028 (see note to art. 3, § 34); *State v. Williams*, 40 S. C. 373, 19 S. E. 5, 27 L. R. A. 595, 35 L. R. A. 566, 43 L. R. A. 47, 58, 77, 45 L. R. A. 155; *Utsey v. Charleston, etc., R. Co.*, 38 S. C. 399, 17 S. E. 141.

Section 23. Actions in magistrates' courts.—Every civil action cognizable by Magistrates shall be brought before a Magistrate in the County where the defendant resides, and every criminal action in the County where the offence was committed. In all cases tried by them, the right of appeal shall be secured under such rules and regulations as may be provided by law: *Provided*, That in Counties where Magistrates have separate and exclusive territorial jurisdiction, criminal causes shall be tried in the Magistrate's district where the offence was committed, subject to such provision for change of venue from one Magistrate's district to another in the same County as may be provided by the General Assembly.

See Const. 1868, IV, 23.

Cross references.—As to provisions with respect to courts of magistrates, see § 257, et seq., and notes thereto. As to appeals from magistrates' courts in crim-

inal cases, see §§ 1024, et seq., and notes thereto.

Coextensive jurisdiction of magistrates in same county.—Under this section pro-

viding that every civil action cognizable by a magistrate shall be brought before a magistrate in the county where defendant resides, magistrates in a county have jurisdiction coextensive with the county, which is not limited to actions in the township where the defendant resides. *Wise v. Werts*, 72 S. C. 132, 51 S. E. 547.

Action by attachment against nonresident and judgment in rem.—This section does not prevent an action by attachment against a nonresident and a judgment in rem. *Burckhalter v. Jones*, 58 S. C. 89, 36 S. E. 495, L. R. A. 1917C, 151, Ann. Cas. 14A, 1088.

Requirement that civil action be brought in county when cause of action arose.—Under this section providing that every civil action cognizable by a magistrate shall be brought before a magistrate in the county where the defendant resides, a requirement that an action should be brought before a magistrate in the county where the cause of action arose is unauthorized. *Baker v. Irvine*, 62 S. C. 293, 40 S. E. 672.

Sufficiency of pleadings.—Though this section provides that every civil action before a magistrate shall be brought in the county where the defendant resides, and the jurisdiction of the court must be established affirmatively by the record, where, in actions before a magistrate, defendant is located in one suit in the town of W., which is in G. county, and the other in D. township, in G. county, and the same person is defendant in both

actions, it sufficiently appears in the record that the location of the defendant is in G. county to confer jurisdiction in a magistrate's court in such county, under § 274, subd. 5, providing that pleadings are not required to be in any particular form before a magistrate, but must be such as to enable a person of a common understanding to know what is intended. *Hall v. Sullivan*, 70 S. C. 397, 50 S. E. 27.

Waiver of objection to jurisdiction by appearance and participating in trial.—Jurisdiction for penalty under act, 24 stat. 81, may be acquired by magistrate in another county than the one in which cause of action arose by appearance of carrier, pleading and participating in trial. *Jenkins v. Atlantic, etc., R. Co.*, 84 S. C. 343, 66 S. E. 409, Ann. Cas. 17A, 989.

No waiver of want of jurisdiction by failure to appear. See section 275.

Statutes inconsistent with section.—This section providing that every civil action cognizable by magistrates shall be brought before a magistrate in the county where defendant resides, being inconsistent therewith, repeals the act of 1887 (19 St. at Large, p. 1027), which provides for the location of a magistrate at Greers, in Greenville county, who shall have jurisdiction in the counties of Greenville and Spartanburg, so far as jurisdiction of an action against a resident of Spartanburg county is concerned. *Dill v. Durham*, 56 S. C. 423, 35 S. E. 3, Ann. Cas. 12C, 615.

Section 24. Compensation for all other officers.—All officers other than those named in Section nine provided for in this Article shall receive for their services such compensation as the General Assembly may from time to time by law direct.

See Const. 1868, IV, 25.

Section 25. Powers at chambers.—Each of the Justices of the Supreme Court and Judges of the Circuit Court shall have the same power at chambers to issue writs of habeas corpus, mandamus, quo warranto, certiorari, prohibition and interlocutory writs or orders of injunction as when in open Court. The Judges of the Circuit Courts shall have such powers at chambers as the General Assembly may provide.

Circuit judge has power to grant interlocutory order of injunction.—No one doubts, or has doubted, that a judge of a circuit has the power to grant an interlocutory order of injunction, at chambers, in any action brought in his circuit. If this be true, and each justice of the Supreme Court has the same power at chambers, then each justice has "jurisdiction" power to hear and determine a motion for an interlocutory order of injunction at chambers, just as any circuit

judge could. To put any other construction upon the section would defeat its intent as expressed. The words "as when in open court" mean that each of the justices of the Supreme Court has the "same power at chambers to issue writs of habeas corpus * * * and interlocutory writs or orders of injunction" as all of the justices might issue "when in open court." The term "each" is used in contradistinction to "all" of the justices, as implied, necessarily, in the term "court,"

which is made up of "all" of the justices; the term "chambers" in contradistinction to "open court"; and the power of the several justices in granting interlocutory orders at chambers is the same "as" the "court" when it is "open," and considering an application for an interlocutory writ or order of injunction. *Salinas v. Aultman & Co.*, 49 S. C. 325, 27 S. E. 385, 387.

A justice of the Supreme Court has jurisdiction to grant an interlocutory order of injunction at chambers; this section declaring that "each" of the justices of the Supreme Court shall have the same power at chambers to issue interlocutory writs or orders of injunction as when in open court—that is, as all the justices in open court. *Salinas v. Aultman & Co.*, 49 S. C. 325, 27 S. E. 385.

This section does not restrict the court's power to issue writs of injunction to cases pending in such court, either in its original or appellate jurisdiction. *Salinas v. Aultman & Co.*, 49 S. C. 325, 27 S. E. 385.

Under this section a jury trial of issues of fact in quo warranto is not demandable by either party as of right, though the court or judge hearing the proceeding, if he desires, in his discretion, and for his own assistance, may have the benefit of a verdict of a jury on the issues of fact. *State v. Gibbes*, 109 S. C. 135, 95 S. E. 346.

Single justice of Supreme Court has power to issue writ or order in court's original jurisdiction and make it returnable to court as a whole. *King, Insurance Commissioner, v. Aetna Ins. Co. et al.*, 168 S. C. 84, 167 S. E. 12.

Judge of another circuit sitting at chambers has jurisdiction to appoint receiver, where party opposing appointment appears and contests application on merits without objecting to court's

jurisdiction. *Truesdell v. Johnson*, 144 S. C. 188, 142 S. E. 343.

But while holding court in other circuit, judge cannot hear mandamus application in action arising in his circuit. —A circuit judge, while holding court in a circuit other than his own, has no jurisdiction to hear and determine, at chambers, in such other circuit, an application for mandamus in a cause which arose in his circuit. *State v. Smith*, 50 S. C. 558, 27 S. E. 933, Ann. Cas. 13E, 391.

In order that judge of an adjoining circuit may exercise jurisdiction, record must show compliance with statute and necessity for assuming jurisdiction, including absence of resident judge and fact that no other judge, special or regular, is presiding in the circuit. *Ex parte Hart*, 186 S. C. 125, 195 S. E. 253.

A motion for discontinuance may be heard and granted at chambers. *Shelton v. Southern Ry.*, 80 S. C. 74, 61 S. E. 220.

An order for granting alimony pendente lite may be granted at chambers. —An order granting alimony pendente lite is an interlocutory one, which the court has power to grant at chambers, though the marriage is denied. *Messervy v. Messervy*, 80 S. C. 277, 61 S. E. 442, Ann. Cas. 13A, 667, 6 A. L. R. 73, 193.

Where there is no resident judge, judge of another circuit has authority to appoint receiver in chambers, in case of default or by consent of parties. *Truesdell v. Johnson*, 144 S. C. 188, 142 S. E. 343.

Act requiring Supreme Court clerk to notify penitentiary superintendent of dismissal of appeal suspending execution of death sentence is not unconstitutional as depriving Supreme Court justices and circuit court judges of right to issue writs named under this provision. *Ex parte Howell*, 168 S. C. 197, 167 S. E. 230.

Section 26. Charge to juries.—Judges shall not charge juries in respect to matters of fact, but shall declare the law.

See Const. 1868, IV, 26.

I. General Consideration.

II. Application.

I. GENERAL CONSIDERATION.

Editor's Note.—Some of the cases construing this section were decided under the provisions of the 1868 Constitution, altho most of them were decided under the provisions of the Constitution of 1895, the section as it now stands. While the first clause of the old section remains unchanged—"Judges shall not charge juries in respect to matters of fact"—the second clause has been changed in two important particulars. The permission to "state the testimony" has been omitted, and the permission to "declare the law"

has been changed into a mandate. Instead of the former permissive clause, "Judges * * * may * * * declare the law," we find the now imperative provision, "Judges * * * shall declare the law." See *Norris v. Clinkscales*, 47 S. C. 488, 25 S. E. 797, 804, Ann. Cas. 13E, 796.

Magistrates are included in the word "judges" in this section, and it is their duty to charge juries in their court. *Marchbanks v. Marchbanks*, 58 S. C. 92, 36 S. E. 438, Ann. Cas. 18D, 990.

Section embodies common law concept of trial.—Upon the common-law concept of the trial has been ingrafted the theory of jury trial now embodied in

this section. *Powers v. Rawles*, 119 S. C. 134, 112 S. E. 78, 83.

Its object is to leave decision of all questions of fact exclusively to jury.—The real object of this clause of the Constitution is to leave the decision of all questions of fact to the jury exclusively, uninfluenced by any expressions of opinion by the judge. *State v. Davis*, 27 S. C. 609, 4 S. E. 567, 568, 35 L. R. A. 122, 7 A. L. R. 588, 605; *Haynes v. Graham et al.*, 192 S. C. 382, 6 S. E. (2d) 903.

And prevent trial judge from intimating to jury his opinion of case.—The purpose of this section is to prevent trial judge from intimating to jury his opinion of case, what weight should be given to evidence, and participating in any manner with jury's finding of fact. *Engle v. Seaboard, etc., Ry. Co.*, 110 S. C. 137, 96 S. E. 490.

Either expressly or impliedly.—A trial judge cannot convey to the jury, either expressly or impliedly, his opinion of the force and effect of testimony upon any question of fact at issue. *Jackson v. Jackson*, 32 S. C. 591, 11 S. E. 204; *State v. Pruitt*, 187 S. C. 58, 196 S. E. 371.

Be it by interrogation of witnesses or by remarks in ruling upon evidence offered.—Not only must the formal charge to the jury be kept free from any statement of facts in issue or expression as to the weight and sufficiency of evidence, but it has been frequently held that a trial judge should not by the interrogation of witnesses, by remarks in ruling upon evidence offered, or by comment upon the facts in relation to interlocutory motions, indicate opinions or express views reasonably calculated to influence the jury in deciding a material issue of fact. *Powers v. Rawles*, 119 S. C. 134, 112 S. E. 78, 83.

Or by so declaring the law as to ignore or minimize contentions of fact of one party to the advantage of the other.—If the judge may not become a participant in the verdict of the jury by indicating an opinion at any stage of the trial on an issuable fact, clearly he may not participate in the verdict by so declaring the law as to ignore or minimize legitimate contentions of fact of one party to the advantage of the other. To do so may be to express an opinion indirectly upon the weight and sufficiency of evidence far more influential in molding the jury's verdict than isolated expressions of opinion upon detached portions of the evidence. *Powers v. Rawles*, 119 S. C. 134, 112 S. E. 78, 83.

Or by stating the testimony in instructions.—*Ballentine v. Hammond*, 68 S. C. 153, 46 S. E. 1000.

By charging a rule of evidence.—A charge stating a rule of evidence is erroneous as a charge on the facts. *State v. Phillips*, 73 S. C. 236, 53 S. E. 370, 21 L.

R. A. (N. S.) 312.

But a charge merely stating a rule of evidence does not come within the inhibition of the Constitution. *State v. Phillips*, 73 S. C. 236, 53 S. E. 370, 371, 21 L. R. A. (N. S.) 312.

Or by a charge intimating to jury inference to be drawn from facts.—Request which intimates to jury inference to be drawn from facts in case therein stated in detail is charge on facts. *Weaver v. Southern Ry. Co.*, 76 S. C. 49, 64, 56 S. E. 657, 114 Am. St. Rep. 934, 121 Am. St. Rep. 934, Ann. Cas. 13C, 1367, 13 A. L. R. 946.

Or by stating to jury the undisputed facts in absence of uncontradicted evidence.—*State v. Cannon*, 49 S. C. 550, 27 S. E. 526, 68 L. R. A. 198.

Reasonably calculated to influence the jury.—Under this section the trial court should avoid expressions of opinions reasonably calculated to influence the jury in deciding material issue of fact. *Powers v. Rawles*, 119 S. C. 134, 112 S. E. 78.

So that jury may determine all questions of fact uninfluenced by the Judge.—This section was intended clearly to leave to the jury all questions of fact, and to prevent the judges from forcing upon juries their own convictions as regards matters of fact. The force and effect of any evidence is for the jury; it is for them to determine what credence they will give to it and what weight it will have with them. The juries are the judges of all matters of fact, and cannot look to the court for a controlling view; they are to form their own conclusions from the facts submitted to them, and the court cannot employ its influence over the minds of the jurors to force upon them its conclusions in any case. The court is not at liberty to give its conclusions in any particular portions of the testimony. The real object of this clause in the Constitution is to leave the decision of all questions of fact to the jury exclusively, uninfluenced by any expressions of opinion by the judge. The judge's position would naturally add great weight to any opinion he might express upon any question of fact arising in a case, and for this reason he should carefully refrain from and avoid expressing any opinion that he may have formed from the facts as to the force, weight, and effect, leaving it to the jury to draw their own conclusions, and not impress upon them any impressions that the testimony may have made in the mind of the judge. The juries are to determine all questions of fact, uninfluenced by the judge and unbiased by his impressions. *State v. McHaffey*, 125 S. C. 313, 118 S. E. 623.

And to this end it is proper to modify a requested instruction, which, unmodified, would constitute a violation of this

section. *State v. Cooper*, 120 S. C. 280, 113 S. E. 132.

And a request to charge on weight of evidence of violation of this section is properly refused. *Glenn v. Walker*, 113 S. C. 1, 100 S. E. 706.

On the other hand this section does not affect the discretion of a trial judge in the conduct of a trial, nor to prevent him from asking questions of witnesses. *Willson v. Ohio River, etc., Ry. Co.*, 52 S. C. 537, 30 S. E. 406, 57 L. R. A. 880.

Thus the court may, in declaring the law, base that law on hypothetical findings of fact. *State v. Jones*, 86 S. C. 17, 67 S. E. 160, *Ann. Cas.* 12D, 446, 13 A. L. R. 1263; *Sentell v. Southern Ry.*, 70 S. C. 183, 49 S. E. 215; *Ballentine v. Hammond*, 68 S. C. 153, 46 S. E. 1000, 1003; *Jenkins v. Charleston St. Ry. Co.*, 58 S. C. 373, 36 S. E. 703, 53 L. R. A. 64; *State v. Aughtry*, 49 S. C. 285, 26 S. E. 619, 27 S. E. 199, 97 *Am. St. Rep.* 776, 41 L. R. A. (N. S.) 751, *Ann. Cas.* 12C, 236, 17 A. L. R. 1128; *Norris v. Clinkscales*, 47 S. C. 488, 25 S. E. 797, 798, *Ann. Cas.* 13E, 796; *Greene v. Duncan*, 37 S. C. 239, 15 S. E. 956, 959; *Kitchens v. Southern Ry.*, 80 S. C. 531, 61 S. E. 1016, *Ann. Cas.* 12C, 1038. See also *Bellamy v. Conway, etc., R. Co.*, 85 S. C. 450, 453, 67 S. E. 545, L. R. A. 1918A, 940, *Ann. Cas.* 15D, 997, 28 A. L. R. 190.

The judge may state issue presented.—Under this section a statement of the issues presented, and all the evidence on which the State and the defendant relied to support their respective positions, is authorized. *State v. Johnson*, 66 S. C. 23, 44 S. E. 58.

Assume uncontested fact.—Where there is nothing in the testimony contesting a fact, the assumption of such fact in an instruction is not erroneous as a charge on the evidence. *Riser v. Southern Ry. Co.*, 67 S. C. 419, 46 S. E. 47, 25 L. R. A. (N. S.) 347, L. R. A. 1915A, 1061.

Facts stated in a charge which were not in dispute do not make the charge erroneous as one on facts, in violation of this section. *Turner v. Lyles*, 68 S. C. 392, 48 S. E. 301, 126 *Am. St. Rep.* 499, *Ann. Cas.* 12B, 222, 8 A. L. R. 1202.

Refer to testimony already in case.—It is not a violation of this section for the judge, in giving his reason for a ruling on evidence, to refer to testimony already in the case. *State v. Thraikill*, 71 S. C. 136, 50 S. E. 551, 124 *Am. St. Rep.* 1021, 3 L. R. A. (N. S.) 370, 14 L. R. A. (N. S.) 710, 19 L. R. A. (N. S.) 494, L. R. A. 1916A, 1250, 10 A. L. R. 1123.

In refusing to charge that there is no evidence to show that acts in question were intentional or wilful, it is not a charge on facts for the judge to say that there is some evidence of such acts, if there be such evidence, disclaiming any intention to give opinion as to weight or

sufficiency of evidence. *Thomasson v. Southern Ry.*, 72 S. C. 1, 51 S. E. 443.

Refer to admitted state of facts.—*Williams v. Atlantic Coast Lbr. Corp.*, 136 S. C. 423, 134 S. E. 390, 395.

Repeat a portion of evidence.—The court does not violate by repeating a short portion of the evidence given without expressing any opinion as to its truth or falsity. *State v. Moorman*, 27 S. C. 22, 2 S. E. 621.

Explain an ordinance.—Judge's explanation of municipal ordinance regulating speed of automobiles is not charge on facts. *Daugherty v. Williams*, 114 S. C. 437, 142 S. E. 722.

Motions.—A motion for a nonsuit or a directed verdict can only be granted by the court upon the entire absence of evidence. It can never be granted by the court upon an "appearance from all the evidence." The trial judge has no power to weigh the evidence. *Cato v. Atlanta & A. L. Ry. Co. et al.*, 164 S. C., 123, 162 S. E. 239.

And where testimony is susceptible of only one inference, the court may direct the jury to so find. *Harrison v. Phoenix Assur. Co.*, 127 S. C. 205, 120 S. E. 848.

Colloquy among foreman of jury, counsel and judge as to certain evidence is not necessarily prejudicial. *State v. Gibson*, 83 S. C. 34, 64 S. E. 607, 916.

A remark by the judge in making a ruling during the trial does not violate this section. *State v. Crawford*, 39 S. C. 343, 17 S. E. 799, 62 L. R. A. 274, 10 A. L. R. 1123.

It would be a great stretch of construction to hold that an incidental remark, made during the progress of the case, amounted to a violation of this section. *State v. Turner*, 36 S. C. 534, 15 S. E. 602, 605, 82 *Am. St. Rep.* 27, 46 L. R. A. 641, 41 L. R. A. (N. S.) 874, 920, 10 A. L. R. 1123.

Negligence being a mixed question of law and fact, it is the court's duty to define negligence, but it is the jury's province to draw the inference from the facts. *Turbyfill v. Atlanta, etc., Ry. Co.*, 83 S. C. 325, 65 S. E. 278, L. R. A. 1915E, 517, 533; *Hunter v. Pelham Mills*, 52 S. C. 279, 29 S. E. 727, 68 *Am. St. Rep.* 904, 7 A. L. R. 116; *Lampley v. Atlantic, etc., R. Co.*, 71 S. C. 156, 50 S. E. 773, 774.

An exception that court violated this section must specify particulars.—An exception that the court, in giving instructions set out, violated this section prohibiting judges from charging in respect to matters of fact, which fails to specify in what particulars they trespassed on the constitutional provision, is too general to be considered. *Love v. Turner*, 78 S. C. 513, 59 S. E. 529, 15 L. R. A. (N. S.) 1186, 22 A. L. R. 1458.

An assignment of error that the trial judge, in his charge, violated the consti-

tutional provision in relation to charging upon the facts of the case in his manner of stating the testimony is too general to be considered. *State v. Aughtry*, 49 S. C. 285, 26 S. E. 619, 27 S. E. 199, 97 Am. St. Rep. 776, 41 L. R. A. (N. S.) 751, Ann. Cas. 12C, 236, 17 A. L. R. 1128.

And part of charge alleged to constitute comment on facts must be read in connection with other parts of charge. *State v. Stalvey*, 146 S. C. 275, 143 S. E. 817.

But conjoined with this duty it is the mandatory duty of judge to declare the law.—But conjoined with the duty to refrain from trespassing upon the domain of the facts is the mandatory and non-delegable duty imposed upon the judge of declaring the law. *Powers v. Rawles*, 119 S. C. 134, 112 S. E. 78, 83.

Of course, the right to have all the law declared may be waived like any other right. *Watson v. Sprott*, 134 S. C. 367, 133 S. E. 27, 28.

Such as by acquiescence in omission or by failure to request instructions.—The right to have all the law declared may be waived like any other right, and an omission acquiesced in. The failure to request instructions on any particular point is regarded as a waiver of the right to such instruction and acquiescence in the omission. *White v. Charleston, etc., Ry. Co.*, 132 S. C. 448, 129 S. E. 457, 459.

Charge of trial court should not on appeal be held defective for failure to declare law, as required by this section where judge was not asked to amplify his charge, and no request was made for further charge. *State v. Wardlaw*, 153 S. C. 175, 150 S. E. 614.

Failure to declare the law applicable to the case to the jury as required by this section is not reversible error, in the absence of a request for additional charges. *Huffman v. Moore*, 122 S. C. 220, 115 S. E. 634.

Or failure to charge may be cured by the verdict.—The law is the right of a party arising out of a state of facts. A jury ought to be instructed about what right springs out of a fact to be determined by them. The jury ought not to be left to cut a way through the woods with no compass to guide it. But if the jury has found the right way without a compass, then no real wrong has been done. *Collins-Plass Thayer Co. v. Hewlett*, 109 S. C. 245, 95 S. E. 510, 513; *Westbrook v. Jefferies*, 173 S. C. 178, 175 S. E. 433.

An exception that the court erred in not charging the law applicable to the issues as required by this section is too general for consideration on appeal, because it fails to specify in what particular there was error. *State v. Hendrix*, 86 S. C. 64, 68 S. E. 120, 130.

II. APPLICATION.

Charges were held not to be in contravention of this section in cases pertaining to the following alphabetically arranged subjects:

Account and accounting. *Crosland Co. v. Pearson*, 86 S. C. 313, 68 S. E. 625, 138 Am. St. Rep. 466; **Adultery.** *State v. Martin*, 120 S. C. 208, 112 S. E. 922; **adverse possession.** *Bryan v. Donnelly*, 87 S. C. 388, 69 S. E. 840; **automobiles.** *Denny v. Doe*, 116 S. C. 307, 108 S. E. 95 **burden of proof.** *Clayton v. Southern Ry. Co.*, 110 S. C. 122, 96 S. E. 479; *Waters v. South Carolina Light, etc., Co.*, 103 S. C. 489, 88 C. E. 289; **carriers.** *Harris v. Greenville Tract. Co.*, 101 S. C. 360, 85 S. E. 899; *Dodd v. Spartanburg Ry., etc., Co.*, 95 S. C. 9, 78 S. E. 525, L. R. A. 1917F, 46, L. R. A. 1918A, 667, 685; *Nelson v. Charleston, etc., Ry. Co. (S. C.)*, 75 S. E. 408; *Ladshaw v. Southern Ry. Co.*, 90 S. C. 462, 73 S. E. 879, Ann. Cas. 13C, 304, 11 A. L. R. 1078; **contracts.** *Hinsdale et al. v. Westrope et al.*, 173 S. C. 68, 174 S. E. 898; **crossings.** *Thomasson v. Southern Ry.*, 72 S. C. 1, 51 S. E. 443; *Gosa v. Southern Ry.*, 67 S. C. 347, 45 S. E. 810, 811, 19 L. R. A. (N. S.) 502, 20 L. R. A. (N. S.) 145, L. R. A. 1918A, 745, Ann. Cas. 12C, 321; *Brown v. Southern Ry.*, 65 S. C. 260, 43 S. E. 794, L. R. A. 1918C, 1134; *Davis v. Atlanta, etc., Ry. Co.*, 63 S. C. 370, 41 S. E. 468, 470, 9 L. R. A. (N. S.) 340, 365, 12 L. R. A. (N. S.) 855, L. R. A. 1918E, 267, 28 A. L. R. 142, 159; *Kirby v. Southern Ry.*, 63 S. C. 494, 41 S. E. 765, 49 L. R. A. (N. S.) 817; *Edwards v. Southern R. Co.*, 63 S. C. 271, 41 S. E. 458, 9 L. R. A. (N. S.) 340, 366; *Turbyfill v. Atlantic, etc., Ry. Co.*, 86 S. C. 379, 68 S. E. 687, L. R. A. 1916C, 866, L. R. A. 1916E, 192; *Turbyfill v. Atlanta, etc., Ry. Co.*, 83 S. C. 325, 65 S. E. 278, L. R. A. 1915E, 517, 533; **damages.** *Bussey v. Charleston, etc., Ry. Co.*, 52 S. C. 438, 30 S. E. 477; **ejecting from train.** *Enlee v. Seaboard, etc., Ry.*, 110 S. C. 137, 96 S. E. 490; **ejectment.** *Bradley v. Drayton*, 48 S. C. 234, 26 S. E. 613; **electricity.** *Walker v. Southern Bell Tel., etc., Co.*, 92 S. C. 188, 75 S. E. 1024; **evidence.** *State v. Johnson*, 66 S. C. 23, 44 S. E. 58, 59; *State v. Taylor*, 54 S. C. 174, 32 S. E. 149; **fertilizers.** *Durham Fertilizer Co. v. Pagdett*, 39 S. C. 69, 17 S. E. 563; **fire insurance.** *Kingman v. Lancashire Ins. Co.*, 54 S. C. 599, 32 S. E. 762, 25 L. R. A. (N. S.) 23; **flood waters.** *Bayham v. State Highway Department of S. C.*, 181 S. C. 435, 187 S. E. 528; **gambling.** *State v. Lane*, 82 S. C. 144, 63 S. E. 612; **homicide.** *State v. Kennedy*, 143 S. C. 318, 141 S. E. 559; *State v. Pittman*, 137 S. C. 75, 134 S. E. 514; *State v. Brown*, 108 S. C. 490, 95 S. E. 61, 16 A. L. R. 417; *State v. Gallman*, 79 S. C. 229, 60 S. E. 682, 16 A. L. R. 1307; *State v. Davis*, 50 S. C. 405, 27 S. E. 905, 62

Am. St. Rep. 837, 4 L. R. A. (N. S.) 156, 5 L. R. A. (N. S.) 811; *State v. Aughtry*, 49 S. C. 285, 26 S. E. 619, 27 S. E. 190, 97 Am. St. Rep. 776, 41 L. R. A. (N. S.) 751, Ann. Cas. 12C, 236, 17 A. L. R. 1128; *State v. Dill*, 48 S. C. 249, 26 S. E. 567, 103 Am. St. Rep. 898, 124 Am. St. Rep. 1032, 3 L. R. A. (N. S.) 370, 14 L. R. A. (N. S.) 710, 740, 41 L. R. A. (N. S.) 913; *State v. Way*, 38 S. C. 333, 17 S. E. 39, 134 Am. St. Rep. 1041, 4 L. R. A. (N. S.) 157, 5 L. R. A. (N. S.) 823, 19 L. R. A. (N. S.) 493, 22 A. L. R. 268; *State v. Littlejohn*, 33 S. C. 599, 11 S. E. 638; *State v. Jackson*, 36 S. C. 487, 15 S. E. 559, 31 Am. St. Rep. 890, 41 L. R. A. 530, 29 A. L. R. 1131; *State v. Davis*, 27 S. C. 609, 4 S. E. 567, 35 L. R. A. 122, 7 A. L. R. 588, 605; *State v. Milling*, 35 S. C. 16, 14 S. E. 284, 97 Am. St. Rep. 799, 57 L. R. A. 882; *State v. Wyse*, 32 S. C. 45, 10 S. E. 612, 56 L. R. A. 390, 19 L. R. A. (N. S.) 808, Ann. Cas. 12B, 1237; *State v. James*, 31 S. C. 218, 9 S. E. 844, L. R. A. 1918A, 673; *State v. Williams*, 31 S. C. 238, 9 S. E. 853, 68 L. R. A. 877, 19 A. L. R. 1068; *State v. Norton*, 28 S. C. 572, 6 S. E. 820; *State v. Addy*, 28 S. C. 4, 4 S. E. 814, 19 L. R. A. (N. S.) 808; **housebreaking and larceny**, *State v. Lucas*, 88 S. C. 520, 71 S. E. 27, Ann. Cas. 13C, 517; *State v. Howard*, 32 S. C. 91, 10 S. E. 831; **injury on highways**, *Latimer v. Anderson County*, 95 S. C. 187, 78 S. E. 879, L. R. A. 1915A, 764, L. R. A. 1915B, 954, Ann. Cas. 16E, 268; **injury on railroad bridge**, *Rembert v. South Carolina Ry. Co.*, 31 S. C. 309, 9 S. E. 968; **insurance**, *Rearden v. State Mut. Life Ins. Co.*, 79 S. C. 526, 60 S. E. 1106 Ann. Cas. 13A, 851; *Lagrone v. Timmerman*, 46 S. C. 372, 24 S. E. 290, 34 L. R. A. (N. S.) 529, Ann. Cas. 14C, 60; **injury and death by train**, *Horne v. Southern Ry. Co.*, 186 S. C. 525, 197 S. E. 31; **intoxicating liquors**, *State v. Arnold*, 127 S. C. 80, 120 S. E. 747; *State v. Nickels*, 65 S. C. 169, 43 S. E. 521; **larceny**, *State v. Roof*, 196 S. C. 204, 12 S. E. (2d) 705; **libel**, *Duncan v. Record Pub. Co.*, 145 S. C. 196, 143 S. E. 31; **life insurance**, *Walker v. Life Ins. Co. of Virginia*, 175 S. C. 153, 178 S. E. 618; *Peay v. Durham Life Ins. Co.*, 185 S. C. 78, 193 S. E. 199; *Tisley v. Prudential Life Ins. Co. of America*, 183 S. C. 457, 191 S. E. 307; **logs and logging**, *Williams v. Atlantic Coast Lbr. Corp.*, 136 S. C. 423, 134 S. E. 390; **marriage**, *Pooler v. Smith*, 73 S. C. 102, 52 S. E. 967, Ann. Cas. 12D, 1233, Ann. Cas. 14B, 1130; **master and servant**, *Pinckney v. Atlantic, etc., R. Co.*, 92 S. C. 528, 75 S. E. 964, 8 A. L. R. 873; *Wilson v. Southern Ry.*, 73 S. C. 481, 53 S. E. 968, 30 L. R. A. (N. S.) 439, 23 A. L. R. 316; **master and servant—negligence**, *McKain v. Camden Water, etc., Co.*, 89 S. C. 378, 71 S. E. 949, Ann. Cas. 12A, 642; **membership in benevolent society**, *Thompson v.*

Family Protective Union, 66 S. C. 459, 45 S. E. 19, 11 L. R. A. (N. S.) 983; **nuisances**, *State v. Nelson*, 79 S. C. 97, 60 S. E. 307; **obstructing culvert**, *Shores v. Southern Ry. Co.*, 72 S. C. 244, 51 S. E. 699, L. R. A. 1918E, 264, Ann. Cas. 12D, 1233; **partition**, *Moss v. Smith*, 73 S. C. 231, 53 S. E. 284; **ruling on motion for nonsuit**, *Hunt v. Atlantic Coast Lumber Corp.*, 101 S. C. 64, 85 S. E. 229; **sales**, *Pittsburgh Plate Glass Co. v. Monroe*, 79 S. C. 564, 61 S. E. 92; **temporary insanity**, *State v. Stalvey*, 146 S. C. 275, 143 S. E. 817; **warehouses and warehousemen**, *Jordan v. Hudgens*, 146 S. C. 209, 143 S. E. 811; **witnesses**, *State v. Crosby*, 88 S. C. 98, 70 S. E. 440, 38 L. R. A. (N. S.) 1101; *State v. Anderson*, 26 S. C. 599, 2 S. E. 699.

Judge's statement to defense counsel to address jury in defendant's absence, that "we will not need him here until he is ready for sentence, if he is convicted" is not contravention of this section. *State v. Green*, 167 S. C. 359, 166 S. E. 359.

Statements of trial judge and attorney assisting solicitor about editorial defining duty of jurors to assist in enforcement of laws, held not contravention of this section. *Id.*

Charges were held to be in contravention of this section in the following subjects (alphabetically arranged):

Adverse possession, *Lewis v. Pope*, 86 S. C. 285, 68 S. E. 680; **alibi**, *State v. Smalls*, 98 S. C. 297, 82 S. E. 421, Ann. Cas. 18A, 718, 14 A. L. R. 1427; **assault and battery**, *State v. Howell*, 28 S. C. 250, 5 S. E. 617; **burglary**, *State v. Brown*, 33 S. C. 151, 11 S. E. 641, 92 Am. St. Rep. 115, 23 L. R. A. 347, 40 L. R. A. (N. S.) 38; **carriers—negligence**, *Lawson v. Southern Ry. Co.*, 91 S. C. 201, 74 S. E. 473; **conspiracy**, *State v. McAdams*, 167 S. C. 405, 166 S. E. 405; **contracts**, *Stouffer v. Erwin*, 81 S. C. 541, 62 S. E. 843; *Ott v. American Agricultural Chemical Co.*, 171 S. C. 359; 172 S. E. 304; **conviction on testimony of accomplice**, *State v. Clark*, 85 S. C. 273, 67 S. E. 300, Ann. Cas. 13C, 517; *State v. Sowell*, 85 S. C. 278, 67 S. E. 316, 7 A. L. R. 1543; **evidence**, *State v. Mitchell*, 56 S. C. 524, 35 S. E. 210, 97 Am. St. Rep. 774, 795, 30 L. R. A. (N. S.) 848, 6 A. L. R. 1609; *Burnett v. Crawford*, 50 S. C. 161, 27 S. E. 645, 7 A. L. R. 863; *State v. Stello*, 49 S. C. 488, 27 S. E. 659; **intoxicating liquor**, *State v. Burns*, 133 S. C. 238, 130 S. E. 641; **larceny**, *State v. Caddon*, 30 S. C. 609, 8 S. E. 536, 19 L. R. A. (N. S.) 808; **negligence** *China v. Sumter*, 51 S. C. 453, 29 S. E. 206; *Haynes v. Graham*, 192 S. C. 382, 6 S. E. (2d) 903; *Garrison v. Coca Cola Bottling Co.*, 174 S. C. 396, 177 S. E. 656; **partnership**, *Wilson v. Moss*, 79 S. C. 120, 60 S. E. 313; **poker game**, *Lusk v. State Highway Dept.*, 181 S. C. 101, 186 S. E. 786; **slander**, *Gatling*

v. Great Atlantic & Pacific Tea Co., 168 S. C. 385, 167 S. E. 652; **telegraphs**, Toale v. Western Union Tel. Co., 76 S. C. 248, 57 S. E. 117, 14 L. R. A. (N. S.) 930, 49 L. R. A. (N. S.) 325; **witnesses**, Sumter Trust Co. v. Holman, 134 S. C. 412, 132 S. E. 811.

See generally, State v. Dill, 48 S. C. 249, 26 S. E. 567, 103 Am. St. Rep. 898, 124 Am. St. Rep. 1032, 3 L. R. A. (N. S.) 370, 14 L. R. A. (N. S.) 710, 740, 41 L. R. A. (N. S.) 913; State v. Godfrey, 60 S.

C. 498, 39 S. E. 1; McDaniel v. Monroe, 63 S. C. 307, 41 S. E. 456; Willcox, Ives & Co. v. Jeffcoat, 135 S. C. 149, 133 S. E. 463; Jeffords v. Tokio, etc., Ins. Co., 123 S. C. 467, 117 S. E. 79; State v. Danelly, 116 S. C. 113, 107 S. E. 149, 14 A. L. R. 1420; Burnett v. Senn, 91 S. C. 175, 74 S. E. 376; State v. Anderson, 85 S. C. 229, 67 S. E. 237, 137 Am. St. Rep. 887, 46 L. R. A. (N. S.) 907, L. R. A. 1916A, 1195; Garrett v. Weinberg, 59 S. C. 162, 37 S. E. 51.

Section 27. Clerk of court.—There shall be elected in each county, by the electors thereof, one Clerk for the Court of Common Pleas, who shall hold his office for the term of four years, and until his successor shall be elected and qualified. He shall, by virtue of his office, be Clerk of all other Courts of record held therein, but the General Assembly may provide by law for the election of a Clerk, with a like term of office, for each or any other of the Courts of record, and may authorize the Judge of the Probate Court to perform the duties of Clerk for his Court under such regulations as the General Assembly may direct. Clerks of Courts shall be removable for such cause and in such manner as shall be prescribed by law.

See Const. 1868, IV, 27.

Where constitution designated no time for holding election for office of clerk of court, and no method of filling vacancy, it was proper for General Assembly to supply omission by legislation. Cannon v. Sligh, et al., 170 S. C. 45, 169 S. E. 712.

Legislature has no power to vary term of clerk of court fixed by constitution at 4 years. Ibid.

An election for clerk of court for

Charleston county in year which was not the year for the regular election of the clerk of court for that county was void since, if election was for unexpired portion of term only, the term of four years fixed by the Constitution would be varied, and if for four years, the election year as fixed by statute would be changed Limehouse v. Blackwell, 190 S. C. 122, 2 S.E.2d 483.

Section 28. Attorney general.—There shall be an Attorney General for the State, who shall perform such duties as may be prescribed by law. He shall be elected by the qualified electors of the State for the term of four years, and shall receive for his services such compensation as shall be fixed by law.

See Const. 1868, IV, 28.

Amended by a joint resolution and an act: 1924 (33) 1492; 1926 (34) 961. See FOREWORD on page 1159 of this volume.

Section 29. Solicitor.—There shall be one Solicitor for each Circuit, who shall reside therein, to be elected by the qualified electors of the Circuit, who shall hold his office for the term of four years, and shall receive for his services such compensation as shall be fixed by law. In all cases when an attorney for the State of any Circuit fails to attend and prosecute according to law, the Court shall have power to appoint an attorney pro tempore. In the event of the establishment of County Courts the General Assembly may provide for one Solicitor for each County in the place and instead of the Circuit Solicitor, and may prescribe his powers, duties and compensation.

See Const. 1868, IV, 29.

Filling vacancy.—The solicitor is an "officer of the executive department,"

and the Governor has no power to appoint a solicitor for a time extending be-

yond the first general election held after the vacancy occurred. *State v. Singleton*, 100 S. C. 465, 84 S. E. 989.

Solicitor may enter nolle prosequi at any time before jury is impaneled and sworn without consent of the court. *State v. Charles*, 183 S. C. 188, 190 S. E. 466.

And nolle prosequi so entered made subsequent proceedings at direction of court, resulting in conviction, nugatory. *Ibid.*

See generally. *State v. Hough*, 103 S. C. 87, 87 S. E. 436, L. R. A. 1918F, 1049.

Section 30. Sheriff and coroner.—The qualified electors of each County shall elect a Sheriff and Coroner, for the term of four years, and until their successors are elected and qualified; they shall reside in their respective Counties during their continuance in office, and be disqualified for the office a second time if it should appear that they, or either of them, are in default for moneys collected by virtue of their respective offices.

See Const. 1868, IV, 30.

The filling of vacancies in office of sheriff and the determination of time for election of sheriffs, which are not provided for by Constitution, are matters within legislative power and discretion. —*Privette v. Grinnelle*, 191 S. C. 376, 4 S. E. (2d) 305.

Under statutes providing for election of sheriffs every fourth year and statute authorizing appointment by Governor to fill vacancies in office of sheriff, an appointee of the Governor to fill vacancy in office of sheriff would be entitled to hold office until the next general election for county sheriff, and not merely to the next succeeding biennial general election. *Ibid.*

A statute construed as limiting term of sheriff elected to fill vacancy caused by death of predecessor, to unexpired portion of predecessor's term, was unconstitutional as varying sheriff's four year term fixed in Constitution, and the un-

constitutional portion could not be severed from the remainder so as to permit election thereunder for full four year term. *Ibid.*

Where vacancy occurred in office of sheriff of Darlington county in 1938, as result of death of the incumbent, and the Governor appointed a new sheriff, a purported election of another sheriff at a general election in 1938 was void, and the sheriff appointed by the Governor would hold office until the general election of 1940, at which time the regular election for office of sheriff would occur. *Ibid.*

The statute fixing the time for the holding of the biennial general elections is inapplicable to the office of sheriff, the term of which is fixed by the Constitution at four years. *Privette v. Grinnel*, 191 S. C. 376, 4 S. E. 305.

Applied in *State v. Hough*, 103 S. C. 87, 87 S. E. 436, L. R. A. 1918F, 1049.

Section 31. Writs—indictments.—All writs and processes shall run and all prosecutions shall be conducted in the name of the State of South Carolina; all writs shall be attested by the Clerk of the Court from which they shall be issued; and all indictments shall conclude "against the peace and dignity of the State."

See Const. 1868, IV, 31.

The word "prosecutions," in this section applies to indictments for crime, and does not affect suits under penal statutes, which may be brought in the name of any person in the manner provided by the statute creating the same. *Johnson v. Seaboard, etc., Ry.*, 73 S. C. 36, 52 S. E. 644.

Or prosecutions for violation of city ordinances.—This section does not prohibit a prosecution for violation of a city ordinance by the city council. *City Council v. Leopard*, 61 S. C. 99, 39 S. E. 248, 1 L. R. A. (N. S.) 384, 17 L. R. A. (N. S.) 54.

And a summons is not a process within this section.—The courts of South Carolina having decided that a summons

is not a "process" within its Constitution, and that therefore it need not be in the name of the State. A summons issued in South Carolina by the circuit court of the United States need not be in the name of the United States, in order to conform to the procedure of that state. *Chamberlain v. Mensing*, 47 F. 435.

Substantial compliance with section is sufficient.—A literal compliance with the mandatory formulas of this section is not exacted, but that a substantial compliance is sufficient. *Smith v. Jennings*, 67 S. C. 324, 45 S. E. 821, 824, L. R. A. 1915B, 1060, 2 A. L. R. 1593.

Thus, an indictment should not be quashed when it concludes with the words "against the peace and dignity of

the same state aforesaid," instead of the words "against the peace and dignity of the state," as required by this section, as the additional words may be regarded as

surplusage. *State v. Mason*, 54 S. C. 240, 32 S. E. 357, 38 L. R. A. (N. S.) 1078; *State v. Robinson*, 27 S. C. 615, 4 S. E. 570, 38 L. R. A. 587.

Section 32. Decisions of Supreme Court.—The General Assembly shall provide by law for the speedy publication of the decisions of the Supreme Court made under this Constitution.

See Const. 1868, IV, 32.

Section 33. Sentence to labor on highways.—Circuit Courts and all Courts inferior thereto and municipal Courts shall have the power, in their discretion, to impose sentence of labor upon highways, streets and other public works upon persons by them sentenced to imprisonment.

Section 34. Matters now pending.—All matters, civil and criminal, now pending within the jurisdiction of any of the Courts of this State shall continue therein until disposed of according to law.

Trial justices in office at the time the constitution went into effect should act as magistrates until the Legislature shall pass a law regulating and defining the duties of magistrates. In *re Hooper*, 48

S. C. 149, 26 S. E. 466, Ann. Cas. 18D, 990. Applied in *Middleton v. Taber*, 46 S. C. 337, 24 S. E. 282, 58 Am. St. Rep. 91, 72 Am. St. Rep. 63, 33 L. R. A. 547, 50 L. R. A. (N. S.) 733.

ARTICLE VI.

Jurisprudence.

Section 1. Arbitration.—The General Assembly shall pass laws allowing differences to be decided by arbitrators, to be appointed by the parties who may choose that mode of adjustment.

See Const. 1868, V, 1.

Cross reference.—For code section providing for arbitration, see § 7041, and note thereto.

Contract providing for arbitration of question of fact as condition precedent to action will be enforced.—Under this section, a contract providing expressly or impliedly that the determination of some

specific question of fact by arbitration shall be a condition precedent to a right of action thereon, will be upheld where the other party without good excuse failed to so arbitrate. *Jones v. Enoree Power Co.*, 92 S. C. 263, 75 S. E. 452, 453, 47 L. R. A. (N. S.) 353, 363, 380, 395, 405, Ann. Cas. 14B, 293.

Section 2. Change of venue.—It shall be the duty of the General Assembly to pass laws for the change of venue in all cases, civil and criminal, over which the Circuit Courts have original jurisdiction, upon a proper showing, supported by affidavit, that a fair and impartial trial cannot be had in the County where such action or prosecution was commenced. The State shall have the same right to move for a change of venue that a defendant has for such offences as the General Assembly may prescribe. Unless a change of venue be had under the provisions of this Article the defendant shall be tried in the County where the offence was committed: *Provided, however*, That no change of venue shall be granted in criminal cases until after a true bill has been found by the grand jury: *And provided*,

further, That if a change be ordered it shall be to a county in the same Judicial Circuit.

See Const. 1868, V, 2.

Cross references.—As to specific section providing for change of venue by circuit court, see § 35, and note thereto. As to specific section providing for change of venue in general, see § 426, and note thereto. As to specific section providing for change of venue by magistrates, see § 274 subd. 19, and § 946, and notes thereto.

This section is not exhaustive in its provisions, and did not prevent the legislature from enacting § 426. *Utsey v. Charleston, etc., R. Co.*, 38 S. C. 399, 17 S. E. 141, 143.

"Affidavit" defined.—An affidavit is a statement of fact under oath, reduced to writing, certified to by the officer before whom the same is made, and usually, though not necessarily, unless required by statute, signed by the affiant. *State v. Sullivan*, 39 S. C. 400, 17 S. E. 865, 868.

Object of section is to satisfy court that fair trial could not be had.—The object of this section is to satisfy the mind of the judge who hears the motion that a fair and impartial trial could not be had in the county where the action or prosecution was begun; and this conviction of the judge must be founded on sworn statements. *State v. Sullivan*, 39 S. C. 400, 17 S. E. 865, 868.

And requirements are met when witnesses sworn and statements reduced to writing.—The requirements of the section are complied with when witnesses are introduced in open court, and sworn by presiding judge, and their statements, at the time and place, reduced to writing by the official stenographer. *State v. Sullivan*, 39 S. C. 400, 17 S. E. 865, 868.

An act providing for change but failing to make provision that motion be on affidavit is invalid.—An Act providing that the court may change the place of trial "when there is reason to believe that an impartial trial cannot be had

therein," but makes no provision that the motion therefor shall be upon affidavits, does not meet the requirements of this section. *Willoughby v. Northeastern R. Co.*, 46 S. C. 317, 24 S. E. 308, 309.

But in absence of abuse of discretion court will not review granting of change of venue.—Where there is no abuse of discretion shown in granting a change of venue, the Supreme Court will not consider whether a proper showing was made in the court below authorizing the granting of the motion. *Carrol v. Charleston, etc., R. Co.*, 61 S. C. 251, 39 S. E. 364, 366.

A statute, taking State's action on contract with individual out of general statutory rule as to venue is void. *State v. Columbia Ry. Gas, etc., Co.*, 129 S. C. 455, 124 S. E. 758, 760.

"County where offense was committed" means where offense was committed under existing laws.—The provision of this section entitling a defendant to trial in the "county where the offense was committed" would be construed to mean where the offense was deemed committed under existing laws; and hence, where a person was wounded in C. county, but died in S. county, defendant was properly indicted and convicted for the crime in the latter county. *State v. McCoomer*, 79 S. C. 63, 60 S. E. 237, 239. 30 L. R. A. (N. S.) 394, L. R. A. 1918F, 966.

But judge has common law power to grant change of venue in county constituting an entire circuit.—In spite of the provision of this section that a change of venue shall be in a county in the same judicial circuit, a circuit judge in a county constituting an entire circuit has common law power to grant a change of venue in a criminal case in that circuit. *State v. Harvey*, 128 S. C. 494, 122 S. E. 860, 861.

Section 3. Law and equity.—Justice shall be administered in a uniform mode of pleading without distinction between law and equity.

See Const. 1868, V, 3.

Object of section to simplify system of pleading and practice.—The prime object of this section was to simplify the system of pleading and practice, so as to rid it as far as practicable, of the stringent and extremely technical rules which had disfigured the system that previously prevailed. *Jerkowski v. Marco*, 56 S. C. 241, 34 S. E. 386, 388, Ann. Cas. 16E, 133.

An equitable defense can be set up in a law case. *Bell, Probate Judge v. Mackey et al.*, 191 S. C. 105, 3 S. E. (2d)

816.

Complaint seeking to foreclose mortgage is not demurrable for failure to set out condition broken.—In view of this section, a complaint seeking to foreclose a mortgage, and alleging the death of the mortgagor, leaving defendant as his sole heir and distributee at law, is not demurrable for failure to set out a condition of the mortgage alleged to be broken, and to state whether the mortgagor died testate or intestate, or to set

forth any facts showing defendant to be the sole heir at law and distributee of the mortgagor. *Rutherford v. Johnson*, 49 S. C. 465, 27 S. E. 470, 471.

As to specific section providing for foreclosure of mortgages, see § 487, and note thereto.

New trial may be granted on equity side by motion and cause shown.—Under this section, a circuit judge presiding on the equity side of the court of common pleas may grant a new trial in such a cause on motion and cause shown, with-

out adopting the old process of a petition for rehearing on a bill of review. *Covington v. Covington*, 47 S. C. 263, 25 S. E. 193, 197.

Court of common pleas has co-ordinate jurisdiction.—Under this section, and Const. art. 5, § 15 and § 9 of the Code, a court of common pleas has equal and co-ordinate jurisdiction in all respects with any other like court of any other county, except as to territorial jurisdiction. *Fidelity Fire Ins. Co. v. Windham*, 134 S. C. 373, 133 S. E. 35, 37.

Section 4. Statute public law.—Every Statute shall be a public law, unless otherwise declared in the Statute itself.

Section 5. Codification of laws.—The General Assembly, at its first session after the adoption of this Constitution, shall provide for the appointment or election of a Commissioner, whose duty it shall be to collect and revise all the General statute laws of this State then of force as well as that which shall be passed from time to time, and to properly index and arrange the said statutes when so passed. And the said Commissioner shall reduce into a systematic Code the general statutes, including the Code of Civil Procedure, with all the amendments thereto, and shall, on the first day of the session for the year nineteen hundred and one, and at the end of every subsequent period of not more than ten years, report the result of his labors to the General Assembly, with such recommendations and suggestions as to the abridgement and amendments as may be deemed necessary or proper. Said report when ready to be made shall be submitted to the General Assembly at the first session in such manner as may be provided by law, but shall not be taken up for consideration until the next session of the said General Assembly. The said Code shall be declared by the General Assembly, in an Act passed according to the forms of this Constitution for the enactment of laws, to be the only general statutory law of the State; but no alterations or additions to any of the laws therein contained shall be made except by Bill passed under the formalities heretofore prescribed for the passage of laws. Provision shall be made by law for imposing such other duties as may be desired, for filling vacancies, regulating the term of office and the compensation of said Commissioner. And the General Assembly shall by committee inquire into the progress of his work at each session.

See Const. 1868, V, 5.

Amended by a joint resolution and an act: 1932 (37) 1396; 1933 (38) 587. See FOREWORD on page 1159 of this volume.

Cross reference. — For parallel code section, see § 2112, and note thereto.

Section repeals all laws not included in code.—The inevitable consequence of this section is to repeal all general statutory laws which were not included in the code, because, if the code contains the only general statutory law of the State, of course there can be none other. *Nexsen v. Ward*, 96 S. C. 313, 80 S. E. 599, 601; *Paris Mountain Water Co. v. Greenville*, 105 S. C. 180, 89 S. E. 669, 670.

Acts relative to appointment of school district trustees to permit their election in certain counties are inoperative under this section, for failure to incorporate the amendments bodily in the 1922 Code, though the new section provides that nothing therein should be construed to repeal previous Acts providing for different methods of selection of school trustees. *State v. Meares*, 148 S. C. 118, 145 S. E. 695, 697.

As to specific section providing for elec-

tion of school trustees, see § 5369, and note thereto.

And act incorporated in code becomes law without reference to original title.—When an act is incorporated in the code in accordance with this section, it becomes statutory law, without reference to its title as originally enacted, and the objection that the subject of the act does not correspond with its title cannot be raised. *Parks v. Laurens Cotton Mills*, 75 S. C. 560, 56 S. E. 234, 237, 23 A. L. R. 1481.

General statutory law.—The code and the statutes passed since its adoption must be recognized as the only general statutory law of the State. *Greenville v. Pridmore*, 162 S. C. 52, 160 S. E. 144.

But if unconstitutional because special legislation, not cured by inclusion of

such act in the code.—The constitutional provision for codification of general statutes does not have effect of curing all possible violations of constitutional prohibition of enactment of local law where general law can be made applicable, by expedient of passing an act declaring statutes embodied in code to be the general statutory law. *Gamble v. Clarendon County*, 188 S. C. 250, 198 S. E. 857.

Where statute authorizing county to retain fees and costs payable to sheriffs under general law was unconstitutional because in violation of constitutional prohibition of enactment of local law where general law can be made applicable, inclusion of the statute in Code of 1932 as a part of the general statutory law did not obviate such unconstitutionality. *Ibid.*

Section 6. Prisoner lynched through negligence of officer—penalty on officer—county liable for damages.—In the case of any prisoner lawfully in the charge, custody or control of any officer, State, County or municipal, being seized and taken from said officer through his negligence, permission or connivance, by a mob or other unlawful assemblage of persons, and at their hands suffering bodily violence or death, the said officer shall be deemed guilty of a misdemeanor, and, upon true bill found, shall be deposed from his office pending his trial, and upon conviction shall forfeit his office, and shall, unless pardoned by the Governor, be ineligible to hold any office of trust or profit within this State. It shall be the duty of the prosecuting Attorney within whose Circuit or County the offence may be committed to forthwith institute a prosecution against said officer, who shall be tried in such County, in the same circuit, other than the one in which the offence was committed, as the Attorney General may elect. The fees and mileage of all material witnesses, both for the State and for the defence, shall be paid by the State Treasurer, in such manner as may be provided by law: *Provided*, In all cases of lynching when death ensues, the County where such lynching takes place shall, without regard to the conduct of the officers, be liable in exemplary damages of not less than two thousand dollars to the legal representatives of the person lynched: *Provided, further*, That any County against which a judgment has been obtained for damages in any case of lynching shall have the right to recover the amount of said judgment from the parties engaged in said lynching in any Court of competent jurisdiction.

Cross reference. — For parallel code section, see § 3041, and note thereto.

This section limits the liability of counties in cases of mob violence to cases where death ensues to the party mobbed or lynched. *Brazill v. Lancaster County*, 132 S. C. 347, 128 S. E. 728, 729.

But this section authorizes a recovery against the county whether the one lynched was a prisoner or not. *Brown v. Orangeburg County*, 55 S. C. 45, 32 S. E. 764, 765, 44 L. R. A. 734, 13 A. L. R. 755.

Under this section, an instruction that "mob" means the same thing as "unlaw-

ful assemblage." is a proper instruction. *Cantey v. Clarendon County*, 101 S. C. 141, 85 S. E. 228, 229, 13A. L. R. 776.

Section should be liberally construed.—This section, and § 3041, should receive a liberal interpretation to the end that the remedy prescribed should not be denied in any case coming substantially within their spirit. *Kirkland v. Allendale County*, 128 S. C. 541, 123 S. E. 648, 650.

And acts of mob contributing to death of prisoner are included.—Where a mob bent on killing a negro prisoner, took him from sheriff and, while serious-

ly wounded and bleeding, carried him a considerable distance in an automobile and left him lying therein more dead than alive, without medical or other attention, there was a "lynching" rendering county liable under this section, if such acts contributed to his death, even though he was dead before his body was hanged or burned. *Kirkland v. Allendale County*, 123 S. C. 541, 123 S. E. 648, 650.

"Without regard to the conduct of the officers" means without reference to other provisions of section. — The words, "without regard to the conduct of the officers," when considered in connection with the evil which the constitution intended to remedy, must be construed to mean, "without reference to what has been said in regard to the conduct of the officers", or in other words, without reference to other provisions of

the section. *Brown v. Orangeburg County*, 55 S. C. 45, 32 S. E. 764, 765, 44 L. R. A. 734, 13 A. L. R. 755.

An action for damages against a county for lynching plaintiff's intestate, under this section, is for money only, and at common law was triable by jury. *Best v. Barnwell County*, 114 S. C. 123, 103 S. E. 479, 480.

Burden is upon plaintiff to prove by preponderance of the evidence that decedent was "lynched" as defined by law. *Green v. Greenville County*, 176 S. C., 433; 180 S. E., 471.

Complaint in action against county to recover damages for destruction of tobacco crop by mob of disorderly and riotous persons demurrable as not stating cause of action. *Warr v. Darlington County*, 181 S. C. 254; 186 S. E. 920.

ARTICLE VII.

Counties and County Government.

Section 1. Formation of new counties—county seats and name.—The General Assembly may establish new Counties in the following manner: Whenever one-third of the qualified electors within the area of each section of an old County proposed to be cut off to form a new County shall petition the Governor for the creation of a new County, setting forth the boundaries and showing compliance with the requirements of this Article, the Governor shall order an election, within a reasonable time thereafter, by the qualified electors within the proposed area, in which election they shall vote "Yes" or "No" upon the question of creating said new County; and at the same election the question of a name and a County seat for such County shall be submitted to the electors.

General note.—An examination of this article of the Constitution, relating to counties and county government, will not show a single provision with regard to the creation of a constitutional office, or any attempt whatever to define or create a corporate authority, or to establish a uniform or definite form of county government. In this particular the present Constitution differs materially from that of 1868. *Lillard v. Melton*, 103 S. C. 10, 87 S. E. 421, 427, L. R. A. 1916D. 572, L. R. A. 1917E, 468, 5 A. L. R. 761, 24 A. L. R. 941.

When two sections of a Constitution are inconsistent, effect will ordinarily be given to that which is in harmony with other provisions, rather than to that which is inconsistent with more than one provision. *Massey v. Glenn*, 106 S. C. 53, 90 S. E. 321.

For example the word "shall," in § 2, of this article which provides that if two-thirds of the qualified electors shall vote "Yes" then the General Assembly at the

next session "shall" establish such new county, is in conflict with the word "may" in this section, which provides that the General Assembly "may" establish new counties, etc., it is also in conflict with the construction necessarily placed on the word "shall" in that part of this section which provides that at the same election the question of a county seat shall be submitted to the electors. *Id.*

This and the following section require a two-thirds vote only on the question of the creation of a new county, and not on the question of a name, or county seat. *State v. Parler*, 52 S. C. 207, 29 S. E. 651, Ann. Cas. 14C, 626.

And all qualified electors within the territory to be included in the new county are entitled to vote on that question, and the Legislature cannot deny that right by failing to provide a means of voting for such electors in a statute designed to carry out the constitutional provision. *Callison v. Peebles*, 102 S. C. 256, 86 S. E. 635, Ann. Cas. 17E, 469.

And means must be provided for the qualified electors to vote. *Callison v. Peoples*, 102 S. C. 256, 86 S. E. 635, Ann. Cas. 17E, 469.

But this section does not refer to such divisions of the county as townships, school districts, and the like, but means that portion of the old county which is proposed to be embraced within the new county, without regard to county or school district lines. *Fraser v. James*, 65 S. C. 78, 43 S. E. 292.

"Old county" means any county looking to the formation of a new county.—This section shows clearly that the convention meant by "old county," any county then in existence, and by "new county" only those counties proposed and in process of formation under the law. *Rhame v. Du Rant* (S. C.) 75 S. E. 1028, 1031, 76 S. E. 611, 612.

This section imposes exclusively on the Governor the duty to determine whether there has been a compliance with the Constitution preparatory to the ordering of an election for the formation of a new county, and courts have no power to interfere with him in the exercise of his discretion. *Lamar v. Croft*, 73 S. C. 407, 53 S. E. 540, Ann. Cas. 13B, 789.

And it is within the discretion of the Governor to refuse or allow an amendment to a petition for the creation of a new county, setting forth with more definiteness the boundaries thereof. *Parler v. Fogle*, 78 S. C. 570, 59 S. E. 707, 40 L. R. A. (N. S.) 580, Ann. Cas. 12A, 723, Ann.

Cas. 15C, 989.

And the courts cannot control the Governor's prerogative, under this section, in determining whether constitutional requirements preparatory to holding an election to establish a new county have been met. *State v. Weeks*, 87 S. C. 474, 70 S. E. 898, Ann. Cas. 13B, 789.

But one Governor can review and vacate an order of his predecessor calling an election, on a satisfactory showing of noncompliance with some constitutional requirement, especially if no private or property right is thereby destroyed. *State v. Weeks*, 87 S. C. 474, 70 S. E. 898, Ann. Cas. 13B, 789.

That Constitution provides for creation of county does not deprive Legislature of right to prescribe its powers. *Park v. Greenwood County*, 174 S. C. 35, 176 S. E. 870.

And Legislature may grant county power to discharge such governmental functions as it thinks proper to promote prosperity, safety, convenience, health, and common good of county's inhabitants. *Park v. Greenwood County*, 174 S. C. 35, 176 S. E. 870.

Hence act providing for erection, maintenance and operation of hydroelectric system is within proper corporate purposes of county, and revenue bonds, issued for construction of plant, valid obligations of county. *Park v. Greenwood County*, 174 S. C. 35, 176 S. E. 870.

Section 2. Section of old county to be cut off.—If two-thirds of the qualified electors voting at such election shall vote "Yes" upon such questions, then the General Assembly at the next session shall establish such new County: *Provided*, No section of the County proposed to be dismembered shall be thus cut off without consent by a two-thirds vote of those voting in such section; and no County shall be formed without complying with all the conditions imposed in this Article. An election upon the question of forming the same proposed new County shall not be held oftener than once in four years.

See notes under § 1 of this article.

General note as to formation of counties.—A county formed under the Constitution of 1895 is not an "Old County" under this article. *Rhame v. DuRant*, 93 S. C. 217, 76 S. E. 611.

An attempted election as to formation of a new county, set aside as void, does not bar another election on the same question a year later. *Robinson v. McCown*, 104 S. C. 285, 88 S. E. 807.

Where an election is held in portions of two counties on proposition of forming new county out of portions of terri-

tory of each, and the election fails in one county, the validity of the election held in the other is immaterial. *State v. Smith*, 86 S. C. 55, 67 S. E. 1072, Ann. Cas. 14C, 626.

Those who seek the formation of a new county must see that all the constitutional requirements are complied with. *State v. Weeks*, 87 S. C. 474, 70 S. E. 898, Ann. Cas. 13B, 789.

As to the determination by the legislature of the formation of a new county, see *Fraser v. James*, 65 S. C. 78, 43 S. E. 292.

Section 3. Inhabitants—taxable property—area of new county.—No

new County hereafter formed shall contain less than one one-hundred and twenty-fourth part of the whole number of inhabitants of the State, nor shall it have less assessed taxable property than one and one half million of dollars as shown by the last tax returns, nor shall it contain less area than four hundred square miles.

Section 4. Area, taxable property and inhabitants of old county.—No old County shall be reduced to less area than five hundred square miles, to less assessed taxable property than two million dollars, nor to a smaller population than fifteen thousand inhabitants.

This section does not forbid the reduction of counties created since the constitution was adopted.—This section of the Constitution forbidding in the creation of new counties the reduction of "old counties to a less area than 500 square miles, does not forbid the reduc-

tion below 500 square miles of counties created since the Constitution was adopted; the words "old county" being used to designate only counties then existing. *Robinson v. McCown*, 104 S. C. 285, 88 S. E. 807, approving *Rhame v. Du Rant*, 93 S. C. 217, 76 S. E. 611.

Section 5. Eight mile limit.—In the formation of new Counties no old County shall be cut within eight miles of its court house building.

Section 6. Indebtedness.—All new Counties hereafter formed shall bear a just apportionment of the valid indebtedness of the old County or Counties from which they have been formed.

Section 7. Alteration of county lines.—The General Assembly shall have the power to alter County lines at any time: *Provided*, That before any existing County line is altered the question shall be first submitted to the qualified electors of the territory proposed to be taken from one County and given to another, and shall have received two-thirds of the votes cast: *Provided, further*, That the change shall not reduce the County from which the territory is taken below the limits prescribed in Sections 3, 4 and 5 of this Article: *Provided*, That the proper proportion of the existing County indebtedness of the section so transferred shall be assumed by the County to which the territory is transferred.

Section 8. Removal of county seat.—No County Seat shall be removed except by a vote of two-thirds of the qualified electors of said County voting in an election held for that purpose, but such election shall not be held in any County oftener than once in five years.

Section 9. Election district—body corporate.—Each County shall constitute one election district, and shall be a body politic and corporate.

There is nothing in article 7 which restricts rights of legislature to authorize a county to build and operate a hydre-electric plant. The fact that constitutional provides for creation of county does not

take away from General Assembly right to prescribe its powers. *Park v. Greenwood County*, 174 S. C., 35; 176 S. E., 870.

Section 10. Consolidation of two or more counties.—The General Assembly may provide for the consolidation of two or more existing Counties if a majority of the qualified electors of such Counties voting at an election held for that purpose shall vote separately therefor, but such election shall

not be held oftener than once in four years in the same Counties.

Section 11. Townships—body corporate—township government.—Each of the several townships of this State, with names and boundaries as now established by law, shall constitute a body politic and corporate, but this shall not prevent the General Assembly from organizing other townships or changing the boundaries of those already established; and the General Assembly may provide such system of township government as it shall think proper in any and all the Counties, and may make special provision for municipal government and for the protection of chartered rights and powers of municipalities: *Provided*, That this Section shall not apply to the following townships in the following Counties: Dunklin and Oaklawn in the County of Greenville; the Townships of Cokesbury, Ninety Six and Cooper, in the County of Greenwood; Sullivan Township, in the County of Laurens; Huiett and Pine Grove, in the County of Saluda. That the corporate existence of said townships be, and the same is hereby, destroyed, and all officers under said townships are abolished, and all corporate agents removed.

Amended by a joint resolution and an act: 1902 (23) 1227; 1903 (24) 3. See FOREWORD on page 1159 of this volume.

See section 1 of article VII and notes thereto.

General note as to certain acts. — Act. 25, Stat. 280, repealing charter of town of Moultrieville and establishing township government for Sullivan's Island as township of Charleston County, if such repeal affect merely public government of municipality, is permissible. *Board v. Buckley*, 82 S. C. 352, 64 S. E. 163.

The amendment of 1903 is void as against bonded debts previously created by them and the Legislature may treat such debts as valid upon said territory and provided for its payment by taxation, and designate proper officers and agents to carry out such purpose. *Smith v. Walker*, 74 S. C. 519, 54 S. E. 779. See also *Graham v. Folsom*, 200 U. S. 248, 26 S. Ct. 245, 50 L. Ed. 464.

The Act, 25 Stat. 1203, abolishing the office of the county supervisor for Fairfield County and changing the townships of the county is valid. *Fooshe v. McDonald*, 82 S. C. 22, 63 S. E. 3, 4 A. L. R. 216.

"Municipal government" as used in this section, relates to counties and not cities. *Carroll v. York*, 109 S. C. 1, 95 S. E. 121; *Floyd v. Calvert*, 114 S. C. 116, 103 S. E. 82; *State v. Touchberry*, 121 S. C. 5, 113 S. E. 345; *Spartanburg County v. Miller*, 135 S. C. 348, 132 S. E. 673; *Carolina Grocery Co. v. Burnet*, 61 S. C. 205, 39 S. E. 381, 98 Am. St. Rep. 882, 58 L. R. A. 687, 853.

And "county" and "township" are separate entities for purposes of certain taxation and where an act imposes a uni-

form tax in a particular township, art. 10, § 1, would not be violated. *Nettles v. Cantwell*, 112 S. C. 24, 99 S. E. 765.

But a "township" is a division of the county made for governmental purposes, and under the express provisions of this section is a body politic. *Gallishaw v. Jackson*, 99 S. C. 342, 83 S. E. 454; *Battle v. Willcox*, 128 S. C. 500, 122 S. E. 516.

Corporate existence of townships in Beaufort county would be inferred, notwithstanding that no statute creating the townships could be discovered, where repeated statutory references recognized the existence of those townships. *De Loach v. Scheper*, 188 S. C. 21, 198 S. E. 409.

General Assembly has complete control.—Constitutional prohibition of enactment of local law where general law can be made applicable apply to statute of which subject-matter is within intendment of constitutional provision authorizing General Assembly to provide such system of township government as it shall think proper in any and all counties and make special provision for municipal government. *Salley v. McCoy*, 182 S. C. 249, 189 S. E. 196.

The constitutional provision that General Assembly may provide such system of township government as it shall think proper in any and all counties and may make special provisions for municipal government and for the protection of chartered rights and powers of municipalities gives the general assembly complete control over the government and other internal affairs of the counties of

the state. *Reese v. Hinnant*, 187 S. C. 474, 198 S. E. 403.

Statutes relating to Orangeburg County only and abolishing right of county treasurer to collect fee for issuance of tax execution and reducing compensation of county treasurer below amount fixed by general statutes not valid. *Salley v. McCoy*, 182 S. C. 249; 189 S. E. 196.

Local act removing duties pertaining to collection of delinquent taxes in Pickens county, from office of sheriff and placing such duties in hands of a tax collector was authorized by constitution-

al provision relating to powers of legislature in the formation and control of county government. *Craig v. Pickens County*, 189 S. C. 164, 200 S. E. 825.

As to local legislation as "special" acts, see notes to article III, sect. 34.

See generally, *Fleming v. Royall*, 145 S. C. 438, 143 S. E. 162, holding the townships of Christ Church Parish and St. James Santee, Charleston County, to be bodies politic. *Folsom v. Ninety Six*, 159 U. S. 611, 16 S. Ct. 174, 40 L. Ed. 278.

Section 12. Boundaries of counties—boundaries of Saluda and Edgefield.—Until changed by the General Assembly, as allowed by this Constitution, the boundaries of the several counties shall remain as now established, except that the boundaries of the County of Edgefield shall undergo such changes as are made necessary by the formation of a new County from a portion of Edgefield, to be known as Saluda, the boundaries of which are set forth in a Constitutional Ordinance. The election ordered in said ordinance for the location of its County seat shall be held under the Constitution and laws now of force. And the General Assembly shall provide for the assessment of property in the County of Saluda for the fiscal year beginning January first eighteen hundred and ninety six, and for the collection of said taxes when assessed.

Section 13. Judicial and Congressional districts.—The General Assembly may at any time arrange the various Counties into Judicial Circuits, and into Congressional Districts, including the County of Saluda, as it may deem wise and proper, and may establish or alter the location of voting precincts in any County.

Section 14. No county line through city or town.—Hereafter no County lines shall be so established as to pass through any incorporated city or town of this State.

ARTICLE VIII.

Municipal Corporations and Police Regulations.

Section 1. Organization and classification of municipal corporations.—The General Assembly shall provide by general laws for the organization and classification of municipal corporations. The powers of each class shall be defined so that no such corporation shall have any powers or be subject to any restrictions other than all corporations of the same class. Cities and towns now existing under special charters may reorganize under the general laws of the State, and when so reorganized their special charters shall cease and determine.

Cross references.—As to the General Assembly's power to enact special provisions in general laws see Const. art. 3, § 34, subd. 10, and note thereto.

Article apparently does not apply to townships. — The whole trend of this article indicates its application to cities and towns and not to townships and the action of the General Assembly in making a classification of cities and towns, and none of townships, lends color to this construction. See *Askew v. Smith*, 126 S. C. 159, 119 S. E. 378, 381.

All acts must be general, to a class, and not special. — An Act which allowed some towns to tax merchants selling cotton and prohibited others from doing so contravenes this section prohibiting special laws. *Carroll v. York*, 109 S. C. 1, 95 S. E. 121.

A law prohibiting 40 named towns without some reasonable basis for classification to collect a license tax from persons engaged in the sale of cotton, no mention being made of other towns, would seem to be a "local or special law" in form and in essence. *Carroll v. York*, 109 S. C. 1, 95 S. E. 121.

Provisions of the code which authorized three cities to acquire waterwork systems by condemnation violation this section when there is a fourth city in the same class. *Paris Mountain Water Co. v. Greenville*, 105 S. C. 180, 89 S. E. 669.

An Act which required an election on the question of abandoning the commission form of government in a named city is contrary to this section. *Floyd v. Calvert*, 114 S. C. 116, 103 S. E. 82.

An Act providing for erection of tuberculosis hospital for Spartanburg county and for selection of site by board of trustees of Spartanburg General Hospital is not violative of this section as subjecting city of Spartanburg to restrictions other than those imposed on other corporations of the same class. *Law v. Spartanburg*, 148 S. C. 229, 146 S. E. 12.

An Act abolishing a certain township highway commission and devolving all their duties upon an advisory board and the county engineer is not in conflict with this section in view of Const. art. 7, § 11. *Askew v. Smith*, 126 S. C. 159, 119 S. E. 378.

If a special provision robs the law of its general character it is plainly not permissible. — *Carroll v. York*, 109 S. C. 1, 95 S. E. 121.

That there may be special provisions in general laws is true, but not such provisions as would nullify the general character of the law. *Carroll v. York*, 109 S. C. 1, 95 S. E. 121; *Floyd v. Calvert*, 114 S. C. 116, 103 S. E. 82.

Section forbids restricting or adding to the power of any part of a class.—An Act which gives power to or restricts one of a class of cities is equally forbid-

den by this section. *Floyd v. Calvert*, 114 S. C. 116, 103 S. E. 82.

Reincorporation of a city supersedes original charter and all amendments thereto.—The reincorporation of a city under the general laws superseded the old charter and an act which gave it special powers in regard to a board of fire commissioners, as the Act was in the nature of an amendment, to the original charter and to have held it otherwise would be to contravene this section of the Constitution. *Beattie v. City Council*, 113 S. C. 541, 102 S. E. 751. See also, *Rutledge v. Greenville*, 155 S. C. 520, 152 S. E. 700.

The reorganized city is a continuation of the city under the old charters.—While this section ordains that the old charter shall cease and determine, clearly it does not ordain expressly or by implication that the corporate life of the town shall be cut off even for a moment. The provision is not that the existing city or town shall go out of existence, but that one charter shall be substituted for another, not that there shall be destruction of the city or town, but merely reorganization. This substitution of one charter for another and reorganization of the municipality is not a break in the corporate existence of the city or town, but a continuation of it with the powers and franchises conferred by the general law. *Black v. Fishburne*, 84 S. C. 451, 66 S. E. 681, 683, 19 Ann. Cas. 1104.

And corporate proceedings begun under the old charter may be completed under the new. — By the provisions of this section the property of the municipality acquired under the old charter continues its property under the new, its contracts legally made under its old charter remain valid under the new, and all corporate proceedings legally undertaken while the old charter was in force may be carried to completion after the issuance of the new charter, unless they will result in the doing of an Act which could not be legally done under the new charter. *Black v. Fishburne*, 84 S. C. 451, 66 S. E. 681, 683, 19 Ann. Cas. 1104.

Under this section, municipal corporations can issue bonds maturing beyond their corporate life under their charters; the statutes in effect being amendments of their original charters extending their corporate existence as to such bonds until their payment, so that the surrender of their special charter and reincorporation under the general laws would not affect the validity of bonds, even if actually issued after incorporation under the general law. *Black v. Fishburne*, 84 S. C. 451, 66 S. E. 681, 19 Ann. Cas. 1104.

Section does not apply to laws governing creation, jurisdiction and incident of municipal courts.—It is not the intention of the Constitution to make the

creation, jurisdiction, and incidents of a municipal court the subject of a "general law," which must be a law in force in every county in the state, and which, while it may contain special provisions making its effect different in certain counties, cannot exempt them from its entire operation, so that the provision of an act providing a method of preparing and drawing jurors in the recorder's court for the city of Columbia, is valid. *Columbia v. Smith*, 105 S. C. 348, 89 S. E. 1028.

Legislature may authorize town councils to establish municipal courts.—A provision of the code allowing the city council of cities of specified populations to create a municipal court is not void as an illegal delegation of legislative powers. *Greenville v. Foster*, 101 S. C. 318, 85 S. E. 769.

The power conferred upon the General Assembly to provide by general laws for

the reorganization and classification of municipal corporations includes the power to establish municipal courts. *Greenville v. Foster*, 101 S. C. 318, 85 S. E. 769.

Statute providing for the classification of cities desiring to adopt the commission form of government, although it contains some special provisions, is valid. *Forde v. Owens, Mayor, et al.*, 160 S. C., 168, 158 S. E. 147.

Statute providing for automatic entry into higher class by city with commission form of government on attaining requisite population is not in conflict with this section, and neither is a statute making provisions for the commission form of government for cities of certain size. *Ibid.*

Act governing incorporation of "resort communities" held unconstitutional. *Thomas v. Macklen*, 186 S. C. 290, 195 S. E. 539.

Section 2. Electors must consent to organization.—No city or town shall be organized without the consent of the majority of the electors residing and entitled by law to vote within the district proposed to be incorporated; such consent to be ascertained in the manner and under such regulations as may be prescribed by law.

This section seems to be the only instance in the Constitution in which a majority of all the electors, those voting and those not voting, is necessary to carry an election by the people. See *Paris Mountain Water Co. v. Greenville*, 110 S. C. 36, 96 S. E. 545.

Act governing incorporation of "resort communities, which gave nonresident freeholders of the proposed incorporated town the right to vote and hold office therein is unconstitutional. *Thomas v. Macklen*, 186 S. C. 290, 195 S. E. 539.

Section 3. Taxes.—The General Assembly shall restrict the powers of cities and towns to levy taxes and assessments, to borrow money and to contract debts, and no tax or assessment shall be levied or debt contracted except in pursuance of law, for public purposes specified by law.

Section is modified by § 7.—This section is modified by § 7 of this article which allows indebtedness to be incurred in anticipation of the collection of taxes. *Luther v. Wheeler*, 73 S. C. 83, 52 S. E. 874, 4 L. R. A. (N. S.) 746, Ann. Cas. 13C, 899, Ann. Cas. 13D, 77.

This section relates to the bonded indebtedness of municipalities.—*Lillard v. Melton*, 103 S. C. 10, 87 S. E. 421, 431, L. R. A. 1916D, 572, L. R. A. 1917E, 468, 5 A. L. R. 761, 24 A. L. R. 941.

This section, art. 8, § 7, art. 2, § 13, art. 10, § 6, art. 10, § 5, and art. 10, § 13, when considered together, show clearly how careful the framers of the Constitution were to throw safeguards around bonded indebtedness, whether it was of the State, municipalities, or political divisions or subdivisions of the State. *Lillard v. Melton*, 103 S. C. 10, 87 S. E. 421, 431, L. R. A. 1916D, 572, L. R. A. 1917E, 468, 5 A. L. R. 761, 24 A. L. R. 941.

Section contemplates the use of corporate utilities for public purposes.—This and §§ 4 and 5 of this article contemplate that the construction and operation of water and electric plants, not only for the purposes of the corporation, strictly speaking, but for supplying citizens of the municipality with light and water, shall be a public purpose, for which the municipality may incur debts and levy taxes. *Irvine v. Greenwood*, 89 S. C. 511, 72 S. E. 228, 43 L. R. A. (N. S.) 863, L. R. A. 1916B, 948, L. R. A. 1917F, 101, Ann. Cas. 12B, 818, Ann. Cas. 13C, 533.

Requires constitutional authority for municipal officers to contract debt.—For the creation of a debt of any description, it is necessary for municipal authorities to find either legislative authority or warrant in some other provision of the Constitution itself than in this section. *Luther v. Wheeler*, 73 S. C. 83, 52 S. E.

874, 4 L. R. A. (N. S.) 746, Ann. Cas. 13C, 899, Ann. Cas. 13D, 77.

Act giving to town council power of taxation does not contravene this section.—The power of taxation given by an Act of the Legislature to the town council of Beaufort is not in conflict with this section. *State v. Town Council*, 39 S. C. 5, 17 S. E. 355.

Section does not repeal an act conferring on a city power to assess license tax.—The Act of 1871, 14 Stats. 569, conferring on the city of Columbia power to assess license tax, is not repealed by this section. *Florida Cent., etc., R. Co. v. Columbia*, 54 S. C. 266, 267, 32 S. E. 408.

Restriction here is not upon the legislature.—The restriction of this section as to the power of taxation is not upon the Legislature, but the injunction is to the Legislature to restrict the powers of the town to levy taxes. *Paris*

Mountain Water Co. v. Greenville, 110 S. C. 36, 96 S. E. 545, 550.

Legislature may vest county board of education with power to tax to support schools.—An Act vesting a county board of education of a certain county with power to tax for support of high schools, held, not violative of constitutional provisions intended to limit public debt, among which is this section. *Powell v. Hargrove*, 136 S. C. 345, 134 S. E. 380.

Debts of municipalities to equip and maintain fire department—see *United States Rubber Products v. Town of Batesburg*, 183 S. C. 49; 190 S. E. 120.

Municipalities can contract debts for any legitimate corporate purpose. *United States Rubber Products v. Town of Batesburg*, 183 S. C. 49; 190 S. E. 120.

And which existing laws recognize as being within their province and authority to contract. *United States Rubber Products v. Town of Batesburg*, 183 S. C. 49; 190 S. E. 120.

Section 4. Street railway, etc.—No law shall be passed by the General Assembly granting the right to construct and operate a street or other railway, telegraph, telephone or electric plant, or to erect water or gas works for public uses or to lay mains for any purpose, without first obtaining the consent of the local authorities in control of the streets or public places proposed to be occupied for any such or like purposes.

Section contemplates the use of corporate utilities for public purposes.—See this catchline under § 3 of this article.

Legislature may grant such rights upon condition that consent be obtained before operations.—An Act passed by the General Assembly granting a right to lay and operate railroad tracks

along a street but requiring that the consent of the proper authorities be first obtained is not in violation of this section. *Riley v. Charleston Union Station Co.*, 71 S. C. 457, 51 S. E. 485, 110 Am. St. Rep. 579, 10 L. R. A. (N. S.) 909, 11 L. R. A. (N. S.) 942, 22 L. R. A. (N. S.) 8, 36, 47, 75, 87, 123, Ann. Cas. 15A, 83.

Section 5. Waterworks systems—plants furnish lights and ice.—Cities and towns may acquire, by construction or purchase, and may operate, waterworks systems and plants for furnishing lights and ice manufacturing plants and may furnish water and lights and ice, to individuals, firms and private corporations for a reasonable compensation: *Provided*, That no such construction or purchase shall be made except upon a majority vote of the electors in said cities or towns who are qualified to vote on the bonded indebtedness of said cities or towns.

Amended by a joint resolution and an act: 1920 (31) 1707; 1921 (32) 273. See FOREWORD on page 1159 of this volume.

Cross references.—As to the power of municipal corporations to condemn lands for waterworks, see § 7302 and note thereto. As to the construction and operation of waterworks and electric plants, the issuance of bonds for such, the elections required, and the power of condemnation in relation thereto, see § 7280 and note thereto. As to the provisions for special elections, as to issuance of bonds for enlarging, extending or establishing waterworks, see § 7327 and note thereto.

Editor's note.—The power of a municipality to operate an electric plant for furnishing lights to private residents did not exist in this State until the Constitution was adopted in 1895. *Union v. Sartor*, 91 S. C. 248, 74 S. E. 496. And a city's purchase and maintenance of one, to the extent of furnishing lights to private residences and places of business at a compensation, were *ultra vires*. *Mauldin v. City Council*, 33 S. C. 1, 11 S. E. 434, 8 L. R.

A. 291, 63 L. R. A. 133, 64 L. R. A. 41, 60, 15 L. R. A. (N. S.) 711, 36 L. R. A. (N. S.) 21, Ann. Cas. 13C, 719, Ann. Cas. 16B, 524.

This Section Expresses Three Subjects.—This section confers the right to purchase; it limits the right to a majority vote of the electors of the city; it by necessary implication prescribes the way in which that majority shall be ascertained, that is to say, as electors vote on a bonded indebtedness. *Enterprise Real Estate Co. v. City Council*, 107 S. C. 492, 93 S. E. 184.

It is self-executing.—This and § 7 of this article providing cities may acquire waterworks and provide for payment therefor, are self-executing. *Paris Mountain Water Co. v. Greenville*, 110 S. C. 36, 96 S. E. 545. See also, *Chick Springs Water Co. v. State Highway Dept.*, 159 S. C. 481, 157 S. E. 842, 848.

This section does not limit the service to those situated within the city limits. *Paris Mountain Water Co. v. Greenville*, 110 S. C. 36, 96 S. E. 545.

Section contemplates the use of corporate utilities for public purposes.—See this catchline under § 3 of this article.

Establishment of these utilities may be properly regarded as a corporate purpose.—Under the provisions of this section the establishment of a system of waterworks and electric light by a city can properly be regarded as a corporate purpose. *State v. Evans*, 47 S. C. 418, 25 S. E. 216, 61 L. R. A. 50.

A city can acquire waterworks and light plant only as provided here.—*Stehmeyer v. City Council*, 53 S. C. 259, 31 S. E. 322, 78 Am. St. Rep. 236, 271, 61 L. R. A. 55, 3 L. R. A. (N. S.) 819, 28 L. R. A. (N. S.) 1133, Ann. Cas. 16B 527.

An Act which authorizes cities and towns to construct and operate waterworks, and to raise funds for that purpose by the issue of bonds when approved by the qualified electors at an election by the municipal authorities, and further provides that at such election commissioners of public works shall be elected to sell and dispose of the bonds and to build and control the waterworks, relates to the construction, purchase, and operation of waterworks and electric light plants, and obviously was intended to carry into effect the provisions of this section. *Seegers v. Gibbes*, 72 S. C. 532, 52 S. E. 586.

A statute omitting word "purchase" is sufficient.—A statute enacted to carry out the provisions of this section though it does not use the word "purchase," is sufficient when considered with this section to warrant the city to purchase waterworks. *Enterprise Real Estate Co. v. City Council*, 107 S. C. 492, 93 S. E. 184.

City's agreement whereby private company should manage supply system is valid.—Under this section a contract whereby a city should build additional water supply system, which should be managed, operated, and maintained by private company is not invalid as involving exercise of power of taxation for purposes essentially private. *Green v. Rock Hill*, 149 S. C. 234, 147 S. E. 346.

City operating waterworks is not a public service corporation to non-residents.—This section cannot be held to mean that cities and towns, by exercising the power of operating waterworks, assume to non-residents of the city the relation and duties of a public service corporation. *Childs v. Columbia*, 87 S. C. 566, 70 S. E. 296, 34 L. R. A. (N. S.) 542, Ann. Cas. 12C, 939.

And it is bound only by the contract made.—A city operating waterworks under this section is bound to a non-resident only by the contract made. *Childs v. Columbia*, 87 S. C. 566, 70 S. E. 296, 34 L. R. A. (N. S.) 542, Ann. Cas. 12C, 939.

Proposition to install sewerage may be included.—This section is confined to waterworks systems and electric light plants, but there is nothing to indicate that the legislature might not provide that either or both of these two purposes might not be submitted to the voters, along with the proposition to install a sewerage system. *Waits v. Ninety-Six*, 154 S. C. 350, 151 S. E. 576, 579.

Section implies power of municipality to hold election.—This section necessarily implies the power of the municipality to hold an election to ascertain the will of the majority, though possibly this may be defeated by the failure of the General Assembly to provide election machinery. *Dick v. Scarborough*, 73 S. C. 150, 53 S. E. 86.

In a city election to determine the issue of bonds for purchase of waterworks, any form of ballot in accordance with the previous notice, giving the voter full knowledge of the issue involved, is sufficient. *Dick v. Scarborough*, 73 S. C. 150, 53 S. E. 86.

And legislature cannot deny voter constitutional right to vote on purchase of waterworks.—The Legislature can not so limit the use of the election machinery as to deny to the voter the constitutional right to vote for the purchase of waterworks, and all rights given by the Constitution may be exercised by the voters, whether expressly mentioned in a Statute or not. *Dick v. Scarborough*, 73 S. C. 150, 53 S. E. 86.

This and § 7 of this article and art. 2, § 13 indicate procedure for an election on question of purchase of waterworks as well as payment of price. *Enterprise Real Estate Co. v. City Council*, 107 S.

C. 492, 93 S. E. 184.

Question of purchase of waterworks and of bond issue for payment thereof may be submitted to elector contemporaneously.—Enterprise Real Estate Co. v. City Council, 107 S. C. 492, 93 S. E. 184.

A majority of those voting is sufficient.—A vote in favor of construction or purchase by a majority of the qualified voters who voted at the election is sufficient in view of this section. Harby v. Jennings, 112 S. C. 479, 101 S. E. 649.

Elections under this section and § 7 of this article are controlled by art. 2, § 13, providing that a majority of those voting at special elections is sufficient to authorize city bonds. Paris Mountain Water Co. v. Greenville, 110 S. C. 36, 96 S. E. 545.

And absent electors are presumed to assent to will of majority voting.—Qualified electors who have absented themselves from an election duly called are presumed to assent to the express will of the majority of those voting, unless the law providing for the election otherwise declares. Paris Mountain Water Co. v. Greenville, 110 S. C. 36, 96 S. E. 545.

Petition for election to bond city must be by majority of freeholders.—A petition for an election to issue bonds to meet the cost of constructing waterworks and electric light plants must be signed by a majority of the freeholders as shown by the tax books of the city or town. State v. Evans 47 S. C. 418, 25 S. E. 216, 61 L. R. A. 50.

As to the requirements of a petition from majority of freeholders of a city as a condition precedent to election to bond the city, see Const. art. 2, § 13, and note thereto.

As to the provisions relating to incurring bonded debts of cities and towns and requiring elections therefor, see § 7 of this article and note thereto. As to the provisions for levying taxes, for corporate purposes and the limit of bonded debts, see Const. art. 10, § 5 and note thereto.

Purposes for issuing bonds need not be submitted separately.—Const. art. 8, §§ 5, 7, and art. 10 § 5, do not require the separate submission of purposes for which bonds may be issued by municipalities, since manner in which purposes for which municipalities may issue bonds shall be submitted to electorate is one purely of legislative cognizance. Waits v. Ninety-Six, 154 S. C. 350, 151 S. E. 576.

Bonds issued by town, pursuant to election submitting as a general proposition the purpose of establishing and constructing waterworks and sewerage system within corporate limits, were valid and binding obligations; there being no constitutional limitations rela-

tive to manner in which questions are to be submitted. Waits v. Ninety-Six, 154 S. C. 350, 151 S. E. 576.

Section does not authorize involuntary acquisition by condemnation.—Paris Mountain Water Co. v. Greenville, 105 S. C. 180, 89 S. E. 669.

But legislature may delegate its power to condemn a waterworks to a city.—The primary right of a city to condemn a waterworks rests in eminent domain vested in the state not created by the Constitution, but affirmed by Const. art. 14, and limited in its exercise by art. 1, § 17, and art. 9, § 20 the exercise of the right being vested in the Legislature, which may delegate it to the city. Paris Mountain Water Co. v. Greenville, 110 S. C. 36, 96 S. E. 545.

The fundamental right of a city to acquire by condemnation a waterworks plant cannot be defeated by the suggestion that persons outside of the city now supplied by contract may be hereafter cut off from use of water. Paris Mountain Water Co. v. Greenville, 110 S. C. 36, 96 S. E. 545.

And vote must be taken before condemnation proceedings are started.—This section requires a majority vote in favor of construction or purchase before condemnation proceedings are started, assuming that purchase includes the power to condemn. Paris Mountain Water Co. v. Greenville, 105 S. C. 180, 89 S. E. 669.

As to constitutional provisions for taking of private property for public use only on making a just compensation therefor, see Const. 1895, art. 1, § 17, and note thereto. As to provisions prohibiting the taking of property without due process of law see U. S. Const. 5th Amend. (limitations on Federal Government) and U. S. Const. 14th Amend. (limitation on States).

Right given to cities and towns herein to establish and operate lighting plants does not affect power of legislature to confer similar right upon counties. Park v. Greenwood County, 174 S. C., 35; 176 S. E., 870.

Municipality may charge rate for water rent that will yield fair profit to same extent as private corporations, service received being test of reasonableness in rates charged. Simons v. City Council of Charleston, 181 S. C. 353, 187 S. E. 545.

But imposition upon water consumers of rates sufficiently high to produce necessary income to pay bonds issued to provide for necessary extension of municipal waterworks system does not require imposition of unreasonable rates within constitutional inhibition. Simons v. City Council of Charleston, 181 S. C. 353; 187 S. E. 545.

Section 6. Corporate taxes must be uniform—license.—The corporate authorities of cities and towns in this State shall be vested with power to assess and collect taxes for corporate purposes, said taxes to be uniform in respect to persons and property within the jurisdiction of the body composing the same; and all the property, except such as is exempt by law, within the limits of cities and towns shall be taxed for the payment of debts contracted under authority of law. License or privileged taxes imposed shall be graduated so as to secure a just imposition of such tax upon the classes subject thereto.

Cross references.—As to the provisions for taxes and licenses for businesses and professions in towns and cities over 1000 inhabitants, see § 7433 and note thereto; in cities over 5000 inhabitants, see § 7470 and note thereto.

This section is merely a direction to the General Assembly, and is not a direct grant of power.—*Charleston Heights Co. v. City Council*, 138 S. C. 187, 136 S. E. 393.

Section is not applicable to franchises granted by state.—This section is applicable only to licenses imposed by municipal corporations, and not to franchises granted by the state. *Ware Shoals Mfg. Co. v. Jones*, 78 S. C. 211, 58 S. E. 811, 129 Am. St. Rep. 288, 44 L. R. A. (N. S.) 212, 225.

Legislature has exclusive power of taxation.—The Constitution of 1895 has not taken from the Legislature the exclusive power of taxation, but it may delegate such power to the towns. *Carroll v. York*, 109 S. C. 1, 95 S. E. 121.

Although this section provides that corporate authorities of cities, etc., shall be vested with power to assess and collect taxes for corporate purposes, yet, in order to make its provisions effectual, it is necessary that there should be legislative enactment for that purpose, as this section does not undertake to vest this power directly in the corporate authorities aforesaid, but only provides that it "may" be vested. *State v. Kelly*, 45 S. C. 457, 23 S. E. 281, 282.

But it may delegate such power to towns and cities.—This section does not give towns an inherent right to collect a license tax, such being an exclusive power of the Legislature, but which it may delegate. *Carroll v. York*, 109 S. C. 1, 95 S. E. 121.

By this section and art. 10, § 5, it is directed: (1) That the corporate authorities of cities shall be vested with the power to tax for corporate purposes; (2) that such taxes shall be uniform in respect to persons and property; (3) that all property (save that excepted) shall be taxed; (4) that this power to tax to borrow money and to contract debts shall be restricted. *Carroll v. York*, 109 S. C. 1, 95 S. E. 121, 124. The General Assembly is empowered to confer on

towns the power to tax and to limit its exercise in these four particulars. *Id.*

But only for a corporate purpose.—

Under a proper construction of this section, the taxing power of the Legislature cannot be delegated except for a corporate purpose. *Floyd v. Perrin*, 30 S. C. 1, 8 S. E. 14, 64 Am. St. Rep. 103, 2 L. R. A. 242. *Ann. Cas. 12A, 554; Atlantic Trust Co. v. Darlington*, 63 F. 76, 391.

An Act, declaring townships along the line of a railroad bodies corporate, with power to subscribe stock, and assess and collect taxes to pay the subscription, but not declaring for what corporate purpose the power is given, is in violation of this section. *Floyd v. Perrin*, 30 S. C. 1, 8 S. E. 14, 64 Am. St. Rep. 103, 2 L. R. A. 242. *Ann. Cas. 12A, 554.*

The object of the graduation is to make taxes uniform.—The object of the graduation is to make such taxes as far as possible uniform, a just imposition being the end in view. *Ware Shoals Mfg. Co. v. Jones*, 78 S. C. 211, 58 S. E. 811, 129 Am. St. Rep. 288, 44 L. R. A. (N. S.) 212, 225.

An ordinance of the city of Sumter, providing that, if the gross annual income from the business of auctioning horses and mules does not exceed \$2,000, the license tax shall be \$300 a day, and \$300 plus 2½ per cent. of the excess if the gross annual income exceeds that amount, held void under this section and § 7433, as it fixes an unreasonable sum for the license and does not graduate the license fairly according to gross income nor according to capital invested. *Ex parte Bates*, 127 S. C. 167, 120 S. E. 717.

A tax may be uniform as to members of a class on which it operates.—A city ordinance requiring persons in certain occupations and professions to pay a license or privilege tax, which is uniform as to the members of each class or occupation on which it operated, is not in violation of this section, requiring such taxes to be just, in that the different classes are not taxed alike. *Hill v. City Council*, 59 S. C. 396, 38 S. E. 11, *Ann. Cas. 12 B, 879, 24 A. L. R. 942.*

The tax must be upon all the property not exempt and not just a part.—A con-

tract between a city and corporation that the latter shall construct a system of waterworks and an electric light plant, and convey them to the city, and that the city shall operate such plants, and shall, among other stipulations yearly collect a certain sum from owners of lots fronting on streets in which water mains are laid, so much a foot for the ground, with a certain addition in case of improvements, violates this section, requiring that taxation shall be on assessment of property according to its value, and that all the property, except such as is exempt, shall be taxed for payment of debts. *Stehmeyer v. City Council*, 53 S. C. 259, 31 S. E. 322, 78 Am. St. Rep. 236, 271, 61 L. R. A. 55, 3 L. R. A. (N. S.) 819, 28 L. R. A. (N. S.) 1133, Ann. Cas. 16B, 527.

The property of a manufacturing company is not exempt under this section.—*Atlantic Trust Co. v. Darlington*, 63 F. 76.

The only exemptions under this section are of property used for municipal, educational, literary, scientific, religious, or charitable purposes. *Atlantic Trust Co. v. Darlington*, 63 F. 76, 83.

Only express statutory provisions can make taxes a lien on property taxed.—Taxes imposed under this section are not a lien on property taxed, in absence of statute expressly creating a lien. *Charleston Heights Co. v. City Council*, 138 S. C. 187, 136 S. E. 393.

Assuming that this section is a direct grant of power to cities "to assess and collect taxes," it does not carry with it by implication a lien on property taxed. *Charleston Heights Co. v. City Council*, 138 S. C. 187, 136 S. E. 393.

Section renders inoperative act incorporating Charleston.—The act incorporating the city of Charleston, and conferring on it the power to assess property for taxation, was rendered inoperative by the adoption of this section. *State v. Kelly*, 45 S. C. 457, 23 S. E. 281.

The provisions of this section are in effect a denial of the right of corporations to make assessments of property for taxation, until the general assembly should grant such right, and the charter of the city of Charleston, in so far as it vested such right in the city council, became inoperative. *State v. Kelly*, 45 S. C. 457, 23 S. E. 281, 283.

Complaint seeking refund of taxes must allege non-graduation.—In a complaint seeking to recover a license tax paid under protest, it will not be presumed that the tax was not graduated, in the absence of allegations to that effect. *Florida Cent., etc., R. Co. v. Columbia*, 54 S. C. 266, 32 S. E. 408.

An ordinance requiring a license tax but exempting licensed dealers is unconstitutional.—An ordinance requir-

ing dealers in oils to pay a license of a certain sum per year, and providing that this license shall not apply to dealers handling oils on which the license has been paid, is unconstitutional because there is no reasonable ground for such classification; this section providing for uniformity of taxes. *Standard Oil Co. v. Spartanburg*, 66 S. C. 37, 44 S. E. 377, 129 Am. St. Rep. 270.

The taxing of money lenders except regularly established banks is not unconstitutional.—A city ordinance providing that persons, firms and corporations, except regularly established banks, lending money on personal property security, should pay licenses according to a schedule of their gross business, thus placing such money lenders in a class different from that of banks, was not unconstitutional, as discriminatory. *Cowart v. City Council*, 67 S. C. 35, 45 S. E. 122, 129 Am. St. Rep. 281, 11 L. R. A. (N. S.) 638, 17 L. R. A. (N. S.) 898, Ann. Cas. 14B, 1197, 24 A. L. R. 942.

Chain stores and individual stores may be classified differently for purpose of taxation.—The state has conferred on municipalities the power to make classifications in imposing license taxes; hence chain stores may be placed in a different classification from individual stores for purpose of taxation. *Great A. & P. Tea Co. v. City of Spartanburg*, 170 S. C. 262; 170 S. E. 273.

Non-resident license tax.—Ordinance requiring "bakeries with established place of business out of city, and selling or delivering their products within city" to pay higher license tax than bakeries within city is valid, as not shown higher license was unreasonable, capricious, or confiscatory. *Am. Bakeries Co. v. City of Sumter*, 173 S. C. 94; 174 S. E. 919. See also *Crosswell & Co., Inc. v. Town of Bishopville*, 172 S. C. 26, 172 S. E. 698.

The requirement that taxes levied be uniform in respect to persons and property is inapplicable to "sanitary tax" manifesting intent to impose inspection or service charge in connection with privilege of maintaining sanitary toilets and privies. *Town of Marion v. Baxley*, 192 S. C. 112, 5 S. E. 2d 573.

A regulation requiring heads of families maintaining a sanitary closet or privy to pay annual "sanitary tax" of \$3, and keepers of boarding, lodging or rooming house to pay "sanitary tax" of \$6, is within power of board of health, and not invalid as discriminatory, oppressive, or unreasonable. *Ibid.*

In determining how far in advance of maturity date of outstanding bonds a municipal corporation may issue refunding bonds, the rule of reason must be applied. *Kalber v. Stokes*, 194 S. C. 339, 9 S. E. 2d 785.

Refunding bonds which city contracted

to sell, pursuant to express statutory authorization, on July 1, 1940, to refund bonds maturing December 1, 1940, and November 1, 1941, were not invalid because issued too far in advance of dates of their maturity. Ibid.

Section 7. Bonded debt—certificates of indebtedness—sinking fund—refunding bonded debt—provisos as to certain cities added by amendment.—No city or town in this State shall hereafter incur any bonded debt which, including existing bonded indebtedness, shall exceed eight per centum of the assessed value of the taxable property therein, and no such debt shall be created without submitting the question as to the creation thereof to the qualified electors of such city or town, as provided in this Constitution for such special elections; and unless a majority of such electors voting on the question shall be in favor of creating such further bonded debt, none shall be created: *Provided*, That this Section shall not be construed to prevent the issuing of certificates of indebtedness in anticipation of the collection of taxes for amounts actually contained or to be contained in the taxes for the year when such certificates are issued and payable out of such taxes: *And provided, further*, That such cities and towns shall on the issuing of such bonds create a sinking fund for the redemption thereof at maturity. Nothing herein contained shall prevent the issuing of bonds to an amount sufficient to refund bonded indebtedness existing at the time of the adoption of this Constitution: *Provided*, That the limitation imposed by this Section and by Section 5, Article IV, of this Constitution shall not apply to bonded indebtedness incurred by the Cities of Columbia, Rock Hill, Charleston and Florence, where the proceeds of said bonds are applied solely for the purchase, establishment, maintenance or increase of water works plants, sewerage system; and by the City of Georgetown, when the proceeds of said bonds are applied solely for the purchase, establishment, maintenance or increase of water works plant, or sewerage system, gas and electric light plants where the entire revenue arising from the operation of such plants or systems shall be devoted solely and exclusively to the maintenance and operation of the same, and where the question of incurring such indebtedness is submitted to the freeholders and qualified voters of such municipality, as provided in the Constitution, upon the question of other bonded indebtedness: *Provided, further*, That the limitations imposed by this Section and by Section 5, Article X, of this Constitution, shall not apply to bonded indebtedness incurred by the City of Greenville, but said City of Greenville may increase its bonded indebtedness in the manner provided in said Section of said Article, to an amount not exceeding fifteen per cent of the value of the taxable property therein, where the proceeds of said bonds are applied solely to the payment of past indebtedness, to expenses and liabilities incurred, or to be incurred in the improvements of streets and sidewalks, and for providing sewerage for said city, or any part thereof, for purchasing, establishing, owning or operating water works or electric light plants: *Provided, further*, That the limitations imposed by this Section, and by Section 5, of Article X, of this Constitution, shall not apply to the bonded indebtedness incurred by the City of Bennettsville, where the proceeds of said bonds are applied solely and exclusively for the purchase, establishment and maintenance of a water works plant or sewerage system, and where the

question of incurring such indebtedness is submitted to the freeholders and qualified voters of such municipality, as provided in the Constitution upon the question of other bonded indebtedness: *Provided, further,* That the limitations imposed by this Section and by Section 5, of Article X, of this Constitution, shall not apply to bonded indebtedness incurred by the Town of Gaffney, in the County of Cherokee, when the proceeds of said bonds are applied solely and exclusively for the building, erecting, establishing and maintenance of waterworks, electric light plants, or sewerage system, and where the question of incurring such indebtedness is submitted to the qualified electors of said municipality as provided in the Constitution upon the question of bonded indebtedness: *Provided,* That the limitation imposed by this Section and by Section 5, of Article X, of this Constitution, shall not apply to bonded indebtedness incurred by the Town of Darlington, where the proceeds of said bonds are applied solely for the purpose of drainage of said town and street improvements, and where the question of incurring such indebtedness is submitted to the freeholders and qualified voters of such municipality, as provided in the Constitution, upon the question of other bonded indebtedness: *Provided, further,* That the limitations imposed by this Section, and by Section 5, of Article X, of this Constitution, shall not apply to the bonded indebtedness incurred by the towns of Aiken, in the County of Aiken; Camden, in the County of Kershaw; Cheraw, in the County of Chesterfield; Clinton, in the County of Laurens; Edgefield, in the County of Edgefield; and St. Matthews, in the County of Calhoun, when the proceeds of said bonds are applied solely and exclusively for the building, erecting, establishing and maintenance of waterworks, electric light plants, sewerage system or streets, and where the question of incurring such indebtedness is submitted to the qualified electors of said municipality, as provided in the Constitution upon the question of bonded indebtedness: *Provided, further,* That the limitations imposed by this Section, and by Section 5, of Article X, of this Constitution, shall not apply to the bonded indebtedness in and by any municipal corporation when the proceeds of said bonds are applied solely and exclusively for the purchase, establishment and maintenance of a waterworks plant, or sewerage system, or lighting plant, and when the question of incurring such indebtedness is submitted to the freeholders and qualified voters of such municipality, as provided in the Constitution, upon the question of other bonded indebtedness: *Provided, further,* That the limitations imposed by this Section, and by Section 5, Article X, of this Constitution, shall not apply to bonded indebtedness incurred by the Town of St. Matthews, but said Town of St. Matthews may increase its bonded indebtedness in the manner provided in said Section of said article to an amount not exceeding fifteen per cent of the value of the taxable property therein, where the proceeds of said bonds to the amount of twenty thousand (\$20,000) dollars shall be turned over by the Town Council of said Town of St. Matthews to the duly appointed commissioners of the County of Calhoun for the purpose of aiding in the construction of public buildings for the County of Calhoun.

Hereinabove provisions amended by joint resolutions and acts: 1900 (23) 570, 1901 (23) 616; 1904 (24) 676, 1905 (24) 955; 1906 (25) 365, 1907 (25) 488; 1908 (25)

1460, 1909 (26) 36; 1910 (26) 1046; 1911 (27) 9; 1910 (26) 1054, 1911 (27) 12; 1910 (26) 1055, 1911 (27) 13. See FOREWORD on page 1159 of this volume.

Provided, further, That the limitations imposed by this section and Section 5, of Article X, of the Constitution, shall not apply to the bonded indebtedness incurred by the Cities of Chester and Sumter, but the said Cities of Chester and Sumter may increase each its bonded indebtedness to an amount not exceeding fifteen per cent. of the assessed value of the taxable property therein where said bonds are issued for the sole purpose of paying the expenses or liabilities incurred or to be incurred in the improvements of streets and sidewalks where the abutting property owners are being assessed for two-thirds or one-half of the cost thereof.

Amended by a joint resolution and an act: 1914 (28) 955; 1915 (29) 60. See FOREWORD on page 1159 of this volume.

Provided, further, That the limitations imposed by this Section and by Section 5, of Article X, of this Constitution shall not apply to the bonded indebtedness incurred by the school district of Yorkville, in the County of York, when the proceeds of said bond are applied exclusively to erecting or making additions to school buildings in the said district, and where the question of incurring such indebtedness is submitted to the qualified electors of said district, as provided in the Constitution, upon the question of bonded indebtedness.

Amended by a joint resolution and an act: 1914 (28) 949; 1915 (29) 107. See FOREWORD on page 1159 of this volume.

That the limitations imposed by this Section and Section 5, Article X, of the Constitution, shall not apply to the bonded indebtedness incurred by the City of Florence, in the County of Florence, when the proceeds of said bonds are applied exclusively for the building, erecting, establishing, and maintaining of streets, waterworks, lighting plants, sewerage system or for the payment of debts already incurred, exclusively for any of said purposes; and when the question of incurring such indebtedness is submitted to the qualified electors of said municipality, as provided in the Constitution upon the question of bonded indebtedness.

Amended by a joint resolution and an act: 1914 (28) 954; 1915 (29) 87. See FOREWORD on page 1159 of this volume.

Provided, further, That the limitations imposed by this Section and by Section 5, of Article X, of the Constitution, shall not apply to the bonded indebtedness incurred by the City of Anderson, but, in addition to the powers now possessed, said City of Anderson may increase its bonded indebtedness in the manner provided in said Section 7 of Article VIII, to an amount not exceeding fifteen per cent of the value of the taxable property therein, where the proceeds of said bonds are applied to the payment of past indebtedness, to the expenses and liabilities incurred or to be incurred in the improvements of streets, sidewalks or other public places, or the purchase, establishment, maintenance, operation or increase of a city market or a public park or parks, or any corporate purpose. But nothing herein contained shall be construed to limit the operation of the amendment to Section 7, of Article XIII, of the Constitution, approved February third, 1911, which said amendment reads as follows:

“Provided, further, That the limitations imposed by the Section and by Section 5, of Article X, of this Constitution shall not apply to the bonded indebtedness in and by any municipal corporation, when the proceeds of the bonds are applied solely and exclusively for the purchase, establishment and maintenance of a waterworks plant, or sewerage system, or lighting plant, and when the question of incurring such indebtedness is submitted to the freeholders and qualified voters of such municipality, as provided in the Constitution, upon the question of other bonded indebtedness,” and said amendment shall remain in full force and effect.

Amended by a joint resolution and an act: 1916 (29) 1235; 1917 (30) 224. See FOREWORD on page 1159 of this volume.

Provided, further, That the limitations imposed by this Section and Section 5, of Article X, of the Constitution, shall not apply to the bonded indebtedness incurred by the City of Abbeville, but, in addition to the powers now placed, said City of Abbeville may increase its bonded indebtedness in the manner provided in Section 7, of Article VIII, to an amount not exceeding fifteen (15) per centum of the value of the taxable property therein, where the proceeds of said bonds are applied to the payment of expenses and liabilities incurred or to be incurred in the improvements of streets and sidewalks; but nothing herein contained shall be construed to limit the operation of the amendment to Section 7, of Article VIII, of the Constitution, approved February 3, 1911.

Amended by a joint resolution and an act: 1917 (30) 662; 1919 (31) 28. See FOREWORD on page 1159 of this volume.

Provided, further, That the limitations imposed by this Section, and by Section 5, of Article X, of the Constitution, shall not apply to the bonded indebtedness incurred by the Cities of Rock Hill, in the County of York, and Florence, in the County of Florence, when the proceeds of any bonds issued by said cities are applied exclusively to the purchase, erection, improvement and maintenance of streets, sidewalks, waterworks, lighting plants, gas plants, sewerage system, or for the payment of debts incurred, and when the question of incurring such indebtedness is submitted to the qualified electors of the said municipalities as provided by law.

Amended by a joint resolution and an act: 1918 (30) 1140; 1919 (31) 74. See FOREWORD on page 1159 of this volume.

Provided, further, That the limitations imposed by this section, and by Section 5 of Article X, of this Constitution, shall not apply to the bonded indebtedness incurred by the town of McCormick, but that said town of McCormick may increase its bonded indebtedness in the manner provided in said section of said article to an amount exceeding fifteen per centum of the value of the taxable property therein where the proceeds of the said bonds, which are to be in the amount of thirty thousand (\$30,000) dollars, shall be turned over by the Town Council of the said town of McCormick to the duly elected Commissioners of the county of McCormick for the purpose of aiding in the construction of the public buildings of the said county of McCormick.

Amended by joint resolutions: 1918 (30) 1138; 1919 (31) 58. See act 421 of 1920 for meaning of ratifying joint resolution of 1919. See FOREWORD on page 1159 of this volume.

Provided, That the limitations imposed by this Section, and Section 5, of Article X, of the Constitution of the State of South Carolina, shall not apply to the bonded indebtedness of the City of Orangeburg when the proceeds of such bonds are applied exclusively for the building, erecting, establishing, repairing, extending or maintaining of sidewalks, streets, waterworks, lighting plants, sewerage system, fire department or city hall and guard-house for such city, or for any or either of such purposes, or for the payment of any indebtedness already incurred for any or either of such purposes, and when the questions of incurring such bonded indebtedness is submitted to the qualified electors of such municipality by the City Council of said city and a majority of those voting in such election or elections shall vote in favor thereof.

Amended by a joint resolution and an act: 1918 (30) 1135; 1919 (31) 124. See FOREWORD on page 1159 of this volume.

Provided, further, That the limitations imposed by this Section, and by Section 5, of Article X of the Constitution, shall not apply to the bonded indebtedness incurred by the City of Abbeville, but in addition to the powers now possessed said City of Abbeville may increase its bonded indebtedness in the manner provided in said Section 7, of Article VIII, to an amount not exceeding 15 per cent of the value of the taxable property therein where the proceeds of said bonds are applied to the payment of expenses and liabilities incurred or to be incurred in the improvement of streets and sidewalks. But nothing herein contained shall be construed to limit the operation of the amendment to Section 7, of Article VIII of the Constitution, approved February 3, 1911, which said amendment reads as follows: *Provided, further*, That the limitations imposed by this Section and by Section 5, of Article X, of this Constitution shall not apply to the bonded indebtedness in and by any municipal corporation when the proceeds of the bonds are applied solely and exclusively for the purchase, establishment and maintenance of a waterworks plant, or sewerage system, or lighting plant, and when the question of incurring such indebtedness is submitted to the freeholders and qualified voters of such municipality, as provided in the Constitution, upon the question of other bonded indebtedness.

Amended by a joint resolution and acts: 1917 (30) 662; 1919 (31) 229; 1920 (31) 761. See FOREWORD on page 1159 of this volume.

Provided, further, That the limitations imposed by this Section, and by Section 5, of Article X, of this Constitution shall not apply to the bonded indebtedness incurred by the City of Charleston where the proceeds of said bonds are applied solely for the acquisition, purchase, establishment, improvement, maintenance or operation of lands, water or riparian rights, wharves, docks, warehouses, buildings, rights of way, or any other property for the development of the port and terminal utilities of the port of Charleston, where the question of incurring such indebtedness is submitted to the freeholders and qualified voters of the city of Charleston as provided in the Constitution, upon the question of other bonded indebtedness.

Amended by a joint resolution and an act: 1920 (31) 1714; 1921 (32) 21. See FOREWORD on page 1159 of this volume.

Provided, further, That the limitations imposed by this Section and by Section 5, of Article X, of the Constitution, shall not apply to the bonded indebtedness incurred by the City of Laurens, in addition to the powers possessed, said City of Laurens may increase its bonded indebtedness in the manner provided in Section 7, of Article VIII, where the proceeds of said bond are applied to the payment of expenses and liabilities incurred, or to be incurred, in the improvement of streets and sidewalks. But nothing herein contained shall be construed to limit the operation of the amendment of Section 7, of Article VIII, of the Constitution, approved February 3, 1911, which amendment reads as follows:

Provided, further, That the limitations imposed by this Section and by Section 5, of Article X, of this Constitution shall not apply to the bonded indebtedness in and by any municipal corporation when the proceeds of the bond are applied solely and exclusively for the purchase, establishment and maintenance of the waterworks plant or sewerage system, or lighting plant, and when the question of incurring such indebtedness is submitted to the freeholders and qualified voters of such municipality as provided in the Constitution upon the question of other bonded indebtedness, said amendment shall remain in full force and effect.

Amended by a joint resolution and an act: 1920 (31) 1710; 1921 (32) 29. See FOREWORD on page 1159 of this volume.

Provided, That the limitations imposed in Section 7, of Article VIII, and Section 5, of Article X, of the Constitution of the State of South Carolina, shall not apply to the bonded indebtedness incurred by the Town of Harts-ville, when the proceeds of any bonds issued by said town are applied exclusively to the purchase, erection, improvement and maintenance of streets and sidewalks, where the abutting property owners are assessed for as much as two-thirds the cost thereof, or for waterworks, lighting plants, gas plants, sewerage system, or for the payment of debt incurred, and when the question of incurring such indebtedness is submitted to the qualified electors of the said municipality by law.

Amended by a joint resolution and an act: 1920 (31) 1719; 1921 (32) 30. See FOREWORD on page 1159 of this volume.

Provided, That the limitations imposed in Section 7, of Article VIII, and of Section 5, of Article X of the Constitution of the State of South Carolina, shall not apply to the bonded indebtedness incurred by the Town of Chesterfield when the proceeds of any bonds issued by said town are applied exclusively to the purchase, erection, improvement and maintenance of streets and sidewalks, where the abutting property owners are assessed for as much as one-half the cost thereof, or for waterworks, lighting plants, gas plants, sewerage systems, or for the payment of debts incurred, and when the question of incurring such indebtedness is submitted to the qualified electors of the said municipality as provided by law.

Amended by a joint resolution and an act: 1920 (31) 1718; 1921 (32) 32. See FOREWORD on page 1159 of this volume.

Provided, That the limitations imposed by this Section and Section 5, of Article X of the Constitution of the State of South Carolina, shall not apply to the bonded indebtedness of the Town of Marion, when the proceeds

of such bonds are applied exclusively for the building, erecting, establishing and repairing, extending or maintaining of fire department or town hall and guardhouse for such town, or for either of such purposes or for the payment of any indebtedness already incurred for any or either of such purposes; and when the question of incurring such bonded indebtedness is submitted to the qualified electors of said municipality by the town council of said town, and a majority of those voting in such election or elections shall vote in favor thereof.

Amended by a joint resolution and an act: 1920 (31) 1702; 1921 (32) 41. See FOREWORD on page 1159 of this volume.

Provided, further, That the limitations imposed by this Section, and by Section 5, Article X of the Constitution, shall not apply to the bonded indebtedness incurred by the Town of Bishopville, but that the said Town of Bishopville may increase its bonded indebtedness in the manner provided in said Section of said Article to an amount not exceeding 15 per cent of the assessed value of the taxable property therein, where the proceeds derived from said bonds are applied for the improvement of the streets and sidewalks in the said Town of Bishopville: *Provided,* the question of increasing such bonded indebtedness is submitted or has been submitted to the qualified electors of said municipality by the Town Council of said Town of Bishopville, a majority of those voting in such election shall vote in favor thereof.

Amended by a joint resolution and an act: 1920 (31) 1716; 1921 (32) 42. See FOREWORD on page 1159 of this volume.

Provided, further, That the limitations imposed by this Section, and by Section 5 of Article X of the Constitution, shall not apply to the bonded indebtedness incurred by the Town of Newberry; but in addition to the powers now possessed said Town of Newberry may increase its bonded indebtedness in the manner provided in said Section 7, of Article VIII, to an amount not exceeding twenty per cent of the value of the taxable property therein, where the proceeds of said bonds are applied to the expenses and liabilities incurred, or to be incurred, in the improvement of streets, sidewalks or other public places, or the purchase, establishment, maintenance, operating or increase of a city market or a public park or parks, or other corporate purposes. But nothing contained herein shall be construed to limit the operation of the amendment of Section 7, of Article VIII, of the Constitution, approved February 3, 1911, which said amendment reads as follows: "*Provided, further,* That the limitations imposed by this Section and by Section 5, of Article X of this Constitution, shall not apply to the bonded indebtedness in and by any municipal corporation when the proceeds of the bonds are applied solely and exclusively for the purchase, establishment and maintenance of a waterworks plant, or sewerage system, or lighting plant, and when the question of incurring such indebtedness is submitted to the freeholders and qualified voters of such municipality as provided in the Constitution upon the question of other bonded indebtedness," and said amendment shall remain in full force and effect.

Amended by joint resolutions: 1920 (31) 1715; 1921 (32) 50. See FOREWORD on page 1159 of this volume.

Provided further, That the limitations imposed by this Section and Section 5, of Article X of the Constitution of the State of South Carolina, shall not apply to the bonded indebtedness of the Towns of Saluda, in Saluda County, and Kingstree, Williamsburg County, when the proceeds of such bonds are applied exclusively to the building, erecting, establishing, repairing, extending or maintaining of sidewalks, streets, waterworks, lighting plants, sewerage system, fire department or town hall and guard-house for such town, or for any or either of such purposes, or for the payment of any indebtedness already incurred for any or either of such purposes, and when the question of incurring such bonded indebtedness is submitted to the qualified electors of said municipalities by the Town Council of said towns, a majority of those voting in said election or elections shall vote in favor thereof.

Amended by a joint resolution and an act: 1920 (31) 1703; 1921 (32) 68. See FOREWORD on page 1159 of this volume.

Provided, further, That the limitations imposed by this Section and by Section 5, Article X of the Constitution, shall not apply to the bonded indebtedness incurred by the City of Charleston, nor to the issuing of certificates of indebtedness by said city, where the proceeds of said bonds or certificates of indebtedness are applied solely and exclusively to the payment of permanent improvements on streets, the intersection of streets and sidewalks and for curbing of streets and for drains, where the City Council of said city shall levy an assessment upon abutting property, as provided in and by the amendment to Section 14-A, Article X of said Constitution, ratified February 15, 1919, and where the entire revenue arising from the assessments so levied by the City Council of said city shall be devoted solely and exclusively to the payment of said bonds or certificates of indebtedness and where the question of incurring such indebtedness is submitted to the freeholders and qualified voters of said city, as provided in the Constitution upon other bonded indebtedness.

Amended by a joint resolution and an act: 1920 (31) 1704; 1921 (32) 69. See FOREWORD on page 1159 of this volume.

Provided, That the limitations imposed in Section 7, Article VIII, and Section 5, Article X, of the Constitution of the State of South Carolina, shall not apply to the bonded indebtedness incurred by the City of Chester, when the proceeds of any bonds issued by said city are applied exclusively to the purchase, erection, improvements and maintenance of streets and sidewalks, where the abutting property owners are assessed for as much as one-half of the cost thereof, or for waterworks, lighting plants, gas plants, sewerage system, or for the payment of debts incurred, and when the question of incurring such indebtedness is submitted to the qualified electors of said municipality as provided by law.

Amended by a joint resolution and an act: 1920 (31) 1720; 1921 (32) 107. See FOREWORD on page 1159 of this volume.

Provided, further, That the limitations and restrictions imposed by this Section and by Section 13 of Article II, and Section 5 of Article X of the Constitution, shall not apply to bonds issued or to be issued by the City of Union for the purpose of funding or paying any indebtedness incurred

before February 15, 1920, for municipal purposes, and all such indebtedness incurred before said date is hereby validated, and the General Assembly shall have power by special Act to authorize said city to issue bonds to fund the same without regard to limitations and restrictions.

Amended by a joint resolution and an act: 1920 (31) 1709; 1921 (32) 92. See FOREWORD on page 1159 of this volume.

Provided, further, That the limitations imposed by Section 7, Article VIII, and Section 5, Article X of the Constitution, shall not apply to the bonded indebtedness incurred by the Townships of Cross Keys, Santuc, Pickney, Goshen Hill, Union, Boganville, Jonesville and Fish Dam, in Union County; and that the aforesaid townships may increase their bonded indebtedness in the manner provided in said Section of said Article to an amount not exceeding thirty-five (35) per cent of the assessed value of the taxable property therein for improvements of the highways and bridges in the said townships of Union County: *Provided,* The question of increasing such bonded indebtedness is submitted, or has been submitted to the qualified electors of said townships, and a majority of those voting in such election or elections, shall vote in favor thereof.

Amended by a joint resolution and an act: 1920 (31) 1711; 1921 (32) 97. See FOREWORD on page 1159 of this volume.

Provided, That the limitations imposed in Section 7, of Article VIII, and in Sections 5 and 6, of Article X, of the Constitution of the State of South Carolina, shall not apply to the bonded indebtedness incurred by the County of Richland, when the proceeds of any bonds issued by said county are applied exclusively to the purpose of erection, improvement and maintenance of a public hospital and court house or in payment of debts incurred, and when the question of incurring such indebtedness is submitted to the qualified electors of said county, as provided by law.

Amended by a joint resolution and an act: 1920 (31) 1721; 1921 (32) 156. See FOREWORD on page 1159 of this volume.

Provided, That the provisions of Article VIII, Section 7, and Article X, Section 5, shall not apply to the bonded indebtedness incurred by the Town of Allendale, in Allendale County, when the proceeds of said bonds are applied, or are to be applied for the building, erecting, establishment and maintenance of waterworks, electric light plants, sewerage system or streets; or where the proceeds of said bonds are to be applied to the building and construction of a court house and jail in the said town.

Amended by a joint resolution and an act: 1920 (31) 1722; 1921 (32) 169. See FOREWORD on page 1159 of this volume.

Provided, further, That the limitations imposed by this Section and by Section 5, of Article X of this Constitution, shall not apply to the bonded indebtedness incurred by the City of Charleston where the proceeds of said bonds are applied solely for the acquisition, purchase, establishment, improvement, maintenance or operation of lands, water or riparian rights, wharves, docks, warehouses, buildings, rights of way, or any other property for the development of the port and terminal utilities of the port of Charleston where the question of incurring such indebtedness is submitted to the freeholders and qualified voters of the City of Charleston as provided in the Constitution, upon the question of other bonded

indebtedness.

Amended by a joint resolution and an act: 1920 (31) 1705; 1921 (32) 352. See FOREWORD on page 1159 of this volume.

Provided, That the limitations imposed by this Section and Section 5, of Article X of the Constitution of the State of South Carolina, shall not apply to the bonded indebtedness of the Town of Bennettsville, when the proceeds of such bonds are applied exclusively for the building, erecting, establishing, repairing, extending or maintaining of sidewalks, streets, waterworks, lighting plants, sewerage system, fire department, or town hall and guardhouse for such town, or for either of such purposes or for the payment of any indebtedness already incurred for any or either of such purposes; and when the question of incurring such bonded indebtedness is submitted to the qualified electors of said municipality by the town council of said town, and a majority of those voting in such elections shall vote in favor thereof.

Amended by joint resolutions and an act: 1920 (31) 1713, 1717; 1921 (32) 96. 1922 (32) 821 should be consulted herewith. See FOREWORD on page 1159 of this volume.

Provided, further, That the limitations imposed by this Section and by Section Five (5) of Article Ten (10) of the Constitution shall not apply to bonded or other indebtedness of the Town of Bennettsville incurred for street or sidewalk improvements in cases where the corporate authorities of said town shall have levied or shall have determined to levy, special assessments on abutting property for the purpose of paying for the improvement (whether including or not including improvements at street intersections) and such indebtedness of the Town of Bennettsville shall not be considered in determining the amount of indebtedness permitted to be incurred by said town for other purposes, or by any other political or civil division or subdivision of the State for any purpose.

Amended by a joint resolution and an act: 1920 (31) 1717; 1922 (32) 916. See 1921 (32) 97; 1922 (32) 821. See FOREWORD on page 1159 of this volume.

Provided, That the limitations imposed in Section 7, Article VIII, and by Section 5, of Article X, of the Constitution of the State of South Carolina shall not apply to the bonded indebtedness incurred by the City of Beaufort, when the proceeds of any bonds issued by said city are applied exclusively to the purchase, erection, improvements and maintenance of streets and sidewalks where the abutting property owners are assessed as much as one-half the cost thereof, or for the purchase, construction and maintenance of waterworks, lighting plants, gas plants, sewerage system or for the payment of debts incurred and when the question of incurring such indebtedness is submitted to the qualified electors of said municipality as provided by law.

Amended by a joint resolution and an act: 1922 (32) 1329; 1923 (33) 1. See FOREWORD on page 1159 of this volume.

Provided, That the limitations imposed in Section 7, Article VIII, and by Section 5, Article X, of the Constitution of the State of South Carolina shall not apply to the bonded indebtedness incurred by the City of Spartanburg when the proceeds of any bonds issued by said city are applied exclusively to the purchase, erection, improvements and maintenance of streets and sidewalks, or for the purchase, construction and

maintenance of waterworks, lighting plants, gas plants, sewerage systems, or for the payment of debts incurred, and when the question of incurring such indebtedness is submitted to the qualified electors of the said municipality as provided by law: *Provided*, That the amount of bonds issued hereunder shall not exceed fifteen per cent. of the assessed valuation of property, in the City of Spartanburg.

Amended by a joint resolution and an act: 1922 (32) 1568; 1923 (33) 128. See FOREWORD on page 1159 of this volume.

Provided, That all limitations imposed by Section seven of Article eight and Section five of Article ten of the Constitution of the State of South Carolina shall not apply to bonded indebtedness incurred by the City of Union when the proceeds of said bonds issued by said city are applied exclusively to pay past indebtedness.

Amended by a joint resolution and an act: 1926 (34) 1373; 1927 (35) 207. See FOREWORD on page 1159 of this volume.

Provided, That the limitations imposed by Article VIII, Section 7, and Article X, Section 5, of the Constitution shall not apply to the bonded indebtedness incurred by the City of Charleston where the proceeds of said bonds are applied solely to the replacement of funds heretofore used for purposes other than those for which the taxes represented thereby were levied and collected, or to the funding or payment of any indebtedness incurred before March 15, 1926, for municipal purposes, or to the laying, extension, repair and maintenance of drains, or to the costs of street improvement; and the General Assembly shall have power by special Act or Acts to authorize said city to issue bonds for all or any of the purposes aforesaid, without regard to limitations or restrictions and for the issuance of such bonds it shall not be necessary, unless the Act authorizing such issue shall require it, to submit the question of the creation of such debt to the freeholders and qualified electors of said city and for a prerequisite for holding such election no petition from the freeholders of said city shall be necessary, any provisions in Section 13 of Article II of the Constitution to the contrary notwithstanding.

Amended by a joint resolution and an act: 1926 (34) 1376; 1927 (35) 33. See FOREWORD on page 1159 of this volume.

Provided, That the limitation imposed by Section 7, Article VIII, and Section 5 of Article X of the Constitution of the State of South Carolina, shall not apply to the bonded indebtedness of the Town of Conway, Horry County, when the proceeds of such bonds are applied exclusively for the building, erecting, establishing, repairing, extending or maintaining sidewalks, streets, street lighting, waterworks, lighting plants, storm sewers, drainage, sewerage system, fire departments, or public buildings for such town. or for any or either of such purposes, or for the payment of any indebtedness already incurred for any or either of such purposes; when the question of incurring such bonded indebtedness is submitted to the qualified electors of said municipality by the Town Council of said Town, and a majority of those voting in such election or elections shall vote in favor thereof.

Amended by a joint resolution and an act: 1926 (34) 1367; 1927 (35) 46. See FOREWORD on page 1159 of this volume.

Provided, That the limitations imposed under Section 7 of Article VIII and Section 5 of Article X of the Constitution of the State of South Carolina, shall not apply to the bonded indebtedness incurred by the Town of Lancaster when the proceeds of any bonds issued by the said town are applied exclusively to the purchase, construction and maintenance of water-works, construction and extension of the sewerage system, and for the purchase, construction and maintenance of streets and sidewalks where the abutting property owners are assessed as much as one-half the cost thereof, or for the payment of past indebtedness, and when the question of incurring such indebtedness is submitted to the qualified electors of said municipality as provided by law.

Amended by a joint resolution and an act: 1926 (34) 1378; 1927 (35) 59. See FOREWORD on page 1159 of this volume.

Provided, further, That the limitations imposed by this Section of the Constitution shall not apply to bonded or other indebtedness of the Town of McColl incurred for street or sidewalk improvements, in cases where corporate authorities of said town shall have levied or shall have determined to levy special assessments on abutting property for the purpose of paying for the improvements (whether or not including improvements at street intersections); and such indebtedness of the Town of McColl shall not be considered in determining the amount of indebtedness permitted to be incurred by said town for other purposes, or by any other political or civil division or subdivision of the State for any purpose, and shall not exceed fifteen (15) mills of the assessed valuation of the property in said town.

Amended by a joint resolution and an act: 1926 (34) 1371; 1927 (35) 65. See FOREWORD on page 1159 of this volume.

That the limitations imposed by Section 7, Article VIII, and Section 5, Article X, of the Constitution of the State of South Carolina, shall not apply to the Town of Dillon, when the proceeds of such bonds are applied exclusively for the building, establishing, erecting, repairing, extending, improving, paving or maintaining of sidewalks, streets, fire department, city or town hall and guardhouse for such town, or for any or either of such purposes, or for payment of any indebtedness already incurred for any or either of such purposes; and when the question of incurring such bonded indebtedness is submitted to the qualified electors of said municipality by the Town Council of said town, and a majority of those voting in such election or elections shall vote in favor thereof.

Amended by a joint resolution and an act: 1926 (34) 1369; 1927 (35) 111. See FOREWORD on page 1159 of this volume.

Provided, That the limitations imposed by this Section of the Constitution shall not apply to bonded or other indebtedness of the Town of Clio, said town being hereby expressly authorized to vote bonds to an amount not exceeding sixteen (16) per cent of the value of all taxable property within the corporate limits of said town as valued for taxation by the State under such restrictions and limitations as the General Assembly may prescribe, and where the question of incurring such indebtedness is submitted to the qualified electors of said town as provided in the Constitution upon the question of bonded indebtedness.

Amended by a joint resolution and an act: 1926 (34) 1372; 1927 (35) 184. See FOREWORD on page 1159 of this volume.

Provided, That the limitations imposed in Section 7, Article 8, and Section 5, Article 10, of the Constitution of the State of South Carolina, shall not apply to the Town of Mullins, in the County of Marion to the extent herein provided when the proceeds of any bond or other obligation issued by said town are applied to past indebtedness, street paving and other improvements of said streets; but the Town of Mullins is hereby authorized to issue bonds or other obligations for past indebtedness, street paving and other improvements of streets to an amount not exceeding seventy thousand (\$70,000.00) dollars in addition to the limitations now imposed by the Constitution.

Amended by a joint resolution and an act: 1926 (34) 1374; 1927 (35) 303. See FOREWORD on page 1159 of this volume.

Section 1. That the limitations imposed under Section 7, Article VII, and Section 5, Article X, of the Constitution of the State of South Carolina shall not apply to the bonded indebtedness incurred by the Town of Kershaw, in the Counties of Lancaster and Kershaw, when the proceeds of any bonds issued by the said town are applied exclusively to the purchase, construction and maintenance of waterworks, sewerage system, and for the purchase, construction and maintenance of streets and sidewalks where the abutting property owners are assessed as much as one-half the cost thereof.

Amended by a joint resolution and an act: 1938 (35) 1699; 1929 (36) 148. See FOREWORD on page 1159 of this volume.

Section 1. That the limitations imposed under Section 7 of Article 8, and Section 5 of Article 10, of the Constitution of the State of South Carolina shall not apply to the bonded indebtedness incurred by the Town of Heath Springs, in the County of Lancaster, when the proceeds of any bonds issued by the said Town are applied exclusively to the purchase, construction and maintenance of waterworks, purchase, construction and maintenance of a sewerage system, and for the purchase, construction and maintenance of streets and sidewalks where abutting property is assessed as much as one-half the cost thereof, or for the payment of past indebtedness, when the question of incurring such indebtedness is submitted to the qualified electors of said municipality as provided by law.

Amended by a joint resolution and an act: 1938 (35) 1690; 1929 (36) 149. See FOREWORD on page 1159 of this volume.

Provided, further, That the limitations imposed by this Section and by Section 5 of Article X, of the Constitution, and by any amendments thereof, shall not apply to the bonded indebtedness incurred by the City of Anderson, but, in addition to the powers now possessed, said City of Anderson may increase its bonded indebtedness in the manner provided in said Section 7 of Article VIII, to an amount not exceeding thirty (30%) per cent. of the value of the taxable property therein, where the proceeds of said bonds are applied to the payment of any indebtedness incurred by said city before January 1, 1929, or to expenses and liabilities incurred or to be incurred in the improvements of streets, sidewalks or other public places, or to the purchase, establishment, maintenance, operation or increase of a city cemetery or city market or public parks: *Provided, however*, That nothing herein contained shall be construed to limit the operation of the

amendment to Section 7 of Article VIII, of the Constitution approved February 3, 1911, by which the limitations imposed by said Section 7 of Article VIII, and by said Section 5 of Article X, of the Constitution were removed from any municipal corporation when the proceeds of the bonds are applied solely and exclusively for the purchase, establishment and maintenance of a waterworks plant, or sewerage system, or lighting plant, and when the question of incurring such indebtedness is submitted to the freeholders and qualified voters of such municipality, as provided in the Constitution upon the question of other bonded indebtedness, and said amendment of February 3, 1911, shall remain of full force and effect and said City of Anderson shall have the full benefit thereof.

Amended by a joint resolution and an act: 1928 (35) 1702; 1929 (36) 260. See FOREWORD on page 1159 of this volume.

Provided, That the limitations imposed by Article VIII, Section 7, and Article X, Section 5, of the Constitution of the State of South Carolina, shall not apply to the bonded indebtedness incurred or to be incurred by the City of Walterboro where the proceeds of such bonds are applied exclusively to the payment of expenses and liabilities incurred or to be incurred for the purchasing, repairing, enlarging, or improving of City or Town Hall, or public park, or parks, and grounds therefor; public market and guardhouse; purchasing, enlarging, extending, improving and establishing electric light and power plants, waterworks or sewerage systems; erecting, repairing, enlarging, improving, or altering school buildings, fire department and fire protection purposes; improvement of streets and sidewalks and drainage therefor, or other corporate purposes for the said City of Walterboro, or for any or either of such purposes. And when the question of incurring such bonded indebtedness is submitted to the qualified electors of the City of Walterboro by the City Council of the said City of Walterboro, and the majority of those voting in such election, or elections, shall vote in favor thereof; and the said City of Walterboro shall have power to issue bonds for any or all of the purposes aforesaid in the manner above provided, without regard to limitations or restrictions; and no petition from the freeholders of the said City shall be necessary as a prerequisite for holding such election, or elections, any provisions in Section 13, of Article II, of the Constitution to the contrary notwithstanding.

Amended by acts: 1928 (35) 1688; 1929 (36) 280. See FOREWORD on page 1159 of this volume.

Provided, further, That the limitations imposed by this Section and by Section 5 of Article X of the Constitution shall not apply to any bonded indebtedness incurred by the City of Columbia, where the bonded indebtedness is authorized to be incurred for the purpose of enlarging and maintaining its fire department or for purchase, building and maintenance of fire stations, fire alarm systems or fire equipment, or for any one or more of said purposes, and when the question of incurring such bonded indebtedness is submitted to the qualified electors of said City at an election or elections to be called by the City Council of said City, and a majority of those voting thereon shall vote in favor thereof; and the General Assembly need not prescribe as a condition precedent to the holding of any such election a petition from the freeholders as provided in Section 13 of Article II of the Constitution.

Amended by a joint resolution and an act: 1930 (36) 1207; 1931 (37) 110. See FOREWORD on page 1159 of this volume.

Provided, further, That the limitations imposed by this Section and by Section 5, Article X, of the Constitution, and by any amendments thereof, shall not apply to the bonded indebtedness incurred by the City of Anderson, but, in addition to the powers now possessed, said City of Anderson may increase its bonded indebtedness in the manner provided in said Section 7, of Article VIII, to an amount not exceeding thirty per cent. of the value of the taxable property therein, where the proceeds of said bonds are applied to the payment of any indebtedness of said City heretofore or hereafter incurred or to be incurred by said City, or to expenses and liabilities incurred or to be incurred in the improvements of streets, sidewalks or other public places, or to the purchase, establishment, maintenance, operation or increase of a city cemetery or city market or public parks, or to expenses, indebtedness or liabilities heretofore or hereafter incurred or to be incurred by said City in the purchase, establishment, maintenance or operation of an airport or airports located or to be located in Anderson County, South Carolina, or to any other municipal purpose: *Provided, however,* That nothing herein contained shall be construed to limit the operation of the amendment to Section 7 of Article VIII of the Constitution, approved February 3, 1911, by which the limitations imposed by said Section 7 of Article VIII, and by said Section 5 of Article X of the Constitution were removed from any municipal corporation when the proceeds of the bonds are applied solely and exclusively for the purchase, establishment and maintenance of a waterworks plant, or sewerage system, or lighting plant and when the question of incurring such indebtedness is submitted to the freeholder and qualified voters of such municipality, as provided in the Constitution upon the question of other bonded indebtedness, and said amendment of February 3, 1911, shall remain of full force and effect and said City of Anderson shall have the full benefit thereof.

Amended by a joint resolution and an act: 1930 (36) 1279; 1931 (37) 157. See FOREWORD on page 1159 of this volume.

Provided, That the limitations imposed by this Section and by Section 5 of Article X of the Constitution shall not apply to the bonded indebtedness of the City of Georgetown for the purpose of retiring certain outstanding past indebtedness as evidenced by certain bonds and promissory notes of the City of Georgetown, as of December 31st, 1931, as shown by the audit of E. T. Campbell, Certified Public Accountant, of the City of Georgetown, or the retiring of other promissory notes outstanding having been issued in payment of, or to renew the aforesaid promissory notes: *Provided, However,* That the total bonded indebtedness of the said City of Georgetown shall not exceed at any time, excluding bonds issued for waterworks, sewerage, electric light distribution system and street paving and tax anticipated notes, pledging the unincumbered taxes of the said City of Georgetown for the current fiscal year, fifteen (15%) per centum of the assessed value of the taxable property in the said City of Georgetown.

Amended by a joint resolution and an act: 1932 (37) 1400; 1933 (38) 585. See FOREWORD on page 1159 of this volume.

Provided, That the limitations imposed by Section 7, Article 8 and Sec-

tion 5 of Article 10 of the Constitution of the State of South Carolina shall not apply to the bonded indebtedness of the town of St. George when the proceeds of such bonds are applied exclusively for the building, erecting, establishing, repairing, extending or maintaining of sidewalks, streets, water-works, lighting plants, sewerage system, fire department, or town hall and guard house for such town, or for either of such purposes or for the payment of any indebtedness already incurred for any or either of such purposes, and when the question of incurring such bonded indebtedness is submitted to the qualified electors of said municipality by the town council of said town and a majority of those voting in such elections shall vote in favor thereof.

Amended by a joint resolution and an act: 1930 (36) 1212; 1938 (38) 589. See FOREWORD on page 1159 of this volume.

Provided, further, That the limitations and restrictions imposed by this Section and by Section 13 of Article II, and Section 5 of Article X of the Constitution, shall not apply to bonds issued or to be issued by the Town of Walterboro and the Town of Manning, for the purpose of funding or paying any indebtedness incurred before the ratification of this amendment by the General Assembly, for municipal purposes, and the General Assembly shall have power by special Act or Acts, to authorize said towns to issue their respective bonds to fund the same without regard to limitations and without the requirement of an election.

Amended by a joint resolution and an act: 1931 (37) 281; 1933 (38) 588. See FOREWORD on page 1159 of this volume.

Provided, That the limitations imposed by this Section and Section 5, Article X of the Constitution, shall not apply to the City of Greenwood when the proceeds of bonds are applied solely and exclusively for the purchase, establishment and maintenance of a waterworks plant or sewer system or lighting plant, and, in addition to bonds issued for those purposes, the City of Greenwood may issue assessed bonds to an amount not exceeding twenty per cent (20%) of the value of the taxable property therein where the bonded indebtedness is incurred for the cost of improving traffic conditions in said city by the relocation of all or part of the railroad tracks in said city, the said city being specifically authorized to provide new rights-of-way for the railroads whose tracks may be relocated, such new rights-of-way to be located both in the City of Greenwood and near the City of Greenwood, as well as for all costs or damages incident thereto and also for the cost of acquiring for street, parking, parkway, or traffic purposes the present rights-of-way of the said railroads whose tracks are relocated and also for any costs or expenses connected with or a part of the relocation of tracks, elimination of grade crossings and acquiring for street, parking, parkway or traffic purposes any property or rights-of-way now owned by railroads whose tracks are relocated as well as any reversionary interest therein when the question of increasing such bonded indebtedness is submitted to the qualified electors of said city at an election or elections to be called by the city council of said City, and a majority of those voting thereon shall vote in favor thereof.

Amended by joint resolutions: 1940 (41) 1756; 1041 (42) 271. See FOREWORD on page 1159 of this volume.

- I. General Consideration.
- II. Certificates of Indebtedness.
- III. The Sinking Fund.
- IV. Incidents Preliminary to Issuing Bonds.
- V. Incidents and Illustrations of Issuing Bonds.

Cross References.

As to the provisions for taxing to pay township bonds issued in aid of railroads, see § 2572, and note thereto. As to the provisions for increasing the bonded indebtedness of municipal corporations, see art. 10, § 5, post, and note thereto. As to the provisions for issuing bonds to refund or paying in part or whole the bonded indebtedness of a municipality, see § 7319 and note thereto. See also § 7442.

I. GENERAL CONSIDERATIONS.

Editor's note.—Reference to art. 4, § 5 in the third proviso is erroneous and should be art. 10, § 5. See *Bray v. City Council*, 62 S. C. 57, 39 S. E. 810.

Article 10, § 5 referred to in the provisions throughout this section is in the nature of a provision on the increase of bonded debts of municipalities while this section relates principally to the creation of such bonded debts. These two sections are constantly cited together in cases dealing with bonded indebtedness of municipalities. Consequently many of the cases citing this section will be found in the note under art. 10, § 5, to which the practitioner is referred.

Conclusions deducible from constitutional provisions on assessment and taxation.—It seems that the following conclusions are deducible from this section and other constitutional provisions on assessment and taxation: (1) That all the property in the state is liable to be taxed except such as is specially exempted by the Constitution, and except such as could not be taxed without a violation of the provisions of the Constitution of the United States. (2) That all taxes, whether state or county or municipal, must be laid upon the actual value of the property taxed, as the same shall be ascertained by an assessment previously made for that purpose. (3) That such assessment must be uniform, whether made for the purpose of State, county, or municipal taxation. (4) That the corporate authorities of a town may be vested with power to assess and collect taxes for corporate purposes, but in doing so "the General Assembly shall require that all the property, except that heretofore exempted, within the limits of municipal corporations, shall be taxed for the payment of debts contracted under authority of law." (5) That while there is no express provision authorizing the general assembly to invest the municipal authorities of a town with

power to borrow money, and issue bonds to secure the same, yet this is necessarily implied by the provisions of this section. (6) That this power to borrow money and issue bonds is limited by this section providing that after 1834 the bonded debt of any municipal corporation "shall never exceed eight per centum of the assessed value of all the taxable property therein." *Germania Sav. Bank v. Darlington*, 50 S. C. 337, 27 S. E. 846, 857, 28 L. R. A. (N. S.) 149, 29 L. R. A. (N. S.) 183, Ann. Cas. 13E, 86.

This section and other constitutional provisions on taxation practically show (1) that taxation of persons and property must be uniform, and based upon an assessment of property already made; (2) that taxes must be laid upon all the property within the territory of municipal corporations according to its value; (3) that taxes can only be levied by municipal corporations for public or corporate purposes; (4) that methods for increasing the public debt of municipal corporation are prescribed. *Stehmeyer v. City Council*, 53 S. C. 259, 31 S. E. 322, 329, 73 Am. St. Rep. 236, 271, 61 L. R. A. 55, 3 L. R. A. (N. S.) 819, 28 L. R. A. (N. S.) 1133, Ann. Cas. 16B, 527.

Intention of section.—In the dissenting opinion of *Paris Mountain Water Co. v. Greenville*, 105 S. C. 180, 89 S. E. 669, 674, it is said that the intention of this section and § 5 is that the result in each instance shall be determined by a majority of the qualified electors voting upon the respective questions, and there is no good reason why both questions cannot be submitted to the qualified electors, provided the questions are so submitted that the electors shall be able to vote on each question.

Last official assessment preceding bond issue used to ascertain their validity.—In applying this section, to ascertain if bonds issued are in excess of 8 per cent. "of the assessed value of all the taxable property therein," reference must be had to the last official assessment made by a town preceding the issue of the bonds. This assessment investors have the right to rely on when they make inquiry as to the power of the city to issue the amount of bonds in question. *State v. Tolly*, 37 S. C. 551, 552, 16 S. E. 195, 88 Am. St. Rep. 285; *State v. Cornwell*, 40 S. C. 26, 18 S. E. 184, 28 L. R. A. (N. S.) 150. Only in the absence of a legal city assessment should reference be had to the assessment of property within the city made for state and county purposes. *State v. Kelly*, 45 S. C. 457, 23 S. E. 281. Reference should be had to the legal assessment by the city to test whether the issue of bonds by the city is excessive, because the assessment and tax thereon is the source

from which payment is to be derived. *Germania Sav. Bank v. Darlington*, 50 S. C. 337, 27 S. E. 846, 861, 28 L. R. A. (N. S.) 149, 29 L. R. A. (N. S.) 183, Ann. Cas. 13E, 86.

As to legislative resolutions on amendments.—Where joint resolution proposing amendment to this section, exempting the town of Clinton and the city of Camden from the limitations of municipal indebtedness fixed by this section, and art. 10, § 5, was entered at least once upon the House and Senate Journals with a yea and nay vote, and from said Journals it appeared that the original joint resolution proposing the conference committee amendment referring only to the town of Clinton was regularly passed by the required two-thirds yea and nay vote, and so entered in the Senate Journal, and that said joint resolution on the second reading in the House was, by the necessary two-thirds yea and nay vote, amended by adding the city of Camden, and so entered in the House Journal, and the joint resolution was duly ratified, signed by the President of the Senate and Speaker of the House, and approved by the Governor with the great seal of the state impressed thereon, held, that it could not be shown by reference to the legislative journals that at the third reading in the House of the amended joint resolution it was read under its original title referring only to the town of Clinton, and that the city of Camden was not named in the title or body of the act as required by Const. art. 16, § 1. *Stevenson v. Carrison*, 122 S. C. 212, 115 S. E. 251.

Where amendment to art. 8, § 7 incorrectly referred to section other than art. 10, § 5, Legislature could not rectify the error.—See the catchline under art. 10, § 5.

This section is self-executing. — *Paris Mountain Water Co. v. Greenville*, 110 S. C. 36, 96 S. E. 545; *Chick Springs Water Co. v. State Highway Dept.*, 159 S. C. 481, 157 S. E. 842, 848.

The provisions of this seventh amendment show that two important changes were contemplated: First, the repeal of the limitation theretofore imposed upon the power of municipal corporations to incur a bonded indebtedness when the proceeds of the bonds are applied solely and exclusively for the purchase, establishment, and maintenance of a waterworks plant, etc., and, second, to confer upon any and every municipal corporation in the state the power to incur a bonded indebtedness, without limitation as to the amount thereof, provided the proceeds of the bonds are applied solely and exclusively for the purchase, establishment, and maintenance of a waterworks plant. *Lillard v. Melton*, 103 S. C. 10, 87 S. E. 421, L. R. A. 1916D,

572, L. R. A. 1917E, 468, 5 A. L. R. 761, 24 A. L. R. 941, cited in the dissenting opinion of *Paris Mountain Water Co. v. Greenville*, 105 S. C. 180, 89 S. E. 669, 673.

Though each proviso limits two sections, each is only one amendment.—A single amendment to this section, limiting the indebtedness of municipalities by adding a proviso that the limitations imposed by this section and by art. 10, § 5, limiting the indebtedness of political divisions extending over the same territory or portions thereof, shall not apply to any bonded indebtedness where the proceeds of the bonds are applied to the purchase and maintenance of waterworks plants and sewerage systems, is not violative of art. 16, § 2, declaring that where two or more amendments shall be submitted at the same time they shall be submitted that the electors shall vote for or against each of them separately, since the amendment refers to the single subject of the limitation of indebtedness of municipalities. *Bethea v. Dillon*, 91 S. C. 413, 74 S. E. 983.

II. CERTIFICATE OF INDEBTEDNESS.

The essential elements of the procedure set out in the first proviso are: (1) The certificates must be issued in anticipation of the collection of the taxes, which necessarily means before the taxes may be due; (2) they must be issued at some time in the year in which the taxes are collectible; (3) they must be payable alone out of the taxes against which they may be issued. *Sullivan v. City Council* (S. C.) 130 S. E. 876, 877.

The terms of this section are exhaustive of the power.—This provision was evidently inserted in this section in order to enable a city council to make some definite provision for current indebtedness which it was intended should be paid from taxes when collected, but in anticipation of the collection of said taxes. Such a scheme would terminate with the year in which the taxes would be collected. It was not intended, nor did it do so, to clothe the city council with power by one contract to pledge a sum of each year's taxes for the period of 50 years next ensuing. The terms of the section are exhaustive of the power. The General Assembly could not add to it, for the expression of the Constitution whereby a municipal corporation is allowed to issue certificates of indebtedness in advance of the receipt of the taxes to pay such certificates is a negation of any power in a city government to do more than what is expressly contained in the grant of power heretofore recited as contained in such section of the Constitution. *Duncan v. Charleston*, 60 S. C. 532, 39 S. E. 265, 273, 37 L. R. A. (N. S.) 1069, Ann. Cas. 12D, 660.

And only the one year's taxes may be pledged by contract.—The contract of a city having a bonded indebtedness of more than 8 per cent. of its taxable property to pay a certain sum each year out of its current receipts for a number of years for the purpose of supplying the city with light and water was void, as in violation of this section and art. 10, § 5. *Duncan v. Charleston*, 60 S. C. 532, 39 S. E. 265, 37 L. R. A. (N. S.) 1069, Ann. Cas. 12D, 660.

And a statute to the contrary is unconstitutional.—A statute authorizing cities to purchase or contract for water-works, and to issue certificates of indebtedness, to be paid out of current taxes for future years, is unconstitutional, as violating this section, prohibiting an increase of bonded indebtedness where the question of such indebtedness has not been submitted to the electors. *Duncan v. Charleston*, 60 S. C. 532, 39 S. E. 265, 37 L. R. A. (N. S.) 1069, Ann. Cas. 12D, 660.

Even if a contract does not actually add to the bonded indebtedness of a city, the provision of this section of our State Constitution would present an insuperable barrier to any attempt by the General Assembly of this state to clothe the city council of such city with any such power to pledge or dispose of the municipal income for an indefinite term of years. *Duncan v. Charleston*, 60 S. C. 532, 39 S. E. 265, 273, 37 L. R. A. (N. S.) 1069, Ann. Cas. 12D, 660.

Certificates evidencing amounts of past-due and unpaid taxes do not create new indebtedness.—An act, authorizing a city to issue certificates of indebtedness, evidencing amounts of past-due and unpaid taxes, was held not to create a new indebtedness without petition and election in violation of Const. art. 2, § 13, or in excess of limit prescribed by this section. *Sullivan v. City Council* (S. C.) 130 S. E. 876.

III. THE SINKING FUND.

Provisions as to sinking fund relate only to cities and towns.—It appears that this section is the only provision in the Constitution with regard to a sinking fund, and it specifically relates to "cities and towns." *State v. Moorser*, 152 S. C. 455, 150 S. E. 269, 280.

As special funds may be pledged to meet retirement of state obligations.—An Act, providing for financing construction of State highway system through State unit or district unit plan, and for appropriation of proceeds of State gasoline tax and motor vehicle license tax for payment of evidences of indebtedness, is not void for failure to provide for levy of tax for sinking fund, since this section providing for sinking fund, relates only to cities and towns, and payments for retirement of obligations will be met

from current funds, and special funds pledged are equivalent of sinking funds. *State v. Moorser*, 152 S. C. 455, 150 S. E. 269, 270.

An ordinance providing for a sinking fund, "if necessary" is valid.—Under this section, providing that cities in issuing bonds shall create sinking fund, and statute providing that the city council may collect sufficient annual tax to raise one-fortieth of entire bonded debt as sinking fund, an ordinance providing that, "if necessary," there shall be collected annually a sufficient tax to raise such sum, is not invalid, because of use of words "if necessary." *Enterprise Real Estate Co. v. City Council*, 107 S. C. 492, 93 S. E. 184.

City bonds are not "issued" until actually or constructively delivered under a contract of sale, so that even if this section providing for the issuing of bonds by cities or towns, and requiring them, on issuing such bonds, to create a sinking fund for their redemption, required such fund to be created before the bonds could be legally issued, unsold bonds still in the hands of a town council were not invalid on that ground, though dated after the creation of the sinking fund. *Black v. Fishburne*, 84 S. C. 451, 66 S. E. 681, 19 Ann. Cas. 1104.

The date printed or written on the bond, is not conclusive of the date of the issue. They are still in fact in the hands of the town council, and cannot be regarded "issued" until a contract of sale is completed and the bonds actually or constructively delivered. *Black v. Fishburne*, 84 S. C. 451, 66 S. E. 681, 682, 19 Ann. Cas. 1104. See also, *Cleveland v. Spartanburg*, 54 S. C. 83, 31 S. E. 871.

Election not required on bonds to refund indebtedness existing at adoption of constitution.—Under this section a city may issue bonds to refund a bonded indebtedness existing at the adoption of the constitution of 1895 without submitting the question to a popular vote. *Jordan v. Greenville*, 79 S. C. 436, 60 S. E. 973. See, also, *McCreight v. Zemp*, 49 S. C. 78, 26 S. E. 984, 37 L. R. A. (N. S.) 1099.

While the framers of our present Constitution provided stringent regulations as to a future bonded indebtedness in cities and towns, they were very careful to secure an absence of such requirements in their application to such indebtedness which had already been created, as is seen in the concluding words of this section. *McCreight v. Zemp*, 49 S. C. 78, 26 S. E. 984, 987, 37 L. R. A. (N. S.) 1099.

IV. INCIDENTS PRELIMINARY TO ISSUING BONDS.

All the taxable property is considered in fixing assessed value of town property.—The constitution, in its terms, con-

finer itself to the assessed value of all the taxable property, not that from which taxes are collected or levied. *Atlantic Trust Co. v. Darlington*, 63 F. 76, 83.

Unless within the class exempt from taxation.—Property of a manufacturing company, not being within the classes of property which may be exempted from taxation under § 6, is to be considered in determining the assessed value of the property of a town, within this section, prohibiting any issue of bonds by a town in excess of 8 per cent of the assessed value of its taxable property. *Atlantic Trust Co. v. Darlington*, 63 F. 76.

Prior assessment, if accepted to collect taxes, may be used to decide validity of bonds.—In determining whether an issue of bonds by a town was in violation of this section, providing that it shall not exceed 8 per cent. of the assessed value of its taxable property, the assessment prior thereto will be considered valid, though the assessors did not file a report thereof within 10 days, as directed by the town charter, where it was filed soon after, accepted, and acted on, the taxes being collected thereunder. *Atlantic Trust Co. v. Darlington*, 63 F. 76.

Extent of bonded debt must be determined according to assessment under art. 10, § 13.—See this catchline under art. 10, § 13.

A majority of those voting is sufficient.—See this catchline under § 5.

Purposes for issuing bonds need not be submitted.—See this catchline under § 5.

This section does not prevent legislature from authorizing issue of bonds by county without submitting question to election.—*Carrison v. Kershaw County*, 83 S. C. 88, 64 S. E. 1018.

Petition and notice for ordering election need not be in exact words of this section.—Petition for election and notice ordering election on question of issuing bonds were proper where it was stated therein that the bonds were to be used for the purpose of erecting buildings, repairing, altering, and equipping old buildings for school purposes, under § 5359, and this section as amended. *Brice v. McDow*, 116 S. C. 324, 108 S. E. 84, 85.

Section indicates procedure for election on question of purchase as well as payment.—Const. art. 8, § 5, and this section indicate procedure for an election on question of purchase of waterworks as well as payment of price. *Enterprise Real Estate Co. v. City Council*, 107 S. C. 492, 93 S. E. 184.

Town may not raise debt of property within its borders above limit herein imposed.—See this catchline under art. 10, § 5.

If debt is in excess of limit, whole debt is invalid.—An Act of the Legisla-

ture having a debt of a township exceeding in amount the limit fixed by the Constitution the whole debt is invalid. *Mass.*, etc., *Constr. Co. v. Cane Creek*, 45 F. 336.

Where township bonds are declared invalid by the courts, and the Legislature afterwards passes an Act providing for the payment of such bonds, the debt represented by the bonds is incurred at the date of such Act, and assessments made after that date will not affect the validity of the debt. *Mass.*, etc., *Constr. Co. v. Cane Creek*, 45 F. 336.

So an authority to issue "in any amount" is limited to 8%.—An Act, authorizing a town to issue bonds "in any amount" in aid of the construction of a railroad, will be construed to mean any amount within the constitutional limit of 8 per cent. of the assessed value of its taxable property in conformity with this section, and therefore not in conflict with it. *Atlantic Trust Co. v. Darlington*, 63 F. 76.

The charter of a town, permitting it to issue bonds in aid of the construction of railroads to any amount, is not in conflict with this section, limiting the indebtedness of municipal corporations to 8 per cent. of their taxable property, since the provision of the charter will be held to operate only within the constitutional limit. *Darlington v. Atlantic Trust Co.*, 68 F. 849, 850.

In construing a statute or charter of a city, the presumption is that the legislature intended that bonds might be issued to the full limit authorized by the Constitution—"in any amount" not prohibited by the organic law. *Darlington v. Atlantic Trust Co.*, 68 F. 849, 856.

Town council's guarantee of paving certificates not a part of bonded debt.—The guaranty by a town council of payment of certificates of indebtedness representing assessments against abutting property is not a part of the bonded debt of the town, within the meaning of this section, forbidding any town or city from incurring any bonded debt which, including existing bonded indebtedness, shall exceed 8 per cent. of the assessed value of the taxable property therein. *McIntyre v. Rogers*, 123 S. C. 334, 116 S. E. 277. See, also, *Brownlee v. Brock*, 107 S. C. 230, 92 S. E. 477; *Lillard v. Melton*, 103 S. C. 10, 87 S. E. 421, L. R. A. 1916D, 572, L. R. A. 1917E, 463, 5 A. L. R. 761, 24 A. L. R. 941.

But a contract with a corporation to light streets for 10 years must be voted on.—A contract between a town and a corporation to light the streets of the town for a period of 10 years is of the nature of a bond debt, which, under this section, cannot be created without the sanction of a majority of the qualified electors of the town. *Fowler v. Town Council*, 90 S. C. 352, 73 S. E. 626.

V. INCIDENTS AND ILLUSTRATIONS OF ISSUING BONDS.

A bond issue may submit two purposes jointly as one proposition.—Where the proceeds of an issue of bonds was to be used for the purpose of improving and extending the waterworks and sewerage system of the city of Florence, and the issue was under the constitutional amendments to this section and art. 10, § 5, in neither of which amendments did the word “or” appear in connection with the words “waterworks and sewerage,” the 1915 amendments’ use of “Exclusively for any of said purposes” negatives a disjunctive interpretation, “any” meaning one or more, and the bond issue was not void as submitting two purposes jointly as one proposition. *Lucas v. Barringer*, 120 S. C. 68, 112 S. E. 746.

“Improving and extending” embraced within “building, directing, and maintaining”.—As the proceeds of waterworks and sewerage bonds of the city of Florence were to be used for “improving and extending” the systems, these purposes were embraced within the amendment “building, directing and maintaining,” and as the proceeds of the street improvement bonds were to be used for “building, repairing and improving” streets and sidewalks, the bond issues came within the provisions of the constitutional amendments to this section and art. 10, § 5, and did not exceed the constitutional or statutory limitations. *Lucas v. Barringer*, 120 S. C. 68, 112 S. E. 746.

Art. 8, § 7 repeals limitations of art. 10, § 5 as to waterworks bonds. — See this catchline under art. 10, § 5.

So waterworks bonds within amendment to section are not considered in estimating “bonded indebtedness”.—See this catchline under art. 10, § 5.

Indebtedness for city sewerage and county and school district not computed in amount which city may incur.—Under this section, as amended, exempting certain cities, including Greenville, from certain limitations on bonded indebtedness prescribed therein, and by art. 10, § 5, the indebtedness of the city for sewerage and the indebtedness of the county and coterminal school district should not be included in computing the amount of bonded indebtedness which the city of Greenville was entitled to incur. *Beacham v. Greenville*, 104 S. C. 421, 89 S. E. 401, L. R. A. 1917E, 474.

An act authorizing issuance of bonds impliedly authorizes an election for such.—An Act authorizing board of trustees of Yorkville school district to issue \$35,000 in bonds, furnished necessary machinery for an election to determine issuance of bonds under the subsequent constitutional amendment to this section removing the limits provided thereby, and an Act of Legislature was unnecessary. *Brice v.*

McDow, 116 S. C. 324, 108 S. E. 84.

“Past indebtedness” means up to the time of filing petition for election.—The words “past indebtedness” within this section as amended, authorizing the city of Anderson to increase its bonded indebtedness to an amount not exceeding 15 per cent. of the value of taxable property where proceeds are applied to the payment of “past indebtedness,” refers to all indebtedness existing at the time of the filing of the petition for an election as to issuance of bonds, irrespective of whether such indebtedness was created before or after the adoption of the amendment and does not refer merely to the indebtedness existing at the time of the adoption of the amendment. *Clinkscapes v. Fant*, 116 S. C. 206, 107 S. E. 515.

A city may issue bonds for streets and waterwork improvements even when they are debts “already incurred.” — This section as amended, providing that the limitation imposed by this section shall not apply to the bonded indebtedness of the city of Florence when the proceeds of its bonds are applied exclusively for the building and maintenance of streets, waterworks, etc., or for the payment of debts “already incurred” exclusively for any of such purposes, applies to debts for streets and waterworks improvement when they are the debts “already incurred,” and is not confined in its operation to the question of debt limit. *Lucas v. Florence*, 103 S. C. 169, 87 S. E. 996.

A city’s past indebtedness, both for the paving of its streets and for the building and maintenance of its waterworks system, exceeding the limits allowed by the Constitution might be validated by a constitutional amendment, where no vested rights were impaired. *Lucas v. Florence*, 103 S. C. 169, 87 S. E. 996.

Or be liable for money had and received on a contract for such improvements.—A city receiving the benefits of contracts for paving its streets, improving its waterworks system, etc., even though made in violation of the Constitution, would be liable on the doctrine of money had and received. *Lucas v. Florence*, 103 S. C. 169, 87 S. E. 996.

Under proviso bonds of Spartanburg may exceed 15 per cent.—See this catchline under art. 10, § 5.

A city may by ordinance levy a tax for interest on bonds.—The 1921 amendment to this section providing that its limitations and those of art. 10, § 5 should not apply to the city of Charleston’s bonded indebtedness nor to its certificates of indebtedness, the proceeds of which were solely applied to street, sidewalk, and drain improvements, did not by implication prohibit the levy by ordinance of a tax for interest, and sinking fund for bonds voted for such improvements,

since the only effect of such restriction would be to insure the revenue from being diverted to other purposes, thus rendering the bonds a more attractive investment. *Sullivan v. City Council*, 123 S. C. 91, 116 S. E. 104.

The proviso excepting the city of Anderson is self-executing.—*Clinkscales v. Fant*, 116 S. C. 206, 107 S. E. 515.

Limitation removed as to town of Saluda.—See this catchline under art. 10, § 5.

And Yorkville district.—See this catchline under art. 10, § 5.

Legislature has plenary power to authorize issuance of school bonds.—See this catchline under art. 10, § 11.

And may vest county board of education with power to tax for support of high schools.—An Act, vesting a county board of education of a county with power to tax for support of high schools, is not violative of constitutional provisions intended to limit public debt, particularly art. 8, §§ 3, 7 and art. 10, §§ 5, 6, 8, 11-13. *Powell v. Hargrove*, 136 S. C. 345, 134 S. E. 380.

Petition for school bonds need not be signed by two-thirds of freeholders in Marlboro school district.—See this catchline under art. 10, § 5.

The submitting to voters the purchase of waterworks plant and the issue of bonds to pay for same in one question is not violative of this section. *McDaniel v. Bristol et al.*, 160 S. C., 408, 158 S. E., 804.

Pledge of revenues of city's waterworks system for payment of bonds to be issued by it to enlarge its sewerage system does not violate this section or § 5, Article 10, said indebtedness is not "bonded debt." *Roach v. City of Columbia*, 172 S. C. 478; 174 S. E. 461.

County revenue bonds, issued to pay for construction of county hydro-electric plant not constitutional debt. *Park v. Greenwood County*, 174 S. C., 35; 176 S. E., 870.

Money borrowed by town from its water commission, which is not a separate entity capable of contracting with town itself, but is merely a department of town itself is not such an existing indebtedness as would affect the constitutional limitation of its bonded indebtedness. *Tarver v. Town of Johnston*, 175 S. E., 821; 173 S. C., 333.

Statutes (§§ 7319 and 7320) authorizing municipalities to issue bonds to refund bonded indebtedness, whether matured or not, and to issue refunding bonds without submitting question of their issuance to electors, and act specifically authorizing city issue refunding bond, do not violate this section. *Williams v. City of Rock Hill*, 177 S. C., 82; 180 S. E., 799.

Refunding bonds do not create "debt"

within constitutional limitation on municipal indebtedness, in so far as aggregate interest which must be paid on refunding bonds exceeded aggregate interest city would have to pay if outstanding bonds were not refunded, since unearned interest to become due in future is not a "debt." *Williams v. City of Rock Hill*, 177 S. C., 82; 180 S. E., 799.

Debts of municipalities to equip and maintain fire department—see *United States Rubber Products v. Town of Batesburg*, 183 S. C. 49; 190 S. E. 120.

Municipalities can contract debts for any legitimate corporate purpose. *United States Rubber Products v. Town of Batesburg*, 183 S. C. 49; 190 S. E. 120.

There is nothing in this section which prevents a municipal corporation issuing tax anticipation notes. *City of Florence v. Anderson*, 95 F. (2d) 777.

And recital in notes that they were issued pursuant to council resolution and that all conditions and requirements of constitution and statutory law complied with, holders not required to look further to determine whether within constitutional debt limitation. *City of Florence v. Anderson*, 95 F. (2d) 777.

But see *Bolton v. Wharton*, 163 S. C. 242, 161 S. E. 454, to contra.

Tax anticipation certificates create valid indebtedness for which general judgment can be rendered, though not alleged and proved taxes available for payment had been collective for levy of year in which note was issued. *City of Georgetown v. Elliott*, 95 F. (2d) 774.

Bonds which were to be issued by Housing Authority to carry out slum clearance and low-cost housing project in city were not to be computed in arriving at the limitations on city's bonded indebtedness, in view of statutory provision that no indebtedness of Housing Authority shall constitute a debt or obligation of municipality or state. *McNulty v. Owens*, 188 S. C. 377, 199 S. E. 425.

Municipal corporations may not issue any evidences of indebtedness except bonds and tax anticipation notes. *Bolton v. Wharton*, 163 S. C. 242, 161 S. E. 454.

Municipal bond represents primary obligation, to payment of which general credit of municipality is pledged, whereas tax anticipation note is merely payable from particular fund. *Ibid.*

Tax anticipation notes or certificates issued in anticipation of collection of taxes must be issued before taxes are due and in year in which taxes are collectible, and must be payable solely from such taxes, and must show on their face that they are payable solely from taxes against which they have been issued. *Ibid.*

Municipality's notes under seal are "bonds", not tax anticipation notes.

Ibid.

Act authorizing city to construct stadium and issue therefor bonds payable solely from revenue derived from stadium, without approval of voters, does not violate "bonded debt" limitation. *Cathcart v. City of Columbia*, 170 S. C. 362, 170 S. E. 435.

And issuance, without approval of voters, of bonds for extension of city's waterworks system, secured by pledge of revenues from extension and present revenues of department, does not create "bonded debt" within this section. *Cathcart v. City of Columbia*, 170 S. C. 362, 170 S. E. 435.

Statute authorizing town of Hartsville to issue refunding bonds and permitting town council to sell them in such manner as it might deem advisable, held not violative of this section. *Kalber v. Stokes*, 194 S. C. 339, 9 S. E. (2d) 785.

Amendment in Art. X, sect. 16, giving town of Timmonsville authority to assess abutting owners for cost of street improvements, does not exempt the municipality from the 8 per cent. limitation with respect to bonds issued by the town for the purpose of paying its part of the cost of such improvements. *Rose v. Baskins*, 178 S. C. 69, 182 S. E. 153.

Section 8. Manufactories may be exempt from taxation.—Cities and towns may exempt from taxation, by general or special ordinance, except for school purposes, manufactories established within their limits for five successive years from the time of the establishment of such manufactories: *Provided*, That such ordinance shall be first ratified by a majority of such qualified electors of such city or town as shall vote at an election held for that purpose: *Provided*, That the General Assembly shall have power to extend the provisions of this Section to all manufacturing establishments of a capital of not less than twenty-five thousand (\$25,000.00) dollars and employing not less than fifteen people full time, desiring to locate in the Counties of Orangeburg and Florence, so as to exempt such establishments from county taxes, except for school purposes, for five years from the date of establishment: *Provided*, In Bamberg County all such manufactories shall be exempt from all county taxes except for school purposes, for five (5) years from the time of their establishment.

Amended by joint resolutions and an act: 1927 (35) 700; 1929 (36) 124; 1927 (35) 702; 1930 (36) 1278. See FOREWORD on page 1159 of this volume.

Provided, That in Florence and Georgetown Counties furniture factories, pulp and paper mills, and cigarette and tobacco factories of value above one hundred thousand (\$100,000.00) dollars, shall be exempt from all county taxes, except for school purposes, for five (5) years from the time of their establishment.

Amended by a joint resolution and an act: 1926 (34) 1379; 1927 (35) 69. See FOREWORD on page 1159 of this volume.

Provided, In Williamsburg and Laurens Counties all such manufactories of value above one hundred thousand (\$100,000.00) dollars shall be exempt from all county taxes, except for school purposes, for five years from the time of their establishment.

Amended by a joint resolution and an act: 1935 (34) 614; 1927 (35) 156. See FOREWORD on page 1159 of this volume.

Provided, further, That the General Assembly shall have the power to extend the provisions of this Section to all manufacturing establishments with a capital of not less than twenty-five thousand (\$25,000.00) dollars desiring to locate in the County of Greenville and the County of Sumter.

Amended by a joint resolution and an act: 1927 (35) 870; 1929 (36) 35. See FOREWORD on page 1159 of this volume.

Provided, Any county in the State shall be empowered to exempt all new manufacturing enterprises where the capital stock of said enterprise is not less than fifty thousand (\$50,000.00) dollars, and all additions to existing manufacturing enterprises where the cost of such addition is not less than fifty thousand (\$50,000.00) dollars, from all county taxes, except for school purposes, for five years from the establishment of such new manufacturing enterprises, or the additions to existing manufacturing enterprises.

Amended by a joint resolution and an act; 1927 (35) 709; 1929 (36) 90. See FOREWORD on page 1159 of this volume.

Provided, further. That the General Assembly shall have the power to extend the provisions of this section to all manufacturing establishments with a capital of not less than twenty-five thousand (\$25,000.00) dollars desiring to locate in the County of Spartanburg.

Amended by a joint resolution and an act; 1927 (35) 701; 1929 (36) 238. See FOREWORD on page 1159 of this volume.

Provided, In the Counties of York, Abbeville, Aiken, Allendale, Cherokee, Charleston, Colleton, Calhoun, Edgefield, Greenwood, Berkeley, McCormick, Union, Richland, Orangeburg, Saluda, Chesterfield, Hampton, Clarendon, Florence and Fairfield, and Marion and Chester, all such cotton or textile enterprises of value above one hundred thousand dollars shall be exempt from all county taxes, except for school purposes, for five years from the time of their establishment.

Amended by a joint resolution and an act; 1925 (34) 611; 1927 (35) 54. See FOREWORD on page 1159 of this volume.

Cross reference.—As to powers of the General Assembly to provide for taxation and assessment see art. 10, § 1, of this Constitution and note thereto.

A majority of electors voting is sufficient. — Paris Mountain Water Co. v. Greenville, 110 S. C. 36, 96 S. E. 545.

Section expressly sanctions exemption

of manufactories from taxation. — The policy of exempting property used in manufacturing was expressly approved and sanctioned by this section, and practice of allowing such exemption has been largely exercised by cities and towns of State. Duke Power Co. v. Bell, 156 S. C. 299, 152 S. E. 865.

Section 9. Armed police force.—No armed police force or representatives of a detective agency shall ever be brought into this State for the suppression of domestic violence; nor shall any other armed or unarmed body of men be brought in for that purpose, except upon the application of the General Assembly or of the Executive of this State (when the General Assembly is not in session), as provided in the Constitution of the United States. The General Assembly shall provide proper penalties for the enforcement of the provisions of this Section.

Section 10. Boards of health.—It shall be the duty of the General Assembly to create Boards of Health wherever they may be necessary, giving to them power and authority to make such regulations as shall protect the health of the community and abate nuisances.

Cross reference.—As to statutory provisions on boards of health see §§ 4997, et seq., and notes thereto.

Municipal boards of health derive their authority to isolate persons afflicted with

contagious diseases from this section, and § 5028 passed pursuant thereto. Kirk v. Wyman, 83 S. C. 372, 65 S. E. 387, 23 L. R. A. (N. S.) 1188, Ann. Cas. 15B, 1215, 8 A. L. R. 837, 14 A. L. R. 306, 24

A. L. R. 799.

City cannot require civil service exam. of health inspectors.—City ordinance, placing health inspectors under civil service rules, and requiring a civil service examination of them, is void, as in conflict with this section and §§ 5028-5030 authorizing the board of health to select its health inspectors without qualification or restriction on such right. *Murphy v. Cooper*, 149 S. C. 449, 147 S. E. 438.

Under this section, of the Constitution, the board of health selects its health inspectors without qualification or restriction upon such right; the city fixes their compensation; §§ 4997 et seq. show their power and duties; ordinances in conflict

with the Constitution and these sections of the Civil Code are null and void. *Murphy v. Cooper*, 149 S. C. 449, 147 S. E. 438, 439. See also, *Law v. Spartanburg*, 148 S. C. 229, 146 S. E. 12, and cases therein cited.

Navigation, health betterment, flood control, and the reforestation of watersheds are public purposes in which the state is interested and may engage. *Clarke v. South Carolina Public Service Authority et al.*, 177 S. C., 427; 181 S. E., 481.

"Sanitary tax" on heads of families and boarding house keepers maintaining sanitary closet or privy is within power of board of health. *Town of Marion v. Baxley*, — S. C. —, 8 S. E. (2d) 573.

Section 11. Alcoholic liquor and beverages.—In the exercise of the police power the General Assembly shall have the right to prohibit the manufacture and sale and retail of alcoholic liquors or beverages within the State. The General Assembly may license persons or corporations to manufacture and sell and retail alcoholic liquors or beverages within the State under such rules and restrictions as it deems proper; or the General Assembly may prohibit the manufacture and sale and retail of alcoholic liquors and beverages within the State, and may authorize and empower State, County and municipal officers, all or either, under the authority and in the name of the State, to buy in any market and retail within the State liquors and beverages in such packages and quantities, under such rules and regulations, as it deems expedient: *Provided*, That no license shall be granted to sell alcoholic beverages in less quantities than one-half pint, or to sell them between sundown and sunrise, or to sell them to be drunk on the premises: *And provided, further*, That the General Assembly shall not delegate to any municipal corporation the power to issue licenses to sell the same.

The power to prohibit is not always co-extensive with the power to grant, or, to express the idea upon which this argument rests more accurately, the power to prohibit is not limited by the power to grant. *Florence v. Brown*, 49 S. C. 332, 26 S. E. 880, 883, 27 S. E. 273, 15 L. R. A. (N. S.) 939.

This section, giving the General Assembly the exclusive right to license the sale of liquors, and prohibiting such body to delegate such power to municipal corporations, does not prevent the General Assembly from authorizing such corpora-

tions to prohibit the sale of liquors therein. *Florence v. Brown*, 49 S. C. 332, 26 S. E. 880, 27 S. E. 273, 15 L. R. A. (N. S.) 939.

Applied as to county dispensaries in *Carolina Glass Co. v. State*, 87 S. C. 270, 69 S. E. 391, 44 L. R. A. (N. S.) 198, Ann. Cas. 16D, 62; as to state ownership and control of State dispensaries in *State v. Murray*, 79 S. C. 316, 60 S. E. 928, 44 L. R. A. (N. S.) 198; in *Murray v. Wilson Distilling Co.*, 213 U. S. 151, 29 S. Ct. 458, 53 L. Ed. 752.

See notes under § 1829.

Section 12. Prize fighting.—All prize-fighting is prohibited in this State, and the General Assembly shall provide by proper laws for the prevention and punishment of the same.

Section 13. Municipal ice plants.—Cities and towns may acquire, by construction or purchase and may operate manufactories or plants for making ice, and may furnish ice at wholesale or retail to individuals, firms

and private corporations for reasonable compensation: *Provided*, That the purchase or construction of any such ice plant by any city or town heretofore made is ratified and confirmed: *And provided, further*, That no such construction or purchase shall be made hereafter except upon a majority vote of the electors in said cities or towns who are qualified to vote on the bonded indebtedness of said cities or towns: *Provided, further*, The provisions hereof shall not apply to the counties of Aiken, Calhoun, Marion, Barnwell and Marlboro.

Amended by a joint resolution and an act: 1920 (31) 1708; 1921 (32) 272. See FOREWORD on page 1159 of this volume.

Section 14. Extension of corporate limits of Greenville.—It shall be lawful to extend the corporate limits of the City of Greenville, from time to time, so as to include any adjacent territory, whether the said adjacent territory be in whole or in part an incorporated municipality under the plan hereinafter set forth. All such portions of the territory annexed to the city from time to time (whether such portions be contiguous or separated by other lands) as may belong wholly to cotton mills or other industrial corporations shall constitute a separate district, hereinafter referred to as the "Industrial Zone:" *Provided*, That in order to enter such industrial zone each such corporation shall have a locally invested capital of at least fifty thousand (\$50,000.00) dollars, and shall provide and maintain its own streets, sidewalks, street lights, sewers and water supply. The lands owned by any such corporation within the present city limits may enter or re-enter such industrial zone at any time by the consent of the City Council, Commissioners or other governing body of said city; and any lands owned or previously owned by such a corporation in any portion of said city, as enlarged from time to time, may cease to be a portion of such industrial zone, if such consent be given. Said industrial zone and all property taxable therein shall be exempt from municipal taxation (a) to pay any portion of the present bonded indebtedness of said city, except the bonds of the par value of eighteen thousand five hundred (\$18,500.00) dollars issued in aid of Atlanta and Charlotte Air Line Railroad, the bonds of the par value of fifteen thousand five hundred (\$15,500.00) dollars, issued in aid of Greenville and Laurens Railroad, and the bonds of the par value of two hundred and fifty thousand (\$250,000.00) dollars, issued for the purpose of the purchase, enlargement and permanent equipment of the present City Hospital; (b) to pay for local improvements including streets, water and sewerage, in other parts of the city; (c) to pay for water, lights and services in caring for streets, sewerage and the disposal of garbage in other parts of the city. All property taxable in said industrial zone shall bear its proper portion of all city taxes for general purposes and of all liability for bonds subsequently issued by said city, except as in this Act otherwise provided. There shall be, and is hereby committed to each of the various corporations at any time constituting said industrial zone the exclusive control and full responsibility for the construction, maintenance and lighting of all buildings, streets, sidewalks, alleys, parks, and other public places and of all water mains and pipes, lateral sewers, and other local improvements lying wholly within its boundaries and the other parts of the city shall not be responsible for any part of the cost thereof, or for any other liability in connection

therewith: *Provided*, That where any street, sidewalk, alley, park or other public place abuts the property of any such industrial corporation it shall bear its proportionate share of the cost of constructing, maintaining, improving and lighting the same, and of all water mains, pipes and lateral sewers therein. There shall be and is hereby committed to the portions of said city not included in such industrial zone the exclusive control of and full responsibility for the construction, maintenance and lighting of all streets, sidewalks, alleys, parks, and other public places, water mains, pipes, lateral sewers and other improvements therein and said industrial zone shall not be responsible for any part of the cost thereof or for any other liability in connection therewith. Such portions of the entire city so enlarged from time to time, as are not included in said industrial zone may be subdivided into districts and vested with such powers, control and responsibility regarding streets, local improvements, *et cetera*, and exempted, in whole or in part, from such taxes or other obligations concerning such local improvements in such manner and to such extent as may be prescribed from time to time by action of the City Council, Commissioners, or other governing body, if confirmed by a majority of the votes cast by the qualified electors residing within the present city limits and by a majority of the votes cast by the qualified electors residing within the area so annexed to the city from time to time, or if neither cast a majority of ballots against such action. All real and personal property taxable within the entire city, as so enlarged from time to time, shall be assessed, for the purpose of municipal taxation only, upon a just, equal and uniform basis by a Board of Commissioners or assessors to be appointed as may be provided by law. Except by consent of the corporations directly concerned or by consent of a majority of the industrial corporations constituting the industrial zone, no business license or occupation tax exceeding five hundred (\$500.00) dollars per annum shall be imposed upon any corporation in said industrial zone to take effect prior to the year 1950. The State and City Boards of Health shall have all powers and authority over the said industrial zone and over all other portions of the entire city, as so enlarged from time to time, with which they may be vested now or hereafter over the territory comprised within the present city limits. Nothing contained herein shall be deemed to affect taxation of liability of any property within said industrial zone, or any other portion of said city, as so enlarged from time to time, for any present or future indebtedness of the Greater Greenville Sewerage District; or to preclude any right of the city, County or State to condemn property in any part of the city, as so enlarged from time to time, or to charge against abutting property owners the costs of street or other local improvements, of any portion thereof. The annexation provided for by this Act shall become complete and effective upon the adoption and ratification of this amendment: *Provided*, That no postponement of such adoption or ratification shall necessitate the holding of another election as to any territory once voted into the city. Subsequent elections may be held from time to time to determine the question of enlarging still further the corporate limits of said city, and all territory so annexed from time to time, shall be subject to the provisions hereof.

Amended by a joint resolution and an act: 1927 (35) 703; 1929 (36) 272. See FOREWORD on page 1159 of this volume.

And, Provided, Further, That it may be lawful for the Board of Assessors or Appraisers having the power to assess property in the area so annexed and in the present city limits at the time thereof, to continue to assess property in any newly annexed territory, except any industrial zone territory, for the period of years fixed by ordinances of the City of Greenville, prior to the holding of the election on the question of annexation and the assessed value as fixed by any such authority for state and county purposes shall be used for the purpose of municipal taxation until the expiration of the time fixed in any such ordinance. Any such time may be shortened by a majority vote of the electors of both the City and of those in the affected territory: *And, Provided, Also,* That it is to be understood that this entire Section, and the various provisions thereof are intended to provide additional and further methods of annexation and are not to be construed as amending, restricting or barring annexation by, or under, any other method or plan now, or hereafter provided by law. *And, Provided, Still Further,* That this amendment shall be retroactive so as to render legal any election, or annexation, consummated thereunder even though such election or annexation take place prior to the ratification hereof.

Amended by a joint resolution and an act: 1938 (40) 1871; 1939 (41) 451. See FOREWORD on page 1159 of this volume.

ARTICLE IX.

Corporations.

Section 1. Corporation defined.—The term corporation as used in this Article includes all associations and joint stock companies having powers and privileges not possessed by individuals or partnerships, and excludes municipal corporations.

Section 2. Charter of incorporation.—No charter of incorporation shall be granted, changed or amended by special law, except in the case of such charitable, educational, penal or reformatory corporations as may be under the control of the State, or may be provided for in this Constitution, but the General Assembly shall provide by general laws for changing or amending existing charters, and for the organization of all corporations hereafter to be created, and any such law so passed, as well as all charters now existing or hereafter created, shall be subject to future repeal or alteration: *Provided,* That the General Assembly may by a two-thirds vote of each House on a concurrent resolution allow a Bill for a special charter to be introduced, and when so introduced may pass the same as other Bills.

See Const. 1868, IX, 9; XII, 1.

This section relates to private and some quasi-public corporations, but not to school districts, as it is expressly provided that the Legislature may make special laws affecting educational matters. *State v. McCaw*, 77 S. C. 351, 58 S. E. 145, 146.

Charters in existence at time of constitution must be amended in order to claim benefit under it.—Construed with §§ 16, 17, 18 and 21 of this article, it is

evident that in order to make charters, in existence at the time the Constitution of 1895 was adopted, subject to provisions of these sections, it is necessary that there be legislation to that effect. *Lauraglen Mills v. Ruff*, 52 S. C. 448, 30 S. E. 587, 588.

Section indicates that private property may not be taken without consent of owner unless corporation given

power.—When construed with § 17 of art. 1 and §§ 2 and 20 of this article, this section means that private property shall not be taken for private use without the consent of the owner, except in cases where this power is conferred upon corporations by the General Assembly. *Boyd v. Winnsboro Granite Co.*, 66 S. C. 433, 45 S. E. 10, 12; *Wilson v. Alderman & Sons Co.*, 69 S. C. 176, 48 S. E. 81, 84.

Act providing for payment of wages to discharged laborers constitutional.—An Act providing for the payment to discharged laborers of wages up to the time of the discharge, is sustainable as an amendment of the corporate charter of a company, under this section. *Wynne v. Seaboard, etc., Ry.*, 96 S. C. 1, 79 S. E. 521, 522, 51 L. R. A. (N. S.) 1098, Ann. Cas. 16B, 133, 12 A. L. R. 613, 629.

As to specific code section covering payment of wages to discharged laborers see § 7033 and note thereto.

An act organizing corporation to build railroad station does not violate section.—An Act organizing a corporation to build a union station, is not in violation of this section by granting to several railroads the said powers, where the act of incorporation was passed under a concurrent resolution. *Riley v. Charleston Union Station Co.*, 71 S. C. 457, 51 S. E. 485, 497, 110 Am. St. Rep. 579, 10 L. R. A. (N. S.) 909, 11 L. R. A. (N. S.) 942, 22 L. R. A. (N. S.) 8, 36, 47, 75, 87, 123, Ann. Cas. 15A, 83.

And imposition of license tax is not impairment of contract.—Under this section, the Legislature has unlimited power

to alter corporate charters, so that the imposition of a license tax on a corporation organized under the general law subsequent to such Constitution does not constitute an impairment of the state's contract obligation to the corporation. *Ware Shoals Mfg. Co. v. Jones*, 78 S. C. 211, 58 S. E. 811, 814, 129 Am. St. Rep. 288, 44 L. R. A. (N. S.) 212, 225.

Also legislature may pass a bill ratifying and confirming charter.—Under the proviso in this section, the Legislature may pass a bill ratifying and confirming the charter of a company and investing the company with the power to construct and maintain a dam across a river, together with the right to acquire by purchase or condemnation proceedings. *McMeeken v. Central Carolina Power Co.*, 80 S. C. 512, 61 S. E. 1020, 1023, 124 Am. St. Rep. 605, 128 Am. St. Rep. 885, 19 L. R. A. (N. S.) 727, 38 L. R. A. (N. S.) 767, Ann. Cas. 13E, 52.

Charters of banking corporations are subject to state's reserved right to amend, modify or repeal. *Witt v. Peoples's State Bank of South Carolina*, 166 S. C. 1, 164 S. E. 306.

Special statute incorporating orphanage could not be held unconstitutional in absence of a showing that General Assembly in passing statute did not comply with constitutional requirement that it should have a concurrent resolution adopted by two-thirds vote of each house authorizing introduction of the bill. It will be presumed that this was done. *Epworth Orphanage v. Wilson*, 185 S. C. 243, 193 S. E. 644.

Section 3. Transporting and transmitting corporations taxed as such—common law liability.—All railroad, express, canal and other corporations engaged in transportation for hire and all telegraph and other corporations engaged in the business of transmitting intelligence for hire are common carriers in their respective lines of business, and are subject to liability and taxation as such. It shall be unlawful for any such corporation to make any contract relieving it of its common law liability or limiting the same, in reference to the carriage of passengers.

The most general test of a common carrier is the offer to carry for all alike for hire. *Reaves v. Western Union Tel. Co.*, 110 S. C. 233, 96 S. E. 295, 297.

And a common carrier may be such, though his business is not his exclusive business, and he is not continually or regularly engaged in it. *Reaves v. Western Union Tel. Co.*, 110 S. C. 233, 96 S. E. 295, 297.

Common carrier may be liable in tort for breach of duty originating in contract.—For dereliction in duty owing to public by common carrier, he is liable in tort to person injured, though tort originated in breach of contract, and actual and punitive damages may be

awarded as circumstances warrant. *Reaves v. Western Union Tel. Co.*, 110 S. C. 233, 96 S. E. 295, 297.

But common carrier is not liable as such on contracts made outside of scope of common carrier.—A common carrier may make special contracts outside his duties to the public, and may make some special contracts relative to such duties, if not such as are prohibited by statute or public policy, and under such contracts he is not held to the strict liability of a common carrier. *Reaves v. Western Union Tel. Co.*, 110 S. C. 233, 96 S. E. 295, 297.

A telephone company is a "common carrier" of intelligence for hire. *Miller*

v. Central Carolina Telephone Co., 194 S. C. 327, 8 S. E. (2d) 355; State v. Citizens Tel. Co., 61 S. C. 83, 39 S. E. 257, 262, 85 Am. St. Rep. 515, 55 L. R. A. 139, 67 L. R. A. 111, 251, 30 L. R. A. (N. S.) 1028, 32 L. R. A. (N. S.) 494.

And as such, may be required by mandamus proceedings to furnish all with equal facilities. A telephone company has the duty to furnish service to all customers alike, and to charge them uniform rates therefor, and has no right to discriminate against one subscriber, as to rates or service, or to give preferences or favors to others. *Miller v. Central Carolina Telephone Co.*, 194 S. C. 327, 8 S. E. (2d) 355.

Alleged special contract between telephone company and owners of drug store that owners would not be liable for long distance telephone calls unless actually made by them or expressly authorized by them, was invalid and unenforceable under the rules of the public service commission forbidding discrimination as to subscribers, and hence owners of drug store could not recover actual or punitive damages from telephone company for disconnection of telephone when owners refused to pay for long distance telephone calls not made or authorized by them. *Miller v. Central Carolina Telephone Co.*, 194 S. C. 327, 8 S. E. (2d) 355.

Section declaratory of common law as to telegraph companies. — The provision of this section that all telegraph companies engaged in transmitting intelligence for hire are common carriers,

is merely declaratory of the common law. *Reaves v. Western Union Tel. Co.*, 110 S. C. 233, 96 S. E. 295, 297.

And company may be required to deliver telegram outside of free delivery limit if distance reasonable. — Under its liability as a common carrier, a telegraph company must undertake to deliver a message to one outside the free delivery limits, if upon notice the sender pays for such delivery, provided such person lives within a reasonable distance from the office of delivery. *Campbell v. Western Union Tel. Co.*, 74 S. C. 300, 54 S. E. 571, 572, Ann. Cas. 12B, 596, 17 A. L. R. 116.

Stipulation on telegram as to time for presentation of claims does not limit liability. — The stipulation on printed form for telegram requiring claims for damages or statutory penalties to be presented within a certain time, does not limit the liability of the company, and is binding on the sender. *Broom v. Western Union Tel. Co.*, 71 S. C. 506, 51 S. E. 259, 260, 49 L. R. A. (N. S.) 265.

Stipulation in pass as to liability of railroad void when pass issued for consideration. — A railroad is not relieved of liability for the negligent killing of the wife of plaintiff, in spite of stipulation on pass on which she was riding, where it was shown that pass was issued on consideration that plaintiff go to a certain point in order to testify for railroad. *Nickles v. Seaboard, etc., Ry.*, 74 S. C. 102, 54 S. E. 255, 265, 37 L. R. A. (N. S.) 237, 250, L. R. A. 1915A, 1049.

Section 4. Agent of corporation—office.—Every corporation organized or doing business in this State, other than religious, educational or benevolent associations, shall have and maintain at least one agent in this State upon whom process may be served, and at least one public office for the transaction of its business: *Provided*, This Section shall not apply to mercantile corporations: *Provided*, That nothing contained in this Section shall be construed to prohibit the General Assembly from providing for the service of process on any agent of a corporation so as to bind such corporation.

Section 5. Discrimination in charges.—No discrimination in charges or facilities for transportation of the same classes of freight or passengers, or for the transmission of intelligence within this State, or coming from or going to any other State, shall be made by any railroad or other transportation or transmission company between places or persons. Persons and property transported by any railroad, or any other transportation or transmission company or corporation, shall be delivered at any station, landing or port at charges not exceeding the charges for the transportation of persons and property of the same class, in the same direction, to any more distant station, landing or port. Excursion and commutation tickets may be issued at special rates. This Section shall not prevent the Railroad Commission from making such competitive rates as shall, in their judgment,

be just and equitable between the Railroads and the public, at all Junctional and Competitive points, or at points where water competition controls the traffic, or at points where the competition of points located in other States may make necessary the prescribing of different rates for the protection of the commerce of this State.

See art. IX, section 3, and notes thereto.

Section 6. Transportation company may connect or cross lines of another.—Any railroad or other transportation corporation, and any telegraph or other transmitting corporation, organized under the laws of this State, shall have the right to connect its roads or lines, at the State line, with those in other States, and shall have the right to intersect with or cross any other railroad, street railway, transportation road or transmitting line, and shall each receive and transport the freight, passengers, cars (loaded or empty) and messages delivered to it by another without delay or discrimination.

This section is not violated by § 8429, denying the right to cross at grade except by consent of the Railroad Commission and this only in the manner prescribed, since the constitutional right to cross does not necessarily imply the right

to cross at grade. *Atlantic, etc., R. Co. v. Caughman*, 89 S. C. 472, 72 S. E. 18, Ann. Cas. 14D, 795.

As to specific code section regulating crossings, see § 8429 and note thereto.

Section 7. Consolidation of stock with competing line—jury may decide whether lines are parallel or competing.—No railroad, or other transportation company, and no telegraph or other transmitting corporation, or the lessees, purchasers or managers of any such corporation, shall consolidate the stock, property or franchises of such corporation with, or lease or purchase the works or franchises of, or in any way control, any other railroad or other transportation, telegraph or other transmitting company owning or having under its control a parallel or competing line; and the question whether railroads or other transportation, telegraph or other transmitting companies are parallel or competing lines shall, when demanded by the party complainant, be decided by a jury as in other civil causes.

The Act of 1894, 21 Stats., 812, § 8239, is not inconsistent with, or repealed by, Constitution of 1895. *Edwards v. South-*

ern Ry., 66 S. C. 277, 44 S. E. 748, 750, 64 L. R. A. 734.

Section 8. No foreign corporation can build or operate a railroad in this State—no general or special law for foreign corporation, except on conditions.—The General Assembly shall not grant to any foreign corporation or association a license to build, operate or lease any railroad in this State; but in all cases where a railroad is to be built or operated, or is now being operated, in this State, and the same shall be partly in this State and partly in another State, or in other States, the owners or projectors thereof shall first become incorporated under the laws of this State; nor shall any foreign corporation or association lease or operate any railroad in this State, or purchase the same or any interest therein.

Consolidation of any railroad lines and corporations in this State with others shall be allowed only where the consolidated company shall become

a domestic corporation of this State. No general or special law shall ever be passed for the benefit of any foreign corporation operating a railroad under any existing license of this State or under any existing lease, and no grant of any right or privilege and no exemption from any burden shall be made to any such foreign corporation, except upon the condition that the owners or stockholders thereof shall first organize a corporation in this State under the laws thereof, and shall thereafter operate and manage the same and the business thereof under said domestic charter.

"Railroad" means property necessary for operation of a railroad.—"Railroad" as used in this section does not mean company or corporation; but it refers to the property fairly falling within the term railroad including, track, rolling stock, station houses, and generally such property as is usual, incident or necessary to the operation of a railroad, doubtless including all franchises when conferred. *Carolina, etc., Ry. v. McCown*, 84 S. C. 318, 66 S. E. 418, 423.

"Owners" applies to those who have interest in tangible railroad. — The term "owners" applies more especially to those who have right of property in a tangible railroad in existence in such form as to constitute the subject of ownership. *Carolina, etc., Ry. v. McCown*, 84 S. C. 318, 66 S. E. 418, 423.

"Projectors" are those who plan or promote railroad.—Projectors of a railroad not in existence, as distinguished from owners, are those who project, plan, or promote the prospective railroad. *Carolina, etc., Ry. v. McCown*, 84 S. C. 318, 66 S. E. 418, 423.

Object of section is to place foreign corporation on footing with domestic. — The main object of this section was to require foreign railroad companies, operating or seeking to operate railroads in this state, to be placed on the same footing with domestic corporations as to their rights and liabilities, under the jurisdiction of the state courts. *Carolina, etc., Ry. v. McCown*, 84 S. C. 318, 66 S. E. 416, 420.

And section requires full incorporation in the state. *Lyles v. McCown*, 82 S. C. 127, 63 S. E. 355, 366, Ann. Cas. 18B, 281.

Under this section, a foreign corporation cannot operate a railroad in South Carolina at all, and the owners or projectors must first become incorporated under the laws of South Carolina, and operate and manage the railroad and do business under the South Carolina charter. *Blue Ridge Power Co. v. Southern Ry. Co.*, 122 S. C. 222, 115 S. E. 306, 308.

As to specific code section stating how foreign railroad companies may do business in state, see §§ 7778 et seq., and note thereto.

And an act providing that a foreign railroad corporation, by filing a copy of its charter with the secretary of state, shall become a domestic corporation, with

all the rights and liabilities thereof, does not violate this section. *State v. Tompkins*, 48 S. C. 49, 25 S. E. 982, 984.

And foreign corporation filing charter and carrying on business is estopped to deny it is domestic corporation. — A foreign railroad corporation filing a copy of its charter granted in another state, with the Secretary of State, and carrying on business in the state, becomes a domestic corporation and is estopped to deny itself subject to service of summons as such. *Geraty v. Atlantic, etc., R. Co.*, 80 S. C. 355, 60 S. E. 936, 937.

As to specific code section providing for obtaining of charter by foreign railroad corporations, see § 7776 and note thereto.

But foreign corporation and corporation organized to operate railroad in state are separate corporations.—A Virginia corporation owning a railroad, and a South Carolina corporation, organized under this section, to operate the portion of said railroad within the state of South Carolina are separate and distinct corporations. *Blue Ridge Power Co. v. Southern Ry. Co.*, 122 S. C. 222, 115 S. E. 306, 309.

And granting of domestic charter does not have effect of transferring property of foreign corporation.—The granting of a domestic charter for the operation, under this section, of that portion of a railroad owned by a foreign corporation within the state cannot have the effect of transferring the property of the foreign corporation to the domestic corporation. *Blue Ridge Power Co. v. Southern Ry. Co.*, 122 S. C. 222, 115 S. E. 306, 309.

And domestic corporation is not responsible on contracts of parent organization. — A domestic corporation organized under this section, to operate so much of a foreign corporation's railroad as is within the state, is not responsible on the contracts of the parent organization. *Blue Ridge Power Co. v. Southern Ry. Co.*, 122 S. C. 222, 115 S. E. 306, 309.

Right to operate railroad cannot be attacked collaterally in proceeding between corporation and individual. — The complaint of a railroad company to recover part of its right of way, though alleging that it is chartered under the laws of another state, and doing business as a common carrier, is not subject to demurrer on the ground that the corpora-

tion is operating its road in violation of this section, and so has not capacity to sue; there not only being an allegation in the complaint that plaintiff is doing the business of a common carrier in the state under its laws, but as between a corporation and an individual, the right of a railroad to operate its road is not open to attack in a collateral proceeding. *Atlantic, etc., R. Co. v. Epperson*, 85 S. C.

134, 67 S. E. 235, 33 L. R. A. (N. S.) 356.

A railroad company incorporated under the laws of another state is a nonresident of South Carolina for the purposes of removal of causes to a federal court, though it has complied with the requirements for domestication of a corporation. *Calvert v. Southern Ry. Co.*, 64 S. C. 139, 36 S. E. 750, 41 S. E. 963, 18 A. L. R. 136.

Section 9. Banks.—The General Assembly shall have no power to grant any special charter for banking purposes, but corporations or associations may be formed for such purposes, under general laws, with such privileges, powers and limitations, not inconsistent with this Constitution, as it may deem proper. The General Assembly shall provide by law for the thorough examination and inspection of all banking and fiscal corporations of this State.

See Const. 1868, XII, 6.

Section 10. Stock issued for money or labor.—Stock or bonds shall not be issued by any corporation save for labor done, or money or property actually received or subscribed; and all fictitious increase of stock or indebtedness shall be void.

Cross references.—As to specific code sections covering fictitious issue of stock, see § 7692 and § 8195, and notes thereto.

As a general rule, a corporation cannot legally bind itself to pay the purchase price of stock sold by a stockholder to a third person, and this principle is embraced in the inhibition of this section. *Shumpert v. Nat. State Bank*, 231 F. 82, 86.

Stockholders cannot object to pledging of stock at greater than par value where it is in depreciated condition.—The stockholders of a corporation cannot object under this section, to the pledging of unissued stock for money loaned, the stock being in a depreciated condition

and being issued at the rate of \$200 for each \$100 of money lent, where the complainant refused to accept the stock in payment of his debt, the stock being issued for money paid. *Granite Brick Co. v. Titus*, 226 F. 557, 568.

And bonds pledged are not invalid because face value may be greater than sum borrowed.—This section does not render invalid bonds of a corporation pledged by it as security for money borrowed and used in the purchase of machinery necessary in its business, although the face value of the bonds may be greater than the sums borrowed. *Firth Co. v. South Carolina Loan, etc., Co.*, 122 F. 569, 570.

Section 11. Election of officers of corporations.—The General Assembly shall provide by law for the election of directors, trustees or managers of all corporations so that each stockholder shall be allowed to cast, in person or by proxy, as many votes as the number of shares he owns multiplied by the number of directors, trustees or managers to be elected, the same to be cast for any one candidate or to be distributed among two or more candidates.

Cross reference.—As to specific code section covering election of directors, etc., see § 7680, and note thereto.

Act failing to include provisions of section violates it.—An act failing to make provision for the election of directors, trustees, or managers of the corporation which may be created thereunder and the voting of the stock, as required by this section, violates the section. *Caro-*

lina, etc., Ry. v. McCown, 84 S. C. 318, 66 S. E. 418, 426. See *Looker v. Maynard*, 179 U. S. 46, 21 S. Ct. 21, 45 L. Ed. 79, declaring constitutional a similar provision in another state.

Conveyance by stockholders of their interest in corporation to other stockholders in trust for a certain time to manage and operate corporation is valid. *Bethea v. Allen*, 178 S. C., 9; 181 S. E., 897.

Section 12. Business of corporations.—Corporations shall not engage in any business except that specifically authorized by their charters or necessarily incident thereto.

Section 13. Trusts, combinations, etc.—The General Assembly shall enact laws to prevent all trusts, combinations, contracts and agreements against the public welfare; and to prevent abuses, unjust discriminations and extortion in all charges of transporting and transmitting companies; and shall pass laws for the supervision and regulation of such companies by Commission or otherwise, and shall provide adequate penalties, to the extent, if necessary for that purpose, of forfeiture of their franchises.

Cross references. — As to specific code section treating illegal trusts and combinations, see § 6620, and note thereto.

Trust defined.—A trust has been defined as a contract, combination, confederation, or understanding, express or implied, between two or more persons to control the price of a commodity or service for the benefit of the parties thereto and to the injury of the public, and which tends to create a monopoly. *Wood Mowing, etc., Co. v. Greenwood Hdw. Co.*, 75 S. C. 378, 55 S. E. 973, 975, 9 L. R. A., (N. S.) 501, 9 Ann. Cas. 902.

Test as to reasonableness of trust is whether it interferes with interests of public.—The test to determine whether a contract in partial restraint of trade is

reasonable is whether it affords only a fair protection to the interests of the parties in whose favor it is made without being so large in its operation as to interfere with the interests of the public. *Wood Mowing, etc., Co. v. Greenwood Hdw. Co.*, 75 S. C. 378, 55 S. E. 973, 976, 9 L. R. A. (N. S.) 501, 9 Ann. Cas. 902.

And the legislature must primarily determine what agreements are against public welfare. *Henderson v. McMaster*, 104 S. C. 268, 88 S. E. 645, 646, Ann. Cas. 18E, 481.

S. C. Fair Trade Act constitutional.—*Miles Laboratories, Inc. v. Seignieres*, 30 F. S. 599.

See *State v. Standard Oil Co. of N. J.*, 195 S. C. 267, 10 S. E. (2d) 778.

Section 14. The public service commission.—A commission is hereby established to be known as “the Railroad Commission”, which shall be composed of not less than three members, whose powers over all transporting and transmitting corporations, and duties, manner of election and term of office shall be regulated by law; and until otherwise provided by law the said commissioners shall have the same powers and jurisdiction, perform the same duties and receive the same compensation as now conferred, prescribed and allowed by law to the existing railroad commissioners: *Provided*, That the members thereof shall be elected at the expiration of the terms of the present Railroad Commissioners, who are hereby continued in office for the terms for which they were elected. *Provided*, that upon the adoption and ratification of this amendment the said Commission shall be known as The Public Service Commission.

Amended by a joint resolution and an act: 1934 (38) 1629; 1935 (39) 25. See FOREWORD on page 1159 of this volume.

Cross references.—As to specific code sections covering powers of Railroad Commission, see §§ 8210, 8331, and notes thereto.

Jurisdiction of commission not specified.—This section does not undertake to specify the jurisdiction of the commission, but, contemplates that this is to be fixed by statute. *Columbia Gaslight Co. v. Mobley*, 139 S. C. 107, 137 S. E. 211, 213.

Section requiring railroads to build

crossings valid under this section.—Section 8331, empowering Railroad Commission to require railroads passing through city to build connecting track, cost to be borne in proportion fixed by the Commission, without expressly providing that notice of hearing be given to railroads, is not violative of due process clause, Const. U. S. Amend. 14, in view of the hearing provided by this section. *Shealy v. Seaboard, etc., Ry. Co.*, 131 S. C. 144, 126 S. E. 622.

To bring about uniformity of services and rates, rules and regulations of public service commission, adopted pursuant to law, must be observed by telephone companies. *Miller v. Central Carolina Telephone Co.*, 194 S. C. 327, 8 S. E. (2d) 355.

Alleged special contract between telephone company and owners of drug store that owners would not be liable for long distance telephone calls unless actually made by them or expressly authorized by them, was invalid and unenforceable under the rules of the Public Service Commission forbidding discrimination as to subscribers, and hence owners of

drug store could not recover actual or punitive damages from telephone company for disconnection of telephone when owners refused to pay for long distance telephone calls not made or authorized by them. *Miller v. Central Carolina Telephone Co.*, 194 S. C. 327, 8 S. E. (2d) 355.

See *City of Columbia v. Pearman*, 180 S. C. 296, 185 S. E. 747, and *Darby v. Southern Ry. Co.*, 194 S. C. 421, 10 S. E. (2d) 465.

See generally, *Railroad Com'rs v. Columbia, etc., R. Co.*, 82 S. C. 418, 64 S. E. 240, 32 L. R. A. (N. S.) 651, Ann. Cas. 14C, 1171.

Section 15. Rights and remedies of employees.—Every employee of any railroad corporation shall have the same rights and remedies for any injury suffered by him from the acts or omissions of said corporation or its employees as are allowed by law to other persons not employees, when the injury results from the negligence of a superior agent or officer, or of a person having a right to control or direct the services of a party injured, and also when the injury results from the negligence of a fellow servant engaged in another department of labor from that of the party injured, or of a fellow servant on another train of cars, or one engaged about a different piece of work. Knowledge by any employee injured of the defective or unsafe character or condition of any machinery, ways or appliances shall be no defence to an action for injury caused thereby, except as to conductors or engineers in charge of dangerous or unsafe cars or engines voluntarily operated by them. When death ensues from any injury to employees, the legal or personal representatives of the person injured shall have the same right and remedies as are allowed by law to such representatives of other persons. Any contract or agreement, expressed or implied, made by any employee to waive the benefit of this Section shall be null and void; and this Section shall not be construed to deprive any employee of a corporation, or his legal or personal representative, of any remedy or right that he now has by the law of the land. The General Assembly may extend the remedies herein provided for to any other class of employees.

Cross references.—As to specific code sections covering liability of railroad for injuries to employees, see §§ 8366 et seq., and notes thereto.

Section is constitutional.—The provisions of this section are a conspicuous instance of a change in the rules of evidence and the section is not in violation of the fourteenth amendment of the United States Constitution. *Drennan v. Southern Ry.*, 91 S. C. 507, 75 S. E. 45, 50, L. R. A. 1915E, 504, 524, 534.

Where assumption of risk is not pleaded it is not error for court to refuse to decide constitutionality.—Where, in an action for personal injuries, the defense of assumption of risk is not pleaded, and the question does not fairly arise on the record, it is not error for the court to refuse to go into the question as to whether the provision relating to the

assumption of risk by employees is in violation of the fourteenth amendment of the United States Constitution. *Montgomery v. Seaboard, etc., Ry.*, 73 S. C. 503, 53 S. E. 987, 990, Ann. Cas. 13C, 335.

And contention that section applies only to employees engaged in actual train operation is without merit.—A contention that, unless this section is construed as applicable only to employees engaged in actual train operation or subject to dangers directly connected therewith, is repugnant to the fourteenth amendment of the Federal Constitution, is without merit. *Becker v. Atlantic, etc., R. Co.*, 128 S. C. 131, 121 S. E. 476, 478.

"Railroad corporation" includes lumber company operating logging railroad.—Where defendant corporation engaged in the manufacture of lumber, operated a logging railroad for its own use, and

also hauled some freight for persons who lived along its line, it was a "railroad corporation" under this section. *Holmes v. Hamilton Ridge Lbr. Corp.*, 120 S. C. 165, 112 S. E. 536.

While this section confers a right, it does not create a presumption or rule of evidence. *Land v. Southern Ry.*, 67 S. C. 290, 45 S. E. 203, 204, L. R. A. 1917E, 156.

And does not place employees in same position as passengers in regard to recoveries for injuries.—Although this section puts employees in the same position as other persons in regard to recoveries for injuries, it does not place them in the same class as passengers. *Land v. Southern Ry.*, 67 S. C. 290, 45 S. E. 203, 204, L. R. A. 1917E, 156.

The sole purpose and effect of this section is to limit the defense of the negligence of a fellow servant. *Johnson v. Charleston, etc., Ry. Co.*, 55 S. C. 152, 33 S. E. 174, 175, 44 L. R. A. 645, 10 L. R. A. (N. S.) 200, 11 L. R. A. (N. S.) 189, Ann. Cas. 12A, 1152, 12 A. L. R. 488.

The provisions of this section do not apply to telegraph companies. *Brabham v. American Tel., etc., Co.*, 71 S. C. 53, 50 S. E. 716, 717.

But have been extended to street railways. — Under § 8479, extending the provisions of this section to street railways, it is not error to charge that doctrine of assumption of risk does not apply to case, if plaintiff, power plant employee, was employee of street railway corporation. *Veronee v. Charleston Consol. Ry., etc., Co.*, 152 S. C. 178, 149 S. E. 753, 756.

In running a train the conductor is a representative of the company, and where an injury is caused by his negligence the company is liable. *Wilson v. Southern Ry.*, 73 S. C. 481, 53 S. E. 968, 976, 30 L. R. A. (N. S.) 439, 23 A. L. R. 316; *Reed v. Southern Ry.*, 75 S. C. 162, 55 S. E. 218, 221, 45 L. R. A. (N. S.) 373, L. R. A. 1918E, 270, Ann. Cas. 12D, 1228, 28 A. L. R. 159, 173.

Test as to "person having right to control services" is whether he is performing duty of master.—The usual test to determine whether a superior servant is a fellow servant or a vice principal is not whether the superior has power to direct the services of the other, but whether the offending servant is in the performance of some duty which the master has intrusted to him and which the master owes to the injured servant. *James v. Fountain Inn Mfg. Co.*, 80 S. C. 232, 61 S. E. 391, 392, 21 L. R. A. (N. S.) 142.

And this section applies to a servant working as an assistant car repairer and workman about the yards and tracks of a railroad company, while working underneath a defective and overloaded

car, according to the directions of one in charge of the repairs. *Whisonant v. Atlanta, etc., Ry. Co.*, 86 S. C. 300, 68 S. E. 566, 568, 47 L. R. A. (N. S.) 119.

And question is one for jury.—Whether a railroad track foreman was under the control of a supervisor of bridges, so that under this section, the railroad company was liable for the negligence of the supervisor causing injury to the foreman, is, under the evidence, for the jury. *Smith v. Southern Ry. Co.*, 93 S. C. 115, 76 S. E. 109, 110.

And under this section a servant may recover of a railroad company for injuries caused by the carelessness of a fellow servant directing him. *Bussey v. Charleston, etc., Ry. Co.*, 52 S. C. 438, 30 S. E. 477; *Rutherford v. Southern Ry. Co.*, 56 S. C. 446, 35 S. E. 136, 137, Ann. Cas. 15B, 698; *White v. Seaboard, etc., Ry.*, 14 Ga. App. 139, 80 S. E. 667, 668.

And railroad is not exempted from liability for acts of foreman performed as laborer. — Where a foreman, while in control of work and directing the servants under him, performs an act of manual labor pursuant to and in furtherance of the directions which he has previously given in regard to the particular work, he does not cease thereby to be a superintendent for whose negligence the master is liable. *Rippy v. Southern Ry. Co.*, 80 S. E. 539, 61 S. E. 1010, 1012, 21 L. R. A. (N. S.) 601.

Conductor not "fellow servant" with fireman. — The court of appeals of Georgia, in construing this section, took the view that a conductor is not a fellow servant with a fireman who is a member of his train crew and subject to his orders. *Southern Ry. Co. v. Diseker*, 13 Ga. App. 799, 81 S. E. 269, 271.

And an engineer and conductor of a railroad train are not fellow servants under the provisions of this section. *Snipes v. Southern Ry. Co.*, 166 F. 1, 6.

And a farmer temporarily employed as section hand is not "fellow servant." — Under this section, a farmer in the temporary employ of a railroad as section hand taking out defective cross-ties and spacing ties under the direction of a section master was not a "fellow servant." *Williams v. Seaboard, etc., Ry.*, 105 S. E. 468, 90 S. E. 27, 29.

A brakeman on a freight train is not under the direct control of the engineer, within this section, but the engineer and the brakeman are fellow servants. *Pagan v. Southern Ry. Co.*, 78 S. C. 413, 59 S. E. 32, 33.

And roadmaster in charge of wrecking train is "fellow servant" with conductor.—A roadmaster who has control of the wrecking train while at work and attends all wrecks on his division is a fellow servant with the conductor of the train, and cannot recover of the

railroad company, where, after the train was divided by an agreement between him and the conductor, the engineer and the wrecking train struck the detached car on which the roadmaster was standing in moving a part of the train under the direction of the conductor, as all were engaged in a common enterprise—the removal of the wreck. *McDaniel v. Charleston, etc., R. Co.*, 70 S. C. 95, 49 S. E. 2, 3.

And bystander called in to assist in fighting railway fire is fellow servant with section hand.—A bystander on the occasion of a fire at a railway station called in by the station agent to assist in pushing cars from the fire, is a fellow servant of a section hand engaged in the same work, and if injured by the latter's negligence, the company is not responsible. *Jackson v. Southern Ry.*, 73 S. C. 557, 54 S. E. 231, 236, 40 L. R. A. (N. S.) 1181, 52 L. R. A. (N. S.) 169.

One assuming relation of servant at request of superior officer may recover for injuries.—A railroad is liable under this section for injuries suffered by plaintiff, where there was evidence that plaintiff, had assumed the relation of a servant at the request of a superior officer of the railroad company, and the injury was caused by a failure to uncouple certain cars, when it was the duty of the railroad to see that they were uncoupled. *Jackson v. Southern Ry.*, 73 S. C. 557, 54 S. E. 231, 236, 40 L. R. A. (N. S.) 1181, 52 L. R. A. (N. S.) 169.

Under this section, a watchman at a railroad crossing is engaged in "another department of labor" from fellow servants running a trail across the crossing. *Betchman v. Seaboard, etc., Ry.*, 75 S. C. 68, 55 S. E. 140, 141, 48 L. R. A. (N. S.) 155.

Section takes defense of assumption of risk from employer upon failure to furnish suitable machinery.—The object of this section was to take from a defendant that failed to furnish suitable machinery, the right to defeat an action by the employee by showing that he did not act with due care, in voluntarily operating the machinery after knowledge of its defective condition. *Youngblood v. South Carolina, etc., R. Co.*, 60 S. C. 9, 38 S. E. 232, 235, 85 Am. St. Rep. 824, 97 Am. St. Rep. 891, 6 L. R. A. (N. S.) 986, 13 L. R. A. (N. S.) 1154.

And the term "appliances" as used in this section, includes a force of hands sufficient to operate machinery, etc. *Bodie v. Charleston, etc., Ry. Co.*, 61 S. C. 468, 39 S. E. 715, 716, 6 L. R. A. (N. S.) 986, 13 L. R. A. (N. S.) 1155, 21 L. R. A. (N. S.) 138, 47 L. R. A. (N. S.) 912, affirmed, 66 S. C. 302, 44 S. E. 943, 948, 40 L. R. A. (N. S.) 916, L. R. A. 1915F, 496, 507, Ann. Cas. 16B, 387, 395, 424.

But the provisions of this section apply only to the defense of assumption of risk by an employee and do not refer to the question of contributory negligence. *Bouchillon v. Charleston, etc., Ry. Co.*, 90 S. C. 42, 72 S. E. 634, 636, Ann. Cas. 13D, 1 Ann. Cas. 14B, 604.

And under this section, assumption of risk is not a defense applicable to a cause of action arising under the intra-state commerce laws. *Johnson v. Atlantic, etc., Ry. Co.*, 112 S. C. 47, 99 S. E. 755, 756.

A brakeman injured while attempting to couple cars containing defective coupling devices did not assume the risk because he had knowledge of the defect. *Gilliland v. Charleston, etc., Ry. Co.*, 86 S. C. 137, 68 S. E. 186, 188, 33 L. R. A. (N. S.) 649. See also, *Youngblood v. South Carolina, etc., R. Co.*, 60 S. C. 9, 38 S. E. 232, 235, 85 Am. St. Rep. 824, 97 Am. St. Rep. 891, 6 L. R. A. (N. S.) 986, 13 L. R. A. (N. S.) 1154; *Carson v. Southern Ry. Co.*, 68 S. C. 55, 46 S. E. 525, 531, 6 L. R. A. (N. S.) 986, 8 L. R. A. (N. S.) 91, 12 L. R. A. (N. S.) 671, 13 L. R. A. (N. S.) 1155, 20 L. R. A. (N. S.) 475, 25 L. R. A. (N. S.) 348, 30 L. R. A. (N. S.) 406, Ann. Cas. 13B, 352, 23 A. L. R. 316; *Davis v. Northwestern R. Co.*, 75 S. C. 303, 55 S. E. 526, 528; *Whisonant v. Atlanta, etc., Ry. Co.*, 86 S. C. 300, 68 S. E. 566, 568, 47 L. R. A. (N. S.) 119.

But where plaintiff, with full knowledge of the danger, attempted to push down a spring connected with the dash pot of an engine with his hand in order to make the same operate, and his hand slipped, and was injured in the machinery, he assumed the risk, and was not relieved by the provisions of this section. *James v. Fountain Inn. Mfg. Co.*, 80 S. C. 232, 61 S. E. 391, 392, 21 L. R. A. (N. S.) 142.

Under this section, a conductor is not barred of his right to recover for injuries arising from defective cars, unless he would have regarded them as dangerous or unsafe if he had exercised ordinary prudence. *Barksdale v. Charleston, etc., Ry. Co.*, 66 S. C. 204, 44 S. E. 743, 21 L. R. A. (N. S.) 141.

And whether conductor operated defective cars voluntarily is question for jury.—Whether a freight conductor, injured while coupling cars which were unsafe for lack of a proper lever, voluntarily operated the cars within the provisions of this section, is a question for the jury. *Hall v. Northwestern R. Co.*, 81 S. C. 522, 62 S. E. 848, 852, 39 L. R. A. (N. S.) 1065.

And any implied agreement to release the company from liability to an engineer for negligence of a conductor while working under a rule providing that the engineer shall be jointly liable with the conductor for the movement of

the trains, is null and void. *Wilson v. Southern Ry.*, 73 S. C. 481, 53 S. E. 968, 976, 30 L. R. A. (N. S.) 439, 23 A. L. R. 316.

By a divided court, the view was taken that this section has no application to a contract between an employee and the company exempting the latter from liability for its negligence. *Johnson v. Charleston, etc., Ry. Co.*, 55 S. C. 152, 32 S. E. 2, 4, 33 S. E. 174, 44 L. R. A. 645, 10 L. R. A. (N. S.) 200, 11 L. R. A. (N. S.) 189, Ann. Cas. 12A, 1152, 12 A. L.

R. 488.

See generally. *Wilson v. Charleston etc., Ry. Co.*, 51 S. C. 79, 28 S. E. 91, 75 Am. St. Rep. 606, 51 L. R. A. 619, 54 L. R. A. 39, 63, Ann. Cas. 12D, 76 Ann. Cas. 13A, 981; *Hallums v. Southern Ry.*, 82 S. C. 299, 64 S. E. 147, 47 L. R. A. (N. S.) 119, 17 Ann. Cas. 511.

For a recent case giving full discussion of this section, see *Whisenhunt v. A. C. L. R. Co.*, 195 S. C. 213, 10 S. E. (2d) 305.

Section 16. Existing charters.—All existing charters or grants of corporate franchise under which organizations have not in good faith taken place at the adoption of this Constitution shall be subject to the provisions of this Article.

Section 17. Laws for benefit of corporation passed only on conditions.—The General Assembly shall never remit the forfeiture of the franchise of any corporation now chartered, nor alter nor amend the charter thereof, nor pass any general or special law for the benefit of such corporation, except upon the condition that such corporation shall thereafter hold its charter and franchise subject to the provisions of this Constitution, and the acceptance by any corporation of any provision of any such laws or the taking of any benefit or advantage from the same shall be conclusively held an agreement by such corporation to hold its charter and franchises under the provisions of this Article.

Section 18. Liability of stockholders.—The stockholders of all insolvent corporations shall be individually liable to the creditors thereof only to the extent of the amount remaining due to the corporation upon the stock owned by them:

See Const. 1868, XII, 6.

Amended by a joint resolution and an act: 1934 (38) 1628; 1935 (39) 35. See FOREWORD on page 1159 of this volume.

Cross references.—As to specific code section providing for liability of stockholders in corporations in general, see § 7677, and note thereto.

Prior to Constitution of 1895 greater liability than amount of stock could be imposed.—Prior to the Constitution of 1895, the legislature was not prohibited from imposing a greater liability than the amount of stock, since the corresponding section of the Constitution of 1868 was not self-executing. *Parker v. Carolina Sav. Bank*, 53 S. C. 583, 31 S. E. 673, 674, 69 Am. St. Rep. 888, 10 L. R. A. (N. S.) 903, 19 L. R. A. (N. S.) 210, 24 L. R. A. (N. S.) 630, 40 L. R. A. (N. S.) 782.

For cases dealing with double liability of bank stockholders prior to repeal of that part of this section, see *Boykin v.*

Smith, 188 S. C. 53, 198 S. E. 181; *Nettles v. Sottile*, 184 S. C. 1, 191 S. E. 796; *Brice v. Cleveland*, 179 S. C. 283, 184 S. E. 574; *Seabury v. Green*, 173 S. C. 235, 175 S. E. 639; *State ex rel. Zimmerman*, 171 S. C. 209, 172 S. E. 130; *South Carolina Sav. Bank v. Spann*, 169 S. C. 475, 169 S. E. 282; *Bilrite Bldg. Co. v. Elliott*, 166 S. C. 524, 165 S. E. 340; *Nettles v. Rhett*, 94 F. (2d) 42.

Effects of repeal.—See *Henry v. Alexander*, 186 S. C. 17, 194 S. E. 649, holding must show insolvency of bank prior to date of repeal of double liability constitutional and statutory amendments, but holding unconstitutional provision in statute adopted after repeal declaring that bank must have been judicially declared insolvent before date of repeal in order to impose double liability.

Section 19. Corporations cannot do act prohibited through controlling

interest in other corporations.—Nothing prohibited in this Article shall be permitted to be done by any corporation or company, persons or person, either for its or their own benefit or otherwise, by its or their holding or controlling in its or their own name or otherwise, or in the name of any other person or persons, or other corporation or company whatsoever, a majority of the capital stock, or of bonds having voting power, of any railroad or transportation company, or corporation created by or existing under the laws of this State, or doing business within this State.

This section does not prohibit one corporation from holding stock in a state corporation, but the prohibition is against holding a majority of the stock. *Carolina, etc., Ry. v. McCown*, 84 S. C. 318, 66 S. E. 418, 423.

Section 20. Right of way.—No right of way shall be appropriated to the use of any corporation until full compensation therefor shall be first made to the owner or secured by a deposit of money, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury of twelve men, in a court of record, as shall be prescribed by law.

See Const. 1868, XII, 3.

Cross references.—As to specific section providing for condemnation of right of way by railroads, see §§ 8454-8466, and notes thereto. As to condemnation by light and power companies, see § 8540, and note thereto. As to condemnation for drainage ditches, see § 5922, and note thereto. As to condemnation by water companies, see §§ 8454 et seq., and note thereto.

This section does not apply to municipal corporations. *Bramlett v. City Council*, 88 S. C. 110, 70 S. E. 450, 452 L. R. A. 1918A, 895, Ann. Cas. 14B, 480; *Spartanburg v. Cudd*, 132 S. C. 264, 128 S. E. 360, 362.

Nor to highway department. *South Carolina State Highway Department v. Bobotes*, 180 S. C. 183, 185 S. E. 165.

The drainage laws, §§ 6087-6137, are not in violation of this section. *Jackson v. Breeland*, 103 S. C. 184, 88 S. E. 128, 129.

Private property not to be taken for private use except in cases permitted by statute.—When construed with art. 1, § 17 and art. 9, §§ 1, 2, this section means that private property shall not be taken for private use without the consent of the owner, except in cases where this power is conferred upon corporations by the General Assembly. *Boyd v. Winnsboro Granite Co.*, 66 S. C. 433, 45 S. E. 10, 11.

Amount under compensation need not be paid pending an appeal.—A water company instituting condemnation proceedings for erection of dam under §§ 8454 et seq., on depositing with clerk amount of verdict awarded by clerk's jury, had a legal right to enter into possession and proceed with construction of dam, pending an appeal to the circuit

court, since money need not actually be paid over to landowners pending an appeal, under this section. *Lexington Water Power Co. v. Wingard*, 150 S. C. 418, 148 S. E. 366, 368.

But "full compensation" includes interest on award.—"Full compensation" under this section, includes interest on an award where a considerable time elapsed between an award in condemnation proceedings and the taking of the property by the condemnor. *Haig v. Wateree Power Co.*, 119 S. C. 319, 112 S. E. 55, 59.

In view of this section, the owner of land taken by county for highway could recover as damages actual value of land taken only as reduced by special benefits. *Wilson v. Greenville County*, 110 S. C. 321, 96 S. E. 301, 303.

Doubtful whether party can be denied right to have issue as to compensation tried by jury on appeal.—It is doubtful under this section, whether a person who has taken an appeal to the circuit court in the manner prescribed, can be denied the right to have the issue of the amount of compensation which should be allowed him, "tried by a jury of 12 men, in a court of record, as shall be prescribed by law." *South Carolina, etc., Ry. v. Ellen*, 95 S. C. 68, 78 S. E. 963, 966, Ann. Cas. 15B, 1042.

And altering of amount of compensation by judge is not fixing by jury.—Under this section, if a judge grants a new trial nisi and thereby alters the amount in any way, the compensation is fixed by the judge and not the jury. *Southern Power Co. v. White*, 92 S. C. 219, 75 S. E. 459, 461, 51 L. R. A. (N. S.) 862.

And may have trial by jury in court

of record without legislation prescribing method.—The word “shall” as used in this section, cannot be presumed to mean that there must be legislation after the adoption of the Constitution, prescribing the method of securing a trial by jury of 12 men in a court of record. *Atlantic, etc., R. Co. v. South-Bound R. Co.*, 57 S. C. 317, 35 S. E. 553, 556.

And act may grant right to condemn land without providing tribunal to hear question.—An act granting a corporation the right to condemn lands, is not unconstitutional, in that it does not provide some tribunal to determine any question made by the landowners as to the right of the corporation to condemn. *Riley v. Charleston Union Station Co.*, 71 S. C. 457, 51 S. E. 485, 489, 110 Am. St. Rep. 579, 10 L. R. A. (N. S.) 909, 11 L. R. A. (N. S.) 942, 22 L. R. A. (N. S.) 8, 36, 47, 75, 87, 123, Ann. Cas. 15A, 83.

Incorporation of railroad does not grant right of way.—In view of this section, a law incorporating a railroad does not give any presumptive grant or right of way through lands over which railroad might be constructed. *Willard v.*

Southern Ry. Co., 158 S. C. 522, 155 S. E. 833, 836.

But a statute providing for condemnation of land by railroads for right of way, is not in conflict with this section.—*Paris Mountain Water Co. v. Greenville*, 110 S. C. 36, 96 S. E. 545, 551.

And railway failing to comply with statute will be enjoined from building road.—A railroad company, having failed to comply with the statutes of the state, in that it had failed to condemn plaintiff's land, will be enjoined from building its road across the railway of plaintiff. *Wilson v. Alderman & Sons Co.*, 69 S. C. 176, 48 S. E. 81, 84.

And in view of this section, a railroad cannot acquire a right of way by adverse use. *Carolina, etc., Ry. Co. v. Alexander*, 155 S. C. 91, 151 S. E. 893, 894.

Power of eminent domain resides in state of right and by necessity and constitution merely affirms power and limits its exercise. *Jennings v. Sawyer*, 182 S. C. 427; 189 S. E. 746.

Statutes fixing procedure for condemning rights of way for state highways valid hereunder. *Jennings v. Sawyer*, 182 S. C. 427; 189 S. E. 746.

Section 21. Provisions not self-executing.—The General Assembly shall enforce the provisions of this Article by appropriate legislation.

This section is simply intended to mean that, where necessary, legislation should be enacted. *Becker v. Atlantic, etc., R. Co.*, 128 S. C. 131, 121 S. E. 476, 478.

Statute allowing circuit judge to say whether grounds of appeal are sufficient is unconstitutional.—Where the

right of trial by jury is provided for on appeal, it satisfies this section, but an act allowing circuit judge to say if grounds of such appeal are sufficient is unconstitutional. *South Carolina, etc., Ry. v. Ellen*, 95 S. C. 68, 78 S. E. 963, 964, Ann. Cas. 15B, 1042.

ARTICLE X.

Finance and Taxation.

Section 1. Taxation and assessment.—The General Assembly shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe regulations to secure a just valuation for taxation of all property, real, personal and possessory, except mines and mining claims, the products of which alone shall be taxed, and also excepting such property as may be exempted by law for municipal, educational, literary, scientific, religious or charitable purposes: *Provided, however*, That the General Assembly may impose a capitation tax upon such domestic animals as from their nature and habits are destructive of other property: *And provided, further*, That the General Assembly may provide for a graduated tax on incomes, and for a graduated license on occupations and business. *Provided, Further*, That the General Assembly may provide by law for the assessment of all intangible personal property, including moneys, credits,

bank deposits, corporate stocks, and bonds, at its true value for taxation for State, County and municipal purposes or either thereof: *Provided*, That the total rate of taxation imposed thereon shall never exceed one-half of one per centum of the actual value of such intangible property: *Provided, Further*, That such intangible personal property shall not be subject to the three mill levy provided by Section 10, Article 11, of this instrument or to any other general or special tax levy, except such as is especially provided by the General Assembly by the authority and within the limitation of this provision; nor shall such intangible personal property be considered a part of 'taxable property,' as such term is used in this instrument, of the State or any subdivision thereof

See Const. 1868, IX, 1.

Amended by a joint resolution and an act: 1930 (36) 1349; 1932 (37) 1126. See foreword on page 1359 of this volume.

See § 13 of this article, and the note thereto.

See sect. 2569 and notes thereunder.

Section does not restrict use of tax as police power.—This section, requiring a uniform and equal rate of taxation and providing that "the General Assembly may provide * * * for a graduated license upon occupations and business," does not require that license tax on occupations falling within the police power, regulation, such as that of an emigrant agent, should be graduated. *State v. Reeves*, 112 S. C. 383, 99 S. E. 841, 24 A. L. R. 1413.

See §§ 1377, 1378, as to licensing emigrant agents, and the note thereto.

Citizens may not raise question of failure to tax other parties in action for recovery of taxes paid.—The fact that other taxpayers owning property similar to plaintiff's were not required, by the taxing authorities, to return it for taxation, was not ground for plaintiff's recovery from the county treasurer of taxes collected from her on such property, under § 2808 providing for the recovery of taxes wrongfully collected. *Fuller v. Payne*, 96 S. C. 471, 81 S. E. 176.

Nature of taxable property.—Where taxable gasoline is mixed in a tank with non-taxable gasoline to the extent of 30 per cent., this section authorizes the tax commission to tax 30 per cent. of all the sales as the gasoline comes from the reservoir, the seller not being allowed to treat sales up to 70 per cent. of the contents as non-taxable. *Charleston Oil Co. v. Carter*, 131 S. C. 466, 128 S. E. 8.

Tax on gasoline imported into state and stored does not impose property tax within provision requiring uniformity. *Gregg Dyeing Co. v. Query*, 166 S. C. 117, 164 S. E. 588.

An official assessment is prerequisite to constitute a legal tax. See this catchline under art. 1, § 6.

But town may not be authorized to make assessments for taxation.—An act

authorizing a town to make assessments for taxation, is repugnant to this section, providing that the General Assembly "shall provide by law for a uniform and equal rate of assessment," and art. 3, § 29, providing that all taxes shall be laid upon the "actual" value of property, as such provisions permit of but the one assessment, which the law requires to be made by state officers. *Germania Sav. Bank v. Darlington*, 50 S. C. 337, 27 S. E. 846, 28 L. R. A. (N. S.) 149, 29 L. R. A. (N. S.) 183, Ann. Cas. 13E, 86.

Railway property may be assessed at higher per cent. of value than other property.—Where railroad property was assessed at 80 per cent of its real value while other property in the state was only taxed at from 50 to 60 per cent of its value, it is not such evidence of the intention of the board of equalization to violate this section as to warrant the interference of the court. *Chamberlain v. Walter*, 60 F. 738.

Tax on railroads to pay railroad commissioner's salary is within section.—The act of 1881, § 41, requiring all railroad companies in the state to contribute to the salary and expenses of the state railroad commissioner, is a tax so imposed as to be uniform according to this constitutional provision. *Charlotte, etc., R. Co. v. Gibbes*, 27 S. C. 385, 4 S. E. 49, 89 Am. St. Rep. 614, 634, 52 L. R. A. 372. This act is no longer in force. The practitioner is referred to § 8201 and the note thereto.—Ed. note.

As is an act requiring townships to pay for bridge preference.—An act providing for a road and bridge improvement bond issue by Charleston County, and requiring that the townships requesting road or bridge preference pay one-third of cost thereof, is not, in imposing such additional burden, violative of this section, providing for uniform taxation, the counties and townships being separate entities in view of art. 7, § 11, and the tax being imposed on counties and not on townships; even if it

had been imposed on townships, uniformity in the particular township would have satisfied the Constitution. *Nettles v. Cantwell*, 112 S. C. 24, 99 S. E. 765.

Provision that general assembly "may" provide for graduated license tax on occupations and business is not mandatory. *Carolina Music Co. v. Query*, 192 S. C. 308, 6 S. E. (2d) 473.

Taxing different classes on different basis is constitutional.—A city ordinance requiring persons in certain occupations and professions to pay a license or privilege tax, which is uniform as to the members of each class or occupation on which it operates, is not in violation of this section requiring such taxes to be just, in that the different classes are not taxed alike. *Hill v. City Council*, 59 S. C. 396, 38 S. E. 11, Ann. Cas. 12D, 879, 24 A. L. R. 942.

A city ordinance placing a license tax on all persons lending money except banks, which is different from the license tax on banks, does not violate this section. *Cowart v. City Council*, 67 S. C. 35, 45 S. E. 122, 129 Am. St. Rep. 281, 11 L. R. A. (N. S.) 638, 17 L. R. A. (N. S.) 898, Ann. Cas. 14D, 1197, 24 A. L. R. 942.

In order to comply with provision of the constitution as to graduation, it is not necessary that the rate of the tax be graduated. The constitution is satisfied if the amount of tax be graduated in accordance with amount of income. Determination of amount of income that shall be wholly exempted and method and ratio of graduation were left by constitution to discretion of legislature. *Marshall v. South Carolina Tax Commission*, 178 S. C., 57; 182 S. E., 96.

Statute imposing tax on sale of electric power, but exempting sale of current upon which generation tax has been paid, does not violate requirements of uniformity. *South Carolina Power Co. v. South Carolina Tax Commission*, 52 F. (2d) 515.

Graduated license tax on operators of chain stores, though exempting gasoline filling stations and though applicable only to stores in incorporated cities and towns, is not invalid on ground classification is palpably arbitrary. *Southern Grocery Stores, Inc., v. South Carolina Tax Commission*, 55 F. (2d) 931.

Municipal purpose.—A "municipal purpose," within this provision is a "public or governmental purpose", as distinguished from a "private purpose", a purpose intended to embrace some of the functions of government, local or general; word "municipal" being frequently used in connection with cities and towns, but its meaning is much more extensive. *Ellerbe v. David*, 193 S. C. 332, 8 S. E. (2d) 518.

Charitable purpose.—A "charitable

purpose", within this provision is an "eleemosynary purpose", and, the word "charitable" means pertaining to almsgiving or relief of poor, springing from or intended for charity; pertaining to or characterized by charity, benevolence, and kindness; also eleemosynary. *Ellerbe v. David*, 193 S. C. 332, 8 S. E. (2d) 518.

Joint resolution exempting from taxation private property of hail sufferers of Marlboro county, who resided in certain school districts, cannot be upheld on ground that for a charitable purpose or municipal purpose. *Ellerbe v. David*, 193 S. C. 332, 8 S. E. (2d) 518.

This section, permitting exemption of property for "municipal purposes" embraces property exempted for county purposes. *Duke Power Co. v. Bell*, 156 S. C. 299, 152 S. E. 865.

Where part of building is exempt the whole may not be sold for taxes.—Where municipal property used exclusively for public purposes is exempt from taxation the provisions of an act authorizing the sheriff to sell property on which taxes have not been paid, and giving to the purchaser a fee-simple title thereto, cannot be enforced against a city hall, part of which is used exclusively for public purposes. *Columbia v. Tindal*, 43 S. C. 547, 22 S. E. 341, 132 Am. St. Rep. 320, L. R. A. 1915A, 1119, 3 A. L. R. 1453.

Exemption of county bonds is constitutional.—Under this section, providing that the General Assembly may exempt such property from taxation as may be exempted by law for municipal and other named purposes, and § 4, providing that municipal property used exclusively for public purposes shall be exempt from taxation, an act authorizing a county to issue bonds to refund its indebtedness, and providing that such bonds shall be exempt from taxation, is constitutional. *Chester County v. White Bros.*, 70 S. C. 433, 50 S. E. 28, 132 Am. St. Rep. 319.

As to tax exemption of municipal bonds see § 2578, and the note thereto.

As is exemption of canal company except for State purposes.—An act exempting a canal company taking over a canal formerly owned and operated by the State from the payment of taxes except for State purposes, is not in violation of this section. *Columbia Water Power Co. v. Campbell*, 75 S. C. 34, 54 S. E. 833.

But exemption of bank funds invested in city bonds violates this section.—An act declaring that so much of the capital stock or funds of any bank located within a city as shall be invested in the city's bonds shall be exempt from county taxation, even if construed as extending to the tax to be paid by the shareholders, violates this section, providing

for a uniform and equal rate of assessment and taxation. *Carolina Nat. Bank v. Spigner*, 106 S. C. 185, 90 S. E. 748.

Section does not forbid graduated automobile tax in any county.—This and the following section requiring equality and uniformity in taxation, do not forbid the imposition of a license tax on all vehicles owned by residents of a designated county, the amount of which differs for different vehicles. *State v. Touchberry*, 121 S. C. 5, 113 S. E. 345.

Section 2437 is not violative of this section.—Section 2437 providing for a graduated tax on incomes, is not in violation of this section, requiring the Legislature to prescribe regulations to secure a just valuation for taxation for all property, but permitting the General Assembly to provide for a graduated tax on incomes, since taxes on incomes are excepted from the requirement of a uniform and equal rate of assessment and taxation on all property. *Alderman v. Wells*, 85 S. C. 507, 67 S. E. 781, 27 L. R. A. (N. S.) 864, 21 Ann. Cas. 193, Ann. Cas. 13C, 1001, 11 A. L. R. 314.

And § 2527 does not violate section.—An act imposing an occupation tax on dealers in tobacco products (§ 2527), to be paid by stamps affixed to the package in which the product is retailed, graduated according to the retail price, but providing that packages once stamped shall not require further stamps on resales, is not in violation of the rule of uniform taxation imposed by this section. *Doscher v. Query*, 21 F. (2d) 521.

As to tax upon tobacco and its products see § 2527, and the note thereto.

The pay-as-you-go act, authorizing levy of gasoline tax and automobile license tax, is not in conflict with this section. *Briggs v. Greenville County*, 137 S. C. 288, 135 S. E. 153.

See § 2505 as to the tax on sales of gasoline, and the note thereto.

Statute requiring landowners to clear streams not in conflict with section.—A statute requiring that all landowners in certain counties should, during the months of May and August of each year, remove from the running streams of water on their land all trash, trees, rafts, and timbers therein, and making a violation of such requirement a misdemeanor, is not considered as a measure for taxation, and is therefore not in conflict with this section. *State v. Tucker*, 56 S. C. 516, 35 S. E. 215, 1 A. L. R. 727. See also § 1215 and note thereto.

An act of the legislature authorizing city authorities to assess two-thirds of the cost of paving the roadway in a street on the abutting land is in conflict with this section, providing that taxes must be uniform in respect to persons and property within the jurisdiction of the body imposing the same. *Mauldin v. City Council*, 42 S. C. 293, 20 S. E. 842, 46 Am. St. Rep. 723, 27 L. R. A. 284, 58 L. R. A. 355, 28 L. R. A. (N. S.) 1168.

Statutes imposing interest at rate of one per cent per month on delinquent Orangeburg County taxes void. *Webster v. Williams*, 183 S. C. 368; 191 S. E. 51.

As respects validity under constitutional prohibition against enactment of special laws, statutes imposing interest at rate of one per cent per month on delinquent Orangeburg County taxes could not be sustained as tax on theory of classification of taxpayers as delinquent and nondelinquent, where statutes did not comply with constitutional provisions relating to manner in which property taxes should be imposed. *Webster v. Williams*, 183 S. C. 368; 191 S. E. 51.

See generally. *Stehmeyer v. City Council*, 53 S. C. 259, 31 S. E. 322, 78 Am. St. Rep. 236, 271, 61 L. R. A. 55, 3 L. R. A. (N. S.) 819, 28 L. R. A. (N. S.) 1133, Ann. Cas. 16B, 527.

Section 2. Expenses of state government.—The General Assembly shall provide for an annual tax sufficient to defray the estimated expenses of the State for each year, and whenever it shall happen that the ordinary expenses of the State for any year shall exceed the income of the State for such year the General Assembly shall provide for levying a tax for the ensuing year sufficient, with other sources of income, to pay the deficiency of the preceding year together with the estimated expenses of the ensuing year.

See Const. 1868, IX, 3.

The legislature cannot make appropriations except for expenses of fiscal year for which revenues are imposed.—*State ex rel. Edwards v. Osborne*, 193 S. C. 158, 7 S. E. (2d) 526.

A method prescribed by Constitution for legislative action, as in meeting state deficit, is exclusive, in view of

maxim "expressio unius est exclusio alterius" and fundamental principal that legislative power is unlimited except to extent that it is circumscribed by Constitution. *State ex rel. Edwards v. Osborne et al.*, 195 S. C. 295, 11 S. E. (2d) 260.

Section requires state debts to be set-

tled within year next after creation. — While the provisions of the State Constitution give latitude to the General Assembly as to indebtedness for ordinary and current business, yet, by this section, it requires, such indebtedness to be wiped out by money received from taxation in the year of, or the next year to, the creation of such indebtedness. *Duncan v. Charleston*, 60 S. C. 532, 39 S. E. 265, 273, 37 L. R. A. (N. S.) 1069, Ann. Cas. 12D, 660.

And appropriation for two years violates section.—The Warehouse Act, in so far as it makes appropriation for two years, violates this section providing for an annual tax sufficient only to defray the estimated State expenses for each year and for any existing deficiency. *State v. McCown*, 92 S. C. 81, 75 S. E. 392, 393, 42 L. R. A. (N. S.) 222, Ann. Cas. 13C, 1231, Ann. Cas. 16D, 25, 34, 14 A. L. R. 1156, 23 L. R. A. 1481.

"Pay-as-you-go" act does not conflict with section.—The pay-as-you-go act, appropriating a fund for reimbursement to counties advancing money for road construction covering a period of years, is not in conflict with this section, forbidding continuing appropriations. *Briggs v. Greenville County*, 137 S. C. 288, 135 S. E. 153; *State v. Mooror*, 152 S. C. 455, 150 S. E. 269.

Highway certificates of indebtedness. —Where highway certificates of indebtedness proposed to be issued by state officials pursuant to general state appropriation bill for fiscal year beginning July 1, 1939, for alleged purpose of us-

ing proceeds from sale of certificates for current expenses of the state were payable primarily out of annual collections of gasoline tax and motor vehicle license tax, and certificates would be payable over a 13-year period, proposed issue was invalid under constitutional provision respecting expenses of state government. *State ex rel. Edwards v. Osborne*, 193 S. C. 158, 7 S. E. (2d) 526.

Diversion act.—The act appropriating \$2,000,000 of revenues from state gasoline tax and motor vehicle license fees to payment of state's deficit and general expenses is invalid as violating this provision. *State ex rel. Edwards v. Osborne et al.*, 195 S. C. 295, 11 S. E. (2d) 260.

Section 2437 does not violate this section. — Section 2437 providing for a graduated tax on incomes, is not in violation of this section, providing that the General Assembly shall provide for an annual tax sufficient to defray the estimated expenses of the State for a year, as attempting to provide for taxation for more than one year, regardless of the estimated expenses of the State for years in which it is collected, since the tax is levied annually, and is applied to the expense of the State in the year in which it is collected. *Alderman v. Wells*, 85 S. C. 507, 67 S. E. 781, 21 Ann. Cas. 193, 27 L. R. A. (N. S.) 864.

The statute imposing license tax of \$15 per year for each music producing machine operated by coin of 5 cents or more does not violate this provision. *Carolina Music Co., Inc., et al. v. Query, et al.*, 192 S. C. 309, 6 S. E. (2d) 473.

Section 3. Tax shall be levied in pursuance of law.—No tax shall be levied except in pursuance of a law which shall distinctly state the object of the same: to which object the tax shall be applied.

See Const. 1868, IX, 4.

"Law" means act of the Legislature.—This section, providing that no tax shall be levied except in pursuance of a law which shall state the object of the same, means an act of the general Legislature, unless there is a provision of the Constitution that is self-executing. *Southern Ry. Co. v. Kay*, 62 S. C. 28, 39 S. E. 785.

Requiring person to pay back taxes is not "levying" as meant in this section. —Where the purposes for which municipal taxes were levied for the past 13 years have been accomplished, the city council may nevertheless lawfully require the payment of any taxes respondents may owe for those years, it not being true that a tax is ordained or created, that is, "levied," in the sense in which the word is used in this section, such levy having been made by the city council for each current year. *Milster v. Spartanburg*, 68 S. C. 26, 46 S. E. 539, 541, 105 Am. St. Rep. 123, 29 L. R. A.

(N. S.) 183, Ann. Cas. 13C, 899.

Under this section an assessment is essential to constitute a liability for an ad valorem tax. *State v. Cheraw, etc., R. Co.*, 54 S. C. 564, 32 S. E. 691.

Drainage acts are not amenable to limitations on taxing power.—Drainage acts providing for an equitable assessment of lands to be drained, do not violate Const. art. 1, § 6, requiring taxes to be fixed in proportion to the value of the land in the district, or art. 3, § 29, requiring taxes to be made upon actual value, or this section requiring taxes to be levied pursuant to law, or art. 10, § 13, providing for one assessment for all taxes; since the drainage acts provide for assessments, as distinguished from taxes. *Jackson v. Breeland*, 103 S. C. 184, 88 S. E. 128.

Discriminatory acts of tax collectors do not nullify a tax statute.—There is a marked distinction, where the discrim-

inatory classification is created by the act making the appropriation, and when such classification arises from the manner in which the provisions of the statute are administered by the fiscal agents in assessing property subject to taxation, and where the classification mentioned in the complaint would have rendered the statute, under which the appropriation is made, null and void if authorized by the Legislature, it cannot be successfully contended that it had such effect when adopted by the fiscal agents of the county. *Fuller v. Payne*, 96 S. C. 471, 81 S. E. 176, 179.

Bond issued pursuant to an illegal election are void.—Where an act provides that a proposed issue of bonds in a county must be approved by a majority of the voters of the county at an election to be held under the rules and regulations governing Democratic primaries, and where the voters at the election were not required to exhibit their registration certificates and tax receipts as required by Const. art. 2, §§ 3, 11, and §§ 2298, 2307, the issue was invalid in view of Const. art. 1, § 7, and this section. *Dial v. Watts*, 138 S. C. 468, 136 S. E. 891.

The statute imposing license tax of \$15 per year for each music producing machine operated by coin of 5 cents or more does not violate this provision. *Carolina Music Co., Inc. v. Query, et al.*, 192 S. C. 309, 6 S. E. (2d) 473.

Act providing for operation of ferry sufficiently states its object.—An act providing for an annual levy of 2½ mills for payment of indebtedness incurred for construction and operation of a ferry by a county, does not violate this section prohibiting a tax levy, except in pursuance of law distinctly stating its object. *Poulnot v. Cantwell*, 129 S. C. 179, 123 S. E. 651.

Statute directing that certain revenues or taxes, levied and collected under existing laws, should be used in the payment of bonds to be issued under such

statute in the first instance, does not violate this section and is not a re-enactment of the taxes referred to. No tax is "levied" by statute in the sense that word is used in this section. *Clarke v. South Carolina Public Service Authority et al.*, 177 S. C., 399; 181 S. E. 476.

As does an act "to raise revenue by a tax on income."—The title of act March 5, 1897 (§ 2437) "an act to raise revenue for the support of the State government by the levy and collection of a tax on income," is not in violation of this section since it distinctly states the object to which the tax shall be applied. *Alderman v. Wells*, 85 S. C. 507, 67 S. E. 781, 27 L. R. A. (N. S.) 864, 21 Ann. Cas. 193, Ann. Cas. 13C, 1001, 11 A. L. R. 314.

Statutes imposing interest at rate of one per cent per month on delinquent Orangeburg County taxes void. *Webster v. Williams*, 183 S. C. 368; 191 S. E. 51.

As respects validity under constitutional prohibition against enactment of special laws, statutes imposing interest at rate of one per cent per month on delinquent Orangeburg County taxes could not be sustained as tax on theory of classification of taxpayers as delinquent and nondelinquent, where statutes did not comply with constitutional provisions relating to manner in which property taxes should be imposed. *Webster v. Williams*, 183 S. C. 368; 191 S. E. 51.

Diversion.—Sections 99 and 100 of the General State Appropriation bill for the fiscal year beginning July 1, 1939, are unconstitutional as in controvention of this provision, since such sections authorize diversion of revenues collected for a specific purpose to entirely different purposes. *State ex rel. Edwards v. Osborne*, 193 S. C. 158, 7 S. E. (2d) 526.

The act appropriating \$2,000,000 of revenues from state gasoline tax and motor vehicle fees to payment of state's deficit and general expenses violates this provision. *State ex rel. Edwards v. Osborne et al.*, 195 S. C. 295, 11 S. E. (2d) 260.

Section 4. Property exempt from taxation.—There shall be exempted from taxation all County, township and municipal property used exclusively for public purposes and not for revenue, and the property of all schools, colleges and institutions of learning, all charitable institutions in the nature of asylums for the infirm, deaf and dumb, blind, idiotic and indigent persons, except where the profits of such institutions are applied to private uses; all public libraries, churches, parsonages and burying grounds; but property of associations and societies, although connected with charitable objects, shall not be exempt from State, County or municipal taxation: *Provided*, That as to real estate this exemption shall not extend beyond the buildings and premises actually occupied by such schools, colleges, institutions of learning, asylums, libraries, churches, parsonages and burial grounds, although connected with charitable objects.

See Const. 1868, IX, 5.

As to exemption from taxes, see § 2578, and the note thereto.

Under the Constitution, question whether an act is for a public purpose is primarily one for the legislature, and the Supreme Court will not interfere with the legislative finding unless the determination of that body is clearly wrong. *McNulty v. Owens, Mayor, et.*, 188 S. C. 377, 199 S. E. 425.

All the property in the State is liable to be taxed except such as is specially exempt by this section. *Germania Sav. Bank v. Darlington*, 50 S. C. 337, 27 S. E. 846, 28 L. R. A. (N. S.) 149, 29 L. R. A. (N. S.) 183, Ann. Cas. 13E, 86.

Parsonage which pastor rents is exempt. — Under this section, providing that churches and parsonages shall be exempt from taxation, a parsonage belonging to a church, which the pastor rents, and collects and applies the rent to his salary or the rent of another residence, does not lose its character as a parsonage, and is exempt from taxation. *Protestant Episcopal Church v. Prioleau*, 63 S. C. 70, 40 S. E. 1026, 57 L. R. A. 606, 39 L. R. A. (N. S.) 440, 13 A. L. R. 1205.

Exemption of church from taxation does not include exemption from assessment for paving. — Exemption of churches from taxation by direct provision of this section does not include exemption from assessment for pavement in front of church property, for an assessment is not a tax within the meaning of the Constitution. *Wesley M. E. Church v. Columbia*, 105 S. C. 303, 89

S. E. 641, 17 A. L. R. 1059.

See *Epworth Orphanage v. Wilson*, 185 S. C. 243, 193 S. E. 644, and *Strong v. City of Sumter*, 185 S. C. 203, 193 S. E. 649.

Exemption of county bonds is constitutional. See this catchline under § 1 of this article.

Excise tax.—Constitutional exemption from taxation of county, township and municipal "property" used exclusively for public purposes, does not exempt municipalities from excise tax. *City of Greenville et al. v. Query, et. al.*, 166 S. C. 281, 164 S. E. 844. Affirmed in 286 U. S. 472, 76 L. Ed. 1232, 52 S. Ct. 631.

Power tax.—Exemption of municipalities generating electricity from operation of statute imposing tax on production and sale of electric power is authorized by this section. *South Carolina Power Co. v. South Carolina Tax Commission*, 52 F. (2d) 515.

Section does not forbid graduated automobile tax in county. See this catchline under § 1 of this article.

Public properties used for private purposes in addition to their public uses are not exempt from taxation. *Bank v. Greenville County*, 174 S. C., 256; 177 S. E., 369.

But where city and housing authority undertook a slum clearance and low-cost housing project, the property to be used in carrying out the project was "municipal property" within meaning of this section, also property used exclusively for "public purposes", hence exempt from taxation. *McNulty v. Owens, Mayor, et al.*, 188 S. C. 377, 199 S. E. 425.

Section 5. Taxes may be levied for corporate purposes—share of stockholders—limit of bonded debt.—The corporate authorities of counties, townships, school districts, cities, towns and villages may be vested with power to assess and collect taxes for corporate purposes; such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same. All shares of stockholders in any bank or banking association located in this State, whether now or hereafter incorporated, or organized under the laws of this State or of the United States, shall be listed at their true value in money, and taxed for municipal purposes in the city, ward, town or incorporated village, where such bank is located, and not elsewhere: *Provided*, That the words "true value in money" as used in line 12 of this Section shall be so construed as to mean and include all surplus or extra moneys, capital, and every species of personal property of value owned or in possession of any such bank: *Provided*, A like rule of taxation shall apply to the stockholders of all corporations other than banking institutions. And the General Assembly shall require that all the property, except that herein permitted to be exempted within the limits of municipal corporations, shall be taxed for corporate purposes and for the payment of debts contracted under authority of law. The bonded debt of any county, township, school district, municipal corporation or political

division or subdivision of this State shall never exceed eight per centum of the assessed value of all the taxable property therein. And no county, township, municipal corporation or other political division of this State shall hereafter be authorized to increase its bonded indebtedness if at the time of any proposed increase thereof the aggregate amount of its already existing bonded debt amounts to eight per centum of the value of all taxable property therein as valued for State taxation. And wherever there shall be several political divisions or municipal corporations covering or extending over the territory, or portions thereof, possessing a power to levy a tax or contract a debt, then each of such political divisions or municipal corporations shall so exercise its power to increase its debt under the foregoing eight per cent limitation that the aggregate debt over and upon any territory of this State shall never exceed fifteen per centum of the value of all taxable property in such territory as valued for taxation by the State: *Provided*, That nothing herein shall prevent the issue of bonds for the purpose of paying or refunding any valid municipal debt heretofore contracted in excess of eight per centum of the assessed value of all the taxable property therein.

See Const. 1868, IX, 8.

"True value in money" referred to in lines 9 and 10 hereof may be found in line 7 hereof. Arrangement of lines in original and this proof not same.

Provided, further, that the limitations imposed by this section shall not apply to the Charleston School District, comprised within the present limits of the City of Charleston, such school district being hereby expressly authorized to vote bonds to an amount not exceeding two hundred and fifty thousand (\$250,000.00) dollars, the proceeds of such bonds to be applied solely to the erection and maintenance of school buildings in said district, under such restrictions and limitations as the General Assembly may prescribe, and where the question of incurring such indebtedness is submitted to the qualified electors of said school district, as provided in the Constitution, upon the question of bonded indebtedness.

Amended by a joint resolution and an act: 1916 (29) 1238; 1917 (32) 225. See FOREWORD on page 1159 of this volume.

Provided, further, That the limitations imposed by this section shall not apply to the school district of the town of Laurens, said school district being hereby expressly authorized to vote bonds to an amount not exceeding twelve (12) per cent of the value of all taxable property in such territory as valued for taxation by the State under such restrictions and limitations as the General Assembly may prescribe, and where the question of incurring such indebtedness is submitted to the qualified electors of said school district, as provided in the Constitution, upon the question of bonded indebtedness.

Amended by a joint resolution and an act: 1920 (31) 1731; 1921 (32) 16. See FOREWORD on page 1159 of this volume.

Provided, further, That the limitations imposed by this section shall not apply to bonded or other indebtedness of the Santee Bridge District comprising the territory of the Counties of Charleston, Berkeley and Williamsburg, and such indebtedness shall not be considered in determining the

power of any other municipal corporation or political division or subdivision to incur debt.

Amended by a joint resolution and an act: 1920 (31) 1724; 1921 (32) 27. See FOREWORD on page 1159 of this volume.

Provided, further, That the limitations imposed by this section shall not apply to School District Hunter No. 5, of Laurens County, the State of South Carolina, said school district being hereby authorized to issue bonds in an amount not to exceed twelve (12) per cent of the value of all taxable property in the territory embraced in said school district as valued or assessed for taxation by the State under such restrictions and limitations as the General Assembly may prescribe, and where the question of incurring such indebtedness is submitted to the qualified electors of said school district as provided in the Constitution upon the question of bonded indebtedness.

Amended by a joint resolution and an act: 1920 (31) 1729; 1921 (32) 37. See FOREWORD on page 1159 of this volume.

Provided, further, That the limitations imposed by this Section shall not apply to Laurens County, such county being hereby expressly authorized to vote bonds to an amount not exceeding twenty per cent of the value of all taxable property within the limits of Laurens County as valued for taxation by the State; the proceeds of such bonds to be applied to the construction or maintenance of roads, bridges and public buildings within said county: *Provided, further,* That this limitation shall not be construed to affect or limit power of other political divisions or municipal corporations covering or extending over the territory of Laurens County or portions thereof, possessing a power to levy or contract a debt as now provided by law, or as may hereafter be provided by law.

Amended by a joint resolution and an act: 1920 (31) 1730; 1921 (32) 47. See FOREWORD on page 1159 of this volume.

Provided, further, That the limitations imposed by this Section shall not apply to Lancaster School District within the County of Lancaster and embracing the Town of Lancaster, such school district being hereby expressly authorized to vote bonds to an amount not exceeding one hundred fifty thousand (\$150,000.00) dollars in excess of the bonds already issued and authorized. The proceeds of such bonds to be applied solely to the purchase of additional real estate for school purposes, the erection, maintenance, improvements and equipment of school buildings in said school district under such restrictions and limitations as the General Assembly may prescribe, and where the question of incurring such indebtedness is submitted to the qualified electors of said school district, as provided in the Constitution upon the question of bonded indebtedness.

Amended by a joint resolution and an act: 1920 (31) 1733; 1921 (32) 83. See FOREWORD on page 1159 of this volume.

Provided, further, That the limitations imposed by this Section shall not apply to the Charleston School District, comprised within the present limits of the City of Charleston, such school district being hereby expressly authorized to vote bonds to an amount not exceeding one million (\$1,000,-

000.00) dollars, the proceeds of such bonds to be applied solely to the erection and maintenance of school buildings in said district, under such restrictions and limitations as the General Assembly may prescribe, and where the question of incurring such indebtedness is submitted to the qualified electors of said school district, as provided in the Constitution, upon the question of bonded indebtedness.

Amended by a joint resolution and an act: 1920 (31) 1727; 1921 (32) 89. See FOREWORD on page 1159 of this volume.

That the limitations imposed in Section 7, of Article VIII, and in Sections 5 and 6 of Article X of the Constitution of the State of South Carolina, shall not apply to the bonded indebtedness incurred by the County of Richland, when the proceeds of any bonds issued by said County are applied exclusively to the purpose of erection, improvement and maintenance of a public hospital and court house or in payment of debts incurred, and when the question of incurring such indebtedness is submitted to the qualified electors of said county, as provided by law.

Amended by a joint resolution and an act: 1920 (31) 1721; 1921 (32) 156. See FOREWORD on page 1159 of this volume.

Provided, That the limitations imposed by Section 5, Article X, of the Constitution of the State of South Carolina, shall not apply to the bonded indebtedness of the Counties of Allendale and McCormick, when the proceeds of such bonds are applied exclusively for the building of a court house or jail, or for building, improving, or repairing public highways and bridges, nor shall the limitations of this Constitution, as contained in said Section 5, Article X, apply to any township, school district, municipal corporation or other political subdivision of either of the said counties, when the proceeds of such bonds are used for the purposes hereinabove named: *Provided*, The question of incurring such bonded indebtedness is submitted to the qualified electors of the said counties, respectively, and a majority of those voting in such election or elections shall vote in favor thereof; but neither of the said Counties of Allendale or McCormick, nor any township, school district, municipal corporation or other political subdivision of either of said counties, shall be authorized to incur a bonded indebtedness exceeding fifteen (15) per centum of the assessed value of all the taxable property therein.

Amended by a joint resolution and an act: 1920 (31) 1734; 1921 (32) 143. See FOREWORD on page 1159 of this volume.

The corporate authorities of counties, townships, school districts, cities, towns and villages may be vested with power to assess and collect taxes for corporate purposes; such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same. All shares of the stockholders in any bank or banking association located in this State, whether now or hereafter incorporated, or organized under the laws of this State or of the United States, shall be listed at their true value in money, and taxed for municipal purposes in the city, ward, town or incorporated village, where such bank is located, and not elsewhere: *Provided*, That the words "true value in money," as used in line 12 (line 12 of original MS and line 7 as printed) of this Section shall be so construed as

to mean and include all surplus or extra moneys, capital and every species of personal property of value owned or in possession of any such bank: *Provided*, A like rule of taxation shall apply to the stockholders of all corporations other than banking institutions. And the General Assembly shall require that all the property, except that herein permitted to be exempted within the limits of municipal corporations, shall be taxed for corporate purposes and for the payment of debts contracted under authority of law. The bonded debt of any county, township, school district, municipal corporation or political division or subdivision of this State shall never exceed eight per centum of the assessed value of all the taxable property therein. And no county, township, municipal corporation or other political division of this State shall hereafter be authorized to increase its bonded indebtedness if at the time of any proposed increase thereof the aggregate amount of its already existing bonded debt amounts to eight per centum of the value of all taxable property therein as ascertained by the valuation for State taxation. And wherever there shall be several political divisions or municipal corporations covering or extending over the same territory, or portions thereof, possessing a power to levy a tax or contract a debt, then each of such political divisions or municipal corporations shall so exercise its power to increase its debt under the foregoing eight per centum limitation that the aggregate debt over and upon any territory of the State shall never exceed fifteen per centum of the value of all taxable property in such territory as valued for taxation by the State: *Provided*, That nothing herein shall prevent the issue of bonds for the purpose of paying or refunding any valid municipal debt heretofore contracted in excess of eight per centum of the assessed value of all taxable property therein: *Provided*, That the limitations imposed by Paragraph 5, Article X of the Constitution of the State of South Carolina, shall not apply to the bonded indebtedness of the County of Sumter.

Amended by a joint resolution and an act: 1920 (31) 1726; 1921 (32) 273. See FOREWORD on page 1159 of this volume.

Provided, further, That the limitations imposed by this Section (Art. 8, § 7) and by Section five (5) of Article Ten (10) of the Constitution shall not apply to bonded or other indebtedness of the Town of Bennettsville incurred for street or sidewalk improvements in cases where the corporate authorities of said town shall have levied or shall have determined to levy, special assessments on abutting property for the purpose of paying for the improvement (whether including or not including improvements at street intersections) and such indebtedness of the Town of Bennettsville shall not be considered in determining the amount of indebtedness permitted to be incurred by said town for other purposes, or by any other political or civil division or subdivision of the State for any purpose.

Amended by a joint resolution and an act: 1920 (31) 1717; 1922 (37) 916. See 1920 (31) 1713; 1921 (32) 96; 1922 (32) 821.

Provided, That the limitations imposed in Section 7, Article VIII, and by Section 5, of Article X, of the Constitution of the State of South Carolina shall not apply to the bonded indebtedness incurred by the City of Beaufort, when the proceeds of any bonds issued by said city are applied ex-

clusively to the purchase, erection, improvements and maintenance of streets and sidewalks where the abutting property owners are assessed as much as one-half the cost thereof, or for the purchase, construction and maintenance of waterworks, lighting plants, gas plants, sewerage system or for the payment of debts incurred, and when the question of incurring such indebtedness is submitted to the qualified electors of said municipality as provided by law.

Amended by a joint resolution and an act: 1922 (32) 1329; 1923 (33) 1. See FOREWORD on page 1159 of this volume.

Provided, That the limitations imposed in Paragraph 5, Article X, of the Constitution of the State of South Carolina shall not apply to the bonded debt of Beaufort.

Amended by a joint resolution and an act: 1922 (32) 1330; 1923 (33) 2.

Provided, further, That the limitations imposed by this Section shall not apply to School District No. 10, Cherokee County, such school district being hereby expressly authorized to vote bonds to an amount not exceeding \$300,000.00, the proceeds of such bonds to be applied solely for school purposes in said district, under such restrictions and limitations as the General Assembly may prescribe, and where the question of incurring such indebtedness is submitted to the qualified electors of said school district, as provided in the Constitution upon the question of bonded indebtedness.

Amended by a joint resolution and acts: 1922 (32) 1354; 1923 (33) 3, 4. See FOREWORD on page 1159 of this volume.

Provided, That the limitations imposed by this Section shall not apply to the School District of the City of Florence, in Florence County, South Carolina, such school district being hereby expressly authorized to vote bonds to an amount not to exceed twenty per cent of the value of all taxable property in the territory embraced in said school district, as valued or assessed for taxation by the State, the proceeds of such bonds to be applied solely to the erection, equipment and maintenance of schools and school buildings in said district, under such restrictions and limitations as the General Assembly may prescribe, and where the question of incurring such indebtedness is to be submitted to the qualified electors of said school district, as provided in the Constitution, upon the question of bonded indebtedness.

Amended by a joint resolution and an act: 1922 (32) 1398; 1923 (33) 7. See FOREWORD on page 1159 of this volume.

Provided, further, That the limitations imposed by this Section shall not apply to Due West School District No. 38, within the County of Abbeville and embracing the Town of Due West, such school district being hereby expressly authorized to vote bonds to an amount not exceeding seventy-five thousand (\$75,000.00) dollars, in excess of the bonds already issued and authorized, the proceeds of such bonds to be applied solely to the purchase of additional real estate for school purposes, the erection, maintenance, improvement and equipment of school buildings in said school district, under such restrictions and limitations as the General Assembly

may prescribe, and where the question of incurring such indebtedness is submitted to the qualified electors of said school district, as provided in the Constitution, upon the question of bonded indebtedness.

Amended by a joint resolution and an act: 1922 (32) 1291; 1923 (33) 8. See FOREWORD on page 1159 of this volume.

Provided, further, That the limitations imposed by these Sections (Art. 10, §§ 5 and 6) shall not apply to the Township of Christ Church Parish, in Charleston County, contained within the following area: Northeast by Awendaw Creek; southeast by the Atlantic Ocean and the Township of Sullivan's Island; southwest by Charleston Harbor, and northwest by the Wando River and the Berkeley County line, thus containing within the said area the Town of Mount Pleasant, S. C., such township being hereby expressly authorized to vote bonds to an amount not to exceed one hundred and fifty thousand (\$150,000.00) dollars, the proceeds of such bonds to be applied solely to the erection and maintenance of a railroad from a point in Berkeley County, in and through the Township of Christ Church Parish, in and through the town of Mount Pleasant, on Charleston Harbor, under such restrictions and limitations as the General Assembly may prescribe, and when the question of incurring said indebtedness is submitted to the qualified electors of said township, as provided in the Constitution, upon the question of bonded indebtedness.

Amended by a joint resolution and an act: 1922 (32) 1344; 1923 (33) 48. These provisions added to sections 5 and 6 of this article. See FOREWORD on page 1159 of this volume.

Provided, That the limitations imposed in Section 7, Article VIII, and by Section 5, Article X, of the Constitution of the State of South Carolina shall not apply to the bonded indebtedness incurred by the City of Spartanburg when the proceeds of any bonds issued by said city are applied exclusively to the purchase, erection, improvements and maintenance of streets and sidewalks, or for the purchase, construction and maintenance of waterworks, lighting plants, gas plants, sewerage systems, or for the payment of debts incurred, and when the question of incurring such indebtedness is submitted to the qualified electors of the said municipality as provided by law: *Provided,* That the amount of bonds issued hereunder shall not exceed fifteen per cent of the assessed valuation of property, in the City of Spartanburg.

Amended by a joint resolution and an act: 1922 (32) 1568; 1923 (33) 129. See FOREWORD on page 1159 of this volume.

Provided, That the limitations imposed in Paragraph 5, Article X, of the Constitution of the State of South Carolina shall not apply to the bonded indebtedness of the County of Beaufort, or of townships, school districts or other political subdivisions of said county.

Amended by a joint resolution and acts: 1922 (32) 1330; 1923 (33) 2; 1924 (33) 1055. See FOREWORD on page 1159 of this volume.

Provided, That the limitations imposed by these Sections (Art. 10 §§ 5 and 6) shall not apply to St. James Santee Township in Charleston County contained within the following area: north by Berkeley County line; east by Santee River; south by Atlantic Ocean and west by Awensdaw Creek.

Such Township being hereby expressly authorized to vote bonds to an amount not to exceed one hundred and twenty-five thousand (\$125,000.00) dollars, the proceeds of such bonds to be applied solely to the erection and maintenance of a railroad from a point in Berkeley County in and through the Township of St. James Santee, in and through the unincorporated village of McClellanville on Jeremy Creek, under such restrictions and limitations as the General Assembly may prescribe and when the question of incurring such indebtedness is submitted to the qualified electors of said township as provided in the Constitution upon the question of bonded indebtedness.

Amended by a joint resolution and an act: 1925 (34) 613; 1927 (35) 194. These provisions added to section 6 of this article also. See FOREWORD on page 1159 of this volume.

Provided, That the limitation imposed by Section 7, Article VIII, and Section 5 of Article X of the Constitution of the State of South Carolina, shall not apply to the bonded indebtedness of the Town of Conway, Horry County, when the proceeds of such bonds are applied exclusively for the building, erecting, establishing, repairing, extending or maintaining sidewalks, streets, street lighting, waterworks, lighting plants, storm sewers, drainage, sewerage system, fire departments, or public buildings for such town, or for any or either of such purposes, or for the payment of any indebtedness already incurred for any or either of such purposes; when the question of incurring such bonded indebtedness is submitted to the qualified electors of said municipality by the Town Council of said town, and a majority of those voting in such election or elections shall vote in favor thereof.

Amended by a joint resolution and an act: 1926 (34) 1367; 1927 (35) 46. See FOREWORD on page 1159 of this volume.

Provided, That the limitations imposed under Section 7 of Article VIII and Section 5 of Article X of the Constitution of the State of South Carolina, shall not apply to the bonded indebtedness incurred by the Town of Lancaster when the proceeds of any bonds issued by the said town are applied exclusively to the purchase, construction and maintenance of waterworks, construction and extension of the sewerage system, and for the purchase, construction and maintenance of streets and sidewalks where the abutting property owners are assessed as much as one-half the cost thereof, or for the payment of past indebtedness, and when the question of incurring such indebtedness is submitted to the qualified electors of said municipality as provided by law.

Amended by a joint resolution and an act: 1926 (34) 1378; 1927 (35) 59. See FOREWORD on page 1159 of this volume.

Provided, further, That the limitations imposed by this Section of the Constitution shall not apply to bonded or other indebtedness of the Town of McColl incurred for street or sidewalk improvements, in cases where corporate authorities of said town shall have levied or shall have determined to levy special assessments on abutting property for the purpose of paying for the improvements (whether or not including improvements at street intersections); and such indebtedness of the Town of McColl shall

not be considered in determining the amount of indebtedness permitted to be incurred by said town for other purposes, or by any other political or civil division or subdivision of the State for any purpose, and shall not exceed fifteen (15) mills of the assessed valuation of the property in said town.

Amended by a joint resolution and an act: 1926 (34) 1371; 1927 (35) 65. See FOREWORD on page 1159 of this volume.

Provided, further, That the restrictions and limitations imposed by this Section upon the purposes and the amounts of bonded debt and taxes shall not apply to Rock Hill School District No. 12, York County, said School District being hereby expressly authorized to issue bonds to an amount not exceeding eight hundred thousand (\$800,000.00) dollars, of which not exceeding three hundred thousand (\$300,000.00) dollars of bonds is hereby authorized to be issued for the purpose of constructing any building or buildings in said school district to be leased or sold by said school district to any educational institution or institutions in said school district, and said school district may levy taxes for the payment of said bonds: *Provided* That a proposition or propositions to issue such bonds shall first be submitted to and approved by the qualified electors of said school district in such manner as may be prescribed by the General Assembly.

Amended by a joint resolution and an act: 1926 (34) 1385; 1927 (35) 71. See FOREWORD on page 1159 of this volume.

Provided, further, That the limitations imposed by this Section shall not apply to Heath Springs School District No. 38 of Lancaster County, said school district being hereby authorized to issue additional bond in an amount not exceeding thirty thousand (\$30,000.00) dollars, and that the question of incurring such indebtedness be submitted to the qualified electors of said school district as provided in the Constitution upon the question of bonded indebtedness.

Amended by a joint resolution and an act: 1926 (34) 1383; 1927 (35) 75. See FOREWORD on page 1159 of this volume.

Provided, further, That the limitations imposed by this section shall not apply to Bishopville School District No. 1, of Lee County, said school district being hereby authorized to vote bonds to an amount not to exceed fifteen (15) per cent of the value of all taxable property in the territory embraced in said school district as valued for taxation by the State under such restrictions and limitations as the General Assembly may prescribe, and where the question of incurring such indebtedness is submitted to the qualified electors of said school district as provided in the Constitution upon the question of bonded indebtedness.

Amended by a joint resolution and an act: 1926 (34) 1384; 1927 (35) 87. See FOREWORD on page 1159 of this volume.

Provided, That the limitations imposed by Section 7, Article VIII, and Section 5, Article X, of the Constitution of the State of South Carolina, shall not apply to the Town of Dillon, when the proceeds of such bonds are applied exclusively for the building, establishing, erecting, repairing, extending, improving, paving or maintaining of sidewalks, streets, fire de-

partment, city or town hall and guard house for such town, or for any or either of such purposes, or for payment of any indebtedness already incurred for any or either of such purposes; and when the question of incurring such bonded indebtedness is submitted to the qualified electors of said municipality by the Town Council of said town, and a majority of those voting in such election or elections shall vote in favor thereof.

Amended by a joint resolution and an act: 1926 (34) 1369; 1927 (35) 111. See FOREWORD on page 1159 of this volume.

Provided, That the limitations imposed by this Section of the Constitution shall not apply to bonded or other indebtedness of the Town of Clio, said town being hereby expressly authorized to vote bonds to an amount not exceeding sixteen (16) per cent of the value of all taxable property within the corporate limits of said town as valued for taxation by the State under such restrictions and limitations as the General Assembly may prescribe, and where the question of incurring such indebtedness is submitted to the qualified electors of said town as provided in the Constitution upon the question of bonded indebtedness.

Amended by a joint resolution and an act: 1926 (34) 1372; 1927 (35) 185. See FOREWORD on page 1159 of this volume.

Provided, That the limitations imposed in Section 7, Article 8, and Section 5, Article 10, of the Constitution of the State of South Carolina shall not apply to the Town of Mullins, in the County of Marion to the extent herein provided when the proceeds of any bond or other obligation issued by said town are applied to past indebtedness, street paving and other improvements of said streets; but the town of Mullins is hereby authorized to issue bonds or other obligations, for past indebtedness, street paving and other improvements of streets to an amount not exceeding seventy thousand (\$70,000.00) dollars in addition to the limitations now imposed by the Constitution.

Amended by a joint resolution and an act: 1926 (34) 1374; 1927 (35) 303. See FOREWORD on page 1159 of this volume.

Provided, further, That the limitations imposed by this Section shall not apply to Clio School District No. 9, said school district being hereby expressly authorized to vote bonds to an amount not exceeding sixteen per cent of the value of all taxable property in such territory as valued for taxation by the State under such restrictions and limitations as the General Assembly may prescribe, and where the question of incurring such indebtedness is submitted to the qualified electors of said school district as provided in the Constitution upon the question of bonded indebtedness.

Amended by a joint resolution and an act: 1936 (34) 1380; 1927 (35) 177. See FOREWORD on page 1159 of this volume.

Provided, That all limitations imposed by Section 7 of Article 8 and Section 5 of Article 10 of the Constitution of the State of South Carolina shall not apply to bonded indebtedness incurred by the City of Union when the proceeds of said bonds issued by said city are applied exclusively to pay past indebtedness.

Amended by a joint resolution and an act: 1926 (34) 1373; 1927 (35) 207. See FOREWORD on page 1159 of this volume.

That the limitations imposed by this Section shall not apply to the school district known as Marlboro Graded School District No. 10, said District being hereby expressly authorized to vote bonds to an amount not exceeding sixteen per cent of the value of all taxable property in such territory as valued for taxation by the State under such restrictions and limitations as the General Assembly may prescribe and where the question of incurring such indebtedness is submitted to the qualified electors of said School District, as provided in the Constitution upon the question of bonded indebtedness.

Amended by a joint resolution and an act: 1926 (34) 1370; 1927 (35) 291. See FOREWORD on page 1159 of this volume.

Provided, That the limitations imposed by Article VIII, Section 7, and Article X, Section 5, of the Constitution shall not apply to the bonded indebtedness incurred by the City of Charleston where the proceeds of said bonds are applied solely to the replacement of funds heretofore used for purposes other than those for which the taxes represented thereby were levied and collected, or to the funding or payment of any indebtedness incurred before March 15, 1926, for municipal purposes, or to the laying, extension, repair and maintenance of drains, or to the costs of street improvement; and the General Assembly shall have power by special Act or Acts to authorize said city to issue bonds for all or any of the purposes aforesaid, without regard to limitations or restrictions and for the issuance of such bonds it shall not be necessary, unless the Act authorizing such issue shall require it, to submit the question of the creation of such debt to the freeholders and qualified electors of said city and for a prerequisite for holding such election no petition from the freeholders of said city shall be necessary, any provisions in Section 13 of Article II of the Constitution to the contrary notwithstanding.

Amended by a joint resolution and an act: 1926 (34) 1376; 1927 (35) 33. See FOREWORD on page 1159 of this volume.

Provided, That the limitations as to bonded indebtedness imposed by this Section shall not apply to Spartanburg County, and that Spartanburg County may incur bonded indebtedness to an amount not exceeding fifteen per centum of the assessed value of all taxable property therein, without regard to the amount of bonded indebtedness, now outstanding or hereafter created, of any municipal corporation or political subdivision located wholly or partly within said county.

Amended by a joint resolution and an enactment: 1926 (34) 1382; 1927 (35) 41. See FOREWORD on page 1159 of this volume.

Provided, That the limitation herein provided as to the amount of bonded debt of any county shall not apply to the County of York, when the proceeds of such bonds are to be used for highway and bridge construction, in which case it shall never exceed eighteen per cent of the assessed value of all taxable property in said county.

Amended by joint resolutions: 1925 (34) 607; 1927 (35) 50. See FOREWORD on page 1159 of this volume.

Provided, further, That the limitations as proposed by this Section shall

not apply to School District No. 29, of Lexington County, South Carolina, said school district being hereby authorized to issue additional bonds in an amount not exceeding fifteen (15%) per cent of the valuation of the assessable property in said school district, and that the question of incurring said indebtedness be submitted to the qualified electors of said school district as provided in the Constitution upon the question of bonded indebtedness.

Amended by a joint resolution and an act: 1928 (35) 1701; 1929 (36) 4. See FOREWORD on page 1159 of this volume.

Provided, That the limitations imposed by Article VIII, Section 7, and Article X, Section 5, of the Constitution of the State of South Carolina, shall not apply to the bonded indebtedness incurred or to be incurred by the City of Walterboro where the proceeds of such bonds are applied exclusively to the payment of expenses and liabilities incurred or to be incurred for the purchasing, repairing, enlarging, or improving of city or town hall, or public park, or parks, and grounds therefor; public market and guardhouse; purchasing, enlarging, extending, improving and establishing electric light and power plants, waterworks or sewerage systems; erecting, repairing, enlarging, improving, or altering school buildings, fire department and fire protection purposes; improvement of streets and sidewalks and drainage therefor, or other corporate purposes for the said City of Walterboro, or for any or either of such purposes. And when the question of incurring such bonded indebtedness is submitted to the qualified electors of the City of Walterboro by the City Council of the said City of Walterboro, and the majority of those voting in such election, or elections, shall vote in favor thereof; and the said City of Walterboro shall have power to issue bonds for any or all of the purposes aforesaid in the manner above provided, without regard to limitations or restrictions; and no petition from the freeholders of the said City shall be necessary as a prerequisite for holding such election, or elections, any provisions in Section 13, of Article II, of the Constitution to the contrary notwithstanding.

Amended by a joint resolution and an act: 1928 (35) 1688; 1929 (36) 280. See FOREWORD on page 1159 of this volume.

Provided, further, That the limitations imposed by this Section shall not apply to the school district of the City of Greenville, said school district being hereby expressly authorized to vote bonds to an amount not exceeding twelve per centum of the value of all taxable property in such territory as valued for taxation by the State under such restriction limitations as the General Assembly may prescribe, and where the question of incurring such indebtedness is submitted to the qualified electors of said school district, as provided in the Constitution upon the question of bonded indebtedness.

Amended by a joint resolution and an act: 1928 (35) 1704; 1929 (36) 12. See FOREWORD on page 1159 of this volume.

Provided, further, That the limitations imposed by this Section shall not apply to Campobello School District No. 49, said school district being hereby expressly authorized to vote bonds to an amount not exceeding fifteen per centum of the value of all taxable property in such territory as valued for taxation by the State under such restrictions and limitations as the Gen-

eral Assembly may prescribe, and where the question of incurring such indebtedness is submitted to the qualified electors of said school district as provided in the Constitution upon the question of bonded indebtedness.

Amended by a joint resolution and an act: 1928 (35) 1695; 1929 (36) 145. See FOREWORD on page 1159 of this volume.

Section 1. That the limitations imposed under Section 7, Article VIII, and Section 5, Article X, of the Constitution of the State of South Carolina shall not apply to the bonded indebtedness incurred by the Town of Kershaw, in the Counties of Lancaster and Kershaw, when the proceeds of any bonds issued by the said town are applied exclusively to the purchase, construction and maintenance of waterworks, sewerage system, and for the purchase, construction, and maintenance of streets and sidewalks where the abutting property owners are assessed as much as one-half the cost thereof.

Amended by a joint resolution and an act: 1928 (35) 1699; 1929 (36) 148. See FOREWORD on page 1159 of this volume.

Section 1. That the limitations imposed under Section 7 of Article 8, and Section 5 of Article 10, of the Constitution of the State of South Carolina shall not apply to the bonded indebtedness incurred by the Town of Heath Springs, in the County of Lancaster, when the proceeds of any bonds issued by the said town are applied exclusively to the purchase, construction and maintenance of waterworks, purchase, construction and maintenance of a sewerage system, and for the purchase, construction and maintenance of streets and sidewalks where abutting property is assessed as much as one-half the cost thereof, or, for the payment of past indebtedness, when the question of incurring such indebtedness is submitted to the qualified electors of said municipality as provided by law.

Amended by a joint resolution and an act: 1928 (35) 1690; 1929 (36) 149. See FOREWORD on page 1159 of this volume.

Provided, further, That the limitations imposed by this Section and by Section 7 of Article VIII, of the Constitution, and by any amendments thereof, shall not apply to the bonded indebtedness incurred by the City of Anderson, but, in addition to the powers now possessed, said City of Anderson may increase its bonded indebtedness in the manner provided in said Section 7 of Article VIII, to an amount not exceeding thirty (30%) per cent of the value of the taxable property therein, where the proceeds of said bonds are applied to the payment of any indebtedness incurred by said city before January 1, 1929, or to expenses and liabilities incurred or to be incurred in the improvements of streets, sidewalks or other public places, or to the purchase, establishment, maintenance, operation or increase of a city cemetery or city market or public parks: *Provided, however,* That nothing herein contained shall be construed to limit the operation of the amendment to Section 7 of Article VIII, of the Constitution approved February 3, 1911, by which the limitations imposed by said Section 7 of Article VIII, and by said Section 5 of Article X, of the Constitution were removed from any municipal corporation when the proceeds of the bonds are applied solely and exclusively for the purchase, establishment and maintenance of a waterworks plant, or sewerage system, or lighting plant,

and when the question of incurring such indebtedness is submitted to the freeholders and qualified voters of such municipality, as provided in the Constitution upon the question of other bonded indebtedness, and said amendment of February 3, 1911, shall remain of full force and effect and said City of Anderson shall have the full benefit thereof.

Amended by a joint resolution and an act: 1928 (35) 1702; 1929 (36) 260. See FOREWORD on page 1159 of this volume.

Provided, That the limitations as to bonded indebtedness imposed by this Section shall not apply to Landrum School District and that the Landrum School District may incur bonded indebtedness to an amount not exceeding fifteen per centum of the assessed value of all taxable property therein without regard to the amount of bonded indebtedness now outstanding or hereafter created of any municipal corporation or political subdivisions located wholly or partly within said county.

Amended by a joint resolution and an act: 1928 (35) 1694; 1929 (36) 280. See FOREWORD on page 1159 of this volume.

Provided, That the limitations as to bonded indebtedness imposed by this Section shall not apply to Clarendon County, and that Clarendon County may incur bonded indebtedness to an amount not exceeding twenty (20) per centum of the assessed value of all taxable property therein, without regard to the amount of bonded indebtedness now outstanding or hereafter created, of any municipal corporation or political subdivision located wholly or partly within said County.

Amended by a joint resolution and an act: 1930 (36) 1213; 1931 (37) 102. See FOREWORD on page 1159 of this volume.

All notes and bonds heretofore issued by Newberry County and now outstanding and unpaid are hereby validated; and the General Assembly may authorize the said County to issue its bonds for the purpose of paying, funding or refunding the said outstanding notes or bonds, notwithstanding any limitation or restriction contained in this Constitution.

Amended by a joint resolution and an act: 1930 (36) 1091; 1931 (37) 103. See FOREWORD on page 1159 of this volume.

All notes and bonds heretofore issued by Chesterfield County and now outstanding and unpaid are hereby validated, and the General Assembly may authorize the said County to issue its bonds for the purpose of paying, funding or refunding the said outstanding notes or bonds, notwithstanding any limitations or restrictions contained in this Constitution.

Amended by a joint resolution and an act: 1930 (36) 1211; 1931 (37) 104. See FOREWORD on page 1159 of this volume.

All notes and bonds heretofore issued by Dorchester County and now outstanding and unpaid are hereby validated; and the General Assembly may authorize the said County to issue its bonds for the purpose of paying, funding, or refunding the said outstanding notes or bonds, notwithstanding any limitations or restriction contained in this Constitution.

Amended by a joint resolution and an act: 1930 (36) 1210; 1931 (37) 108. See FOREWORD on page 1159 of this volume.

Provided, further, That the limitations imposed by this Section (Art. 8, § 7) and by Section 5 of Article X of the Constitution shall not apply to any bonded indebtedness incurred by the City of Columbia, where the bonded indebtedness is authorized to be incurred for the purpose of enlarging and maintaining its fire department or for purchase, building and maintenance of fire stations, fire alarm systems or fire equipment, or for any one or more of said purposes, and when the question of incurring such bonded indebtedness is submitted to the qualified electors of said City at an election or elections to be called by the City Council of said City, and a majority of those voting thereon shall vote in favor thereof; and the General Assembly need not prescribe as a condition precedent to the holding of any such election a petition from the freeholders as provided in Section 13 of Article II of the Constitution.

Amended by a joint resolution and an act: 1930 (36) 1207; 1931 (37) 110. See FOREWORD on page 1159 of this volume.

Provided, further, That the limitations imposed by this Section (Art. 8, § 7) and by Section 5, Article X, of the Constitution, and by any amendments thereof, shall not apply to the bonded indebtedness incurred by the City of Anderson, but, in addition to the powers now possessed, said City of Anderson may increase its bonded indebtedness in the manner provided in said Section 7, of Article VIII, to an amount not exceeding thirty per cent of the value of the taxable property therein, where the proceeds of said bonds are applied to the payment of any indebtedness of said City heretofore or hereafter incurred or to be incurred by said City, or to expenses and liabilities incurred or to be incurred in the improvements of streets, sidewalks or other public places, or to the purchase, establishment, maintenance, operation or increase of a city cemetery or city market or public parks, or to expenses, indebtedness or liabilities heretofore or hereafter incurred or to be incurred by said City in the purchase, establishment, maintenance or operation of an airport or airports located or to be located in Anderson County, South Carolina, or to any other municipal purpose: *Provided, however,* That nothing herein contained shall be construed to limit the operation of the amendment to Section 7 of Article VIII of the Constitution, approved February 3, 1911, by which the limitations imposed by said Section 7 of Article VIII, and by said Section 5 of Article X of the Constitution were removed from any municipal corporation when the proceeds of the bonds are applied solely and exclusively for the purchase, establishment and maintenance of a waterworks plant, or sewerage system, or lighting plant and when the question of incurring such indebtedness is submitted to the freeholder and qualified voters of such municipality, as provided in the Constitution upon the question of other bonded indebtedness, and said amendment of February 3, 1911, shall remain of full force and effect and said City of Anderson shall have the full benefit thereof.

Amended by a joint resolution and an act: 1930 (36) 1279; 1931 (37) 157; These provisions are part of article VIII, § 7, also. See FOREWORD on page 1159 of this volume.

All notes and bonds heretofore issued by Dorchester County and now outstanding and unpaid are hereby validated; and the General Assembly may authorize the said County to issue its bonds for the purpose of paying,

funding, or refunding the said outstanding notes or bonds, or any of them, notwithstanding any limitations or restriction contained in this Constitution.

Amended by a joint resolution and an act: 1932 (37) 1159; 1933 (38) 590. See FOREWORD on page 1159 of this volume.

Provided, further, That the limitation imposed by this section shall not apply to School District No. 40, within the Counties of Kershaw and Lancaster, such School district being hereby expressly authorized to vote bonds to an amount not exceeding Forty Thousand (\$40,000.00) Dollars, in excess of the bonds already issued and authorized, the proceeds of such bonds to be applied solely to the erection of a school building in said School District, and for the purchase of equipment for said building, under such restrictions and limitations as the General Assembly may prescribe, and where the question of incurring such indebtedness is submitted to the qualified electors of said School District, as provided in the Constitution upon the question of bonded indebtedness.

Amended by a joint resolution and an act: 1934 (38) 1630; 1935 (39) 16. See FOREWORD on page 1159 of this volume.

That the limitation and restrictions imposed by this Section shall not apply to bonds issued, or to be issued, by Pine Grove (Turbeville) School District No. 20 of Clarendon County for the purpose of funding or paying any indebtedness incurred for the erection, equipping and furnishing of its school building at Turbeville incurred before the ratification of this amendment by the General Assembly for the purposes aforesaid, and the General Assembly shall have power by a special Act or Acts to authorize said school district to issue its bonds to fund the same without regard to limitations and without the requirement of an election.

Amended by a joint resolution and an act: 1938 (40) 1740; 1939 (41) 7. See FOREWORD on page 1159 of this volume.

Provided, further, that the limitations imposed by this section shall not apply to the city of Rock Hill, county of York, said city of Rock Hill being hereby expressly authorized to vote bonds in excess of the bonds already issued and authorized, the proceeds of such bonds to be applied solely to the acquisition or purchase of real estate, either within the corporate limits of the city of Rock Hill or within five miles therefrom, and the improvement and/or construction thereon of a building or buildings for the purpose of renting and/or leasing same to newly established manufacturing industries; *Provided, Further,* that the bonded indebtedness shall be a general obligation of the city of Rock Hill, but the net income derived from the said municipal industrial building or buildings shall be pledged and applied towards the payment of the interest upon and the retirement of said bonds; (the acquisition of the real estate and the construction of the aforesaid building or buildings are herein and hereby construed to be corporate purposes); and where the question of incurring such indebtedness is submitted to the qualified electors of the city of Rock Hill as provided in the Constitution upon the question of bonded indebtedness.

Amended by a joint resolution and an act: 1938 (40) 1804; 1939 (41) 91. See FOREWORD on page 1159 of this volume.

- I. General Considerations.
- II. Bonds for "Corporate Purpose" Illustrated.
- III. Limitations on "Corporate Indebtedness."
- IV. Provisos Interpreted.

Cross Reference

See art. 8, § 7, as to the limitations on the bonded debt of a municipal corporation. As to restrictions on the State borrowing money, see art. 8, § 3, and the note thereto. As to bonds for taxes, see § 7284, and the note thereto. As to bonds for waterworks, see § 7278.

I. GENERAL CONSIDERATIONS.

Editor's note.—This provision is intended to be a limitation upon the power of the General Assembly to delegate the power of taxation. The Legislature had no power at all to delegate the taxing power until an exception was made in favor of the municipal corporations enumerated, and the corporate authorities thereof. *Lillard v. Melton*, 103 S. C. 10, 87 S. E. 421, 428, L. R. A. 1916D, 572, L. R. A. 1917E, 468, 5 A. L. R. 761, 24 A. L. R. 941.

Two things are essential to the validity of any tax imposed by a municipal corporation: (1) The power to tax must be conferred upon such corporation by an act of the Legislature, that body having been intrusted with the taxing power by the people through the Constitution, which in this section contains a provision authorizing the delegation of that high power to the corporate authorities of towns for certain purposes, etc. *White v. Town Council*, 34 S. C. 242, 13 S. E. 416, 417. See *Floyd v. Perrin*, 30 S. C. 1, at page 15, 8 S. E. 14, 64 Am. St. Rep. 103, 2 L. R. A. 242, Ann. Cas. 12A, 554. (2) The power thus conferred must be exercised by the municipal authorities in conformity with the terms of the grant.

Where a joint resolution proposed an amendment to art. 8, § 7, of the Constitution, and also provided that the limitation in such amendment as to municipal bonds, and in art. 4, § 5, should not apply to bonded indebtedness of certain cities, and an act to ratify the amendment as to art. 8, § 7, set forth that the reference to art. 4, § 5, of the Constitution, was erroneous, in that it did not apply to bonds, but the article in question should have been this section, the Legislature had no power to change the terms of the joint resolution so as to express the evident intent of the law-makers, and substitute this section, for art. 4, § 5, but the other portion of the amendment is operative without reference to such article. *Bray v. City Council*, 62 S. C. 57, 39 S. E. 810.

Ordinance exempting \$100 worth of household furniture may be proper. — Under this section providing that the

General Assembly shall require that all property, except that heretofore exempted, within the limits of municipal corporations, be taxed for the payment of debts contracted under the authority of law, a provision in a city ordinance exempting \$100 worth of household furniture from the property on which the tax is laid does not invalidate the whole ordinance, unless it is shown that by reason of such exemption the taxes on the property not exempted have been increased. *State v. Town Council*, 39 S. C. 5, 17 S. E. 355.

The Constitution has not taken from the Legislature the exclusive power of taxation, but by this section it may delegate such power to the towns. *Carroll v. York*, 109 S. C. 1, 95 S. E. 121.

The Legislature may authorize the levy of a tax by the county or township authorities, or itself make the levy directly. In either event, the power to collect is conferred on the fiscal authorities of the county. *Southern Ry. Co., v. Kay*, 62 S. C. 28, 39 S. E. 785.

The Legislature is not forbidden by this section or any other constitutional provision, from levying directly a tax on a political subdivision. *Evans v. Beattie*, 137 S. C. 496, 135 S. E. 538.

But section does not give power to subdivide city into tax districts.—Under this section requiring all property to be taxed uniformly, and taxation by municipal corporations to be for municipal purposes, special assessments cannot be laid for improvement of city sidewalks; there being no power to subdivide a city into tax districts. *Mauldin v. City Council*, 53 S. C. 285, 31 S. E. 252, 69 Am. St. Rep. 855, 43 L. R. A. 101.

Section does not preclude Legislature from issuing bonds.—An act validating an election authorizing the issuance of bonds by two townships, and providing for the issuance of the bonds and their payment, is not invalid, this section, vesting the power to issue bonds in townships, not precluding their issuance by the Legislature. *Fripp v. Coburn*, 101 S. C. 312, 85 S. E. 774.

Bonds issued pursuant to an illegal election are void. See this catchline under § 3 of this article.

Discretion and limitations of this section are only limit to city's taxing power upon delegation of such power.—Where an act confers on a city council the power to impose such taxes as they may deem expedient, without any specific limitation as to the amount or rate of such taxes, the only limit is its judgment as to what is necessary, and the limitation of this section that the taxes shall be for a corporate purpose. *State v. Town Council*, 39 S. C. 5, 17 S. E. 355.

Section is not a limitation on mandamus to compel county authorities to

levy a tax.—Mandamus to compel the county authorities through whom taxes are assessed and collected to levy a tax to pay a judgment on township bonds cannot be denied on the theory that, because the Legislature might, under this section, have vested in the township authorities the power to assess and collect taxes for corporate purposes, it could not vest such power in county officers. *Graham v. Folsom*, 200 U. S. 248, 26 S. Ct. 245, 50 L. Ed. 464.

Except where the Legislature has not conferred the power to tax.—Under this section authorizing the General Assembly to vest in municipal authorities of a county power to levy taxes for corporate purposes, the Supreme Court cannot issue a mandamus to compel the county board of commissioners to levy a special tax to pay ordinary claims against the county, where the General Assembly has not conferred such power. *State v. Goodwin* (S. C.), 59 S. E. 35.

Art. 11, § 6, is not a limitation on this section.—An act, authorizing tax levy covering bond issue for payment of indebtedness incurred by several school districts of Oconee County for educational purposes, is not violative of Const. art. 11, § 6, providing for three-mill tax, poll tax and State tax for paying deficiencies in school funds, since such provision is no limitation upon the power of the Legislature to vest county authorities with power to levy taxes, under this and the following section. *Shelor v. Pace*, 151 S. C. 99, 148 S. E. 726.

This section does not apply to issue of bonds to refund a previously existing debt. *McCreight v. Zemp*, 49 S. C. 78, 79, 26 S. E. 984, 37 L. R. A. (N. S.) 1099.

Section enjoins Legislature to require municipal taxes to be uniform.—The restriction in § 3, art. 8, of the Constitution is not upon the Legislature, but the injunction is to the Legislature to restrict the powers of the town to levy taxes. And in this section the Legislature is enjoined, when vesting towns with power to tax, to require the tax to be uniform. *Paris Mountain Water Co. v. Greenville*, 110 S. C. 36, 96 S. E. 545, 550.

Combined debts of consolidated districts must come within this section.—Where several districts are consolidated, the fiscal authority of the constituent districts is destroyed, and the debts of each become obligations of the consolidated district, so that it is immaterial, as respects the limitation of this section what the indebtedness of a constituent district is, as their debt becomes the debt of the consolidated district, and is payable out of its assets. *Walker v. Bennett*, 125 S. C. 389, 118 S. E. 779.

And it must be proved that issue of bonds would exceed limits herein.—There is a presumption in favor of the

constitutionality of legislative enactments, and a statute authorizing the issuance of township bonds cannot be held invalid on the theory that the bonds would exceed the limit of indebtedness prescribed by this section, where there is no proof of that fact. *Fripp v. Coburn*, 101 S. C. 312, 85 S. E. 774.

"Bonded debt" does not exist until bonds are sold.—A "bonded debt" does not exist within the meaning of this section, limiting the permissible bonded debt of a county, until the bonds authorized by statute have been issued by completion of contract of sale and actual or constructive delivery. *Poulnot v. Cantwell*, 129 S. C. 179, 123 S. E. 651, 652, citing with approval *Germania Sav. Bank v. Darlington*, 50 S. C. 337, 362, 27 S. E. 846, 858, 28 L. R. A. (N. S.) 149, 29 L. R. A. (N. S.) 183, Ann. Cas. 13E, 86. See *Black v. Fishburne*, 84, S. C. 451, 66 S. E. 681.

An act providing for the construction and operation by Charleston County of a ferry, does not violate this section limiting the permissible bonded debt of any county. *Poulnot v. Cantwell*, 129 S. C. 179, 123 S. E. 651, 652.

This section contemplates the issuing of bonds by different political divisions or municipal corporations extending over the same territory or parts thereof. *Burris v. Brock*, 95 S. C. 104, 79 S. E. 193, 194.

Act giving "county officers" power to levy and collect taxes means "corporate officers," as provided in this section.—"County officers," in an act declaring it the duty of the county officers, charged with assessment and collection of taxes, to levy and collect from the property within a school district a sum to pay interest on bonds issued by the district, and to create a sinking fund to pay the bonds, has reference to those officers in the county who are authorized to levy and collect the taxes under this section, and so does not contravene this section if vesting in the board of trustees of the district the power to levy and collect such taxes. *Dove v. Kirkland*, 92 S. C. 313, 75 S. E. 503, Ann. Cas. 15A, 532.

An act providing for division of Dillon County into high school districts and vesting county board of education with the power to levy taxes for support of high schools, does not violate this section. *Powell v. Hargrove*, 136 S. C. 345, 134 S. E. 380.

An act abolishing a township highway commission, and devolving all of their duties upon the advisory board and the county engineer, is not in conflict with this section, relating to a township's power to assess and collect taxes for corporate purposes, as the highway commission was not the corporate authority of the township, and the General As-

sembly has not vested them with the power to assess and collect taxes. *Askew v. Smith*, 126 S. C. 159, 119 S. E. 378.

Acts providing for division of a county into high school districts and vesting county board of education, with power to levy taxes for support of high schools, are not violative of this section in view of art. 11, § 3, and § 5346. *Powell v. Hargrove*, 136 S. C. 345, 134 S. E. 380.

And an act directly requiring county auditor to assess and levy tax is not improper.—An act directing and requiring the county auditor to assess and levy each year a license fee on all resident owners of horse-drawn vehicles, automobiles, etc., for the purpose of meeting the principal and interest of bonds thereby authorized to be issued for highway improvement, makes a direct imposition of the tax, and does not delegate the authority to levy the license and tax to the county auditor, in violation of this section. *Lillard v. Melton*, 103 S. C. 10, 87 S. E. 421, L. R. A. 1916D, 572, L. R. A. 1917E, 468, 5 A. L. R. 761, 24 A. L. R. 941.

Coastal highway act, creating highway district and levying special assessment, does not violate this section as being special assessment by legislative action. *Evans v. Beattie*, 137 S. C. 496, 135 S. E. 538.

Or as changing political subdivisions contrary to Constitution.—Sections 5952-5957, providing for plan of financing construction of state highway system by creating highway districts, and by issuance of evidence of indebtedness of districts, is not violative of this section, and art. 3, § 34, and other sections of Constitution recognizing and adopting certain kinds of political subdivisions for purposes of local government. *State v. Moorer*, 152 S. C. 455, 150 S. E. 269.

County supervisor has no power to levy taxes. *Clary v. Harvey*, 176 S. C. 513, 180 S. E. 673.

Nor have county supervisor and board of county commissioners power to direct county auditor to levy tax, though legislature adjourned without having passed a supply bill for the county, and county was without funds to carry on its business. *Clary v. Harvey*, 176 S. C. 513, 180 S. E. 673.

Cited, in *Cowart v. City Council*, 67 S. C. 35, 45 S. E. 122, 129 Am. St. Rep. 281, 11 L. R. A. (N. S.) 638, 17 L. R. A. (N. S.) 898, Ann. Cas. 14B, 1197, 24 A. L. R. 942; in support of the holding that a city's placing money lenders and banks in different classes for purposes of taxation is not unconstitutional.

II. BONDS FOR "CORPORATE PURPOSE" ILLUSTRATED.

"Corporate purposes."—While the term "corporate purposes," used in section 5 of article 10, is not there defined, the General Assembly is empowered by

section 6 of article 10 "to authorize any county * * to levy a tax * * to maintain and support prisoners, pay jurors, county officers, and for litigation * * and court expenses." It is evident, when these two sections are considered together, that the purposes for which a county may levy a tax, as specifically stated in section 6, are embraced within the term "corporate purposes" as used in section 5. *Glymph v. Smith*, 170 S. C. 486; 170 S. E. 913.

"Bonded indebtedness" of municipality.—"Bonded indebtedness" referred to in this section means indebtedness contracted for corporate purposes pursuant to law and to be paid out of taxes to be levied upon all the property within the corporate boundaries. *Jackson v. Bree-land*, 103 S. C., 191, 88 S. E., 128, *Bolton v. Wharton*, 163 S. C., 242, 161 S. E., 454.

The issue of coupon notes by county for payment of past due notes, to be secured by uncollected taxes and county's is not "bonded indebtedness" within the limitations herein. *Haddon v. Cheatham*, Treasurer, 161 S. C., 384, 159 S. E., 843.

Issuing bonds in aid of railroad is not for a "corporate purpose."—An act delegating authority to townships to issue bonds in aid of railroads, is repugnant to this section empowering the Legislature to delegate to townships power to raise money "for corporate purposes." *Coleman v. Broad River*, 50 S. C. 321, 27 S. E. 774. But see *Atlantic Trust Co. v. Darlington*, 63 F. 76, in which it was held that the powers of a municipal corporation, dependent wholly upon the source whence they are derived, may be enlarged at any time by the Legislature. *Rogers v. Burlington* 3 Wall. 654, 18 L. Ed. 79. The Legislature then determines the purposes for which they have been created, and clothes them with the means of attaining them, and these purposes are their corporate purposes, and therefore an act authorizing a town to issue bonds in aid of the construction of a railroad, is not in conflict with this section, permitting the Legislature to authorize municipal corporations to collect taxes for corporate purposes only.

But an act declaring bonds so issued to be township debts is not unconstitutional.—Though an act delegating authority to townships to issue bonds in aid of railroads, is repugnant to this section empowering the Legislature to delegate to townships power to raise money "for corporate purposes," yet an act declaring bonds issued pursuant to said act to be township debts, and providing for their payment, is not unconstitutional, as it is not a validating act, but an exercise of the power to tax. *Coleman v. Broad River*, 50 S. C. 321, 27 S. E. 774.

Acts authorizing subscriptions by a county to the stock of a railroad, and

giving the county power to assess and collect taxes to pay the subscriptions, are in violation of this section, providing that counties, townships, etc., may be vested with power to assess and collect taxes "for corporate purposes." Congaree Const. Co. v. Columbia, 49 S. C. 335, 27 S. E. 570.

The issue of bonds by a city for the purpose of purchasing grounds and erecting school buildings thereon is a "corporate purpose" within this section providing that cities, etc., may be vested with power to assess and collect taxes for corporate purposes. *Jordan v. Greenville*, 79 S. C. 436, 60 S. E. 973.

Establishment of a hospital is a "corporate purpose."—An act authorizing Marion County commissioners to issue and sell bonds for Reaves Township for the establishment of a hospital, confers a power which is for a "corporate purpose" within this section. *Battle v. Willcox*, 128 S. C. 500, 122 S. E. 516.

Tax on vehicles for construction of roads is for a "corporate purpose."—An act requiring the registry of all vehicles in a designated county, and imposing a license fee, the proceeds of which are to be applied to the construction and repair of roads, is not special legislation in violation of Const. art. 3, § 34, subd. 9, prohibiting special laws where a general law can be made applicable, since the act is enacted in the exercise of the taxing power under this section, authorizing the assessment and collection of taxes by counties for corporate purposes, and uniform in respect to persons and property within the jurisdiction of the body imposing the same, which is limited only by § 6, fixing the purposes for which the tax may be levied. *State v. Touchberry*, 121 S. C. 5, 113 S. E. 345.

Money paid for municipality's bonds for stock in silk mill not recoverable under cause of action for money had and received, money not being used for corporate purpose or city benefited. *Bolton v. Wharton*, 163 S. C. 242, 161 S. E. 454.

And recitals that bonds were valid obligations do not estop city to show that they exceeded maximum constitutional indebtedness. *Bolton v. Wharton*, 163 S. C. 242, 161 S. E. 454.

But see *City of Florence v. Anderson*, 95 F. (2d) 777, to contra.

III. LIMITATIONS ON "CORPORATE INDEBTEDNESS."

Last assessment before bond issue is measure of indebtedness.—This section, providing that no bonded debt incurred by a county or municipality shall exceed 8 per cent. of the assessed value of the taxable property therein, appoints as standard the last tax assessment before the bond issue, and no subsequent assessment is material. *State v. Cornwell*, 40 S. C. 26, 18 S. E. 184, 28 L. R. A.

(N. S.) 150.

Town may not raise debt of property within its border above limit herein imposed.—Under Const. 1895, art. 8, § 7, restricting the indebtedness of municipal corporations to 8 per cent. of the assessed value of taxable property therein, and this section providing that whenever several municipal corporations cover the same territory, or portions thereof, each shall so exercise its power to increase its debt to the limit of 8 per cent. that the aggregate debt on any territory shall not exceed 15 per cent. of the value of the taxable property therein, a city may incur an indebtedness to an amount which, together with the debt of a school district co-extensive with the city, and its proportion of the county debt computed on its proportion of the taxable property, shall not exceed 15 per cent. of the value of taxable property therein, provided such city indebtedness does not exceed 8 per cent. thereof. *Todd v. Laurens*, 48 S. C. 395, 26 S. E. 682, 36 L. R. A. (N. S.) 25, 37 L. R. A. (N. S.) 1108, L. R. A. 1917E, 468, Ann. Cas. 12C, 450.

Under this section, as an incorporated high school district is a distinct entity from the common school districts out of which it is created, the fact that one of the common school districts has already made a levy of four mills, which it can not exceed, will not prevent the high school district from making a levy of one mill, the aggregate indebtedness of the common school districts, and high school district not exceeding 15 per cent. of the value of the taxable property within their territory. *Welch v. Getzen*, 85 S. C. 156, 67 S. E. 294, 37 L. R. A. (N. S.) 1108.

An act authorizing the city of Charleston to issue coupon notes to refund outstanding indebtedness, is unconstitutional under Const. art. 8, § 7, and this section limiting bonded indebtedness of cities. *Sullivan v. City Council*, 133 S. C. 156, 130 S. E. 872.

But a county may issue bonds where it will raise a city's debt above 15 per centum limit. — Under this section a county can issue and sell bonds up to 8 per cent. of the total assessed value of all the property in the county, and it is immaterial that a town in the county has a bonded debt which, if added to its proportionate part of the proposed county issue, will raise that town's bonded debt above the 15 per cent. limit fixed in such constitutional provision. *Elliott v. Heyward*, 127 S. C. 468, 121 S. E. 257.

An act, providing for a road and bridge improvement bond issue by Charleston County, does not violate this section, limiting indebtedness of territory of State which is covered by more than one subdivision of State to 15 per cent.

of assessed valuation of assessable property, though bonded debt of city of Charleston exceeds 15 per cent. of its taxable property. *Nettles v. Cantwell*, 112 S. C. 24, 99 S. E. 765, and the cases there cited, cited with approval in *Poulnot v. Cantwell*, 129 S. C. 179, 123 S. E. 651.

As may school district where issue will raise town's indebtedness above such limit.—Under this section a school district can issue bonds up to 8 per cent. of the total assessed value of all the property in the district, and it is immaterial that, if territory within district is chargeable with proportionate part of county's bonded indebtedness, and proportionate part of township's bonded indebtedness, territory which is embraced within the town will be bonded for more than 15 per cent. of assessed value of property and that portion of territory or township which is situate in school district will be bonded for more than 15 per cent. of assessed value of property situate therein. *Banks v. School Dist.*, 129 S. C. 218, 123 S. E. 834.

Act authorizing bonds "to any amount" means as qualified by limitations of this section.—An act giving the town of Darlington power to issue bonds in aid of railroads "to any amount," is not void for repugnancy to this section providing that the bonded debt of a municipal corporation shall not exceed 8 per cent. of its assessed valuation, as conflict can be avoided by reading the constitutional limitation into the act as a qualification of the power conferred. *Germania Sav. Bank v. Darlington*, 50 S. C. 337, 27 S. E. 846, 28 L. R. A. (N. S.) 149, 29 L. R. A. (N. S.) 183, Ann. Cas. 13E, 86. It was held, in this case, that the Act authorizing such bonds was unconstitutional as giving a city the right to make an individual assessment, in contravention of art. 10, § 1, (see note thereto) but it was further held that on the principle "communis error facit jus" said bonds in the hands of innocent holders would not be declared void.—Ed. note.

Issuing bonds in aid of railroad is not for a corporate purpose. See this catchline under this section, analysis line II.

State debt is not included in estimating indebtedness of municipality.—This section limiting the indebtedness of a municipality or political division to 15 per cent. of its taxable valuation, does not require the state debt to be included therein. *Lancaster School Dist. v. Robinson-Humphrey Co.*, 64 S. C. 545, 42 S. E. 998, 37 L. R. A. (N. S.) 1108, L. R. A. 1917E, 468, Ann. Cas. 12C, 451.

Debt of city created without vote is not "bonded debt."—Under Const. art. 8, § 7, providing that no city or town shall incur any bonded debt which, including existing bonded indebtedness,

shall exceed 8 per centum of the assessed value of the taxable property therein, and that "no such debt" shall be created without submitting the question as to the creation thereof to the qualified elector of the city or town, and this section, limiting the aggregate indebtedness of any territory over which several political divisions or municipal corporations possess power to levy a tax 15 per centum of the value of the taxable property, an indebtedness of a city in the form of notes, created without submission of the question as to its creation to a vote of the electors, is not a part of the "bonded debt" or "bonded indebtedness" of such city, which refers only to such obligations as are thus created. *Lillard v. Melton*, 103 S. C. 10, 87 S. E. 421, L. R. A. 1916D, 572, L. R. A. 1917E, 468, 5 A. L. R. 761, 24 A. L. R. 941.

And bonds secured by pledge of funds sufficient to meet obligations without resorting to levying property tax do not constitute "bonded debt," within this section. *Evans v. Beattie*, 137 S. C. 496, 135 S. E. 538; *State v. Moorser*, 152 S. C. 455, 150 S. E. 269.

If proposed county bonds for money to be advanced to state highway commission under reimbursement agreement constituted bonded debt within this section amount of reimbursement should be offset in computing net bonded debt. *Briggs v. Greenville County*, 137 S. C. 288, 135 S. E. 153; *Evans v. Beattie*, 137 S. C. 496, 135 S. E. 538.

See §§ 5952-5957 providing for financing of construction of State highway system, and the note thereto.

But notes not under seal may be "bonded debt."—The notes of Landrum school district No. 45, issuance of which was authorized by an act of the Legislature, though not issued under seal, are primary obligations of the district primarily secured by a tax levied on all taxable property therein, and hence part of "bonded debt" of district within this section. *Thomson v. Christopher*, 141 S. C. 92, 139 S. E. 178.

Art. 8, § 7 repeals limitations of this section as to waterworks bonds.—The amendment to art. 8, § 7 of the Constitution which provides that the constitutional limitations imposed by the section which it amends shall not apply to the bonded indebtedness incurred by certain cities, where the proceeds of the bonds are applied solely for the purchase and maintenance of waterworks plants, repeals, as to the cities therein mentioned, this section providing that municipal corporations or political divisions covering the same territory possessing the power to levy a tax and contract a debt shall so exercise the power to increase their debts that the aggregate debt in any territory of the State shall

never exceed 15 per cent. of the value of all taxable property in such territory. *Seegers v. Gibbs*, 72 S. C. 532, 52 S. E. 586, 587; *Bray v. City Council*, 62 S. C. 57, 39 S. E. 810.

So waterworks bonds within amendment to section are not considered in estimating "bonded indebtedness."—Where the purpose of waterworks bonds of a city are within the contemplation of the amendments to this section or art. 8, § 7, those bonds must be excluded in determining whether an issue of bonds will cause the bonded indebtedness to exceed the amount authorized by the Constitution. *Lillard v. Melton*, 103 S. C. 10, 87 S. E. 421, L. R. A. 1916D, 572, L. R. A. 1917E, 468, 5 A. L. R. 761, 24 A. L. R. 941.

Nor are paving assessments or sewerage certificates.—An act as to Anderson County school bonds, providing for issuance of bonds to bear a rate of interest not exceeding 5 per cent., payable semi-annually, does not violate this section, stating limit of indebtedness, since the aggregate bonded debt, including the proposed issue, will be within the limit, if the paving assessment certificates and sewerage bonds are excluded, as must be done. *Brownlee v. Brock*, 107 S. C. 230, 92 S. E. 477.

Drainage acts do not violate this section, as the section refers to indebtedness for corporate purposes payable out of taxes levied on all property within their boundaries, and not to assessments for local improvements; and as a drainage district is not a "political division or subdivision" invested with governmental functions, certificates of indebtedness to be issued under the acts are not bonds in a strict and technical sense, because not payable by taxation in the strict sense of that term. *Jackson v. Breeland*, 103 S. C. 184, 88 S. E. 128.

Issuance of bonds authorized by an act of the Legislature is not violative of this section, limiting bonded indebtedness, in view of Const. art. 8, § 7, declaring such limitation inapplicable to bonded indebtedness in and by any municipal corporation where the proceeds of bonds are applied solely to purchase, establishment, and maintenance of sewer system. *Rutledge v. Greater Greenville Sewer Dist.*, 139 S. C. 188, 137 S. E. 597.

Slum clearance and low-cost housing project bonds issued by housing authority are not to be computed in arriving at limitations on city's bonded indebtedness, in view of statutory provision that such bonds shall not constitute a debt of municipality or state. *McNulty v. Owens*, 188 S. C. 377, 199 S. E. 425.

County court house may be erected from bonds payable solely out of revenues from building. *Bollin v. Graydon*,

177 S. C. 374, 181 S. E. 467.

Bonded debt incurred after adoption of Constitution may be refunded without electors' approval. *Williams v. City of Rock Hill*, 177 S. C. 82, 180 S. E. 799.

Construction of county hydroelectric plant may be financed by county revenue bonds, payable solely from revenue of power system. *Park v. Greenwood County*, 174 S. C. 36, 176 S. E. 870.

Pledging of existing revenues of city waterworks system to repay obligations created to enlarge or extend system, does not make loan, evidenced by revenue bonds issued for such purpose, a "debt" within this section. *Roach v. City of Columbia*, 172 S. C. 478, 174 S. E. 461.

Construction of municipal stadium, paying therefor by bonds payable solely from revenue derived from stadium, without approval of voters, does not violate this section. *Cathcart v. City of Columbia*, 170 S. C. 362, 170 S. E. 435.

IV. PROVISOS INTERPRETED.

Proviso may be retroactive.—The proviso of this section, proposed in 1920 and subsequently ratified, permitting Bogansville Township to increase its bonded indebtedness, has such retroactive effect as to validate a proposed issue of bonds which at time of passage of act March 1, 1919 (31 St. at Large, p. 595), authorizing the issue, was in excess of constitutional limitation then in force. *Robinson v. Askew*, 129 S. C. 188, 123 S. E. 822; *Chesterfield County v. State Highway Dept.* 191 S. C. 19, 3 S. E. (2d) 686.

Where amount of bonds authorized by school district election could be issued in part only on account of constitutional limitation, the trustees had authority to issue remaining portion of bonds after adoption in 1927 of amendment to this section. *Covington v. McInnis*, 144 S. C. 391, 142 S. E. 650.

And proviso may be effective without enactment of special statute.—The proviso of this section permitting Marlboro graded school district No. 10 to vote bonds to amount exceeding original constitutional limitations of its indebtedness, is self-executing and effective without enactment of special statute, in view of practically identical language of previous amendments of such article as to other school districts. *McColl v. Marlboro Graded School Dist.*, 143 S. C. 120, 141 S. E. 265.

It may also introduce substitute limitation.—This section authorizing school district No. 10, Cherokee County, to vote bonds not exceeding \$300,000, and providing that limitations imposed by original section should not apply to such district, introduces a substitute limitation and subsequent bond issue bringing bonded indebtedness to amount exceed-

ing \$300,000 is invalid, notwithstanding that an act purported to authorize such district to borrow \$50,000. *Smith v. Littlejohn*, 151 S. C. 137, 148 S. E. 719.

Petition for school bonds need not be signed by two-thirds of freeholders in Marlboro school district.—The proviso to this section, requiring that question of incurring additional indebtedness authorized thereby be submitted to qualified electors of Marlboro school district created thereunder as provided in Constitution, held not to require that petition for election be signed by majority of freeholders, as provided in art. 8, § 7, and art. 2, § 13, in case of municipal bonded indebtedness, instead of one-third as required by general school bond law. *McColl v. Marlboro Graded School Dist.*, 143 S. C. 120, 141 S. E. 265.

Limitation removed as to town of Saluda.—Under this section, and art. 8, § 7, as amended, there is no limit on amount of bonds that may be issued by town of Saluda for purpose of establishing either a water or sewerage system or both. *Davis v. Saluda*, 147 S. C. 498, 145 S. E. 412.

And Yorkville district.—The proviso to this section, and Const. art. 8, § 7, gives the Yorkville district of York County power without limitation to issue bonds to raise funds to pay for construction of buildings. *Brice v. McDow*, 116 S. C. 324, 108 S. E. 84.

By art. 8, § 7, and this section, the city of Florence is exempted from the limitations as to bonded indebtedness of those sections. *Lucas v. Barringer*, 120 S. C. 68, 112 S. E. 746.

Bonds for "improving and extending" sewerage system of Florence are within limitation of proviso.—As the proceeds of waterworks and sewerage bonds of the city of Florence were to be used for "improving and extending" the systems, these purposes were embraced within the amendment "building, directing and maintaining," and as the proceeds of street improvement bonds were to be used for "building, repairing and improving" streets and sidewalks, the bond issues came within the provision of the constitutional amendments to art. 8, § 7, and this section, and did not ex-

ceed the constitutional or statutory limitations. *Lucas v. Barringer*, 120 S. C. 68, 112 S. E. 746.

And such bonds are not void as double issue in one proposition.—Where the proceeds of an issue of bonds was to be used for the purpose of improving and extending the waterworks and sewerage system of the city of Florence, and the issue was under the Const. art. 8, § 7, and this section, in neither of which did the word "or" appear in connection with the words "waterworks and sewerage," the 1915 amendments' use of "exclusively for any of said purposes" negatives a disjunctive interpretation, "any" meaning one or more, and the bond issue was not void as submitting two purposes jointly as one proposition. *Lucas v. Barringer*, 120 S. C. 68, 112 S. E. 746.

Under proviso bonds of Spartanburg may exceed 15%.—The adoption of an amendment to this section and Const. art. 8, § 7, exempting city of Spartanburg from constitutional bond debt limits, where bonds are for certain purposes, is not an adoption of the proviso that the amount of bonds should not exceed 15 per cent. of the assessed value of property in the city, in view of failure of title of proposing resolution, and of ratifying act, and failure of ballot to indicate that such proviso was contained therein. *Heinitsh v. Floyd*, 130 S. C. 434, 126 S. E. 336; *Harris v. Floyd*, 132 S. C. 487, 129 S. E. 833.

School district No. 10, Cherokee County.—Issuance of bonds—amount, etc., *Middleton v. Littlejohn*, 179 S. C., 88; 183 S. E., 593.

No requirement that county bonds be submitted to vote of people. *Chesterfield County v. State Highway Department*, 191 S. C. 19, 3 S. E. (2d) 686.

Town of Hartsville refunding bonds held constitutional. *Kalber v. Stokes*, 194 S. C. 339, 9 S. E. (2d) 785.

Charleston high school district, having area coterminous with that of city and previously existing Charleston school district, cannot be authorized to issue bonds in addition to bonds issued by old district in maximum amount. *Conner v. Charleston High School Dist.*, 191 S. C. 412, 4 S. E. (2d) 431.

Section 6. Credit of State—for what purposes tax levied or bonds issued—proviso.—The credit of the State shall not be pledged or loaned for the benefit of any individual, company, association or corporation; and the State shall not become a joint owner of or stockholder in any company, association or corporation. The General Assembly shall not have power to authorize any county or township to levy a tax or issue bonds for any purpose except for educational purposes, to build and repair public roads, buildings and bridges, to maintain and support prisoners, pay jurors, County officers, and for litigation, quarantine and court expenses and for

ordinary County purposes, to support paupers, and pay past indebtedness: *Provided*, That the limitation imposed by this Section shall not apply to any township in the County of Greenwood, nor to any township in the County of Saluda, through which in whole or in part, the line of railroad of Greenwood and Saluda Railroad shall be located and constructed, nor to the County of Saluda, such said townships in Greenwood County and Saluda County, and the County of Saluda, being hereby expressly authorized to vote bonds in aid of the construction of the said proposed railroad under such restrictions and limitations as the General Assembly may prescribe hereinafter: *Provided*, That the amount of such bonds shall not exceed eight per centum of the assessed valuation of the taxable property of such townships.

Amended by a joint resolution and an act: 1910 (26) 1070; 1911 (27) 11. See FOREWORD on page 1159 of this volume.

That the limitations imposed in Section 7, of Article VIII, and Sections 5 and 6 of Article X, of the Constitution of the State of South Carolina, shall not apply to the bonded indebtedness incurred by the County of Richland, when the proceeds of any bonds issued by said county are applied exclusively to the purpose of erection, improvement and maintenance of a public hospital and court house or in payment of debts incurred, and when the question of incurring such indebtedness is submitted to the qualified electors of said county, as provided by law.

Amended by a joint resolution and an act: 1920 (31) 1721; 1921 (32) 156. See FOREWORD on page 1159 of this volume.

Provided, further, That the limitations imposed by these Sections (Art. 10, §§ 5 and 6) shall not apply to the Township of Christ Church Parish, in Charleston County, contained within the following area: northeast by Awendaw Creek; southeast by the Atlantic Ocean and the Township of Sullivan's Island; southwest by Charleston Harbor, and northwest by the Wando River and the Berkeley County line, thus containing within the said area the Town of Mount Pleasant, S. C., such township being hereby expressly authorized to vote bonds to an amount not to exceed one hundred and fifty thousand (\$150,000.00) dollars, the proceeds of such bonds to be applied solely to the erection and maintenance of a railroad from a point in Berkeley County, in and through the township of Christ Church Parish, in and through the Town of Mount Pleasant, on Charleston Harbor, under such restrictions and limitations as the General Assembly may prescribe and when the question of incurring said indebtedness is submitted to the qualified electors of said township, as provided in the Constitution, upon the question of bonded indebtedness.

Amended by a joint resolution and an act: 1922 (32) 1344; 1923 (33) 48. These provisions added to section 5 of this article also. See FOREWORD on page 1159 of this volume.

Provided, That the limitations imposed by these Sections (Art. 10, §§ 5 and 6) shall not apply to St. James Santee Township in Charleston County contained within the following area: north by Berkeley County line; east by Santee River; south by Atlantic Ocean and west by Awensdaw Creek. Such township being hereby expressly authorized to vote bonds to an amount not to exceed one hundred and twenty-five thousand (\$125,000.00) dollars,

the proceeds of such bonds to be applied solely to the erection and maintenance of a railroad from a point in Berkeley County in and through the Township of St. James Santee, in and through the unincorporated village of McClellanville on Jeremy Creek, under such restrictions and limitations as the General Assembly may prescribe and when the question of incurring such indebtedness is submitted to the qualified electors of said township as provided in the Constitution, upon the question of bonded indebtedness.

Amended by a joint resolution and an act: 1925 (34) 613; 1927 (35) 194; These provisions added to section 5 of this article also. See FOREWORD on page 1159 of this volume.

See notes under section 11 of this article.

Limitation does not apply to valid obligations incurred before adoption of Constitution. *Graham v. Folsom*, 200 U. S. 248, 26 S. Ct. 245, 50 L. Ed. 464.

Scope as to "roads, buildings and bridges."—The purpose of this section is to leave the Legislature free to authorize counties and townships to establish and maintain public roads, buildings, and bridges, and the word "build" may be employed in the sense of obtain, secure, or acquire, as well as in the ordinary meaning, and hence the purchase of standing bridges is not a violation. *Verner v. Muller*, 89 S. C. 545, 72 S. E. 393; *Nettles v. Cantwell*, 112 S. C. 24, 99 S. E. 765; *Paris Mountain Water Co. v. Greenville*, 105 S. C. 108, 89 S. E. 669.

Under this section, the Legislature may direct the issuance of bonds by a county for the purpose of building and repairing roads, without submitting the question as to such bond issue to a vote of the electors; there being no provision of the Constitution directly, or by necessary implication, requiring a referendum on the question of issuing bonds by a county, as is required with respect to increasing the public debt of the State, or the issuance of bonds by a city or town. *Lillard v. Melton*, 103 S. C. 10, 87 S. E. 421, L. R. A. 1916D, 572, L. R. A. 1917E, 468, 5 A. L. R. 761, 24 A. L. R. 941; *Graham v. Erwin*, 114 S. C. 419, 103 S. E. 750.

A joint resolution, authorizing a county to levy and issue bonds for construction and operation of a ferry, does not violate this section, providing that the Legislature has no power to authorize a county to levy a tax or issue bonds for any purpose except for educational purposes, to build and repair public roads, buildings, and bridges, and for ordinary county purposes. *Poulnot v. Cantwell*, 129 S. C. 179, 123 S. E. 651.

An Act, conferring on the chamber of commerce for 100 years the exclusive control of a building site for the erection of an office building in which the county was to have the use of certain offices and one-half the rent of any surplus space does not violate this section, providing that the credit of the State shall not be pledged or loaned for the benefit of any

individual, association, or corporation, and the State shall not become joint owner of, or stockholder in, any such organization. *Chapman v. Greenville Chamber of Commerce*, 127 S. C. 173, 120 S. E. 584.

County hospital is "public building."—A proposed hospital for which a township is authorized to issue bonds, and which is to be under the control of public officers, is such a "public building" as is intended to be excepted from this section, limiting the power of the Legislature to authorize any county or township to levy a tax or issue bonds for any purpose except for educational purposes, to build or repair public roads, buildings, etc. *Battle v. Willcox*, 128 S. C. 500, 122 S. E. 516.

Acts passed before this Constitution, exempting part of a county from the operation of the general stock law, are not in conflict with this section, prohibiting the General Assembly from authorizing counties or townships to levy taxes except for certain purposes, in that such acts provide for the levying of taxes for the maintenance of fences, which subjects are not within the exceptions of the Constitution, the provisions of the Constitution being prospective. *McCullough v. Graham*, 70 S. C. 63, 49 S. E. 1, 6 A. L. R. 222.

Exempting certain lands from stock laws.—See this catchline under U. S. Const., amend. 14, analysis line II, B, "Acts Violating the Amendment."

Repugnant statute must have been unconstitutional at enactment.—See this catchline under Const. art. 17, § 11.

Pledging of state's credit to establish warehouse commission does not violate section.—An Act, authorizing money to be borrowed on the State's credit for the carrying out of the provisions of the Act to establish a State warehouse commission, is not violative of this section, providing that the credit of the State shall not be pledged for private purposes. *State v. McCown*, 92 S. C. 81, 75 S. E. 392, 42 L. R. A. (N. S.) 222, Ann. Cas. 13C, 1231, Ann. Cas. 16D, 25, 34, 14 A. L. R. A. 1156, 23 A. L. R. 1481.

Section does not preclude Legislature from issuing bonds.—This this section provides that the General Assembly may

not authorize any county or township to issue bonds except for educational purposes, to build and repair roads, buildings, and bridges, etc., does not preclude the Legislature itself from providing for the issuance of township bonds to construct bridges. *Fripp v. Coburn*, 101 S. C. 312, 85 S. E. 774. See the above catchline under § 5 of this article.

An Act, abolishing the Bogansville township highway commission, and devolving all the duties imposed on them upon the advisory board and the county engineer, is not in conflict with this section and § 13, limiting the purposes for which the General Assembly may authorize counties or townships to issue bonds and providing that the taxes for subdivision of the State shall be levied by the respective fiscal authorities thereof. *Askew v. Smith*, 126 S. C. 159, 119 S. E. 378.

Bonds issued by the state or its political subdivisions which are payable out of special funds do not create debts of the state or its political subdivisions, although the full faith, credit, and taxing powers of the state or its political subdivisions are pledged for the payment of the same. *Clarke v. South Carolina Public Service Authority*, 177 S. C. 427; 181 S. E., 481. *Bollin v. Graydon*, 177 S. C., 374; 181 S. E., 467. *Crawford v. Johnston*, 177 S. C., 399; 181 S. E., 476.

Where revenues provided for are reasonably sufficient to pay principal and

interest of obligations incurred. *State v. Lewis*, 181 S. C. 10; 186 S. E. 625.

The giving of a mortgage over property to be acquired from the proceeds of bonds to be sold by authority under statute authorizing such authority to construct and operate hydro-electric and navigation project would not make the bonds debts of the state within constitutional inhibitions against creation of a public debt without vote of people, especially when no funds, or property, acquired from taxation are involved, and the mortgage is payable solely from revenues of the authority. *Clarke v. South Carolina Public Service Authority*, 177 S. C., 427; 181 S. E., 481.

Under constitutional provision prohibiting General Assembly from authorizing counties or townships to levy taxes except for certain purposes, special local levies can be made for ordinary county purposes. *Webster v. Williams*, 183 S. C. 368; 191 S. E. 51.

Issuance of bonds by county for extension and improvement of airport is not for "ordinary county purposes". *Gentry v. Taylor*, 192 S. C. 145, 5 S. E. (2d) 857.

County revenue bonds, issued to pay for construction of county hydroelectric plant, not "debts" within constitutional limitations. *Park v. Greenwood County*, 174 S. C. 36, 176 S. E. 870. See also actions between same parties in 10 F. S. 854, 299 U. S. 259, 81 L. Ed. 178, 57 S. Ct. 202, and 19 F. S. 932.

Section 7. Scrip, certificate, or evidence of state debt.—No scrip, certificate or other evidence of State indebtedness shall be issued except for the redemption of stock, bonds or other evidences of indebtedness previously issued, or for such debts as are expressly authorized in this Constitution.

See Const. 1868, IX, 10.

Where obligations will be met by special fund without taxation, section is not violated.—An Act, providing in alternative for financing of construction of State highway system by issuance by State of evidences of indebtedness for payment of which proceeds of State gasoline tax and motor vehicle tax were pledged, does not violate this section and § 11, prohibiting increase of State's public debt except for ordinary and current business, without first submitting question to qualified electors, since obligations incurred would be met from special fund without taxation. *State v. Moorer*, 152 S. C. 455, 150 S. E. 269.

Redemption of "Brown Consol" bonds and stocks is proper.—An Act providing for the redemption of that part of the State debt known as the "Brown Consol bonds and stocks" by the issue of other bonds, is not within the meaning of Const. art. 10, § 11, requiring such an Act to be passed "by a vote of two-

thirds of all the members of each branch of the General Assembly," but is within this section, authorizing the issue of evidences of State indebtedness for the redemption of stocks, bonds, etc., previously issued, and is valid, though not passed by a two thirds vote. *Robertson v. Tillman*, 39 S. C. 298, 17 S. E. 678, 37 L. R. A. (N. S.) 1102, L. R. A. 1915D, 186.

The warehouse receipts authorized to be issued under the State Warehouse Act (§ 6476) are not "script, certificates, or other evidence of State indebtedness" within the meaning of this section restricting the issuance of such paper. *State v. McCown*, 92 S. C. 81, 75 S. E. 392, 42 L. R. A. (N. S.) 222, Ann. Cas. 13C, 1231, Ann. Cas. 16D, 25, 34, 14 A. L. R. 1156, 23 A. L. R. 1481.

Issuance of scrip where there is no previous indebtedness is fatal.—The issue of revenue bond scrip under an Act of March 2, 1872, to relieve the State of all liability on its guaranty indorsed

upon railway bonds by authority of an Act of September 15, 1868, when, as the statute showed on its face, there was no outstanding liability represented by the guaranty, comes within the prohibition of this section, against issuing scrip except for the redemption of an "evidence of indebtedness previously issued," where neither statute purported to be an adjustment of a claim against the State, permitted by art. 17, § 2, of the Constitution. *Lee v. Robinson*, 196 U. S. 64, 25 S. Ct. 180, 49 L. Ed. 388.

Bonds issued by state or its political subdivisions which are payable out of special funds do not create "debts" of state or its political subdivisions within constitutional provisions relating to public debt, although full faith, credit, and taxing powers of state or its political subdivisions are pledged for payment of same, where revenues provided for are reasonably sufficient to pay principal and interest of obligations incurred. *State v. Lewis*, 181 S. C. 10; 186 S. E. 625.

See notes under § 11, this article.

Section 8. Receipts and expenditures.—An accurate statement of the receipts and expenditures of the public money shall be published with the laws of each regular session of the General Assembly, in such manner as may by law be directed.

See Const. 1868, IX, 11.

Section 9. Money.—Money shall be drawn from the Treasury only in pursuance of appropriations made by law.

See Const. 1868, II, 22 and IX, 12.

Section protects taxpayer's rights. — Any taxpayer, whether one or more, may invoke the aid of the court to prevent the fiscal officers of the State from applying funds in the treasury to any purpose not authorized by law, for, besides the fact that such funds are derived from taxes levied and collected by the people of the State, and in which, therefore, every taxpayer is more or less interested, the Constitution expressly provides in this section that "no money shall be drawn from the treasury but in pursuance of an appropriation made by law." *Butler v. Ellerbe*, 44 S. C. 256, 22 S. E. 425, 443, 108 Am. St. Rep. 841, 8 L. R. A. (N. S.) 124, 44 L. R. A. (N. S.) 201, L. R. A. 1915D, 185.

Unless there has been an appropriation made by law authorizing payment of salary, comptroller general should not issue his warrant for amount. *Grimball v. Beattie*, Comptroller General, et al., 174 S. C., 422; 177 S. E. 668.

A general law being in force fixing salary of a public officer and its payment at particular periods, a special annual appropriation is not necessary for comptroller to issue warrant on treasurer for such salary. *Grimball v. Beattie*, 174 S. C., 422; 177 S. E., 668.

Appropriation may be made by a permanent continuing statute. *Grimball v. Beattie*, 174 S. C., 422; 177 S. E., 668.

Unrepealed and unmodified statutes being in full force and effect providing for payment of officer's salary, nothing being indefinite or uncertain, no further legislative sanction or action is necessary

to authorize proper officers to pay such salary. *Grimball v. Beattie*, 174 S. C., 422; 177 S. E., 668.

See notes under article 5, section 9, state constitution.

Cited, in *State v. Jennings*, 68 S. C. 411, 47 S. E. 683, 16 L. R. A. (N. S.) 632, 52 L. R. A. (N. S.) 439, 5 A. L. R. 579, in support of the holding that where there is no permanent, continuing statute, or constitutional provision, fixing the salary of a circuit judge, and no appropriation has been made therefor, mandamus will not issue to compel the Comptroller General to issue a warrant for a salary, and the State Treasurer to pay it, since the proceeding would be against the State, in which case the court would have no jurisdiction; in *State v. Derham*, 61 S. C. 258, 39 S. E. 379, 45 L. R. A. (N. S.) 693, Ann. Cas. 15C, 283, 7 A. L. R. 1651, in support of the holding that the sum of \$100,000, appropriated in the General Appropriation Act of 1901, is to be distributed according to the provisions of Act Feb. 19, 1900 (23 St. at Large, p. 409), as amended by Act Feb. 19, 1901 (23 St. at Large, p. 753), for pensions of soldiers and sailors residents of the State, who were in the service of the State or the Confederate States in the late war between the states, and the Comptroller General can only lawfully draw his warrant in favor of the clerk of the circuit court for a pro rata share of pensions going to his county appropriated by such general act, *Fuller v. Payne*, 96 S. C. 471, 81 S. E. 176.

Section 10. Fiscal year.—The Fiscal year shall commence on the First day of July in each year: *Provided*, That the General Assembly at its first

regular session after the passage of this amendment, shall be authorized and empowered to make appropriations for governmental purposes for not exceeding eighteen (18) months, and to make such other changes and provisions in law as may be necessary to effectively make the foregoing provision operative: *Provided, further*, That should this Constitution be amended so as to provide for biennial sessions, then the General Assembly shall have power at the first session after the adoption of such an amendment to make appropriations for a period not exceeding two and one-half (2½) years and thereafter for each succeeding biennium.

Amended by a joint resolution and an act: 1932 (37) 1402; 1933 (37) 591. See FOREWORD on page 1159 of this volume.

Section 11. Public debt—state bonds.—To the end that the public debt of South Carolina may not hereafter be increased without the due consideration and free consent of the people of the State, the General Assembly is hereby forbidden to create any further debt or obligation, either by the loan of the credit of the State, by guaranty, endorsement or otherwise, except for the ordinary and current business of the State, without first submitting the question as to the creation of such new debt, guaranty, endorsement or loan of its credit to the qualified electors of this State at a general State election; and unless two-thirds of the qualified electors of this State, voting on the question, shall be in favor of increasing the debt, guaranty, endorsement, or loan of its credit, none shall be created or made. And any debt contracted by the State shall be by loan on State bonds, of amounts not less than fifty dollars each, bearing interest, payable not more than forty years after final passage of the law authorizing such debt. A correct registry of all such bonds shall be kept by the Treasurer in numerical order, so as to always exhibit the number and amount unpaid, and to whom severally made payable. And the General Assembly shall levy an annual tax sufficient to pay the annual interest on said bonds.

See 16th amend. to Const. 1868.

Scope of section.—In the dissenting opinion to *State v. Moor*, 152 S. C. 455, 150 S. E. 269, 308, Justice Townsend said: "The exception from the prohibition in the Sixteenth Amendment to the Constitution of 1868 and this section, of ordinary and current business of the State, is in contrast to 'extraordinary expenditures' referred to in § 7, art. 9, Constitution 1868; and shows that the requirement of securing the approval of the electors before creating any new debt or obligation applies to the creation of any new debt or obligation on the part of the State for extraordinary expenditures, or expenditures over and above the ordinary and current expenses of the government which annually recur." Citing, with approval, *Robertson v. Tillman*, 39 S. C. 298, 301, 302, 17 S. E. 678, 37 L. R. A. (N. S.) 1102, L. R. A. 1915D, 186.

Section forbids creation of new liability of state by Legislature.—It is beyond the constitutional power of the Legislature to create a liability on the part of the State for an act, direct or imputed,

for which it was not liable at the time of its commission; such legislative action being in contravention of this section, and art. 17, § 2, of the Constitution. *Sandel v. State*, 126 S. C. 1, 119 S. E. 776, 793.

This does not prevent the Legislature from authorizing issue of bonds by county without submitting the question to an election. Act 26 Stat. 298, authorizing county commissioners of Kershaw County to issue \$40,000 of coupon bonds empowers commissioners to submit question to voters, but also permits them to issue bonds without such submission. *Carrison v. Kershaw County*, 83 S. C. 88, 64 S. E. 1018.

This section does not apply to refunding a valid existing debt. *State v. Blease*, 95 S. C. 403, 79 S. E. 247, L. R. A. 1917A, 232, Ann. Cas. 15A, 526.

Redemption of "Brown Consol" bonds by other bonds is proper.—An Act, providing for the redemption of that part of the State debt known as the "Brown Consol bonds and stocks" by the issue of

other bonds, is not a violation of this section, forbidding the creation of any further debt or obligation, "except for the ordinary and current business of the State. * * * unless two-thirds of the qualified voters of the State, voting on the question, shall be in favor" thereof. *Robertson v. Tillman*, 39 S. C. 298, 17 S. E. 678, 37 L. R. A. (N. S.) 1102, L. R. A. 1915D, 186.

As to certificates of stocks in exchange for bonds, see § 7331, and the note thereto.

And state is responsible for redeemed bond restored to circulation by theft.—

This section, forbidding the General Assembly from creating any further debt or obligation without first submitting the question to the electors, does not bar a bona fide holder of a coupon bond of the State from the right to exchange the same for a certificate of stock under the express provisions of Laws 1892, pp. 24, 25, §§ 1, 2, though such bond has theretofore been redeemed by exchange of a certificate of stock, but again restored to circulation by theft. *Ehrlich v. Jennings*, 78 S. C. 269, 58 S. E. 922, 125 Am. St. Rep. 795, 813, 128 Am. St. Rep. 705, 19 L. R. A. (N. S.) 112, 39 L. R. A. (N. S.) 447, 44 L. R. A. (N. S.) 203, 52 L. R. A. (N. S.) 442, L. R. A. 1918E, 183, 13 Ann. Cas. 1166, 1 A. L. R. 717.

Legislature has plenary power to authorize issuance of school bonds.—

There being no restrictions on the issuance of bonds by a school district, such as are contained in Const. art. 8, § 7, and this section, requiring the State, cities, and towns to submit to the voters questions as to creating and increasing debts thereof, the Legislature has plenary power to authorize issuance of bonds by a school district for school purposes. *Zeigler v. Thompson*, 119 S. C. 101, 111 S. E. 880.

Revenue bond scrip violates section.—

The revenue bond scrip issued by the State of South Carolina, under Act March 2, 872 (15 St. at Large S. C. p. 79), is invalid as in contravention of this section, prescribing the mode in which debts shall be contracted by the state, and also because the certificates are in law and in fact bills of credit issued in violation of art. 1, § 10, of the Constitution of the United States. *Robinson v. Lee*, 122 F. 1012.

Issue of bonds under State Warehouse Act invalid.—

The State Warehouse Act (§§ 6466 et seq.), in so far as it provides for an issuance of bonds and an increase of the public debt without first submitting the question to the qualified voters, violates this section, prohibiting an increase in the State debt without the consent of the voters except for the "ordinary" and current business of the State; the building of warehouses not being

"ordinary" State business, and the bonds not being intended to be for a debt of the State. *State v. McCown*, 92 S. C. 81, 75 S. E. 392, 42 L. R. A. (N. S.) 222, Ann. Cas. 13C, 1231, Ann. Cas. 16D, 25, 34, 14 A. L. R. 1156, 23 A. L. R. 1481.

Pay-As-You-Go Act does not violate section.— The Pay-As-You-Go Act, authorizing reimbursement to counties for moneys advanced for road construction, from special fund consisting of gasoline tax, automobile license tax, and federal aid, is not violative of this section, as incurring "debt" without vote of people. *Briggs v. Greenville County*, 137 S. C. 288, 135 S. E. 153.

Where obligations will be met by special fund without taxation, section is not violated. See this catchline under § 7.

See generally, *Luther v. Wheeler*, 73 S. C. 83, 52 S. E. 874, 4 L. R. A. (N. S.) 746, 6 Ann. Cas. 754, Ann. Cas. 13C, 899, Ann. Cas. 13D, 77.

Cited. in *Luther v. Wheeler*, 73 S. C. 83, 52 S. E. 874, 4 L. R. A. (N. S.) 746, 6 Ann. Cas. 754, Ann. Cas. 13C, 899, Ann. Cas. 13D, 77, in support of the holding that, municipal corporations have no authority to borrow money, unless such authority is expressly given, or unless some duties are imposed or powers conferred on the corporations which could not be exercised at all without borrowing money; *Paris Mountain Water Co. v. Greenville*, 110 S. C. 36, 96 S. E. 545; *Powell v. Hargrove*, 136 S. C. 345, 134 S. E. 380; *Duncan v. Charleston*, 60 S. C. 532, 39 S. E. 265, 37 L. R. A. (N. S.) 1069, Ann. Cas. 12D, 660; *Lillard v. Melton*, 103 S. C. 10, 87 S. E. 421, 425, L. R. A. 1916D, 572, L. R. A. 1917E, 468, 5 A. L. R. 761, 24 A. L. R. 941.

This section does not prevent one injured by negligent operation of motor vehicle of State Highway Department from suing the department under statute providing for suit. *Outz v. State Highway Department*, 161 S. C., 21, 159 S. E., 457.

Where obligations will be met by special fund without taxation, this section is not violated. *Bollin v. Graydon*, 177 S. C., 374; 181 S. E., 467. *Crawford v. Johnston*, 177 S. C. 399; 181 S. E., 476. *Clarke v. South Carolina Public Service Authority*, 177 S. C., 427; 181 S. E., 481.

Inasmuch as the statute and bonds and mortgage to be issued by authority expressly provide no debt of state shall be created, nor shall full faith, credit, and taxing power of state be pledged to their payment, no debt of state within the constitutional sense will be created, irrespective of amount available to construct project, and the revenues to be derived therefrom. *Clarke v. South Carolina Public Service Authority*, 177 S. C., 427; 181 S. E., 481.

Under acts providing for erection of

county courthouse, which created courthouse commission and conferred upon it authority to issue bonds payable solely from revenues to be derived from operation of building so erected, county bonds issued for purpose of raising money valid, although question of issuance of bonds was not submitted to voters of county, since retirement was provided for by special fund and no property tax could be levied to pay them. *Bollin v. Graydon*, 177 S. C., 374; 181 S. E., 467.

The refinancing of existing obligations is not the creation of "any further debt or obligation" within the meaning of this section. *State v. Stevens*, 173 S. C., 149; 175 S. E., 213.

Bonds issued by state or its political subdivisions which are payable out of special funds do not create "debts" of state or its political subdivisions within constitutional provisions relating to public debt, although full faith, credit, and taxing powers of state or its political subdivisions are pledged for payment of same, where revenues provided for are reasonably sufficient to pay principal and interest of obligations incurred. *State v. Lewis*, 181 S. C. 10; 186 S. E. 625.

Statute authorizing the issuance of state certificates of indebtedness for purpose of financing the construction of buildings at certain state institutions of higher learning without securing the approval of the electors of the state, for payment of which a part of the income tax as already fixed by law was allocat-

ed, valid. *Arthur v. Johnston*, 185 S. C. 324; 194 S. E. 151.

The purpose of constitutional provisions prohibiting creation of state debt without a vote of the electors is to protect the taxpayers, particularly those whose property might be subjected to taxation, by providing a limit of taxation. *Arthur v. Johnston*, 185 S. C. 324; 194 S. E. 151.

The special fund allocated by a statute for liquidation of a debt thereby created without approval of the electors of the state should be derived only from a source related directly or indirectly to the project for the promotion of which the obligation is pledged. *Arthur v. Johnston*, 185 S. C. 324; 194 S. E. 151.

Ordinary and current business of state may be funded without violation of this section. *Lott v. Blackwood*, 166 S. C. 58, 164 S. E. 439.

"Highway diversion".—State highway certificates of indebtedness are not subject to bond limitation provisions if issued for lawful purpose and upon allocation of a special fund to pay them in such manner that it will not be necessary, presumably, to levy a tax in ensuing year to meet their payment. But where such certificates run for a period of years, and are sought to be issued for ordinary state expenses, they amount to "bonds" and come within constitutional inhibition. *State ex rel. Edwards v. Osborne*, 193 S. C. 158, 7 S. E. (2d) 526.

Section 12. Safe-keeping of public funds—embezzlement of, felony—General Assembly may remove.—Suitable laws shall be passed by the General Assembly for the safe-keeping, transfer and disbursement of the State, County and school funds; and all officers and other persons charged with the same shall keep an accurate entry of each sum received, and of each payment and transfer, and shall give such security for the faithful discharge of such duties as the General Assembly may provide. And it shall be the duty of the General Assembly to pass laws making embezzlement of such funds a felony, punishable by fine and imprisonment, proportioned to the amount of the deficiency or embezzlement, and the party convicted of such felony shall be disqualified from ever holding any office of honor or emolument in this State: *Provided, however*, That the General Assembly, by a two-thirds vote, may remove the disability upon payment in full of the principal and interest of the sum embezzled.

See Const. 1868, art. 10, § 12.

In prosecution for embezzlement of public funds, action of court in finding, from disputed facts, the amount embezzled, in order to determine amount of

imprisonment and fine, instead of permitting jury to determine amount embezzled, was reversible error. *State v. Johnson*, 186 S. C. 202; 195 S. E. 329.

Section 13. One assessment for all taxes.—The General Assembly shall provide for the assessment of all property for taxation; and State, county, township, school, municipal and all other taxes shall be levied on the same

assessment which shall be that made for State taxes; and the taxes for the subdivisions of the State shall be levied and collected by the respective fiscal authorities thereof.

See section 2569 and notes thereto.

Section is not authority for refund of municipal taxes.—In proceedings involving refund of municipal taxes, a change by the tax commission in assessment thereof, does not impliedly change the assessment of municipal taxes, so as to require the municipality to make refund, in view of § 2427, on the ground that there could be only one assessment of State, county, or other taxes, and that municipal taxes are levied on same assessment made for State taxes, under this section, and § 2772. *Columbia v. Peurifoy*, 148 S. C. 349, 146 S. E. 93.

Drainage acts are not amendable to limitations on taxing power. See this catchline under § 3 of this article.

Statute imposing license tax of \$15 per year on coin-operated music producing machines does not violate this section. *Carolina Music House v. Query*, 192 S. C. 308, 6 S. E. (2d) 473.

A levy of a county tax by the Legislature without levy by county authorities is valid. *Dickson v. Burckmyer*, 67 S. C. 526, 46 S. E. 343, Ann. Cas. 15C, 997.

Section confers administrative powers in the collection of a tax.—This section, to the effect that the taxes for the subdivisions of the State shall be levied and collected by the respective fiscal authorities thereof, confers administrative power in the collection of the tax, without reference to its creation. *Southern Ry. Co. v. Kay*, 62 S. C. 28, 39 S. E. 785.

This section, providing that all taxes shall be levied on the same "assessment" which shall be made for State taxes, requires all taxes to be levied on the same valuation. *Southern Ry. Co. v. Kay*, 62 S. C. 28, 39 S. E. 785.

Act permitting town to adopt method of tax assessments by which taxes for town purposes are different from auditor's books is unconstitutional. *Breedin v. Town of Manning*, 171 S. C. 295, 172 S. E. 120.

And mandamus will lie to require board of assessors and equalization board of town to adopt assessment upon county auditor's books. *Breedin v. Town of Manning*, 168 S. C. 69, 167 S. E. 2.

Extent of bonded debt must be determined according to assessment under this section.—In determining whether the bonded debt of a city exceeds the per cent. of the assessed valuation allowed by law, the computation, under this section, must be based on the assessment for State and county purposes only. *Todd v. Laurens*, 48 S. C. 395, 26 S. E. 682, 36 L. R. A. (N. S.) 25, 37 L. R. A. (N. S.) 1108, L. R. A. 1917E, 468, Ann. Cas. 12C, 450.

An official assessment is prerequisite

to constitute a legal tax. See this catchline under art. 1, § 6.

Complaint filed by state for collection of taxes on realty, which failed to allege that realty was legally assessed, stated no cause of action. *State v. Textile Hall Corporation*, 185 S. C. 407, 194 S. E. 66.

Section gives Legislature authority over tax commission.—Under this section, art. 4, § 24, and art. 11, § 4, the General Assembly has the power to prescribe the duties and powers of county auditors, county treasurers, the Comptroller General, and the State tax commission. *Bank of Johnston v. Prince*, 136 S. C. 439, 134 S. E. 387.

Section does not preclude Legislature from issuing bonds.—This section declaring that the General Assembly shall provide for the assessment of all property for taxation, and that State, county, township, etc., and all other taxes, shall be levied on the same assessment, does not preclude the Legislature from directing the issuance of township bonds to build a bridge; the regular assessment not being interfered with. *Fripp v. Curnburn*, 101 S. C. 312, 85 S. E. 774. Cited with approval in *Evans v. Beattie*, 137 S. C. 496, 135 S. E. 538, 556. See the above catchline under § 6 of this article.

Statutes imposing interest at rate of one per cent per month on delinquent Orangeburg County taxes void. *Webster v. Williams*, 183 S. C. 368; 191 S. E. 51.

As respects validity under constitutional prohibition against enactment of special laws, statutes imposing interest at rate of one per cent per month on delinquent Orangeburg County taxes could not be sustained as tax on theory of classification of taxpayers as delinquent and nondelinquent, where statutes did not comply with constitutional provisions relating to manner in which property taxes should be imposed. *Webster v. Williams*, 183 S. C. 368; 191 S. E. 51.

Cited, in *New York Life Ins. Co. v. Bradley*, 83 S. C. 418, 65 S. E. 433, 131 Am. St. Rep. 884, Ann. Cas. 15A, 189, in support of the holding that a tax on the gross income in the State of foreign insurance companies for the preceding year, not being limited to property in the State, is unconstitutional, as taking property without due process; in *State v. Tucker*, 56 S. C. 516, 35 S. E. 215, 1 A. L. R. 727, in support of the holding that a statute requiring that all landowners in certain counties should during the months of May and August of each year remove from the running streams of water on their land all trash, trees, rafts, and timbers therein, and making a violation of such requirement a misdemeanor,

if to be considered as a measure for taxation, is unconstitutional; in *Powell v. Hargrove*, 136 S. C. 345, 134 S. E. 380, in support of the holding that acts, vesting the county board of education of Dillon County with power to tax for support of high schools, are not violative of consti-

tutional provisions intended to limit public debt, in *Fuller v. Payne*, 96 S. C. 471, 81 S. E. 176; *Lillard v. Melton*, 103 S. C. 10, 87 S. E. 421, 431, L. R. A. 1916D, 572, L. R. A. 1917E, 468, 5 A. L. R. 761, 24 A. L. R. 941.

Section 13-A. Assessments for improvement of bridges and highways. Beaufort County.—The General Assembly may authorize the corporate authorities of the several counties of the State to levy an assessment upon abutting property and property adjacent within ten miles in proportion to the benefits derived therefrom for the purpose of paying for permanent improvement of bridges, public roads and highways thereof: *Provided*, That said improvement shall be ordered only upon the written consent of one-half of the owners of the property abutting upon any such bridge, public road, or highway proposed to be improved, and upon condition that said assessment of abutting property owners shall not exceed one-half of the cost of such improvements. *Provided*, the provisions of this Section shall apply only to Beaufort County.

Amended by a joint resolution and an act: 1922 (32) 1331; 1923 (33) 69. See FOREWORD on page 1159 of this volume.

The Coastal Highway Act, creating road district for certain counties, is not in violation of the Constitution for its failure to follow this section and § 20, relating to plan of assessment in two

counties included in district, since amendments did not forbid other taxation for road purposes. *Evans v. Beattie*, 137 S. C. 496, 135 S. E. 538.

Section 14. Certain cities may levy assessment on abutting property—proviso.—The General Assembly may authorize the corporate authorities of the Cities of Greenville, Spartanburg and Columbia, and the Town of Manning, to levy an assessment upon abutting property for the purpose of paying for permanent improvements on streets and sidewalks immediately abutting such property: *Provided*, That said improvements be ordered only upon the written consent of two-thirds of the owners of the property abutting upon the street, sidewalk or part of either proposed to be improved, and upon condition that said corporate authorities shall pay at least one-half of the costs of such improvements.

Amended by a joint resolution and an act. 1910 (26) 1065; 1911 (27) 225. See FOREWORD on page 1159 of this volume.

Provided, further, That the city of Greenville may be authorized, upon the written consent of the owners of two-thirds ($\frac{2}{3}$) of the frontage of the property abutting upon the street, roadway, alleyway, sidewalk or part of either, proposed to be improved, to levy an assessment upon the abutting property for the entire cost of such improvements, including lateral pipe lines; the corporate authorities, however, to pay the cost of improving the intersection of any such streets, roadways, alleyways or sidewalks: *Provided, further*, That said City of Greenville may be authorized and empowered without the necessity of an election to issue improvement certificates or bonds in an amount not exceeding the aggregate amount of the cost of such improvements, pledging the assessments as security therefor, and such certificates or bonds shall not be deemed a part of the bonded indebtedness within the meaning of the constitutional limitation: *Provided, further*, Said

City of Greenville may, at its option, assess only a portion of the cost against abutting property owner, itself paying the remainder.

Amended by a joint resolution and an act: 1928 (35) 1691; 1929 (36) 39. See 664; 1919 (31) 75. See FOREWORD on page 1159 of this volume.

Provided, still further, that crushed stone or slag laid on a prepared clay or top-soil base and bound securely by some bitumious material in such a manner as to form a durable hard surface, by methods commonly termed 'surface treatment', shall be considered and construed to be a type of permanent improvement permitted or authorized hereunder for use on the streets and roadways within the present or enlarged corporate limits of the city of Greenville.

Amended by a joint resolution and an act: 1938 (40) 1830; 1939 (41) 69. See FOREWORD on page 1159 of this volume.

Sections 7374, 7375, requiring election as means of procuring street improvement are inapplicable to city of Columbia. in view of this section, authorizing specified cities, including Columbia, to order improvements on petition of owners of abutting property. *Ballentine v. Columbia*, 132 S. C. 88, 129 S. E. 82.

The city of Spartanburg is authorized by the Constitution to levy a paving assessment. *Blake v. City of Spartanburg*, 185 S. C. 398; 194 S. E. 124.

City of Greenville.—City may pave its streets and charge entire cost to abutting property. *Beatty v. Wittekamp*, 171

S. C. 326, 172 S. E. 122.

And Greenville possesses lien on abutting property for improvements. *Ibid.*

Which lien is superior to every private interest in land, including mortgage previously executed. *Ibid.*

Procedure for collecting assessment lien is one in rem. *Ibid.*

When United States government made no effort to enforce income tax lien for about 10 years, such lien ordered paid after city and state taxes and paving assessments subsequently arising. *United States v. Woodside*, 34 F. S. 281.

Section 14a. Assessments on abutting property in Charleston and Beaufort.—The General Assembly may authorize the corporate authorities of the Cities of Charleston and Beaufort to levy an assessment upon abutting property for the purpose of paying for permanent improvements on streets, and sidewalks immediately abutting such property, and in the City of Charleston to pay for the permanent improvement of intersection of streets and for placing curbing and for laying drains abutting such property: *Provided*, That said improvements be ordered only upon the written consent of two-thirds of the owners of the property abutting upon the street, sidewalk, or part of either, proposed to be improved, and upon condition that said corporate authorities shall pay at least one-half of the costs of such improvements. But this proviso shall not apply to the City of Charleston, in which city the City Council shall have the right to levy an assessment upon abutting property for the purpose of paying for permanent improvements on streets, the intersection of streets and sidewalks, and to pay for curbing of streets and for drains abutting such property without the consent of the owner of the property abutting upon the streets, intersection of streets, sidewalks, or a part of either, proposed to be improved, or where curbing is to be placed or drains laid, and without paying for any of the costs of such improvements.

Amended by joint resolutions and acts: 1912 (27) 1096; 1913 (28) 334; 1917 (30) 664; 1919 (31) 75. See foreword on page 1359 of this volume.

Objection under this section is waived by inaction.—Objections that a petition filed with the city clerk praying for an

election on the question of issuing bonds for street, sidewalk, and drain improvements as authorized by this section, was

not signed by a majority of the free-holders of the city, are waived by failure of taxpayers to file written protest or take proper proceedings in court after the election has been ordered and proper notice thereof given and prior to the holding of the election. *Sullivan v. City Council*, 123 S. C. 91, 116 S. E. 104.

City council may not include prior benefits in assessment.—Under this sec-

tion, authorizing the Charleston city council to levy on abutting property assessments for improvements to streets "proposed to be improved" or where curbing is to be placed or drains laid, the city council has no authority to include in the assessment benefits to a property owner from an adequate drain theretofore installed. *Sullivan v. City Council*, 123 S. C. 91, 116 S. E. 104, 105.

Section 15. Tax abutting property in Chester, Woodruff, Gaffney and Georgetown for permanent improvements.—The General Assembly may authorize the corporate authorities of the towns of Gaffney and Woodruff and the cities of Chester and Georgetown to levy an assessment upon abutting property for the purpose of paying for permanent improvements on streets and sidewalks, or streets or sidewalks, immediately abutting such property: *Provided*, That said improvements be ordered only upon the written consent of a majority of the owners of the property abutting upon the streets or sidewalks, or part of either proposed to be improved, and upon the condition that the corporate authorities shall pay at least one-half of the costs of such improvements.

Amended by a joint resolution and an act: 1912 (27) 1097; 1913 (28) 336. See FOREWORD on page 1159 of this volume.

Section 15a. Latta and Dillon may assess abutting property.—The General Assembly may authorize the corporate authorities of the towns of Latta and Dillon to levy an assessment upon abutting property for the purpose of paying for permanent improvements on streets and sidewalks, or streets or sidewalks, immediately abutting such property: *Provided*, That said improvements be ordered only upon the written consent of two-thirds of the owners of property abutting upon the streets or sidewalks, and upon the condition that the corporate authorities shall pay at least one-half of the cost of such improvements.

Amended by a joint resolution and an act: 1914 (28) 956; 1915 (29) 69. See FOREWORD on page 1159 of this volume.

Section 16. Assessment of abutting property owners by Pendleton.—The General Assembly may authorize the corporate authorities of the Town of Pendleton to levy an assessment upon abutting property for the purpose of paying for permanent improvements on streets and sidewalks, or streets or sidewalks, immediately abutting such property: *Provided*, That said improvements be ordered only upon written consent of two-thirds of the owners of the property abutting upon the streets, sidewalks, or parts of either, proposed to be improved, and upon condition that said corporate authorities shall pay at least one-half of the cost of such improvement.

Amended by a joint resolution and acts: 1918 (30) 1141; 1919 (31) 163; 1920 (31) 711. See FOREWORD on page 1159 of this volume.

Assessment under this section is not a "public debt."—This section, authorizing municipality to levy assessment on abutting property for purpose of paying for permanent improvements on streets and sidewalks, does not create a personal liability against a property owner for amount of assessment, so as to consti-

tute such assessment, a debt due the public entitled to priority under § 8995 out of assets in hands of administrator after owner's death. *Weatherly v. Medlin*, 141 S. C. 290, 139 S. E. 633.

Pay-As-You-Go Act does not conflict with section. See this catchline under § 2 of this article.

Section 16. Sumter, Darlington, Belton and Walhalla may assess abutting property.—The General Assembly may authorize the corporate authorities of the Cities of Sumter and Darlington, and the Towns of Walhalla and Belton to levy an assessment upon abutting property for the purpose of paying for permanent improvements on streets and sidewalks, or streets or sidewalks, immediately abutting said property: *Provided*, That said improvements shall be ordered only upon the written consent of one-half of the owners of the property abutting upon the street, sidewalk, or parts of either, proposed to be improved, and upon condition that said assessment upon abutting property owners shall not exceed one-half of the cost of such improvements, except in the city of Sumter, where the corporate authorities shall pay at least one-third of the cost of such improvements and the abutting property owners not exceeding two-thirds of the cost thereof.

Amended by a joint resolution and an act: 1913 (28) 387; 1915 (29) 59. See FOREWORD on page 1159 of this volume.

Section 16. Florence, Orangeburg and Landrum may assess abutting property for permanent improvements.—The General Assembly may authorize the corporate authorities of the Cities of Florence and Orangeburg, and the Town of Landrum, to levy an assessment upon abutting property for the purpose of paying for permanent improvements on streets, immediately abutting upon such property: *Provided*, That the said improvements be ordered only on the written consent of a majority of the owners of the property abutting upon the streets, sidewalk, or part of either, proposed to be improved, and upon the condition that said corporate authorities shall pay at least one-third of the costs of said improvements.

Amended by a joint resolution and an act: 1914 (28) 950; 1915 (29) 88. See FOREWORD on page 1159 of this volume.

Section 16. Anderson, Greenwood, Bennettsville, Timmons ville and Honea Path may assess abutting property.—The General Assembly may authorize the Cities of Anderson, Greenwood, and Towns of Bennettsville, Timmons ville and Honea Path, to levy an assessment upon abutting property for the purpose of paying for permanent improvements on streets and sidewalks immediately abutting such property: *Provided*, That said improvements be ordered only upon written consent of a majority of the owners of property abutting upon the street, sidewalk, or part of either, proposed to be improved, and upon condition that said corporate authorities shall pay at least one-half of the cost of such improvements.

Amended by a joint resolution and an act: 1914 (28) 969; 1915 (29) 78. See FOREWORD on page 1159 of this volume.

See notes to section 17.

Section 17. Assessments in incorporated cities and towns for permanent improvements.—The General Assembly may authorize the corporate authorities of any or all incorporate cities and towns in the State to levy an assessment upon abutting property for the purpose of paying for permanent improvements on streets and sidewalks immediately abutting such property: *Provided*, That said improvements be ordered only upon the written consent of two-thirds of the owners of the property abutting upon the

street, or sidewalks or part of either, proposed to be improved, and upon condition that said corporate authorities shall pay at least one-half of the cost of such improvements.

Amended by a joint resolution and an act: 1918 (30) 1129; 1919 (31) 37. See FOREWORD on page 1159 of this volume.

Section 17. Fort Mill may assess abutting property.—The General Assembly may authorize the corporate authorities of the Town of Fort Mill to levy an assessment upon abutting property for the purpose of paying for permanent improvements on streets and sidewalks, or streets or sidewalks, immediately abutting such property: *Provided*, That said improvements be ordered only upon the written consent of two-thirds of the owners of property abutting upon the streets or sidewalks, and upon the condition that the corporate authorities shall pay at least one-half of the cost of such improvements.

Amended by a joint resolution and an act: 1914 (28) 961; 1915 (29) 75. See FOREWORD on page 1159 of this volume.

Railroad property abutting on street is not exempt from assessment for street improvements under this section, notwithstanding use of such property for railroad purposes. *Atlanta, etc., Ry. Co. v. Easley*, 117 S. C. 494, 109 S. E. 285.

The contention of property owners that imposition of improvement assessment violated constitutional provisions was without merit in view of the fact that lien was created by the Constitution. *Town of Cheraw v. Turnage*, 184 S. C. 76; 191 S. E. 831.

The imposition of assessment for municipal improvements did not violate due process clause of Federal Constitution. *Town of Cheraw v. Turnage*, 184 S. C. 76; 191 S. E. 831.

The constitutional provision authorizing corporate authorities of incorporated cities and towns levy assessment on abutting property for purposes of paying for permanent improvements is self-executing, and subsequent legislation was unnecessary to create right to impose pav-

ing assessments. *Town of Cheraw v. Turnage*, 184 S. C. 76; 191 S. E. 831.

Enforcement.—The constitutional provision authorizing corporate authorities of incorporated cities and towns to levy assessment on abutting property for purposes of paying for permanent improvements, having failed to make provision for enforcement of liens thereby created, the assessments levied thereunder are enforceable in equity by way of foreclosure, though subsequent legislative enactment providing that payment of assessments may be enforced as payment of city or town taxes is enforced, since statutory remedy is in the alternative. *Town of Cheraw v. Turnage*, 184 S. C. 76; 191 S. E. 831.

This section does not exempt municipality from constitutional limitation on bonded indebtedness with respect to bonds issued to pay municipality's part of cost of permanent improvements, *Rose v. Baskins*, 178 S. C. 69, 182 S. E. 153.

Section 18. Assessments on abutting property in Clinton and Easley.—The General Assembly may authorize the Town of Clinton and the City of Easley to levy an assessment upon abutting property to pay for permanent improvements on streets and sidewalks immediately abutting such property: *Provided*, That said improvements be ordered only upon the written consent of a majority of the owners of property abutting upon the street, sidewalk, or part of either, to be improved; and, upon the further condition that the corporate authorities shall pay at least one-half of the costs of such improvements.

Amended by a joint resolution and an act: 1916 (29) 1245; 1917 (30) 226. See FOREWORD on page 1159 of this volume.

Section 19. Assessment upon abutting property for street improvement in Town of Greer.—The General Assembly may authorize the Town of Greer to levy an assessment upon abutting property to pay for permanent

improvements on streets and sidewalks immediately abutting such property: *Provided*, That said improvements be ordered only upon the written consent of a majority of the owners of property abutting upon the street, sidewalk, or part of either, to be improved, and upon the further condition that the corporate authorities shall pay at least one-half of the costs of such improvement.

Amended by a joint resolution and an act: 1921 (32) 629; 1924 (33) 991. See FOREWORD on page 1159 of this volume.

Section 20. Assessments in County of Florence for Highway Improvement.—The General Assembly may authorize the corporate authorities of the County of Florence to levy an assessment upon property within a radius of one and one-half ($1\frac{1}{2}$) miles of any public road or highway to be improved, for the purpose of paying for permanent improvements on the roads and highways: *Provided*, That no more than one-third ($1/3$) of the costs of any such improvements shall be so assessed and that of the amount so assessed two-thirds ($2/3$) shall be assessed upon the property within a radius of three-fourths ($3/4$) of a mile from the road or highway improved and one-third ($1/3$) upon other property: *And provided, further*, That such special assessments shall be levied or apportioned in accordance with the assessed valuation of the property to be assessed.

Amended by a joint resolution and an act: 1920 (31) 1728; 1921 (32) 90. See FOREWORD on page 1159 of this volume.

ARTICLE XI.

Education.

Section 1. Superintendent of education.—The supervision of public instruction shall be vested in a State Superintendent of Education, who shall be elected for the term of two years by the qualified electors of the State, in such manner and at such time as the other State officers are elected; his powers, duties and compensation shall be defined by the General Assembly.

See Const. 1868, X, 1.

Cross references.—See article IV, section 24, which was amended by Acts of 1926, XXXIV, at page 956, so as to increase the time of office of the State Superintendent of Education to four years. For parallel code section, see § 5272, and note thereto.

Article does not repeal laws relating to graded schools.—The provisions of this article do not repeal the laws applying to the special school districts and

graded schools in this State, and the Acts, 19 Stat. 1050, and 20 Stat. 935, are not unconstitutional. Voting for a school tax in a special school district viva voce is not in violation of the provisions of the Constitution as to elections. *Martin v. School Dist.*, 57 S. C. 125, 35 S. E. 517, 14 L. R. A. (N. S.) 851.

Powers of state board of education fix teachers' salaries.—See note to § 5478.

Section 2. State board of education.—There shall be a State Board of Education, composed of the Governor, the State Superintendent of Education, and not exceeding seven persons to be appointed by the Governor every four years, of which Board the Governor shall be Chairman, and the State Superintendent of Education, Secretary. This Board shall have the regulation of examination of teachers applying for certificates of qualification, and shall award all scholarships, and have such other powers and

duties as may be determined by law. The traveling expenses of the persons to be appointed shall be provided for by the General Assembly.

See Const. 1838, X, 2.

Cross references. — For parallel code section, see § 5279 and note thereto.

Editor's Note.—Under the State Constitution of 1868, art. 10, § 2, the State Board of Education consisted of school

commissioners elected biennially in each county; and the commissioners were considered state officers. *Pettigrew v. Bell*, 34 S. C. 104, 12 S. E. 1023, 1024.

Section 3. School officers.—The General Assembly shall make provision for the election or appointment of all other necessary school officers, and shall define their qualifications, powers, duties, compensation and terms of office.

See Const. 1868, X, 2.

This section is not affected by the provisions contained in art. 3, § 34 of this Constitution. *De Hay v. Com'rs*, 66 S. C. 229, 44 S. E. 790, 794.

County boards may be delegated to alter lines of school districts.—An Act authorizing county board of education to alter lines of school districts, is not in violation of this section, there being a marked difference between the imposition of a duty and the delegation of a legislative power. *Waterloo School Dist. v. Cross Hill School Dist.*, 106 S. C. 292,

91 S. E. 257, 258.

And may be given power to levy taxes for support of school. — An Act providing for division of a county into high school districts and vesting county board of education with power to levy taxes for support of high school, is valid under this section. *Powell v. Hargrove*, 136 S. C. 345, 134 S. E. 380, 383.

As to specific code section covering levy of taxes by county boards of education, see § 5346 and note thereto.

Section 4. Salaries of school officers and county treasurer.—The salaries of the State and County school officers and compensation of County Treasurers for collecting and disbursing school moneys shall not be paid out of the school funds, but shall be otherwise provided for by the General Assembly.

Under art. 4, § 24, art. 10, § 13, and this section, the General Assembly has power to prescribe duties and powers of county auditors, county treasurers, the Com-

troller General, and State Tax Commission. *Bank of Johnston v. Prince*, 136 S. C. 439, 134 S. E. 387, 389.

Section 5. Free public schools—school districts—bonded debt—graded school districts.—The General Assembly shall provide for a liberal system of free public schools for all children between the ages of six and twenty-one years, and for the division of the Counties into suitable school districts, as compact in form as practicable, having regard to natural boundaries, and not to exceed forty-nine nor be less than nine square miles in area: *Provided*, That in cities of ten thousand inhabitants and over, this limitation of area shall not apply: *Provided, further*, That when any school district laid out under this Section shall embrace cities or towns already organized into special school districts in which graded school buildings have been erected by the issue of bonds, or by special taxation, or by donation, all the territory included in said school district shall bear its just proportion of any tax that may be levied to liquidate such bonds or support the public schools therein: *Provided, further*, That nothing in this Article contained shall be construed as a repeal of the laws under which the several graded school districts of this State are organized. The present division of the Counties into school districts and the provisions of law now governing

the same shall remain until changed by the General Assembly.

See Const. 1868, IX, 3.

Provided, That the limitation as to area of school districts imposed by this Section shall not apply to Greenville County, but in said county school districts shall be of such area as the General Assembly may prescribe.

Amended by a joint resolution and an act: 1917 (29) 669; 1919 (31) 288. See FOREWORD on page 1159 of this volume.

Provided, That the limitation as to area of school districts imposed by this Section shall not apply to Spartanburg County, but in said county school districts shall be of such area as the General Assembly may prescribe.

Amended by a joint resolution and an act: 1915 (29) 598; 1918 (31) 726. See FOREWORD on page 1159 of this volume.

Provided, That the limitations imposed by Section 5, Article XI, of the Constitution of the State of South Carolina requiring nine (9) square miles in area shall not apply to Gates, Six Miles, Johnston and Garvin School Districts, in Pickens County.

Amended by a joint resolution and an act: 1922 (32) 1544; 1923 (33) 6. See FOREWORD on page 1159 of this volume.

Provided, further, That the limitation as to area of school districts imposed by this Section shall not apply to Fairfield and Union Counties, but in Fairfield and Union Counties school districts shall be of such area as the General Assembly or the County Board of Education may prescribe.

Amended by a joint resolution and an act: 1928 (35) 1693; 1929 (36) 231. See FOREWORD on page 1159 of this volume.

Provided, further, That the limitation as to area of school districts imposed by this section shall not apply to Bamberg County, Clarendon County and Georgetown County, but in said Counties school districts shall be of such area as the General Assembly may prescribe.

Amended by a joint resolution and an act: 1930 (36) 1407; 1931 (37) 106. See FOREWORD on page 1159 of this volume.

Provided, further, that the limitations as to the area of school districts imposed by this section shall not apply to Lexington County but in said County school districts shall be of such area as the General Assembly may prescribe.

Amended by a joint resolution and an act: 1930 (36) 1215; 1931 (37) 101. See FOREWORD on page 1159 of this volume.

Provided, Further, That the limits of area of School Districts imposed by this Section shall not apply to Florence, Abbeville, Orangeburg, Sumter, Union, Darlington, Charleston, Lancaster, Bamberg, Beaufort, Berkeley, Dorchester, Colleton, Dillon, York, Lee, Williamsburg, Horry, Georgetown, Jasper, Chesterfield, Edgefield and Anderson Counties, but in said counties School Districts shall be of such area as the General Assembly may prescribe.

Amended by a joint resolution and an act: 1936 (39) 1422; 1937 (40) 82. See FOREWORD on page 1159 of this volume.

This section must be construed with Const. art. 3, § 34, subd. 11. *State v. McCaw*, 77 S. C. 351, 58 S. E. 145, 146.

Section shows that no hiatus intended in laws as to education.—This section shows conclusively that the framers of the Constitution of 1895 intended that there should be no hiatus in the laws of this commonwealth in regard to the matter of education in all its ramifications. *De Hay v. Com'rs*, 66 S. C. 299, 44 S. E. 790, 793.

General Assembly is not prohibited from adopting other systems of schools than those mentioned.—There is nothing in the Constitution which prohibits the General Assembly from adopting other systems of schools, and accordingly, the General Assembly has from time to time enacted school laws, some general in their nature and others special. *Holler v. Rock Hill School Dist.*, 60 S. C. 41, 38 S. E. 220, Ann. Cas. 14B, 406.

And school district may be chartered with power to assess scholars.—An Act chartering a school district with power to assess on scholars, as supplementary tuition fees, such sums as should be necessary to meet the expenses of the school attended by them, is not in conflict with the constitutional provision for free public schools. *Holler v. Rock Hill School Dist.*, 60 S. C. 41, 38 S. E. 220, 222, Ann. Cas. 14B, 406.

Act dividing county into high school districts does not violate section.—An Act providing for division of a county into high school districts is not violative of this section, as disregarding provisions thereof for division of the county into suitable school districts. *Powell v. Hargrove*, 136 S. C. 345, 134 S. E. 380, 382.

And a high school district is not limited in area to 49 square miles, notwithstanding the provisions of this section, or § 5608. *Hildebrand v. High School Dist.*, 138 S. C. 445, 136 S. E. 757, 760.

And there is no provision in the Constitution requiring that a survey should be made or plat filed, before an election can be held. *Dove v. Kirkland*, 92 S. C. 313, 75 S. E. 503, 506, Ann. Cas. 15A, 532.

Section 6. Enrollment — trustees — poll tax — supplementary tax.—The General Assembly shall define "enrollment." Not less than three trustees for each school district shall be selected from the qualified voters and taxpayers therein, in such manner and for such terms as the General Assembly may determine, except in cases of special school districts now existing, where the provisions of law now governing the same shall remain until changed by the General Assembly: *Provided*, The manner of the selection of said trustees need not be uniform throughout the State.

There shall be assessed on all taxable polls in the State between the ages of twenty-one and sixty years (excepting Confederate soldiers above the age of fifty years). An annual tax of one dollar on each poll the proceeds of which tax shall be expended for school purposes in the several

County boards may alter lines of any school district.—Under this section, the county boards of education could alter the lines of any school district that had not been created by Act of Legislature, and after an amendment in 1900 to the Act governing such boards, the county boards could alter the lines of any school district, whether or not created by an Act of the Legislature. *Waterloo School Dist. v. Cross Hill School Dist.*, 106 S. C. 292, 91 S. E. 257, 258.

And an act enlarging a school district providing, impliedly, at least, that the enlarged district shall bear its just proportion of any tax for the liquidation of bonds of the old district does not violate this section. *Burris v. Brock*, 95 S. C. 104, 79 S. E. 193, 194.

And may be regarded as special provision to general law.—A special Act extending the boundaries of a school district already created may be regarded as a special provision to a general law, and therefore not unconstitutional. *State v. McCaw*, 77 S. C. 351, 58 S. E. 145, 146.

Creation of school district and authorization of tax does not affect graded schools.—Acts creating a school district and authorizing the levy of a tax for school purposes by a board of trustees, on petition of 20 tax payers, are not in violation of this section, as it provides that nothing therein contained should repeal laws under which graded school districts had been organized. *Martin v. School Dist.*, 57 S. C. 125, 35 S. E. 517, 519, 14 L. R. A. (N. S.) 851.

Lexington County.—Proviso of constitutional amendment exempting Lexington County therefrom, and providing that general assembly might fix area of school districts in such county, did not affect existing statute limiting area of school districts to 49 square miles. *Kyzer v. Dent*, 163 S. C. 403, 161 S. E. 690.

Bamberg County.—Special legislation in formation of new school districts. *Kearse v. Lancaster*, 172 S. C. 59, 172 S. E. 767.

school districts in which it is collected.

Any school district may by the authority of the General Assembly levy an additional tax for the support of its schools. 1939 (41) 8

See Const. 1868, X, 5.

Amended by a joint resolution and an act: 1938 (40) 1912; 1939 (41) 8. See FOREWORD on page 1159 of this volume.

This section confers only administrative power on the board of county commissioners as to the school tax. *Dickson v. Burckmyer*, 67 S. C. 526, 46 S. E. 343, 346, Ann. Cas. 15C, 997.

And tax entered without commission action valid.—Under this section, the county board has no power to do anything other than see that the school tax is entered for collection, and entry of the tax without action by the county commissioner does not affect its validity. *Dickson v. Burckmyer*, 67 S. C. 526, 46 S. E. 343, 346, Ann. Cas. 15C, 997.

Restrictions as to apportionment of taxes applicable only to specific tax authorized.—An Act authorizing issuance of bonds, and providing that proceeds from sale thereof shall be disbursed in payment of past indebtedness incurred for educational purposes by several school districts of a county, is not violative of this section, since the restrictions imposed as to the apportionment of different kinds of taxes were applicable only to specific taxes authorized. *Shelor v. Pace*, 151 S. C. 99, 148 S. E. 726, 730.

Under this section, the school fund of a county belongs to the county, and it may sue for it in its corporate capacity. *Aiken County v. Murray*, 35 S. C. 508, 14 S. E. 954, 955.

And school trustees alone may dis-

burse fund.—The school trustees alone may disburse school funds apportioned or credited to their respective school districts, under the control of the General Assembly, and the General Assembly cannot order the disbursement of such fund itself by joint resolution. *Asbill v. Martin*, 84 S. C. 271, 66 S. E. 297.

School trustees are legislative officers.—Under this section, and § 5354 school trustees are legislative officers whose terms may be ended or extended at the will of the Legislature. *Walpole v. Wall*, 153 S. C. 106, 149 S. E. 760, 764.

And election of trustees does not have to be uniform in state.—A statute respecting election of school trustees of Spartanburg County is not invalid in excepting from its provisions district comprising city of Spartanburg, as this section provides that the manner of selection of school trustees need not be uniform throughout the State. *Becknell v. Waters*, 156 S. C. 77, 152 S. E. 816, 820.

Division of county into high school districts does not violate section.—An Act providing for division of a county into high school districts, does not interfere with or diminish school taxes or method of appointment thereof, in violation of this section. *Powell v. Hargrove*, 136 S. C. 345, 134 S. E. 380, 382.

Section 7. Separate schools.—Separate schools shall be provided for children of the white and colored races, and no child of either race shall ever be permitted to attend a school provided for children of the other race.

See Const. 1868, II, 7.

Cross references.—For parallel code section see § 5377, and note thereto.

Under this section, certain undesirable children may be withdrawn by trustees from a school, notwithstanding they are white, provided a proper school is provided for them. *Tucker v. Blease*, 97 S.

C. 303, 81 S. E. 668, 673, L. R. A. 1915A, 828, Ann. Cas. 16C, 796.

Acts providing for division of a county into high school districts do not violate this section. *Powell v. Hargrove*, 136 S. C. 345, 134 S. E. 380, 382.

Section 8. Clemson Agricultural College—South Carolina School for the Deaf and Blind—University of South Carolina—Winthrop Normal and Industrial College—Colored Normal, Industrial, Agricultural and Mechanical College.—The General Assembly may provide for the maintenance of Clemson Agricultural College, South Carolina School for the Deaf and Blind, located at Cedar Springs, the University of South Carolina, and the Winthrop Normal and Industrial College, a branch thereof, as now estab-

lished by law, and may create scholarships therein; the proceeds realized from the land scrip given by the Act of Congress passed the second day of July, in the year eighteen hundred and sixty-two, for the support of an agricultural college, and any lands or funds which have heretofore been or may hereafter be given or appropriated for educational purposes by the Congress of the United States, shall be applied as directed in the Acts appropriating the same: *Provided*, That the General Assembly shall, as soon as practicable, wholly separate Claflin College from Claflin University, and provide for a separate corps of professors and instructors therein, representation to be given to men and women of the negro race; and it shall be the Colored Normal, Industrial, Agricultural and Mechanical College of this State.

See Const. 1868, X, 9.

Amended by a joint resolution and an act: 1914 (28) 947; 1915 (29) 64. See FOREWORD on page 1159 of this volume.

Section 9. Property or credit of State shall not benefit sectarian institutions.—The property or credit of the State of South Carolina, or of any county, city, town, township, school district, or other subdivision of the said State, or any public money, from whatever source derived, shall not, by gift, donation, loan, contract, appropriation, or otherwise, be used, directly or indirectly, in aid or maintenance of any college, school, hospital, orphan house, or other institution, society or organization, of whatever kind, which is wholly or in part under the direction or control of any church or of any religious or sectarian denomination, society or organization.

Section 10. Gifts for educational purposes.—All gifts of every kind for educational purposes, if accepted by the General Assembly, shall be applied and used for the purposes designated by the giver, unless the same be in conflict with the provisions of this Constitution.

Section 11. Gifts to State—assets of estates or co-partnerships—direct tax—state school fund.—All gifts to the State where the purpose is not designated, all escheated property, the net assets or funds of all estates or co-partnerships in the hands of the Courts of the State where there have been no claimants for the same within the last seventy years, and other money coming into the Treasury of the State by reason of the twelfth Section of an Act entitled “An Act to provide a mode of distribution of the moneys as direct tax from the citizens of this State by the United States in trust to the State of South Carolina,” approved the twenty-fourth day of December, in the year eighteen hundred and ninety-one, together with such other means as the General Assembly may provide, shall be securely invested as the State School Fund, and the annual income thereof shall be apportioned by the General Assembly for the purpose of maintaining the public schools.

Section 12. Income from sale or licenses for sale of liquors.—All the net income to be derived by the State from the sale or license for the sale of spirituous, malt, vinous and intoxicating liquors and beverages, not including so much thereof as is now or may hereafter be allowed by law to

go to the Counties and municipal corporations of the State, shall be applied annually in aid of the supplementary taxes provided for in the sixth Section of this Article; and if after said application there should be a surplus, it shall be devoted to public school purposes, and apportioned as the General Assembly may determine: *Provided, however,* That the said supplementary taxes shall only be levied when the net income aforesaid from the sale or license for the sale of alcoholic liquors or beverages are not sufficient to meet and equalize the deficiencies for which the said supplementary taxes are provided.

Fund sought to be apportioned must be shown to be a surplus.—Under this section, before any county can compel the comptroller to apportion such remainder, it must show that the fund in the treasury, sought to be apportioned, is a surplus remaining after meeting deficiencies. *State v. Derham*, 54 S. C. 349,

32 S. E. 418, 419.

An Act providing that a county, voting out a dispensary, should not receive any part of a surplus of the income from the dispensary school fund, was held to be in violation of this section. *Murph v. Landrum*, 76 S. C. 21, 56 S. E. 850, 853, Ann. Cas. 16D, 62, Ann. Cas. 17C, 919.

ARTICLE XII.

Charitable and Penal Institutions.

Section 1. Institutions for care of insane and poor provided for.—Institutions for the care of the insane and the poor shall always be fostered and supported by this State, and shall be subject to such regulations as the General Assembly may enact.

See Const. 1868, X, 7.

Amended by a joint resolution and an act: 1914 (28) 960; 1915 (29) 104. See FOREWORD on page 1159 of this volume.

Section 2. Board of regents—powers.—The Governor shall, with the advice and consent of the Senate, appoint a Board of Regents, consisting of five members, whose terms of office shall be so designated that the term of one member shall expire each year, subject to the removal by the Governor for cause; which Board shall have charge of such institution or institutions as may be maintained by the State for the care of the insane. The Board of Regents shall have exclusive power to appoint and, in its discretion, remove one Superintendent thereof, and the Superintendent, who shall be a physician, shall have the power, in his discretion, to appoint and remove all other officers and employees of such institution, or institutions, subject to the approval of the Board of Regents.

Amended by a joint resolution and an act: 1915 (29) 594; 1917 (30) 222. See FOREWORD on page 1159 of this volume.

Section 3. County poor.—The respective counties of this State shall make such provision as may be determined by law for all those inhabitants who by reason of age, infirmities and misfortune may have a claim upon the sympathy and aid of society.

Cross references. — For parallel code section, see § 3848, and note thereto.

An Act providing for establishment of separate county hospital for care of tu-

bercular patients, is within the power of the Legislature, under this section. *Law v. Spartanburg*, 148 S. C. 229, 146 S. E. 12, 15.

Section 4. Directors of benevolent and penal state institutions.—The directors of the benevolent and penal State institutions which may be hereafter created shall be appointed or elected as the General Assembly may direct.

See Const. 1868, XI, 3.

Section 5. Directors of penitentiary.—The Directors and Superintendent of the Penitentiary shall be appointed or elected as the General Assembly may direct.

See Const. 1868, XI, 2.

Section 6. Convicts sentenced to hard labor.—All convicts sentenced to hard labor by any of the Courts in this State may be employed upon the public works of the State or of the Counties and upon the public highways.

Section 7. Reformatory for juvenile offenders.—Provision may be made by the General Assembly for the establishment and maintenance by the State of a reformatory for juvenile offenders separate and apart from hardened criminals.

See Const. 1868, X, 8.

In view of this section, a statute providing that infants, tried and convicted, may be sentenced to State Industrial

School until they reach the age of 21, is valid. *State v. Cagle*, 111 S. C. 548, 96 S. E. 291, 292, 8 A. L. R. 854.

Section 8. Vacancies.—The Governor shall have power to fill all vacancies that may occur in the offices aforesaid, except where otherwise provided for, with the power of removal until the next session of the General Assembly and until a successor or successors shall be appointed and confirmed.

See Const. 1868, XI, 4.

This power of removal is conferred only as to the officers of charitable and penal institutions. *McDowell v. Burnett*, 92 S. C. 469, 75 S. E. 873, 878, Ann.

Cas. 14B, 525; *State v. Rhame*, 92 S. C. 455, 75 S. E. 881, 883, Ann. Cas. 14B, 519, Ann. Cas. 16E, 219.

Section 9. Control of convicts.—The Penitentiary and the convicts thereto sentenced shall forever be under the supervision and control of officers employed by the State; and in case any convicts are hired or farmed out, as may be provided by law, their maintenance, support, medical attendance and discipline shall be under the direction of officers detailed for those duties by the authorities of the Penitentiary.

ARTICLE XIII.

Militia.

Section 1. Militia.—The militia of this State shall consist of all able-bodied male citizens of the State between the ages of eighteen and forty-five years, except such persons as are now or may be exempted by the laws of the United States or this State, or who from religious scruples may be averse to bearing arms, and shall be organized, officered, armed, equipped and disciplined as the General Assembly may by law direct.

See Const. 1868, XIII, 1.

Section 2. When exempt from arrest.—The volunteer and militia forces shall (except for treason, felony and breach of the peace) be exempt from arrest by warrant or other process while in active service or attending muster or the election of officers, or while going to or returning from either of the same.

Section 3. Governor may call out.—The Governor shall have the power to call out the volunteer and militia forces, either or both, to execute the laws, repel invasions, suppress insurrections and preserve the public peace.

See Const. 1868, XIII, 2.

After proclamation declaring existence of insurrection. Governor's acts lawfully done in suppression of insurrection are immune from judicial interference, but are open to judicial inquiry and control if exceeding Governor's constitutional and statutory authority, and if injurious to citizens' personal liberty and property rights. *Hearon v. Calus*, 178 S. C. 381, 183 S. E. 13.

Section 4. Adjutant and inspector general—staff officers.—There shall be an Adjutant and Inspector General elected by the qualified electors of the State at the same time and in the same manner as other State officers, who shall rank as Brigadier General, and whose duties and compensation shall be prescribed by law. The Governor shall, by and with the advice and consent of the Senate, appoint such other staff officers as the General Assembly may direct.

See Const. 1868, XIII, 3.

Section 5. Pensions.—The General Assembly is hereby empowered and required, at its first session after the adoption of this Constitution, to provide such proper and liberal legislation as will guarantee and secure an annual pension to every indigent or disabled Confederate soldier and sailor of this State and of the late Confederate States who are citizens of this State, and also to the indigent widows of Confederate soldiers and sailors.

This section does not affect the question of pensions in this State except as furnishing direct authority to the State Legislature to provide pensions. *State v. Derham*, 61 S. C. 258, 39 S. E. 379, 381, 45 L. R. A. (N. S.) 693, Ann. Cas. 15C, 283, 7 A. L. R. 1651.

ARTICLE XIV.

Eminent Domain.

Section 1. Boundary rivers.—The State shall have concurrent jurisdiction on all rivers bordering on this State, so far as such rivers shall form a common boundary to this and any other State bounded by the same; and they, together with all navigable waters within the limits of the State, shall be common highways and forever free, as well to the inhabitants of this State as to the citizens of the United States, without any tax or impost therefor, unless the same be expressly provided for by the General Assembly.

See Const. 1868, VI, 1.

Proof of special damages.—Under this section, an action for damages by private persons cannot be maintained for obstructing navigable rivers, unless special damage is thereby sustained. *South Carolina Steamboat Co. v. Wilmington, etc., R. Co.*, 46 S. C. 327, 24 S. E. 337, 339, 57 Am. St. Rep. 688, 69 Am. St. Rep. 278, 107 Am. St. Rep. 198, 251, 33 L. R. A. 541, 59 L. R. A. 81, 65 L. R. A. 931, 3 L. R. A. (N. S.) 1127, 38 L. R. A. (N. S.)

765.

Negligence.—One sustaining special injuries from the obstruction of a navigable stream may recover therefor without proof of negligence. *Drews v. Burton & Co.*, 76 S. C. 362, 57 S. E. 176, 178, 38 L. R. A. (N. S.) 764.

Applied in *Augusta Power Co. v. Savannah Rive Electric Company*, 163 S. C. 541, 163 S. E. 822.

Section 2. Title to certain lands.—The title to all lands and other property which have heretofore accrued to this State by grant, gift, purchase, forfeiture, escheats or otherwise shall vest in the State of South Carolina, the same as though no change had taken place.

See Const. 1868, VI, 2.

Section 3. Ultimate property in lands.—The people of the State are declared to possess the ultimate property in and to all lands within the jurisdiction of the State; and all lands the title to which shall fail from defect of heirs shall revert or escheat to the people.

See Const. 1868, VI, 3.

Power of eminent domain resides in state of right and by necessity, and constitution merely affirms power and limits its exercise. *Jennings v. Sawyer*, 182 S. C. 427; 189 S. E. 746.

Right of city to condemn waterworks is a delegated right from the Legislature and not a constitutional right. *Paris Mountain Water Co. v. Greenville*, 110 S. C. 36, 96 S. E. 545.

ARTICLE XV.

Impeachment.

Section 1. Power of impeachment—officer impeachment.—The House of Representatives shall have the sole power of impeachment. A vote of two thirds of all the members elected shall be required for an impeachment. Any officer impeached shall thereby be suspended from office until judgment in the case shall have been pronounced; and the office shall be filled during the trial in such manner as may be provided by law.

See Const. 1868, VI, 3.

Section 2. Senate try impeachment—Chief Justice preside.—All impeachments shall be tried by the Senate, and when sitting for that purpose they shall be under oath or affirmation. No person shall be convicted except by a vote of two-thirds of all the members elected. When the Governor is impeached, the Chief Justice of the Supreme Court, or, if he be disqualified, the Senior Justice, shall preside, with a casting vote in all preliminary questions.

See Const. 1868, VII, 2.

Section 3. Officers liable to.—The Governor and all other executive and judicial officers shall be liable to impeachment; but judgment in such case shall not extend further than removal from office. The persons convicted shall, nevertheless, be liable to indictment, trial and punishment according to law.

See Const. 1868, VII, 3.

Officers removable by impeachment.—Under this section, every executive and judicial officer whose authority and jurisdiction extend over the entire State, and whose office is created by the Constitution or by statute and is filled by election by the people at large, is removable by impeachment. *McDowell v. Bur-*

nett, 192 S. C. 469, 75 S. E. 873, 875, Ann. Cas. 14B, 525.

But magistrates are not such judicial officers as are removable by impeachment, under this section. *McDowell v. Burnett*, 92 S. C. 469, 75 S. E. 873, 875, Ann. Cas. 14B, 525.

Section 4. Removal of officers.—For any willful neglect of duty, or other reasonable cause, which shall not be sufficient ground of impeachment, the Governor shall remove any executive or judicial officer on the address of two-thirds of each House of the General Assembly: *Provided*, That the cause or causes for which said removal may be required shall be stated at length in such address, and entered on the Journals of each House: *And provided, further*, That the officer intended to be removed shall be notified of such cause or causes, and shall be admitted to a hearing in his own defence, or by his counsel, or by both, before any vote for such address; and in all cases the vote shall be taken by yeas and nays, and be entered on the Journal of each House respectively.

See Const. 1868, VII, 4.

The provisions of this section are not inconsistent with the provisions of State Const. art. 3, § 27. *McDowell v. Burnett*, 90 S. C. 400, 73 S. E. 782, 785, 5 A. L. R. 581.

General Assembly may provide for removal of sheriff.—This section makes no provision for the removal of a sheriff, such officer not being subject to impeachment or to removal upon the address of both houses of the General Assembly, and the General Assembly may provide for his removal. *State v. Bal-*

lentine, 152 S. C. 365, 150 S. E. 46, 47, 66 A. L. R. 574.

Clerk of Court.—It has been held under this section that a clerk of the court is subject to impeachment. *McDowell v. Burnett*, 92 S. C. 469, 75 S. E. 873, 876, Ann. Cas. 14B, 525.

The Constitution does not require the impeachment of a probate judge as condition precedent to indictment for failure to perform official duties. *State v. Green*, 52 S. C. 520, 30 S. E. 683, Ann. Cas. 13D, 511.

ARTICLE XVI.

Amendment and Revision of the Constitution.

Section 1. Amendments.—Any amendment or amendments to this Constitution may be proposed in the Senate or House of Representatives. If the same be agreed to by two-thirds of the members elected to each House, such amendment or amendments shall be entered on the Journals respectively, with the yeas and nays taken thereon; and the same shall be submitted to the qualified electors of the State, at the next general election thereafter for Representatives; and if a majority of the electors qualified to vote for members of the General Assembly, voting thereon, shall vote in favor of such amendment or amendments, and a majority of each branch of the next General Assembly shall, after such an election, and before another, ratify the same amendment or amendments, by yeas and nays, the same shall become part of the Constitution: *Provided*, That such amendment or amendments shall have been read three times, on three several days, in each House.

See Const. 1868, XV, 1.

Provisions of section are mandatory.—The provisions of this section, regulating the amendment of the Constitution otherwise than by convention, are not merely directory, but mandatory and strict observance of every substantial requirement as set forth, is essential to validity of proposed amendment. *Duncan v. Record Pub. Co.*, 145 S. C. 196, 143 S. E. 31, 68.

General Assembly has power only to determine whether amendment be ratified in prescribed manner after adoption by people.—After an amendment has been submitted to the people, and a majority of the qualified electors have voted in favor of its adoption, the only action which the General Assembly has the power to take in regard to it, is to determine whether it should be ratified in the manner provided by the Constitution. *Bray v. City Council*, 62 S. C. 57, 39 S. E. 810, 815.

Yea and nay vote not required on each reading.—There is no requirement in this section that the yea and nay vote shall be taken on each reading of the proposed amendment, the wording thereof being merely that it shall be agreed to by two-thirds of the members elected to each house and entered in the journals respectively, and the yea and nay vote, taken on the second reading, meets the requirements of this section. *Thompson v. Livingston*, 116 S. C. 412, 107 S. E. 581, 583.

Under this section, a conference committee report on proposed amendment to joint resolution need not be adopted by yea and nay vote. *Stevenson v. Carrison*, 122 S. C. 212, 115 S. E. 251, 252.

Presumption is that amendment passed was in manner prescribed.—In the ab-

sence of showing of failure to comply with the this section, the Supreme Court will presume that the General Assembly and all other officials charged with duties in connection with submission, adoption, and ratification of amendment discharged such duties in manner required. *Duncan v. Record Pub. Co.*, 145 S. C. 196, 143 S. E. 31, 68.

And House Journals are inadmissible to impeach amendment where secretary of state certified such.—Where a joint resolution has been entered once on both the House and Senate Journal with yea and nay vote, this entry fulfilled requirement of the Constitution, and a certificate of the secretary of state certifying that it had been read three times, is evidence of the passage of the act and the introduction of House Journals to show the joint resolution had not received three readings, is inadmissible. *Lucas v. Barringer*, 120 S. C. 68, 112 S. E. 746, 750; *Stevenson v. Carrison*, 122 S. C. 212, 115 S. E. 251, 252.

And failure to state one section of Constitution to be amended does not invalidate amendment.—The requirements of this section are fully carried out, when entire body of joint resolution proposing constitutional amendment was entered in full on journal of House at the time of second and third readings, though statement of title was incomplete, in that it failed to refer to one section of the Constitution proposed to be amended. *Fleming v. Royall*, 145 S. C. 438, 143 S. E. 162, 167.

Amendment to proposed constitutional amendment by house in which the proposed amendment did not originate, must be read three times and spread on minutes of the originating house if

the amendment changes the substance of the proposed amendment. If the amendment merely changes the form, then there is no necessity to read it three times and spread it on the minutes. *Weeks v. Ruff, Supervisor, et al.*, 164 S. C., 398, 162 S. E., 450.

If proposed constitutional amendments made by one house are such as to create

new act, failure in originating house to read amendments three times and spread them on minutes is fatal. *Weeks v. Ruff*, 164 S. C. 398, 162 S. E. 450.

But different if amendments preserve identity, intent and purpose of submitting resolution originating in other house, and change only the language thereof. *Ibid.*

Section 2. Two or more.—If two or more amendments shall be submitted at the same time, they shall be submitted in such manner that the electors shall vote for or against each of such amendments separately.

See Const. 1868, XV, 2.

The provisions of this section are mandatory and not merely directory. *Duncan v. Record Pub. Co.*, 145 S. C. 196, 143 S. E. 31, 68.

But compliance with section is presumed.—In the absence of showing of failure to comply with this section, the Supreme Court will presume that the General Assembly and officials discharged duties in amending Constitu-

tion in required manner. *Duncan v. Record Pub. Co.*, 145 S. C. 196, 143 S. E. 31, 68.

A single amendment to the Constitution, including by reference an amendment to another section, does not violate the provisions of this section where there is reference to only one subject. *Bethea v. Dillon*, 91 S. C. 413, 74 S. E. 983, 984.

Section 3. Constitutional convention. — Whenever two-thirds of the members elected to each branch of the General Assembly shall think it necessary to call a Convention to revise, amend or change this Constitution, they shall recommend to the electors to vote for or against a Convention at the next election for Representatives; and if a majority of all the electors voting at said election shall have voted for a Convention, the General Assembly shall, at its next session, provide by law for calling the same; and such Convention shall consist of a number of members equal to that of the most numerous branch of the General Assembly.

See Const. 1868, XV, 3.

See generally. *Mew v. Charleston, etc.*, 55 S. C. 90, 32 S. E. 828, 17 L. R. A. (N. S.) 775, 20 L. R. A. (N. S.) 482, 50 L. R. A. (N. S.) 976, Ann. Cas. 14D, 46.

ARTICLE XVII.

Miscellaneous Matters.

Section 1. Qualification of officers.—No person shall be elected or appointed to any office in this State unless he possess the qualifications of an elector: *Provided*, The provisions of this Section shall not apply to the offices of State Librarian and Departmental Clerks, to either of which offices any woman, a resident of the State two years, who has attained the age of twenty-one years, shall be eligible.

See Const. 1868, XIV, 1.

A minor may be appointed specially to serve a summons in a magistrate's court, see Const., art. 2, §§ 3, 4, and the notes although this section provides that no hereto.

Person shall be appointed to any office unless he is a qualified elector. *Bell v. Fruit*, 51 S. C. 344, 29 S. E. 5, 6. **Petitioner recommended to Governor under statute for appointment as county tax collector is not entitled to appoint-**

ment where he had no registration certificate and so was not a qualified elec-

tor. *Blalock v. Johnston*, 180 S. C. 41, 185 S. E. 51.

Section 2. Claims against State.—The General Assembly may direct, by law, in what manner claims against the State may be established and adjusted.

See Const. 1868, XIV, 4.

Cross references.—As to special acts of the Legislature violating the fourteenth amendment to the United States Constitution, see analysis line II, B, under that amendment, catchline, "An Act Permitting One Person to Bring an Action against the State." As to claims against the state, see §§ 2071-2073, and the notes thereto.

Section refers only to subsisting claims.

—This section plainly refers to the establishment and adjustment of valid subsisting claims against the State and not to the creation by legislative action of a new liability for an act for which the State was not liable at the time of its commission. *Sandel v. State*, 126 S. C. 1, 119 S. E. 776, 796.

Commission to determine claims authorized by this section is not a court.—

A commission appointed by the Legislature, under the authority of this section, to determine claims against the former State Dispensary, is not a court, though its duties necessarily involve the exercise of judicial functions, but it is limited to the exercise of such powers as are expressly or impliedly conferred upon it by the Legislature. *Carolina Glass Co. v. State*, 87 S. C. 270, 69 S. E. 391, 44 L. R. A. (N. S.) 198, Ann. Cas. 16D, 62.

Under statute creating dispensary commission, it has power to ascertain amount due claimant by State, and in arriving at that conclusion, it could ascertain of claimant is due State anything and difference as result of its finding, although such finding would not have force and effect of judgment by court.

Section 3. Divorces.—Divorces from the bonds of matrimony shall not be allowed in this State.

See Const. 1868, XIV, 5.

Divorces are contrary to the fundamental law of South Carolina, and foreign divorces will not receive willing recognition in the courts of this State. *Shirley v. Parris*, 121 S. C. 260, 113 S. E. 788, 789.

Courts, without careful investigation and scrutiny, will not recognize divorce granted by another State to one who has been a citizen of South Carolina and comes back to State after obtaining divorce in another State. *State v. Duncan*, 110 S. C. 253, 96 S. E. 294.

But foreign divorces must be recog-

Carolina Glass Co. v. State, 87 S. C. 270, 69 S. E. 391, 44 L. R. A. (N. S.) 198, Ann. Cas. 16D, 62.

Action may be maintained against county on claim audited only by special organization committee.—Under this section, where an act provides that all actual expenses included in the formation of a county created by that act shall be an obligation of the county, and creates a special commission authorizing it to borrow money in the name of the county, to pay the same, and pledge taxes to secure the sum borrowed, action may be maintained in the court of common pleas to recover from the county a sum borrowed by the special commission which audited and approved a claim, regardless of whether it was audited by the county board of the county after creation. *Bank of McCormick v. McCormick County*, 114 S. C. 469, 103 S. E. 787.

As to claims against a county, see §§ 3871 et seq., and the notes thereto.

Decision on first appeal is conclusive as to State's waiver of immunity.—

Where, in an action against the State for wrongful death, the Supreme Court on the first appeal held that the complaint stated a good cause of action, a waiver of the State's immunity as a sovereign has been adjudicated, and that question is not open for further consideration. *Sandel v. State*, 126 S. C. 1, 119 S. E. 776.

A waiver of the State's immunity as a sovereign is also a waiver of its immunity as an eleemosynary corporation. *Sandel v. State*, 126 S. C. 1, 119 S. E. 776.

A foreign judgment in a divorce action rendered by a competent court, having jurisdiction of the parties and the subject-matter, is entitled under the full faith and credit clause to such force and effect in South Carolina courts as may properly be accorded the judgment of another State under the rules governing the extraterritorial effect of such judgments. *Scheper v. Scheper*, 125 S. C. 89, 118 S. E. 178.

But a foreign decree purporting to dissolve a marriage contracted in South Carolina will be recognized only to the

extent required by the full faith and credit clause of the Federal Constitution. *Scheper v. Scheper*, 125 S. C. 89, 118 S. E. 178.

As to the credit required of one State to be accorded the decision of another State see U. S. Const. art. 4, § 1, and the note thereto.

Where foreign court had jurisdiction of the persons.—A divorce granted in another State to a citizen of South Carolina will not be recognized in South Carolina, unless the other spouse was personally served in the State in which the divorce was granted, thereby conferring jurisdiction of the court over his or her rights. *State v. Duncan*, 110 S. C. 253, 96 S. E. 294; *Shirley v. Parris*, 121 S. C. 260, 113 S. E. 788.

But where service on defendant was by publication, divorce will not be recognized.—Under this section where citizen of South Carolina went to Georgia and procured there a divorce, serving his wife only by publication, and immediately returned and married another woman, the Georgia divorce would not be recognized in South Carolina. *State v. Duncan*, 110 S. C. 253, 96 S. E. 294.

Foreign courts' adjudication of marital

property rights will be given effect.—Under the law of comity, a judicial determination of a competent court of a sister State, whereby the marital status of a husband was denatured of its efficacy to give rise to a legal right in the wife's separate property, will be given the same force and effect in this jurisdiction as in the State of its rendition. *Scheper v. Scheper*, 125 S. C. 89, 118 S. E. 178.

A judgment of a North Carolina court granting a divorce a mensa et thoro leaves intact the legal bond of a marriage contracted in South Carolina, notwithstanding husband's purported second marriage in Georgia. *Scheper v. Sheper*, 125 S. C. 89, 118 S. E. 178.

In South Carolina, there is no limitation on the power of the courts to settle and decree the rights of litigants, save as prohibited by the fundamental law. *Matheson v. McCormac*, 186 S. C. 93; 195 S. E. 122.

Wife may be granted temporary or permanent alimony in proper case, though divorces from the bonds of matrimony are not allowed in this state. *Johnson v. Johnson*, 194 S. C. 116, 8 S. E. (2d) 351.

Section 4. Supreme Being.—No person who denies the existence of a Supreme Being shall hold any office under this Constitution.

See Const. 1868, XIV, 6.

Section 5. Public printing.—The printing of the laws, journals, bills, legislative documents and papers for each branch of the General Assembly, with the printing required for the Executive and other departments of the State, shall be done as provided by law.

See Const. 1868, XIV, 7.

Amended by a joint resolution and an act: 1922 (32) 1280; 1923 (33) 5. See FOREWORD on page 1159 of this volume.

The Governor and State Treasurer have authority to contract for engraving highway certificates of indebtedness without advertisement and competitive

bids. *Hall v. Richards*, 159 S. C. 34, 156 S. E. 12.

As to public printing, see §§ 2084-2105, and the note thereto.

Section 6. Removal of causes.—The General Assembly shall provide for the removal of all causes which may be pending when this Constitution goes into effect to Courts created by the same.

See Const. 1868, XIV, 9.

Section 7. Lotteries.—No lottery shall ever be allowed, or be advertised by newspapers, or otherwise, or its tickets be sold in this State; and the General Assembly shall provide by law at its next session for the enforcement of this provision.

See Const. 1868, XIV, 2.

See *Darlington Theatres, Inc. v. Coker*, 190 S. C. 282, 2 S. E. (2d) 782, as to advertising plan for stimulating interest in

theatre by giving away cash prizes, held not a "lottery" under facts.

Section 8. Gambling and betting.—It shall be unlawful for any person holding an office of honor, trust or profit to engage in gambling or betting on games of chance; and any such officer, upon conviction thereof, shall become thereby disqualified from the further exercise of the functions of his office, and the office of said person shall become vacant, as in the case of resignation or death.

Section 9. Property of married women.—The real and personal property of a woman held at the time of her marriage, or that which she may thereafter acquire, either by gift, grant, inheritance, devise or otherwise, shall be her separate property, and she shall have all the rights incident to the same to which an unmarried woman or a man is entitled. She shall have the power to contract and be contracted with in the same manner as if she were unmarried.

See Const. 1868, XIV, 8.

As to rights of married women, see §§ 8572-8575.

Editor's Note.—Under the standing of this section in the Constitution of 1868 a married woman was only allowed to bequest, devise, or alienate her separate estate, and the last sentence of this section, as to her power to contract, was not included. For cases construing the section as it then stood, see *Gwynn v. Gwynn*, 27 S. C. 525, 4 S. E. 229, 31 Am. St. Rep. 934, 16 L. R. A. 527, L. R. A. 1916D, 1234, 20 A. L. R. 1313; *Sibley v. Parks*, 28 S. C. 607, 5 S. E. 809, 17 L. R. A. (N. S.) 681; *Hogan v. Hoover*, 33 S. C. 219, 11 S. E. 725, 31 Am. St. Rep. 934, L. R. A. 1916D, 1233; *Kincaid v. Anderson*, 33 S. C. 260, 11 S. E. 766, Ann. Cas. 17B, 609; *Aultman, etc., Co. v. Rush*, 26 S. C. 517, 2 S. E. 402, 39 Am. St. Rep. 742, Ann. Cas. 17B, 602; *Livingston v. Shingler*, 30 S. C. 159, 8 S. E. 842, Ann. Cas. 17B, 602; *Brown v. Pechman*, 49 S. C. 546, 27 S. E. 520; *Aultman, etc., Co. v. Gibert*, 28 S. C. 303, 5 S. E. 806, 17 L. R. A. (N. S.) 681, L. R. A. 1915B, 931, Ann. Cas. 16B, 266 Ann. Cas. 17B, 609, Ann. Cas. 17D, 367, 9 A. L. R. 245; *Brown v. Pechman*, 53 S. C. 1, 30 S. E. 586, Ann. Cas. 18E, 638.

Married woman has unlimited power to contract.—Under this section, a married woman is free from all common-law disabilities of coverture as to property rights, and has unlimited power of contract. *Burwell v. South Carolina Tax Comm.*, 130 S. C. 199, 126 S. E. 29, 38 A. L. R. 1256.

And may enter contract of partnership with her husband.—Under the last provision of this section, and legislative history of statutes relating to the power of married women as to their separate property and the right to contract with reference thereto, a married woman can enter into a contract of partnership with her husband. *Burwell v. South Carolina Tax Comm.*, 130 S. C. 199, 126 S. E. 29, 38 A. L. R. 1256.

And a woman can engage by herself in trade and employ her husband as agent to carry on the business. *Kuster v. Dickson*, 45 F. 91.

But a married woman may not sell property against express provisions of trust.—An express provision in a deed creating a trust-estate in a married woman, with remainder over to her children, which authorizes the trustee to make changes of investment with the consent in writing of the cestui que trust, and to hold the substituted property subject to the same trust as provided in the original deed, is a limitation on the power both of the trustee and the cestui que trust, which prevents a sale except for reinvestment, notwithstanding this section provides that a married woman may alienate her property as though unmarried, as such provision would enlarge the powers of the trustee beyond the terms of the deed of trust. *Rabb v. Flenniken*, 29 S. C. 278, 7 S. E. 597, 19 Am. St. Rep. 281, 63 Am. St. Rep. 476.

The interest of a married woman in lands of which she was seised at the time of marriage prior to the Constitution, is made a "separate interest" by this section. *Kincaid v. Anderson*, 33 S. C. 260, 11 S. E. 766, Ann. Cas. 17B, 609.

Under this section, a conveyance from husband to wife in payment of a bona fide debt is valid as against his creditors. *McGee v. Wells*, 52 S. C. 472, 474, 30 S. E. 602, 90 Am. St. Rep. 536, Ann. Cas. 13C, 153, Ann. Cas. 15D, 654.

Even though the property apparently belongs to husband.—Where, to all appearances, a wife's separate property appears to belong to her husband, it is not sufficient to warrant a holding that the husband owned and was possessed of it, where the husband's creditor had knowledge of the true state of affairs. *DeLoach v. Sarratt*, 55 S. C. 254, 33 S. E. 2, 35 S. E. 441.

Under this section, an unauthorized

levy upon a married woman's property to satisfy a debt of her husband, by which she is damaged, constitutes a good cause of action. *Holtzclaw v. Gassaway*, 52 S. C. 551, 30 S. E. 399.

Her deed need not contain formal identification as separate estate.—A deed by a married woman, of her separate estate, in the usual form, is valid, though it contains no formal declaration of her intent to convey her separate estate. *Carroll v. Thomas*, 54 S. C. 520, 32 S. E. 497.

And her separate estate is liable for her private debts.—Where, in an action against a married woman for goods sold and delivered, it appears that the defendant owns a large plantation in her own right and that by reason of her representations as to her property and on her request, plaintiff was induced to give her credit for goods, the defendant and her estate are bound for all supplies furnished for her plantation. *Brown v. Thomson*, 27 S. C. 500, 4 S. E. 345, 25 Am. St. Rep. 558, 33 L. R. A. (N. S.) 429, Ann. Cas. 17C, 563, 15 A. L. R. 847.

A married woman's separate estate is liable for the fees of a physician whom she calls in for treatment. *Glenn v. Gerald*, 64 S. C. 236, 42 S. E. 155, 133 Am. St. Rep. 254, 11 L. R. A. (N. S.) 907, Ann. Cas. 13C, 309, Ann. Cas. 16C, 402, Ann. Cas. 17C, 562.

Section 10. Laws now of force.—All laws now in force in this State and not repugnant to this Constitution shall remain and be enforced until altered or repealed by the General Assembly, or shall expire by their own limitations.

See § 334, as to when a judge is disqualified to sit in a case because of kinship.

Act passed before constitution must be amended by general act.—Under this and the following section, an Act passed before this Constitution relating to salary of the Commissioner of Education in Berkeley County cannot be amended, repealed, or altered except by a general act. *De Hay v. Com'rs*, 66 S. C. 229, 44 S. E. 790.

City council may still prosecute violation of municipal ordinance.—Under this section, and art. 5, § 31 of this Constitution providing that all writs and processes shall run, and all prosecutions shall be conducted, in the name of the State, a prosecution for violation of a city ordinance by the city council is not prohibited. *City Council v. Leopard*, 61 S. C. 99, 39 S. E. 248, 1 L. R. A. (N. S.) 384, 17 L. R. A. (N. S.) 54.

And attachment still lies against a

On a grant to husband and wife they become tenants in common.—Under this section and §§ 8572-8575, providing that the real and personal property of a married woman shall be her separate property, and giving her power to convey and devise the same, and giving her a right to contract, where a grant is made to a husband and wife in the absence of any express intention of conveying the whole to the survivor, they become tenants in common. *Green v. Canady*, 77 S. C. 193, 57 S. E. 832.

Cited, in *Gainey v. Anderson*, 87 S. C. 47, 68 S. E. 888, 889, 31 L. R. A. (N. S.) 323, Ann. Cas. 16A, 801, 1 A. L. R. 1100, in support of the holding that, while a sale under a judgment in foreclosure vests the purchaser with the estate passed by the mortgage, including the wife's dower when she joined in the mortgage, discharged of the right to redeem, yet where the mortgagor, without his wife, conveys the land to the mortgagee to extinguish the mortgage, the wife's right of dower is not barred.

Wife who executed a release and contract to release her dower in lands of husband for valuable consideration is estopped from claiming dower in such lands. *Watson v. Watson; Terrell v. Watson*, 172 S. C. 362; 174 S. E. 33; *Pippin v. Sams*, 174 S. C. 444, 177 S. E. 659.

non-resident.—Under this and the following section and art. 5, § 23, of the Constitution providing, "Every civil action cognizable by magistrates shall be brought before a magistrate in the county where the defendant resides," does not prevent an action by attachment against a nonresident and a judgment in rem, as theretofore.

See § 527, as to the attachment of the property of non-resident defendants.

And competing railway lines may not lease within State.—Under this and the following section, § 8238, providing that no corporation shall purchase or lease any railroad in the State where such purchaser or lessee is interested in any competing line within or without the State, was not repealed by this Const. art. 9, § 8, relating to the consolidation of railroad lines in the State. *Edwards v. Southern Ry.*, 66 S. C. 277, 44 S. E. 748, 64 L. R. A. 734.

Section 11. Schedule.—That no inconvenience may arise from the

change in the Constitution of this State, and in order to carry this Constitution into complete operation, it is hereby declared:

Laws now of force—ordinances.—First. That all laws in force in this State, at the time of the adoption of this Constitution, not inconsistent therewith, and constitutional when enacted shall remain in full force until altered or repealed by the General Assembly or expire by their own limitation. All ordinances passed and ratified at this Convention shall have the same force and effect as if included in and constituting a part of this Constitution.

Writs, actions, etc.—Second. All writs, actions, causes of action, proceedings, prosecutions and rights of individuals, of bodies corporate and of the State, when not inconsistent with this Constitution, shall continue as valid.

Laws inconsistent with Constitution.—Third. The provisions of all laws which are inconsistent with this Constitution shall cease upon its adoption, except that all laws which are inconsistent with such provisions of this Constitution as require legislation to enforce them shall remain in force until such legislation is had.

Fines, etc., accruing.—Fourth. All fines, penalties, forfeitures and escheats accruing to the State of South Carolina under the Constitution and laws heretofore in force shall accrue to the use of the State of South Carolina under this Constitution, except as herein otherwise provided.

Recognizances, etc.—indictments.—Fifth. All recognizances, obligations and all other instruments entered into or executed before the adoption of this Constitution to the State, or to any County, township, city or town therein, and all fines, taxes, penalties and forfeitures due or owing to this State, or to any County, township, city or town therein, and all writs, prosecutions, actions and proceedings, except as herein otherwise provided, shall continue and remain unaffected by the adoption of this Constitution. All indictments which shall have been found, or may hereafter be found, for any crime or offence committed before the adoption of this Constitution may be prosecuted as if no change had been made, except as otherwise provided herein.

All officers hold over—compensation.—Sixth. All officers, State, executive, legislative, judicial, circuit, district, County, township and municipal, who may be in office at the adoption of this Constitution, or who may be elected before the election of their successors as herein provided, shall hold their respective offices until their terms have expired and until their successors are elected or appointed and qualified as provided in this Constitution, unless sooner removed as may be provided by law; and shall receive the compensation now fixed by the Statute Laws in force at the adoption of this Constitution.

Elections.—Seventh. At all elections held for members of the General Assembly in case of a vacancy, or for any other office, State, County or municipal, the qualifications of electors shall remain as they were under the Constitution of Eighteen hundred and sixty-eight until the first day of November, in the year Eighteen hundred and ninety-six.

Takes effect.—Eighth. This Constitution, adopted by the people of South Carolina in Convention assembled, shall be in force and effect from and

after the Thirty-first day of December, in the year Eighteen hundred and Ninety-five.

Constitution of 1868 repealed.—Ninth. The provisions of the Constitution of Eighteen hundred and Sixty-eight and amendments thereto are repealed by this Constitution, except when re-ordained and declared herein.

Scope of first five subdivisions. — The intention of this section is first, to prevent, as far as possible, any inconvenience that might arise by reason of the changes in the new Constitution; second, that the provisions of the present Constitution should not affect the laws, proceedings, rights, etc., which were not inconsistent with it at the time of its adoption; third, that laws which were inconsistent with it, but required legislation to enforce them, should not be affected by the present Constitution until such legislation was had; and, fourth, that all laws inconsistent with the present Constitution, except those that required legislation to enforce them, should cease upon the adoption of the said Constitution. *Bank of Orangeburg v. Kohn*, 52 S. C. 120, 29 S. E. 625, 628.

All laws of force at the time of the adoption of the present Constitution remained in force, unless they were unconstitutional when enacted, or were inconsistent with the provisions of the Constitution. *Florida Cent., etc., R. Co. v. Columbia*, 54 S. C. 266, 32 S. E. 408.

Repugnant statute must have been unconstitutional at enactment. — Where it is not suggested that the statutes in question were unconstitutional when enacted it is impossible, under this section, for an Act of the Legislature, having the force of law to be declared repugnant to a constitutional provision subsequently adopted, and having prospective operation only. *McCullough v. Graham*, 70 S. C. 63, 49 S. E. 1, 6 A. L. R. 222.

Attachment still lies against a non-resident. See this catchline under the preceding section.

Provisions for special jury in condemnation proceedings are not unconstitutional. — Under this subdivision, Const. art. 9, § 20, providing that in condemnation of land for right of way the compensation to be paid the owner shall be ascertained by a jury of 12 men in a court of record, as shall be prescribed by law, does not supersede §§ 8455, 8457, 8458, providing for the fixing of compensation in condemnation proceedings, by a special jury, as the word "shall" in the constitutional provision "as shall be required by law" cannot be presumed to mean that there must be legislation after the adoption of the Constitution prescribing the method of securing a trial by a jury of 12 men in a court of record. *Atlantic, etc., R. Co. v. South-Bound R. Co.*, 57 S. C. 317, 35 S. E. 553.

School district act not repugnant. — Acts creating a school district, and authorizing the levy of a tax for school purposes by a board of trustees, on petition of 20 taxpayers, are not in violation of art. 11, since § 5 thereof declares that nothing therein contained should repeal laws under which graded-school districts had been organized, which should remain in force until changed by the Legislature, and such Act was not, therefore, abrogated by this section repealing all laws inconsistent with such Constitution, except such as required legislation to enforce them. *Martin v. School Dist.*, 57 S. C. 125, 35 S. E. 517, 14 L. R. A. (N. S.) 851.

As to one mill school tax, see § 5344, and the note thereto.

Provision has no reference to retroactive nature of statutes.—The words in the third subdivision of this section, "The provisions of all laws which are inconsistent with this Constitution shall cease upon its adoption," are in effect the usual repealing words of a statute, and have no reference to the question whether it was intended to be prospective or retroactive in its operation. *Bank of Orangeburg v. Kohn*, 52 S. C. 120, 29 S. E. 625, 628.

Despite this section, and subd. 3, Const. art. 3, § 28, providing that no waiver shall defeat the right of homestead before assignment, except it be by deed or mortgage, and only as against the mortgage debt, and no creditor whose lien does not bind the homestead shall have any right or equity to require that a lien which embraces the homestead and other property shall first exhaust the homestead, is not retroactive. *Bank of Orangeburg v. Kohn*, 52 S. C. 120, 29 S. E. 625.

As to homestead exemptions, see Const. art. 3, § 28, and § 9085.

Supreme court was not discontinued pending election of new justice.—Under this section, subd. 3, art. 5, §§ 2, 3, providing (prior to the 1911 amendment) that the Supreme Court shall consist of 4 members instead of 3, as theretofore, a new tribunal was not created, and the Supreme Court continued as before until the General Assembly elected the additional associate justice. *Middleton v. Taber*, 46 S. C. 337, 24 S. E. 282, 58 Am. St. Rep. 91, 72 Am. St. Rep. 63, 33 L. R. A. 547, 50 L. R. A. (N. S.) 733.

Magistrates under new constitution discharged duties of trial justice under old until new duties defined. — This

subdivision and subd. 6, were intended to authorize magistrates to discharge the duties under the former Constitution discharged by trial justices, until the Legislature should define the duties of magistrates,—an office created by the new Constitution. *Carlisle v. Prior*, 48 S. C. 183, 26 S. E. 244, 107 Am. St. Rep. 727, Ann. Cas. 15C, 317; *In re Hooper*, 48 S. C. 149, 26 S. E. 466, Ann. Cas. 18D, 990.

As to the appointment of magistrates, see Const., art. 5, § 20, and the note thereto; as to the duties of magistrates, see §§ 94, 95, and the note thereto.

Former statute allowing private way through another's lands is repugnant.—A statute authorizing the location of a private way to the highway from the land of one, surrounded on all sides by private land, and without any such right of way, violates Const. art 1, § 17, providing that private property shall not be taken for private use without the consent of the owner, and is made void by subd. 3 of this section. *Beaudrot v. Murphy*, 53 S. C. 118, 30 S. E. 825.

As to the taking of private property without compensation or due process of law, see U. S. Const. amends. 5, 14, and the notes thereto.

Former jeopardy governed by new constitution.—Under subd. 5 of this section, as regards former jeopardy, the rights of a defendant charged with having committed a crime before the new

Constitution went into effect, but who was placed on trial afterwards, were governed by the provisions of the new Constitution. *State v. Richardson*, 47 S. C. 166, 25 S. E. 220, 135 Am. St. Rep. 72, 35 L. R. A. 238, L. R. A. 1917D, 1148.

As to double jeopardy, see art. 1, § 17 of the State Constitution, and art. 5, U. S. Const. Amendments.

Section is not authority for officers to hold over pending appointment of successor.—Subd. 6 of this section does not fix a policy by which officers shall hold over until the appointment of their successors, but was only made to bridge a passage of officers from service under the Constitution of 1868 to the Constitution of 1895. *Gibbes v. Richardson*, 107 S. C. 191, 92 S. E. 333.

New constitution did not affect causes submitted to Supreme Court before ratification.—The provisions of Const. 1895, relating to the jurisdiction of the Supreme Court, do not affect the decision of a cause submitted prior to December 31, 1895, at which time the Constitution was, by this subdivision, to go into effect, though the opinion in such case was not filed till January 3, 1896. *Land Mortgage Inv., etc., Co. v. Faulkner*, 45 S. C. 503, 23 S. E. 516, 24 S. E. 288.

As to the jurisdiction of the Supreme Court, see Const. art. 5, § 4, of the note thereto.

Done in Convention in Columbia on the Fourth day of December, in the year of our Lord, one thousand Eight hundred and Ninety-five.

JNO GARY EVANS

President of the Convention.

IRA B. JONES

Vice-President of the Convention.

W. JASPER TALBERT

Vice-President of the Convention.

Attest:

S. W. VANCE,

Secretary of the Convention.

DELEGATES FROM ABBEVILLE.

FRANK B. GARY

ROBERT R. HEMPHILL

J. C. KLUGH.

I. H. McCALLA

R. F. McCASLAN

W. C. McGOWAN

DELEGATES FROM AIKEN.

D. S. HENDERSON.
ROBT. L. GUNTER
F T WOODWARD

DELEGATES FROM ANDERSON.

J. E. BREAZEALE—
GEO. E. PRINCE
JAMES M. SULLIVAN
D H RUSSELL
J. PERRY GLENN.
L. D. HARRIS

DELEGATES FROM BARNWELL.

W. C. SMITH
C M HIERS
A. HOWARD PATTERSON
ROBERT ALDRICH
G. DUNCAN BELLINGER.
GEO H BATES

DELEGATES FROM BEAUFORT.

DELEGATES FROM BERKELEY.

E. J. DENNIS
J. B. MORRISON
H H MUFRAY
JAS. B. WIGGINS
R C McMAKIN
A. H. DeHAY

DELEGATES FROM CHARLESTON.

JULIAN MITCHELL.
J. N NATHANS
W. St. JULIEN JERVEY—
GEO. F. von KOLNITZ JR
J. P. K. BRYAN.
JOS. L. OLIVER
WILLIAM MOSELEY FITCH
THEODORE G. BARKER

DELEGATES FROM CHESTER.

J. L. GLENN
T J CUNNINGHAM
R. O. ATKINSON
GEORGE WILLIAMS GAGE.

DELEGATES FROM CHESTERFIELD.

E. J. KENNEDY
E. N. REDFEARN
F. P. TAYLOR

DELEGATES FROM CLARENDON.

DANIEL J BRADHAM
JOSEPH. S. CANTEY
JOHN W KENNEDY
J. M. SPROTT—[died during session]

DELEGATES FROM COLLETON.

D. H. BEHRE
L E PARLER
C W GARRIS
M. R. COOPER
M. P. HOWELL

DELEGATES FROM DARLINGTON.

J. O. A. MOORE
HENRY. CASTLES. BURN.
J. N. PARROTT
A. J. H. PERWITT

DELEGATES FROM EDGEFIELD.

W. H. TIMMERMAN
G. D. TILLMAN
J. C. SHEPPARD
R. B. WATSON
B. R. TILLMAN

DELEGATES FROM FAIRFIELD.

G W RAGSDALE
W. L. ROSBOROUGH.
THOS W BRICE
RICHARD ASHE MEARES.

DELEGATES FROM FLORENCE.

R. M. McCOWN.
W. F. CLAYTON
BROWN B McWHITE
J. O. BYRD—(*died During Session*)

DELEGATES FROM GEORGETOWN.

I HARELSTON READ
E. F. MATHEWS

DELEGATES FROM GREENVILLE.

J. WALTER GRAY
G. G. WELLS.
J THOMAS AUSTIN.
HUGH M BARTON
HUGH B BUIST
HENRY J. HAYNESWORTH

DELEGATES FROM HAMPTON.

WILLIAM. J. GOODING.

CHARLES J. C. HUTSON
AMOS J HARRISON.

DELEGATES FROM HORRY.

JOHN P. DERHAM
J. A. McDERMOTTE
JEREMIAH SMITH

DELEGATES FROM KERSHAW.

J. W. FLOYD
C. L. WINKLER
J. T. HAY.

DELEGATES FROM LANCASTER.

J. N. ESTRIDGE
JNO. W. HAMEL

DELEGATES FROM LAURENS.

ALEXIUS J. SMITH
R. L. HENRY
J. H. WHARTON

DELEGATES FROM LEXINGTON.

C. M. EFIRD
J. L. SHULER
E. L. LYBRAND

DELEGATES FROM MARION.

W J MONTGOMERY
J EDWIN ELLERBE
E B BERRY
JAMES D MONTGOMERY

DELEGATES FROM MALBORO.

THOMAS EDWARD DUDLEY
WM DeWITT EVANS
THOS. IRBY ROGERS
ROBERT HAYNE HODGES (Died During Session)

DELEGATES FROM NEWBERRY.

GEORGE JOHNSTONE
J. A. SLIGH
GEO. S. MOWER
JOS. L. KEITT

DELEGATES FROM OCONEE.

J C ALEXANDER
O M DOYLE
W J STRIBLING

DELEGATES FROM ORANGEBURG.

I. W. BOWMAN
L. S. CONNOR

E. H. HOUSER.
OSCAR R. LOWMAN
A. K. SMOKE

DELEGATES FROM PICKENS.
W. THOS FIELD
W THOS. BOWEN
R. FRANK SMITH

DELEGATES FROM RICHLAND.
JOHN T. SLOAN.
JOHN JOSEPH McMAHAN.
JOHN B. DENT
WILIE JONES.
H. C. PATTON

DELEGATES FROM SPARTANBURG.
C A BARRY
M. O. ROWLAND
W. T. BOBO
W E CARVER
A S WATERS
T. EARLE JOHNSON
STANYARNE WILSON

DELEGATES FROM SUMTER.
T B FRASER
RICHD. D. LEE
GEO. P. McKAGEN, SR
SHEPARD NASH
JAS. H. SCARBOROUGH
R. P. STACKHOUSE

DELEGATES FROM UNION.
JAMES. T. DOUGLASS
W. A. NICHOLSON
C. H. PEAKE
J. C. OTTS

DELEGATES FROM WILLIAMSBURG.
S. W. GAMBLE
THOS. M GILLAND
GEORGE J. GRAHAM
W R SINGLETARY

DELEGATES FROM YORK.
A. H. WHITE
WM. BLACKBURN WILSON
J. STUB BRICE
J F ASHE

ARTICLES OF AMENDMENTS

Article I. of Amendments to the Constitution.

The General Assembly shall provide by law for the condemnation, through proper official channels, of all lands necessary for the proper drainage of the swamp and low lands of this State, and shall also provide for the equitable assessment of all lands so drained, for the purpose of paying the expenses of such condemnation and drainage.

Amended by a joint resolution and an act: 1900 (23) 571; 1901 (23) 615. See FOREWORD on page 1159 of this volume.

Article II of amendments to the Constitution. The General Assembly of this State may enact local or special laws concerning the laying out, opening, altering or working roads or highways, and concerning the providing for the age at which citizens shall be subject to road duty, and concerning drainage.

Amended by a joint resolution and an act: 1904 (24) 676; 1905 (24) 830. See FOREWORD on page 1159 of this volume.

INDEX

CONSTITUTION OF SOUTH CAROLINA, 1895 AS AMENDED THRU 1941

ABUTTING OWNERS

Certain cities may levy assessment on abutting property—Proviso, Art. 10 § 14.

ABUTTING PROPERTY

Assessment for street and sidewalks, Beaufort county, Art. 8, § 7, Art. 10, § 5.

Florence county, Art. 10, § 20.

Assessment for street and sidewalk improvements, Art. 10, § 17.

All cities and towns, Art. 10, § 17.

Anderson city of, Art. 10, § 16.

Beaufort, city of, Art. 10, § 14a.

Beaufort, county of, Art. 10, § 13a.

Belton, town of, Art. 10, § 16.

Bennettsville, town of, Art. 10, § 16.

Charleston, city of, Art. 10, § 14a.

Chester, city of, Art. 10, § 15.

Clinton, town of, Art. 10, § 17.

Columbia, city of, Art. 10, § 14.

Darlington, city of, Art. 10, § 16.

Dillon, town of, Art. 10, § 15a.

Easley, city of, Art. 10, § 17.

Florence, city of, Art. 10, § 16.

Florence, county of, Art. 10, § 20.

Fort Mill, town of, Art. 10, § 17.

Gaffney, city of, Art. 10, § 15.

Georgetown, city of, Art. 10, § 15.

Greenville, city of, Art. 10, § 14.

Greenwood, city of, Art. 10, § 16.

Greer, town of, Art. 10, § 19.

Honea Path, town of, Art. 10, § 16.

Landrum, town of, Art. 10, § 16.

Latta, town of, Art. 10, § 15a.

Orangeburg, city of, Art. 10, § 16.

Pendleton, town of, Art. 10, § 16.

Spartanburg, city of, Art. 10, § 14.

Sumter, city of, Art. 10, § 16.

Timmons ville, town of, Art. 10, § 16.

Walhalla, town of, Art. 10, § 16.

Woodruff, town of, Art. 10, § 15.

Validated, L. '25, p. 823, § 1.

Highways, assessment for, Art. 10, § 13a.

ACCUSED

Rights of, Art. 1, § 18.

ACTIONS

Actions, Art. 17, § 11.

Effect of adoption of constitution, Art. 17, § 11.

Magistrates' Court, Art. 5, § 23.

Privileges of members of Legislature, Art. 3, § 14.

Removal of causes, Art. 17, § 6.

ACTS AND JOINT RESOLUTIONS

See "Statutes."

ADJOURNMENT

General Assembly, Art. 3, § 21.

ADJUTANT AND INSPECTOR GENERAL

Adjutant and Inspector General, Art. 13, § 4.

Compensation, Art. 4, § 24.

Duties, Art. 4, § 24.

Elections, Art. 4, § 24.

Term of office, Art. 4, § 24.

AGE OF CONSENT

Age of consent, Art. 3, § 33.

AGRICULTURAL AND MECHANICAL COLLEGE

Agricultural and Mechanical College, Art. 11, § 8.

AID

General Assembly extend, to certain persons, Art. 3, § 32.

ALIENS

Lands owned by aliens, Art. 3, § 35.

AMENDMENTS

See Amendments Ratified.

Amendments, Art. 16.

Convention, Art. 16, § 13.

Procedure, Art. 16, §§ 1-3.

Two or more, Art. 16, § 2.

AMENDMENTS RATIFIED

Amendments are chronologically arranged under sections.

Article 2, § 2.

Circuit Judges to act as Associate Justices, 1931.

Article 2, section 4, subdivision "A" and "E."

Qualifications to vote, 1931.

Article 2, § 12.

Municipal elections, taxes pay vote in, 1941

Article 2, § 13.

City of Columbia, 1931.

Article 3, § 32.

General Assembly may extend financial assistance or care to certain persons, 1937

Article 3, § 34.

Compensation county officers, 1921, 1935.

Game zones and game laws, 1935.

Special Laws, 1905.

Article 4, § 2.

Term of Governor, 1926.

Article 4, § 24.

Term of office for certain State Officers, 1926.

Article 5, § 2.

Members of Supreme Court, terms, 1905.

Article 5, § 12.

Supreme Court, 1911.

Article 5, § 21.

Magistrates, Anderson, City of 1935

Sumter County, 1933

Article 5, § 28.

Term of Attorney General, 1926.

Article 6, § 5.

Statutory law, codification of; code commissioner, 1933

Article 7, § 11.

Greenville County, certain townships in 1900.

Greenwood County, certain townships in 1903.

Laurens County, certain townships in 1903.

Saluda County, certain townships in 1903.

Article 8, § 5.

Municipal Ice Plants, 1921.

Article 4, § 5.

Charleston, city of, 1901.

See Art. 8, § 7.

Columbia, city of, 1901.

See Art. 8, § 7.

Florence, city of, 1901.

See Art. 8, § 7.

Georgetown, city of, 1901.

See Art. 8, § 7.

Rock Hill, city of, 1901.

See Art. 8, § 7.

Article 8, § 7.

Abbeville, city of, 1919, 1920.

Aiken, town of, 1911.

Allendale, town of, 1921.

Anderson, City of, 1918, 1929, 1931.

Beaufort, city of, 1923.

Bennettsville, town of, 1907, 1922.

Bishopville, town of, 1921.

Camden, town of, 1911.

Charleston, city of, 1901, 1921, 1927.

Charleston County, St. James Santee township, 1927.

Cheraw, town of, 1911.

Chester, city of, 1915, 1921.

Chesterfield, town of, 1921.

Clinton, town of, 1911.

Clio, town of, 1927.

Columbia, city of, 1901, 1931.

Conway, town of, 1927.

Darlington, town of, 1911.

Dillon, town of, 1927.

Edgefield, town of, 1911.

Florence, city of, 1901, 1915, 1919.

Gaffney, town of, 1903.

Georgetown, city of, 1901, 1933.

Greenville, city of, 1905.

Greenwood, town of, 1940.

AMENDMENTS RATIFIED (Cont'd)

Article 8, § 7 (Cont'd)

Hartsville, town of, 1921.
Heath Springs, town of, 1929.
Kershaw, town of, 1929.
Kingstree, town of, 1921.
Lancaster, town of, 1927.
Laurens, city of, 1921.
McColl, town of, 1927.
McCormick, town of, 1919.
Manning, town of, 1933.
Marion, town of, 1921.
Mullins, town of, 1927.
Municipal Corporations for waterworks, sewerage, etc., 1911, 1918.
Newberry, town of, 1921.
Orangeburg, city of, 1919.
Richland County, 1921.

Article 9, § 14.

Name of Railroad Commission changed to the Public Service Commission 1935.
Rockhill, city of, 1901, 1919.
St. George, town of, 1933.
St. Matthews, town of, 1911.
Saluda, town of, 1921.
Spartanburg, city of, 1923.
Sumter, city of, 1915.
Union, city of, 1921, 1927.
Union County, certain townships therein, 1921.
Walterboro, city of, 1929, 1933.
York County, Yorkville School Dis., 1915.

Article 8, § 8.

Abbeville County, 1927.
Aiken County, 1927.
Allendale County, 1927.
Bamberg County, 1930.
Berkeley County, 1927.
Calhoun County, 1927.
Charleston County, 1927.
Cherokee County, 1927.
Chester County, 1927.
Chesterfield County, 1927.
Clarendon County, 1927.
Colleton County, 1927.
Counties, all, 1922.
Edgefield County, 1927.
Factories, 1929.
See particular county hereunder.
Fairfield County, 1927.
Florence County, 1927, 1929.
Georgetown County, 1927.
Greenville County, 1929.
Greenwood County, 1927.
Hampton County, 1927.
Laurens County, 1927.
McCormick County, 1927.
Manufacturing Enterprises, 1929.
Marion County, 1927.
Orangeburg County, 1927, 1929.
Richland County, 1927.
Saluda County, 1927.
Spartanburg County, 1929.
Sumter County, 1929.
Union County, 1927.
Williamsburg County, 1927.
York County, 1927.

Article 8, § 13.

Ice Plants for Municipalities, 1921.

Article 8, § 14.

Greenville, city of, 1929, 1939.

Article 9, § 18.

Liability of bank stockholders, 1935

Article 10, § 1.

Assess and tax intangible property, 1932

Article 10, § 5.

Abbeville, city of, 1919, 1920.
See Art. 8, § 7.
Abbeville county, School District No. 38, 1923.
Aiken, town of, 1911.
See Art. 8, § 7.
Allendale County, 1921.
Allendale, town of, 1921.
See Art. 8, § 7.
Anderson, city of, 1918, 1929, 1931.
See Art. 8, § 7.
Beaufort County, 1923, 1924.
Beaufort, city of, 1923.

AMENDMENTS RATIFIED (Cont'd)

Article 10, § 5 (Cont'd)

Bennettsville, town of, 1922.
Bennettsville, city of, 1907.
See Art. 8, § 7.
Camden, town of, 1911.
See Art. 8, § 7.
Campobello school district No. 49, 1929.
Charleston, city of, 1921, 1927.
See Art. 8, § 7.
Charleston County, Christ Church Parish township, 1923.
Charleston County, St. James Santee township, 1927.
Charleston School District, 1918, 1921.
Cheraw, town of, 1911.
See Art. 8, § 7.
Cherokee County, School District No. 10, 1923.
Chester, city of, 1915, 1921.
See Art. 8, § 7.
Chesterfield, town of, 1921.
See Art. 8, § 7.
Chesterfield County, 1931.
Clarendon County, Pine Grove (Turbeville) School District No. 20, 1939
Clarendon County, 1931.
Clinton, town of, 1911.
See Art. 8, § 7.
Clio, town of, 1927.
Clio school district No. 9, 1927.
Columbia, city of, 1931.
Conway, town of, 1927.
Darlington, town of, 1911.
See Art. 8, § 7.
Dillon, town of, 1927.
Dorchester County, 1931, 1933.
Edgefield, town of, 1911.
See Art. 8, § 7.
Florence, city of, 1916, 1919.
See Art. 8, § 7.
Florence city school district, 1923.
Gaffney, town of, 1909.
See Art. 8, § 7.
Georgetown, city of, 1933.
Greenville, city of, 1905.
See Art. 8, § 7.
Greenville, city of, school district, 1929.
Greenwood, city of, 1940
Hartsville, town of, 1921.
See Art. 8, § 7.
Heath Springs, town of, 1929.
Kershaw and Lancaster Counties, School district No. 40, bonded indebtedness, 1935
Kershaw, town of, 1929.
Kingstree, town of, 1921.
See Art. 8, § 7.
Lancaster county, Heath Springs school district No. 38, 1927.
Lancaster School District, 1921.
Lancaster, town of, 1927.
Landrum school district, 1929.
Laurens, city of, 1921.
See Art. 8, § 7.
Laurens County, 1921.
Laurens County, School District No. 5, 1921.
Laurens, town of, School District of, 1921.
Lee County, Bishopville school district No. 1, 1927.
Lexington County, school district No. 29, 1927.
McColl, town of, 1927.
McCormick County, 1921.
Marion, town of, 1921.
See Art. 8, § 7.
Marlboro, graded school district, 1927.
Mullins, town of, 1927.
Municipal corporations, waterworks, sewerage, etc., 1911, 1918.
See Art. 8, § 7.
Newberry, town of, 1921.
See Art. 8, § 7.
Newberry County, 1931.
Orangeburg, city of, 1919.
See Art. 8, § 7.
Richland County, 1921.
Rock Hill, city of, 1919, 1939.
See Art. 8, § 7.
St. Matthews, town of, 1911.
See Art. 8, § 7.
Saluda, town of, 1921.
See Art. 8, § 7.

AMENDMENTS RATIFIED (Cont'd)

- Article 10, § 5 (Cont'd)
 Santee Bridge District, 1921.
 Spartanburg, city of, 1923.
 Spartanburg County, 1927.
 Sumter, city of, 1915.
 See Art. 8, § 7.
 Taxes, assessing and collecting of, 1921.
 Union, city of, 1921, 1927.
 See Art. 8, § 7.
 Union County, certain townships therein, 1921.
 See Art. 8, § 7.
 Walterboro, city of, 1929.
 York County, 1927.
 York County, Rock Hill School District No. 12, 1927.
 York County, Yorkville School District, 1915.
 See Art. 8, § 7.
 Article 10, § 6.
 Charleston county, Christ's Church Parish township, 1923.
 Charleston county, St. James Santee township, 1927.
 Greenwood County, 1911.
 Richland County, 1921.
 Saluda County, 1911.
 Article 10, § 7.
 Bishopville, town of, 1921.
 See Art. 8, § 7.
 Article 10, § 10
 Fiscal year 1933
 Assessment of abutting property for highways,
 Beaufort county, 1923.
 Article 10, § 14.
 Columbia, city of, 1911.
 Greenville, city of, 1911, 1929, 1939.
 Manning, town of, 1911.
 Spartanburg, city of, 1911.
 Article 10, § 14a.
 Beaufort, city of, 1919.
 Charleston, city of, 1919.
 Article 10, § 15a.
 Dillon, town of, 1915.
 Latta, town of, 1915.
 Article 10, § 15.
 Chester, city of 1913
 Gaffney, city of 1913
 Georgetown, city of 1913
 Woodruff, city of 1913
 Article 10, § 16.
 Anderson, city of, 1915.
 Belton, town of, 1915.
 Bennettsville, town of, 1915.
 Darlington, city of, 1915.
 Florence, city of, 1915.
 Greenwood, city of, 1915.
 Honea Path, town of, 1915.
 Landrum, town of, 1915.
 Orangeburg, city of, 1915.
 Pendleton, town of, 1920.
 Sumter, city of, 1915.
 Timmons ville, town of, 1915.
 Walhalla, town of, 1915.
 Article 10, § 17.
 Fort Mill, town of, 1915.
 Municipalities can levy for permanent improvements, 1919.
 Article 10, § 18.
 Clinton, town of, 1918.
 Easley, town of, 1918.
 Article 10, § 19.
 Assessment of abutting property.
 Greer, town of, 1924.
 Article 10, § 20.
 Florence county, 1921.
 Article 11, § 5.
 Abbeville County, 1937
 Anderson County, 1937
 Bamberg County, 1931, 1937
 Beaufort County, 1937
 Berkeley County, 1937
 Charleston County, 1937
 Chesterfield County, 1937
 Clarendon County, 1931.
 Colleton County, 1937
 Darlington County, 1937
 Dillon County, 1937
 Dorchester County, 1937

AMENDMENT RATIFIED (Cont'd)

- Article 11, § 5 (Cont'd)
 Edgefield County, 1937
 Fairfield County, 1929.
 Florence County, 1937
 Georgetown County, 1931, 1937
 Greenville County, 1919.
 Horry County, 1937
 Jasper County, 1937
 Lancaster County, 1937
 Lee County, 1937
 Lexington County, 1931.
 Orangeburg County, 1937
 Pickens County, 1923.
 Spartanburg County, 1918.
 Sumter County, 1937
 Union County, 1929, 1937
 Williamsburg County, 1937
 York County, 1937
 Article 11, § 6
 Tax for schools 1939
 Article 12, § 1.
 Insane and poor, Institutions for, 1915, 1918.
 Article 17, § 5.
 Public Printing, 1923.
 Article 1 of amendments.
 Condemn property for drainage purposes, 1901
 Article 2 of amendments.
 Enact special laws in regard highways, road tax and drainage, 1905
 Constitutional convention, Art 16, § 3.
 Drainage, Art. 1, of the Amendments of the Constitution.
 Elections, Art. 16, § 1.
 How amendment adopted, Art. 16, § 1.
 How amendment proposed, Art. 16, § 1.
 Local or special laws as to highways, Art. 2 of the Amendments of the Constitution.
 Procedure, Art. 16, §§ 1-3.
 Two or more, Art. 16 § 2.
ANNEXATION OF PROPERTY.
 Greenville, city of, Art. 8, § 14
ANIMALS
 Capitation tax, Art. 10, § 1.
APPEALS
 Elections:
 Persons denied registration, Art. 2, § 5.
 Jurisdiction of Court of General Sessions, Art. 5, § 18.
 Jurisdiction of Supreme Court, Art. 5, § 4.
APPORTIONMENT
 House of Representatives:
 Apportionment of representatives among the several counties, Art. 3, § 3.
 Enumeration, Art. 3, § 3.
 When apportionment takes effect, Art. 3, § 5.
 Representatives, Art. 1, § 2.
APPROPRIATION
 Biennially Art. 10, § 10.
 Invasion:
 Appropriations for repelling invasion, Art. 3, § 30.
 Money drawn from treasury only in pursuance of, Art. 10, § 9.
ARBITRATION AND AWARD
 Arbitration and award, Art. 6, § 1.
ARMS
 Right to keep and bear arms, Art. 1, § 26.
ARMY AND NAVY
 Army and Navy, Art. 1, § 26.
 Exemptions from arrest, Art. 13, § 2.
 How soldiers quartered, Art. 1, § 26.
 Military power subordinate to civil, Art. 1, § 26.
ARREST
 Elections:
 Arrests of electors, Art. 2, § 14.
 Militia:
 When exempt from arrest, Art. 13, § 2.
 Privilege from arrest:
 Members of Legislature, Art. 3, § 14.
ASSAULT AND BATTERY
 Court of General Sessions, Art. 5, § 18.
ASSEMBLY, RIGHT OF
 Assembly, right of, Art. 1, § 4.
ATTACHMENT
 Exemptions, Art. 3, § 28.

ATTAINDER

Attainder, Art. 1, § 8.

ATTORNEY AND CLIENT

Right to be heard by counsel, Art. 1, § 18.

ATTORNEY GENERAL

Attorney General, Art. 5, § 28.
Compensation, Art. 4, § 24; Art. 5, § 28.
Duties, Art. 4, § 24; Art. 5, § 28.
Election, Art. 4, § 24; Art. 5, § 28.
Term of office, Art. 4, § 24.

AUTREFOIS, ACQUIT AND CONVICT

Autrefois, Acquit and Convict, Art. 1, § 17.

BAIL AND RECOGNIZANCE

Bail and Recognizance, Art. 17, § 11.
Capital offenses, Art. 1, § 20.
Effect of adoption of constitution, Art. 17, § 11.
Excessive bail, Art. 1, § 19.
Proof is evident or presumption great, Art. 1, § 20.
What offenses bailable, Art. 1, § 20.

BALLOT

See "Elections."

BANKS AND BANKING

Examination and inspection, Art. 9, § 9.
Incorporation, Art. 9, § 9.
Liability of stockholders, Art. 9, § 18.
Special charter, Art. 9, § 9.

BASTARDY

Special laws prohibited, Art. 3, § 34.

BETTING

Betting, Art. 17, § 8.

BILL OF ATTAINDER

Bill of attainder, Art. 1, § 8.

BLIND

State aid Art. 3, § 32

BOARDS OF HEALTH

Boards of Health, Art. 8, § 10.

BONDS

See "Schools"; also Amendments Ratified.
Credit of State—For what purposes tax levied or bonds issued—Proviso, Art. 10, § 6.
Special election for bonded debt in municipalities, Art. 2, § 13.
State bonds, Art. 10, §§6, 7, 11.

BOUNDARIES

Counties:
Alteration of county lines, Art. 7, § 7.
Boundaries of counties—Boundaries of Saluda and Edgefield, Art. 7, § 12.
No county line through city or town, Art. 7, § 14.

BOUNDARY RIVERS

Boundary rivers, Art. 14, § 1.

CANALS

Common-law liability, Art. 9, § 3.
Limiting liability, Art. 9, § 3.
Taxation:

Transporting and transmitting corporations taxed as such—Common-law liability, Art. 9, § 3.

CARRIERS

Common-law liabilities, Art. 9, § 3.
Competition:
Consolidation of stock with competing line — Jury may decide whether lines are parallel or competing, Art. 9, § 7.
Competitive rates, Art. 9, § 5.
Connecting lines:
Transportation company may connect or cross lines of another, Art. 9, § 6.
Discrimination in charges, Art. 9, § 5.
Excursion tickets, Art. 9, § 5.
Foreign corporations, Art. 9, § 8.
Limiting liability, Art. 9, § 3.
Railroad commission, Art. 9, § 14.
Rates established by railroad commission, Art. 9, § 5.
Taxation:
Transporting and transmitting corporations, taxed as such—Common-law liability, Art. 9, § 3.
Transportation company may connect or cross lines of another, Art. 9, § 6.

CENSUS

Census, Art. 3, § 3.

CERTIFICATE OF REGISTRATION

Certificate of Registration, Art. 2, § 4.

CERTIFICATES OF INDEBTEDNESS

Certificates of Indebtedness, Art. 10, § 7.

CERTIORARI

Supreme Court, Art. 5, § 4.

CHAMBERS AND VACATION

Powers at chambers, Art. 5, § 25.

CHANGE OF NAME

Special laws prohibited, Art. 3, § 34.

CHANGE OF VENUE

Change of venue, Art. 6, § 2.

CHARGE TO JURY

Charge to jury, Art. 5, § 26.

CHARITABLE AND PENAL INSTITUTIONS

Charitable and Penal Institutions, Art. 12.

CHARITIES

Gifts for educational purposes, Art. 11, § 10.
Gifts to State—Assets of estates or copartnerships —Direct tax—State school fund, Art. 11, § 11.
Special laws, Art. 3, § 34.

CHILDREN

State aid Art. 3, § 32.

CIRCUIT SOLICITOR

Circuit Solicitor, Art. 5, § 29.

CITIZENS

See "Privileges and Immunities."

CLAFLIN UNIVERSITY

Claflin University, Art. 11, § 8.

CLAIMS AGAINST STATE

Claims against State, Art. 17, § 2.

CLEMSON AGRICULTURAL COLLEGE

Clemson Agricultural College, Art. 11, § 8.

CLERK OF COURT

Clerk of Court, Art. 5, § 27.
Election, Art. 5, § 27.
Removal, Art. 5, § 27.
Term of office, Art. 5, § 27.

CODE

Codification of laws, Art. 6, § 5.

CODE COMMISSIONER

Duties, powers, election, compensation, etc., Art. 6, § 5

CODIFICATION OF LAWS

Art. 6, § 5.

COLLEGES AND UNIVERSITIES

Colleges and Universities, Art. 11, § 8.

COLORADO AGRICULTURAL AND MECHANICAL COLLEGE

Colored Agricultural and Mechanical College, Art. 11, § 8.

COLORADO PERSONS

Miscegenation, Art. 3, § 33.
Separate schools, Art. 11, § 7.

COMBINATIONS

Combinations, Art. 9, § 13.

COMMISSION

Public service commission, the, Art. 9, § 14.
Railroad commission, Art. 9, § 14.

COMMON CARRIERS

See "Carriers."

COMMON PLEAS

See "Courts."

COMMUTATION OF SENTENCE

Commutation of sentence, Art. 4, § 11.

COMPENSATION

Property not to be taken, Art. 1, § 17.

COMPTROLLER-GENERAL

Compensation, Art. 4, § 24.
Duties, Art. 4, § 24.
Elections, Art. 4, § 24.
Term of office, Art. 4, § 24.

CONDEMNATION

Drainage, property for Art. 1 of Amendments.

CONFEDERATE VETERANS

Pensions, Art. 13, § 5.

CONGRESS

Congressional district, Art. 7, § 13.

CONNECTING CARRIERS

See "Carriers."

CONSTITUTION

See "Amendments."

Constitution of 1868 repealed, Art. 17, § 11.

When takes effect, Art. 17, § 11.

CONSTITUTIONAL AMENDMENTS

See "Amendments."

CONSTITUTIONAL CONVENTION

Constitutional convention, Art. 16, § 3.

CONSTRUCTION OF CONSTITUTION

To be construed as mandatory and prohibitory, Art. 1, § 29.

CONTEMPT, Art. 1, § 19.**CONTRACT**

Impairment of obligation of contracts, Art. 1, § 8.

CONVENTION

Constitutional convention, Art. 16, § 3.

CONVICTS

Control of convicts, Art. 12, § 9.

Convicts sentenced to hard labor, Art. 12, § 6.

Elections, Art. 2, § 6.

Sentence to labor on highways, Art. 5, § 33.

CORONER

Elections, Art. 5, § 30.

CORPORATIONS

Agent of corporation, Art. 9, § 4.

Bank, Art. 9, § 9.

Business of corporations, Art. 9, § 12.

Canal companies, Art. 9, § 3.

Carriers, Art. 9, § 3.

Charter of incorporation, Art. 9, § 2.

Common carriers, Art. 9, § 3.

Competitive rates, Art. 9, § 5.

Consolidation of stock and connecting line—Jury may decide whether lines are parallel or competing, Art. 9, § 7.

Corporations, Art. 9.

Corporations cannot do act prohibited through controlling interest in other corporations, Art. 9, § 19.

Definition, Art. 9, § 1.

Discrimination in charges, Art. 9, § 5.

Election of officers of corporations, Art. 9, § 11.

Excursion tickets, Art. 9, § 5.

Existing charters, Art. 9, § 16.

Express companies, Art. 9, § 3.

Incorporation, Art. 9, § 2.

Laws for benefit of corporation passed only on conditions, Art. 9, § 17.

Liability of stockholders—In banks, Art. 9, § 18.

No foreign corporation can build or operate a railroad in this State—No general or special law for foreign corporation, except on condition, Art. 9, § 8.

Office of agent of corporation, Art. 9, § 4.

Process, Art. 9, § 4.

Provisions not self-executing, Art. 9, § 21.

Railroads, Art. 9, § 3.

Right of way, Art. 9, § 20.

Rights and remedies of employees, Art. 9, § 15.

Service of process:

See "Summons and Process."

Special charter, Art. 9, § 2.

Special laws prohibited, Art. 3, § 34.

Stock issued for money or labor, Art. 9, § 10.

Summons and process, Art. 9, § 4.

Taxation:

Share of stockholders, Art. 10, § 5.

Telegraphs and telephones, Art. 9, § 3.

The public service commission, Art. 9, § 14.

The railroad commissioners, Art. 9, § 14.

Transportation company may connect or cross lines of another, Art. 9, § 6.

Transporting and transmitting corporations taxed as such—Common-law liability, Art. 9, § 3.

Trusts, combinations, etc., Art. 9, § 13.

CORRUPTION OF BLOOD

Corruption of blood, Art. 1, § 8.

COUNSEL

Right to be heard by counsel, Art. 1, § 18.

COUNTIES

See "Amendments. Ratified." for particular county affected by Amendment to Constitution.

Alteration of county lines, Art. 7, § 7.

Boundaries:

Alteration of county lines, Art. 7, § 7.

COUNTIES (Cont'd)

Boundaries (Cont'd)

Boundaries of counties—Boundaries of Saluda and Edgefield, Art. 7, § 12.

No county line through city or town, Art. 7, § 14.

Consolidation of 2 or more counties, Art. 7, § 10.

County seat, Art. 7, § 1.

Removal of county seat, Art. 7, § 8.

Division, Art. 7, § 2.

Election district—Body corporate, Art. 7, § 9.

Formation of new counties, Art. 7, § 1.

Lynching:

Prisoner lynched through negligence of officer—Penalty on officer—County liable for damages, Art. 6, § 6.

Municipal corporations:

No county line through city or town, Art. 7, § 14.

Name, Art. 7, § 1.

New counties, Art. 7, § 1.

Alteration of county lines, Art. 7, § 7.

Area, taxable property, and inhabitants of old county, Art. 7, § 4.

Eight mile limit, Art. 7, § 5.

Formation of new counties—County seat and name, Art. 7, § 1.

Indebtedness, Art. 7, § 6.

Inhabitants—Taxable property—Area of new county, Art. 7, § 3.

Section of old county to be cut off, Art. 7, § 2.

Officers:

Special laws prohibited, Art. 3, § 34.

Poor, Art. 12, § 3.

Section of old county to be cut off, Art. 7, § 2.

Taxation:

Taxes may be levied for corporate purposes—Share of stockholders—Limit of bonded debt, Art. 10, § 5.

Township—Body corporate—Township government, Art. 7, § 11.

COUNTY COURTS

See "Courts."

COUNTY OFFICERS

Compensation Art. 3, § 34

COUNTY SEAT

County seat, Art. 7, § 1.

Removal of county seat, Art. 7, § 8.

COUNTY SOLICITOR

County Solicitor, Art. 5, § 29.

COUNTY TREASURER

Salaries of school officers and county treasurer, Art. 11, § 4.

COURT OF COMMON PLEAS

See "Courts."

COURT OF GENERAL SESSIONS

See "Courts."

COURTS

Clerk of Court:

See "Clerk of Court."

Constitutional questions, Art. 5, § 12.

County Court, Art. 5, § 1.

Jurisdiction, Art. 5, § 1.

Court of Common Pleas, Art. 5, § 1.

Jurisdiction of Courts of Common Pleas, Art. 5, § 15.

Sit twice, Art. 5, § 16.

Terms, Art. 5, § 16.

Court of General Sessions, Art. 5, § 1.

Jurisdiction, Art. 5, § 18.

Court of Probate, Art. 5, § 19.

Decisions—When filed, Art. 5, § 17.

Impeachment:

See "Impeachment."

Interchange of Circuits, Art. 5, § 14.

Judicial circuits, Art. 5, § 13.

Judicial districts, Art. 7, § 13.

Judicial power vested in certain courts, Art. 5, § 1.

Matters now pending, Art. 5, § 34.

Municipal Courts, Art. 5, § 1.

Public, Art. 1, § 15.

Removal of causes, Art. 17, § 6.

Sessions:

See *Infra*, "Terms."

Speedy remedy for wrongs in court, Art. 1, § 15.

COURTS (Cont'd)

- Supreme Court, Art. 5, § 1.
- Chief justices, Art. 5, § 2.
- Classification of justices, Art. 5, § 2.
- Compensation of judges and justices, Art. 5, § 9.
- Constitution, Art. 5, § 2.
- Decisions of Supreme Court, Art. 5, § 32.
- Decisions—When filed, Art. 5, § 17.
- Disqualification of justices, Art. 5, § 6.
- Election, Art. 5, § 2.
- Held twice a year at capital, Art. 5, § 5.
- Judgment of Supreme Court, Art. 5, § 8.
- Jurisdiction of Supreme Court, Art. 5, § 4.
- Number of justices, Art. 5, § 2.
- Present chief justice and Associate Justice, Art. 5, § 3.
- Qualifications of, Art. 5, § 10.
- Reporter — Clerk, Art. 5, § 7.
- Senate try impeachment — Chief justice preside, Art. 15, § 2.
- Three necessary for reversal — Constitutional questions—Judge shall not sit, Art. 5, § 12.
- Vacancies — Conservators — Unexpired term, Art. 5, § 11.
- Terms of court:
 - Common pleas, Art. 5, § 16.
 - Supreme Court, Art. 5, § 5.

CRIMINAL LAW

- See "Trial."
- Elections, Art. 2, § 6.
- Laws:
 - Crimes against election laws, Art. 2, § 5.

CRUEL AND UNUSUAL PUNISHMENT

- Cruel and unusual punishment, Art. 1, § 19.

DEAF, DUMB AND BLIND

- Directors of benevolent and penal State institutions, Art. 12, § 4.
- Institutions for blind, insane, deaf and dumb, Art. 12, § 1.
- Vacancies, Art. 12, § 8.

DEATH BY WRONGFUL ACT

- Employees of railroad, Art. 9, § 15.

DEBT

- Imprisonment for debt, Art. 1, § 24.
- Political subdivisions assume Art. 2, Art. 8, Art. 10.
- Public debt, Art. 10, §§ 6, 7, 11.

DECISIONS

- Decisions, Art. 5, § 17.

DECISIONS OF SUPREME COURT

- Decisions of Supreme Court, Art. 5, § 32.

DECLARATION OF RIGHTS

- Apportionment of representatives, Art. 1, § 2.
- Attainder — Ex post facto law, Art. 1, § 8.
- Courts—Remedy, Art. 1, § 15.
- Departments separate, Art. 1, § 14.
- Elections free and open, Art. 1, § 10.
- Excessive bail—Corporal punishment — Contempt, Art. 1, § 19.
- Haheas corpus, Art. 1, § 23.
- Imprisonment for debt, Art. 1, § 24.
- Keep and bear arms — General Assembly may maintain armies—How soldiers quartered, Art. 1, § 26.
- Libel, Art. 1, § 21.
- Martial law, Art. 1, § 27.
- Meeting of General Assembly, Art. 1, § 3.
- Navigable waters free—No tax for use of wharf, Art. 1, § 28.
- No tax without consent, Art. 1, § 7.
- Political power in people, Art. 1, § 1.
- Presentment of grand jury—Not tried twice—Private property, Art. 1, § 17.
- Privileges and immunities—Protection of laws, Art. 1, § 5.
- Property qualifications—Term of office—Duelling, Art. 1, § 11.
- Provisions of constitution, Art. 1, § 29.
- Religious worship — Freedom of speech—Petition, Art. 1, § 4.
- Residence, Art. 1, § 12.
- Right of bail—Sureties, Art. 1, § 20.
- Searches and seizures, Art. 1, § 16.
- Suffrage, Art. 1, § 9.
- Suspension of laws, Art. 1, § 13.
- Taxation, Art. 1, § 6.
- Treason, Art. 1, § 22.
- Trial by jury, Art. 1, § 25.
- Trial by jury—Witnesses, Art. 1, § 18.

DEPARTMENT

- Executive department:
 - See "Governor."
- Judicial department:
 - See "Courts;" "Judges."
- Legislative department:
 - See "Legislative Department."
- Separate departments, Art. 1, § 14.

DESTITUTE

- Provide for, Art. 3, § 32

DETECTIVES

- Forbidding introduction of armed police force into the State, Art. 8, § 9.

DIRECTORY PROVISIONS

- Directory provisions, Art. 1, § 29.

DIVORCES

- Divorces, Art. 17, § 3.

DRAINS AND SEWERS

- Eminent domain, Art. 1, of the Amendment of the Constitution
- Enact special laws concerning, Art. 2 of Amendments.

DUELING

- Officers, Art. 1, § 11.

DUE PROCESS OF LAW

- No person to be deprived of life, liberty or property without, Art. 1, § 5.

EFFECTIVE DATE, Art. 27, § 11.**ELECTIONS**

- See "Officers."
- Adjutant and inspector-general, Art. 4, § 24.
- Amendment to constitution, Art. 16, § 1.
- Appeals:
 - Persons denied registration, Art. 2, § 5.
- Arrests of electors, Art. 2, § 14.
- Attorney General, Art. 4, § 24; Art. 5, § 28.
- Ballot, Art. 2, § 1.
 - Elections by ballot, Art. 2, § 1.
- Certificate of registration, Art. 2, § 4.
- Clerk of Court, Art. 5, § 27.
- Comptroller-General, Art. 4, § 24.
- Convicts, Art. 2, § 6.
- Coroner, Art. 5, § 30.
- Crimes against election laws, Art. 2, § 5.
- Criminal law, Art. 2, § 6.
- Criminals, Art. 2, § 6.
- Disqualification, Art. 2, § 6.
- Districts, Art. 7, § 9.
- Effect of adoption of constitution, Art. 17, § 11.
- Election district—Body corporate, Art. 7, § 9.
- Election district:
 - Representatives, Art. 3, § 3.
- Electors, Art. 2, § 3.
- For polling precincts, Art. 2, § 9.
- Free, Art. 1, § 10.
- General Assembly, Art. 3, § 8.
- Governor, Art. 4, § 2.
 - Boards of Canvassers transmit returns of election for Governor — Returns delivered to speaker of House of Representatives—Contested elections, Art. 4, § 4.
- Duly qualified electors, Art. 4, § 2.
- Time of election, Art. 4, § 2.
- House of Representatives, Art. 3, § 2.
- Insane persons, Art. 2, § 6.
- Lieutenant Governor, Art. 4, §§ 5, 6.
- Municipal elections:
 - Bonded debt in municipalities, Art. 2, § 13.
 - Registration, Art. 2, § 12.
 - Taxes pay vote in Art. 11, § 12.
- Officers:
 - Elections of State officers, Art. 4, § 24.
- Open, Art. 1, § 10.
- Pardon, Art. 2, § 6.
- Paupers, Art. 2, § 6.
- Persons disqualified from voting, Art. 2, § 6.
- Precincts, Art. 2, § 9.
- Primary elections, Art. 2, § 10.
- Prisons and prisoners, Art. 2, § 6.
- Qualifications for suffrage, Art. 2, §§ 3, 4.
 - Certificate of registration, Art. 2, § 4.
 - General, Art. 2, §§ 3, 4.
 - Payment of taxes necessary for voting, Art. 2, § 4.
 - Persons disqualified from voting, Art. 2, § 6.
 - Qualification for registration after January, 1898, Art. 2, § 4.

ELECTIONS (Cont'd)

- Qualification for registration up to January, 1898, Art. 2, § 4.
- Registration, Art. 2, § 4.
- Residence, Art. 2, § 4.
- Registration:
 - Appeal, Art. 2, § 5.
 - Board of Registration, Art. 2, § 8.
 - Books of public record, Art. 2, § 8.
 - Books of registration, Art. 2, §§ 8, 11.
 - Closing books, Art. 2, § 8.
 - Opening books, Art. 2, § 8.
 - Public records, Art. 2, § 8.
- Certificate of registration, Art. 2, § 4.
- Enrolling electors not previously registered, Art. 2, § 4.
- Enrollment of every elector once in ten years, Art. 2, § 4.
- General Assembly to provide for registration, Art. 2, § 8.
- Inspection of books, Art. 2, § 8.
- Municipal elections, Art. 2, § 12.
- Qualification for registration after January, 1898, Art. 2, § 4.
- Qualification for registration up to January, 1898, Art. 2, § 4.
- Representatives, Art. 3, § 8.
- Residence, Art. 2, §§ 4, 6.
- How residence gained or lost, Art. 2, § 7.
- Ministers, Art. 2, § 4.
- Residence in polling precinct, Art. 2, § 4.
- Residence in the county one year, Art. 2, § 4.
- Residence in the State for two years, Art. 2, § 4.
- Teachers, Art. 2, § 4.
- Right of suffrage, Art. 1, § 9; Art. 2, § 15.
- All inhabitants, Art. 1, § 10.
- Protection of, Art. 1, § 9.
- Secretary of State, Art. 4, § 24.
- Senators, Art. 3, § 8.
- Sheriffs and constables, Art. 5, § 30.
- Solicitor, Art. 5, § 29.
- State Superintendent of Education, Art. 4, § 24.
- State Treasurer, Art. 4, § 24.
- Suffrage:
 - See *infra*, "Right of Suffrage;" "Qualifications for Suffrage."
- Taxation:
 - Payment of taxes necessary for voting, Art. 2, § 4.
- Voters, Art. 2, § 3.

ELECTORS

See "Elections."

ELECTRIC LIGHT COMPANIES

Municipal corporations, Art. 8, § 7.

ELECTRIC LIGHTS

Municipal corporations, Art. 8, §§ 4, 5.

EMBEZZLEMENT

Safe keeping of public funds—Embezzlement of, Felony—General Assembly may remove, Art. 10, § 12.

EMINENT DOMAIN

Drains and sewers, Art. 1 of the Amendments of the Constitution.

Just compensation, Art. 1, § 17.

EQUAL PROTECTION OF THE LAWS

Equal protection of the laws, Art. 1, § 5.

EQUITY

No distinction between law and equity, Art. 6, § 3.

ESCHEAT

Escheat, Art. 14, § 3.

Schools, Art. 11, § 11.

EVIDENCE

See "Witnesses."

Treason, Art. 1, § 22.

EXCESSIVE BAIL

Excessive bail, Art. 1, § 19.

EXCESSIVE FINES

Excessive fines, Art. 1, § 19.

EXEMPTIONS

Exemptions, Art. 3, § 28.

EXECUTIVE DEPARTMENT

See "Governor."

Separate departments, Art. 1, § 14.

EXECUTORS AND ADMINISTRATORS

Court of probate, Art. 5, § 19.

EXEMPTION

Taxation, Art. 3, § 28.

See also "Taxation."

EXEMPTIONS FROM EXECUTION AND ATTACHMENT

Exemptions from execution and attachment, Art. 3, § 28.

EX POST FACTO LAW

Ex post facto law, Art. 1, § 8.

EXPRESS COMPANIES

Common law liability, Art. 9, § 3.

Limiting liability, Art. 9, § 3.

Taxation:

Transporting and transmitting corporations taxed as such—Common-law liability, Art. 9, § 3.

FACTORIES

Manufactories may be exempt from taxation, Art. 8, § 8.

FELLOW SERVANTS

Fellow servants, Art. 9, § 15.

FINANCE

Finance, Art. 10.

FINES

Fines, Art. 17, § 11.

Excessive fines, Art. 1, § 19.

FISCAL YEAR

Fiscal year, Art. 10, § 10.

FOREIGN CORPORATIONS

Lands, Art. 3, § 35.

No foreign corporation can build or operate a railroad in this State No general or special law for foreign corporation, except on conditions, Art. 9, § 8.

FORFEITURE

Conviction shall not work forfeiture, Art. 1, § 8.

FRAUD AND DECEIT

Imprisonment for debt, Art. 1, § 24.

FREEDOM OF SPEECH

Freedom of speech, Art. 1, § 4.

FREEDOM OF THE PRESS

Freedom of the press, Art. 1, § 4.

FREE SCHOOLS

See "Schools."

GAMBLING

Gambling, Art. 17, § 8.

GAME ZONES

State divided in Art. 3, § 32

GAME AND GAME LAWS

Laws enact protect, Art. 3, § 34.

GAS AND GAS COMPANIES

Municipal corporations, Art. 8, §§ 4, 5, 7.

GENERAL ASSEMBLY

See "Legislative Department."

Adjournments, Art. 3, § 21; Art. 4, § 16.

Doors open, Art. 3, § 23.

Elections "Viva Voce," Art. 3, § 20.

Extra session, Art. 3, § 16; Art. 4, §§ 16, 19.

Governor to inform legislature, Art. 4, § 15.

Holding two offices, Art. 3, § 24.

House of Representatives:

See "House of Representatives."

Intoxicating liquors:

Powers of General Assembly, Art. 8, § 11.

Journal—"Yeas" and "Nays," Art. 3, § 22.

Meetings, Art. 1, § 3.

Oath of office, Art. 3, § 26.

Removal of officer, Art. 3, § 27.

Sessions:

Governor may convene in extra session, Art. 4, § 16.

Sessions of General Assembly, Art. 3, § 9.

Statutes:

See "Statutes."

Suspension of laws, Art. 1, § 13.

Vacancies, Art. 3, § 25.

"Yeas" and "nays," Art. 3, § 22.

GENERAL SESSIONS

See "Courts."

GOVERNOR, Art. 4, § 1.

Bill or joint resolution must be signed or vetoed by the Governor, Art. 4, § 23.

Boards of Canvassers transmit returns of election for Governor — Returns delivered to speaker of House of Representatives—Contested elections, Art. 4, § 4.

Chief magistrate, Art. 4, § 1.

Commander-in-chief, Art. 4, § 10.

Commissions, Art. 4, § 17.

Compensation of Governor and Lieutenant Governor, Art. 4, § 13.

Elections, Art. 4, § 2.

Extra sessions—Governor may adjourn General Assembly, Art. 4, § 16.

Grants and commissions, Art. 4, § 19.

Impeachment:

See "Impeachment."

Information of Legislature, Art. 4, § 15.

Laws, execution of, Art. 4, § 12.

Lieutenant, Art. 4, § 5.

Member of Senate acting as Governor, Art. 4, § 8.

Militia:

Governor may call out, Art. 13, § 3.

Officers and Boards report to governor, Art. 4, § 14.

Other State officers, Art. 4, § 24.

Pardons—Board of Pardons, Art. 4, § 11.

President pro tempore of Senate, Art. 4, § 7.

Qualifications of Governor, Art. 4, § 3.

Residence of Governor, Art. 4, § 21.

Seal of State, Art. 4, § 18.

Suspension of officers, Art. 4, § 22.

Term of office, Art. 4, § 2.

Vacancy in office of Governor—How filled, Art. 4, § 9.

Vote of Lieutenant Governor, Art. 4, § 6.

GRAND JURY

Necessity of presentment in or indictment by grand jury, Art. 1, § 17.

Number of jurors, Art. 5, § 22.

Special laws prohibited, Art. 3, § 34.

GREENVILLE, CITY OF

Corporate limits extended, Art. 8, § 14.

HABEAS CORPUS

Supreme Court, Art. 4, § 4.

Suspension, Art. 1, § 23.

HEAD OF FAMILY

Head of family, Art. 3, § 28.

HEALTH

Boards of Health, Art. 8, § 10.

HIGHWAYS

Local or special laws, Art. 2 of Amendments.

Navigable waters, Art. 14, § 1.

Navigable waters to be public highways, Art. 1, § 28.

Sentence to labor on highways, Art. 5, § 33.

Waters and watercourses, Art. 14, § 1.

HOMESTEAD

Homestead, Art. 3, § 28.

Taxation, Art. 3, § 28.

HOSPITAL FOR INSANE

Hospital for insane, Art. 12, § 8.

HOSPITALS AND ASYLUMS

Directors of benevolent and penal State institutions, Art. 12, § 4.

Institutions for blind, insane, deaf and dumb, Art. 12, § 1.

State Hospital for Insane—Officers of, Art. 12, § 2.

HOUSE OF REPRESENTATIVES

See "General Assembly;" "House of Representatives."

Absent members, Art. 3, § 11.

Adjournments, Art. 3, § 21.

Apportionment, Art. 3, § 3.

Apportionment of representatives among the several counties, Art. 3, § 3.

Enumeration, Art. 3, § 3.

When apportionment takes effect, Art. 3, § 5.

Apportionment of representatives, Art. 1, § 2.

Apportionment takes effect when, Art. 3, § 5.

Assignment of representatives, Art. 3, § 4.

Bills:

See "Statutes."

Bills for revenue, Art. 3, § 15.

HOUSE OF REPRESENTATIVES (Cont'd)

Census, Art. 3, § 3.

Compensation of members, Art. 3, § 9.

Composition, Art. 3, § 1.

Doors open, Art. 3, § 23.

Each county one election district, Art. 3, § 3.

Each house judge of election returns, Art. 3, § 11.

Each house judge of qualifications of its own members, Art. 3, § 11.

Election, Art. 3, § 2.

Election of representatives, Art. 3, § 8.

Elections "Viva Voce," Art. 3, § 20.

Expulsion, Art. 3, § 12.

Holding two offices, Art. 3, § 24.

In what house bills should originate, Art. 3, § 15.

Journal—"Yeas" and "nays," Art. 3, § 22.

Legislative power, Art. 3, § 1.

Number of members, Art. 3, § 3.

Oath of office, Art. 3, § 26.

Officers, Art. 3, § 12.

Privileges of members, Art. 3, § 14.

Protection of members, Art. 3, § 14.

Qualification of members, Art. 3, § 7.

Quorum, Art. 3, § 11.

Removal of officer, Art. 3, § 27.

Right of punishment, Art. 3, § 13.

Rules, Art. 3, § 12.

Statutes:

See "Statutes."

Terms of office, Art. 3, § 10.

Vacancies, Art. 3, § 25.

"Yeas" and "nays," Art. 3, § 22.

HUSBAND AND WIFE

Exemption, Art. 3, § 28.

Property of married women, Art. 17, § 9.

ICE AND ICE PLANTS

Operation of, by municipalities, Art. 8, §§ 5, 13.

ILLEGITIMATION

Special laws prohibited, Art. 3, § 34.

IMPAIRMENT OF OBLIGATION OF CONTRACTS

Impairment of obligation of contracts, Art. 1, § 8.

IMPEACHMENT

Impeachment, Art. 15.

Officers liable to, Art. 15, § 3.

Power of impeachment—Officer impeached, Art. 15, § 1.

Removal of officers, Art. 15, § 4.

Senate try impeachment—Chief justice preside, Art. 15, § 2.

IMPRISONMENT FOR DEBT

Imprisonment for debt, Art. 1, § 24.

INCOME TAX

Income tax, Art. 10, § 1.

INDICTMENT AND INFORMATION, Art. 5, § 31

Effect of adoption of constitution, Art. 17, § 11.

INDICTMENTS

Indictments, Art. 17, § 11.

Necessity, Art. 1, § 17.

INFANTS

Reformatory for juvenile offenders, Art. 12, § 7.

INJUNCTION

Supreme Court, Art. 5, § 4.

INSANE PERSONS

Court of probate, Art. 5, § 19.

Elections, Art. 2, § 6.

Institutions for blind, insane, deaf and dumb, Art. 12, § 1.

State Hospital for Insane—Officers of, Art. 12, § 2.

INSTRUCTIONS

Instructions, Art. 5, § 26.

INTANGIBLE PROPERTY

Assess and tax, Art. 10, § 1.

INTOXICATING LIQUORS

General Assembly:

Powers of General Assembly, Art. 8, § 11.

Licenses, Art. 8, § 11.

Provision as to alcoholic liquors and beverages, Art. 8, § 11.

Schools:

Income from sale of licenses for sale of liquors, Art. 11, § 12.

INVASION

Appropriation:
Appropriations for repelling invasion, Art. 3, § 30.

JEOPARDY

Jeopardy, Art. 1, § 17.

JOINT RESOLUTIONS

See "Statutes."

JOURNAL

Legislature, Art. 111, § 22.

JUDGES

Charge to juries, Art. 5, § 26.
Compensation, Art. 4, § 9.
Disqualification of judges, Art. 5, § 6.
Election of judges, Art. 5, § 13.
Interchange of circuits, Art. 5, § 14.
Powers of chambers, Art. 5, § 25.
Qualifications of, Art. 5, § 10.
Relationship, Art. 5, § 6.
Vacancies, Art. 5, § 6.
Vacancies—Conservators—Unexpired term, Art. 5, § 11.

JUDICIAL DEPARTMENT

See "Courts," "Judges."
Separate departments, Art. 1, § 14.

JURISDICTION

See "Courts."
Constitutional questions, Art. 5, § 12.
Court of general sessions, Art. 5, § 18.
Jurisdiction of Courts of Common Pleas, Art. 5, § 15.
Magistrates, Art. 5, § 21.
Matters now pending, Art. 5, § 34.
Supreme Court, Art. 5, § 4.

JURY

Number of jurors, Art. 5, § 22.
Qualification of jurors, Art. 5, § 22.
Right of trial by jury, Art. 1, §§ 18, 25; Art. 5, § 22.
Special laws prohibited, Art. 3, § 34.
Trial by jury, Art. 5, § 22.

JUSTICES

See "Courts," "Judges."
Compensation of judges and justices, Art. 5, § 9.

LAWS

See "Statutes."
Inconsistent with constitution, Art. 37, § 11.
No distinction between law and equity, Art. 6, § 3.
Suspension of laws, Art. 1, § 13.

LEGISLATIVE DEPARTMENT

See "General Assembly."
House of Representatives:
See "House of Representatives."
Legislative power, Art. 3, § 1.
Senate:
See "Senate."
Separate departments, Art. 1, § 14.
Sessions of General Assembly, Art. 3, § 9.

LEGISLATURE

See "Legislative Department."
Sessions:
See "General Assembly."

LIBEL AND SLANDER

Jury judges of law and fact, Art. 1, § 21.
Justification, Art. 1, § 21.
Truth of alleged libel, Art. 1, § 21.

LICENSES

Intoxicating liquors, Art. 8, § 11.
Municipal corporations, Art. 8, § 6.

LIEUTENANT GOVERNOR

See "Governor."

LOTTERIES

Lotteries, Art. 17, § 7.

LYNCHING

Prisoner lynched through negligence of officer—
Penalty on officer—County liable for damages,
Art. 6, § 6.

MAGISTRATES

Actions in Magistrates' Courts, Art. 5, § 23.
Anderson, City of, Art. 5, § 21.
Appointment, Art. 5, § 20.
Appointment of constables, Art. 5, § 20.
Jurisdiction, Art. 5, § 21.

MAGISTRATES (Cont'd)

Number, Art. 5, § 20.
Preliminary examination, Art. 5, § 21.
Salary, Art. 5, § 20.
Sumter County, Art. 5, § 21.
Term of office, Art. 5, § 20.

MANDAMUS

Supreme Court, Art. 5, § 4.

MANDATORY PROVISIONS

Mandatory provisions, Art. 1, § 29.

MANUFACTORIES

See amendments for particular city or county
exempting certain.
Manufactories may be exempt from taxation, Art.
8, § 8.
See Art. 8, § 8, (1927 amendment.)

MARRIAGES

Miscegenation, Art. 3, § 33.

MARRIED WOMEN

Exemptions, Art. 3, § 28.
Property of married women, Art. 17, § 9.

MARTIAL LAW

Martial law, Art. 1, § 27.

MASTER AND SERVANT

Fellow servant, Art. 9, § 15.
Railroads:
Rights and remedies of employees, Art. 9, § 15.

MEETINGS

General Assembly, Art. 1, § 3.

MILEAGE

General Assembly, Art. 3, § 19.

MILITIA, Art. 1, § 26; Art. 18.

Adjutant and inspector general, Art. 4, § 24.
See "Adjutant and inspector general."

Arrest:

When exempt from arrest, Art. 13, § 2.
Commander-in-chief, Art. 4, § 10.

Governor:

Governor may call out, Art. 13, § 3.
Holding two offices, Art. 2, § 2.
Military power subordinate to civil authority,
Art. 1, § 26.
Necessity of presentment or indictment, Art. 1, §
17.

Staff officers, Art. 13, § 4.
Term of office, Art. 1, § 11.
Who compose militia, Art. 13, § 1.

MINES AND MINING CLAIMS

Taxation, Art. 10, § 1.

MISCEGENATION

Miscegenation, Art. 3, § 33.

MONOPOLIES

Monopolies, Art. 9, § 13.

MUNICIPAL CORPORATIONS, Art. 8.

See "Amendments Ratified," for particular city
or town affected by Amendments to Constitu-
tion. See also, "Abutting Property."

Boards of Health, Art. 8, § 10.

Bonded debt, Art. 2, § 13; Art. 8, § 7.

Amendments, Art. 8, § 7.

Certificates of indebtedness, Art. 8, § 7.

Limitation of indebtedness, Art. 8, §§ 3, 7.

Limit of bonded debt, Art. 10, § 5.

Proviso as to certain cities added by amend-
ment, Art. 8, § 7.

Redemption, Art. 8, § 7.

Restriction on the right to borrow money, Art.
8, §§ 3, 7.

Sinking fund, Art. 8, § 7.

Certain cities may levy assessment on abutting
property—Proviso, Art. 10, § 14.

Classification, Art. 8, § 1.

Consent of voters, Art. VIII, § 2.

Construction of purchase of water and light plants,
Art. 8, § 5.

Countries:

No county line through city or town, Art. 7,
§ 14.

Debts:

See *Infra*, "Bonded Debt."

Elections, Art. 2, §§ 12, 13.

Electors must consent to organization, Art. 8, § 2.

Electric light companies, Art. 8, § 7.

Electric lights, Art. 7, §§ 4, 5.

Gas and gas companies, Art. 8, §§ 4, 5, 7.

MUNICIPAL CORPORATIONS (Cont'd)

- Licenses, Art. 8, § 6.
- Licenses uniform, Art. 8, § 6.
- Lights, Art. 8, § 5.
- Municipal securities:
 - See infra, "Bonded Debt."
- Organization, Art. 8, § 1.
- Plants for furnishing lights, Art. 8, § 5.
- Police:
 - Armed police force, Art. 8, § 9.
 - Forbidding introduction of armed police force into the State, Art. 8, § 9.
- Schools, Art. 11, § 5.
- Special laws prohibited, Art. 3, § 34.
- Street railways, Art. 8, § 4.
- Streets:
 - Certain cities may levy assessment on abutting property—Proviso, Art. 10, § 14.
 - Consent to use of streets, of street railways, telegraph and telephones, water and gas works, Art. 8, § 4.
- Taxation:
 - Manufactories may be exempt from taxation, Art. 8, § 8.
 - Taxes may be levied for corporate purposes—Share of stockholders—Limit of bonded debt, Art. 10, § 5.
- Taxes, Art. 8, § 3.
- Taxes must be uniform, Art. 8, § 6.
- Telegraphs and telephones, Art. 8, § 4.
- Waterworks and water companies, Art. 8, §§ 4, 5, 7.

MUNICIPAL COURTS

- See "Courts."

MUNICIPAL SECURITIES

- See "Municipal Corporations."
- State securities:
 - See "State."

NAME

- Special laws prohibited, Art. 3, § 34.

NAVIGABLE WATERS

- Free, Art. 1, § 28.
- Highways, Art. 14, § 1.
- Navigable waters to be public highways, Art. 1, § 28.

NEEDY PERSONS

- Aid, Art. 3, § 32.

NEWSPAPERS

- Freedom of the press, Art. 1, § 4.

NOTARY PUBLIC

- Holding two offices, Art. 2, § 2.
- Term of office, Art. 1, § 11.

OATH

- Governor and Lieutenant Governor, Art. 4, § 20.
- Members of General Assembly, Art. 3, § 26.
- Officers, Art. 3, § 26.

OFFICERS

- See "Elections."
- Belief in Supreme Being, Art. 17, § 4.
- Commission, Art. 4, §§ 17, 19.
- Compensation, Art. 3, § 30; Art. 5, § 24.
- Increased or decreased during term of office, Art. 4, § 24.
- Special laws prohibited, Art. 3, § 34.
- Dueling, Art. 1, § 11.
- Elections:
 - Elections of State officers, Art. 4, § 24.
- Governor:
 - See "Governor."
 - Officers and Boards report to Governor, Art. 4, § 14.
- Holding over, Art. 17, § 11.
- Holding two offices, Art. 2, § 2.
- General Assembly, Art. 3, § 24.
- Impeachment:
 - See "Impeachment."
- Militia:
 - Holding two offices, Art. 2, § 2.
- Notary public:
 - Holding two offices, Art. 2, § 2.
- Oath of office:
 - General Assembly, Art. 3, § 26.
- Property qualification, Art. 1, § 11.
- Qualification, Art. 17, § 4.
- Property qualification, Art. 1, § 11.
- Qualification for office, Art. 2, § 2.

OFFICERS (Cont'd)

- Qualification of officers, Art. 17, § 1.
- Religion, Art. 17, § 4.
- Removal of officer, Art. 3, § 27; Art. 15, § 4.
- Representatives:
 - See "House of Representatives."
- Safe keeping of public funds—Embezzlement of, felony—General Assembly may remove, Art. 10, § 12.
- Salaries:
 - Deceased officer, Art. 3, § 32.
- Senators:
 - See "Senate."
- Suspension of officers, Art. 4, § 22.
- Term of office, Art. 1, § 11.
- When term begins, Art. 4, § 2.
- Vacancies, Art. 12, § 8.
- General Assembly, Art. 3, § 24.
- Vacancy in office of Governor—How filled, Art. 4, § 9.

OLD AGE

- Aid, Art. 3, § 32.

ORDINANCE, Art. 17, § 11.

- Effect of adoption of constitution, Art. 17, § 11.

PARDONS, Art. 4, § 11.

- Board of Pardons, Art. 4, § 11.
- Elections, Art. 2, § 6.

PAUPERS, Art. 4, § 11.

- Elections, Art. 2, § 6.

PENITENTIARY

- Contempt, Art. 1, § 19.
- Control of convicts, Art. 12, § 9.
- Convicts sentenced to hard labor, Art. 12, § 6.
- Directors and superintendent, Art. 12, § 5.
- Vacancies, Art. 12, § 8.

PENSIONS

- Confederate Veterans, Art. 13, § 5.

PEOPLE

- Political power in people, Art. 1, § 1.

PETITION, RIGHT OF

- Petition, Right of, Art. 1, § 4.

PETIT JURY

- See "Jury."

POLICE

- Municipal corporations:
 - Armed police force, Art. 8, § 9.

POLITICAL POWER

- Political power in people, Art. 1, § 1.

PRELIMINARY EXAMINATION

- Preliminary examination, Art. 5, § 21.

PRESENTMENT

- Necessity, Art. 1, § 17.

PRIMARY ELECTIONS

- Primary elections, Art. 2, § 10.

PRINTING

- Public printing, Art. 17, § 5.

PRISONS AND PRISONERS

- Control of convicts, Art. 12, § 9.
- Convicts sentenced to hard labor, Art. 12, § 6.
- Elections, Art. 2, § 6.
- Lynching:
 - Prisoner lynched through negligence of officer—Penalty of officer—County liable for damages, Art. 6, § 6.

PRIVILEGE FROM ARREST

- Electors, Art. 2, § 14.
- Members of legislature, Art. 3, § 14.
- Militia, Art. 8, § 2.

PRIVILEGES AND IMMUNITIES

- Abridgement of, Art. 1, § 5.

PRIZE FIGHTING

- Prize fighting, Art. 8, § 12.

PROBATE COURT

- Probate Court, Art. 5, § 19.

PROCESS

- Process, Art. 5, § 31.
- See "Summons and Process."

PROHIBITION

- Supreme Court, Art. 5, § 4.

PROPERTY

- Compensation, Art. 1, § 17.

PROPERTY TAKEN

Property taken, Art. 1, § 17.

PUBLIC DEBT

Public debt, Art. 10, §§ 6, 7, 11.

PUBLIC FUNDS

Public debt—State bonds, Art. 10, §§ 11, 12.

PUBLIC LANDS

Donations, Art. 3, § 31.

Grants, Art. 4, § 19.

Public lands, Art. 3, § 31.

Right of way to railroads, Art. 3, § 31.

Sales, Art. 3, § 31.

PUBLIC LAWS

Public laws, Art. 6, § 4.

PUBLIC OFFICERS

See "Officers."

PUBLIC PRINTING

Public printing, Art. 17, § 5.

PUBLIC SERVICE COMMISSION, THE Art. 9, § 14.**PUNISHMENT**

See "Sentence and Punishment."

QUESTIONS OF LAW AND FACT

Libel, Art. 1, § 21.

QUO WARRANTO

Supreme Court, Art. 5, § 4.

RAILROAD COMMISSION

Name changed, Art. 9, § 14.

RAILROADS

Common law liability, Art. 9, § 3.

Competition:

Consolidation of stock with competing line—

May decide whether lines are parallel or competing, Art. 9, § 7.

Competitive rates, Art. 9, § 5.

Connecting lines:

Transportation company may connect or cross lines of another, Art. 9, § 6.

Death by wrongful act, Art. 9, § 15.

Discrimination in charges, Art. 9, § 5.

Excursion tickets, Art. 9, § 5.

Foreign corporations:

No foreign corporation can build or operate a railroad in this State—No general or special law for foreign corporation, except on conditions, Art. 9, § 8.

Limiting liability, Art. 9, § 3.

Master and servant:

Rights and remedies of employees, Art. 9, § 15.

Railroad commission, Art. 9, § 14.

Rates established by railroad commission, Art. 9, § 5.

Right of way:

Public lands, Art. 3, § 31.

Taxation:

Transporting and transmitting corporations taxed as such—Common law liability, Art. 9, § 3.

Transportation company may connect or cross lines of another, Art. 9, § 6.

RAPE

Age of consent, Art. 3, § 33.

REAL PROPERTY

Aliens and foreign corporations, Art. 3, § 35.

Title of State to certain lands, Art. 14, § 2.

Ultimate property in lands, Art. 14, § 3.

REFORMATORY

Reformatory for juvenile offenders, Art. 12, § 7.

REGISTRATION

See "Elections."

RELIEF

Grant Art. 3, § 32.

RELIGION

Establishment of religion, Art. 1, § 4.

Freedom of religion, Art. 1, § 4.

Supreme Being, Art. 17, § 4.

REMOVAL OF CAUSES

Removal of causes, Art. 17, § 6.

REPORTER

Reporter, Art. 5, § 7.

REPORTS

Decisions of Supreme Court, Art. 5, § 32.

REPRESENTATIVES

See "House of Representatives."

REPRIEVES

Reprieves, Art. 4, § 11.

RESIDENCE, Art. 1, § 12.

Elections, Art. 2, §§ 4, 6.

How residence gained or lost, Art. 2, § 7.

Ministers, Art. 2, § 4.

Residence in polling precinct, Art. 2, § 4.

Residence in the county one year, Art. 2, § 4.

Residence in the State for two years, Art. 2, § 4.

Teachers, Art. 2, § 4.

Governor, Art. 4, § 21.

Temporary absence, Art. 1, § 12.

REVISION

See "Amendments."

RIGHT OF SUFFRAGE

See "Elections."

RIGHT OF TRIAL BY JURY

See "Jury."

RIGHT OF WAY

Right of way, Art. 9, § 4.

RIGHT TO ASSEMBLE

Right to assemble, Art. 1, § 4.

RIGHT TO JURY TRIAL

Right to jury trial, Art. 1, § 18.

RIGHT TO PETITION

Right to petition, Art. 1, § 4.

RIGHT TO PUBLIC TRIAL

Right to public trial, Art. 1, § 18.

RIGHT TO SPEEDY TRIAL

Right to speedy trial, Art. 1, § 18.

RIOT

Court of General Session, Art. 5, § 18.

RIVERS

Concurrent jurisdiction of State on boundary rivers, Art. 14, § 1.

SCHEDULE

Schedule, Art. 17, § 11.

ROAD DUTY

Special laws Art. 2 of Amendments.

SCHOOLS, Art. 11, § 1.

Bonded debt, Art. 11, § 5.

Estates, Art. 11, § 11.

Free public schools—School districts—Bonded debt

—Graded school districts, Art. 11, § 5.

Funds, Art. 11, § 11.

Gifts for educational purposes, Art. 11, § 10.

Gifts to State—Assets of estates or copartnerships

—Direct tax—State school fund, Art. 11, § 11.

Graded school districts, Art. 11, § 5.

Intoxicating liquors:

Art. 11, § 12.

Income from sale or licenses for sale of liquors, Art. 11, § 12.

Municipal corporations, Art. 11, § 5.

Property or credit of State shall not benefit sectarian institutions, Art. 11, § 9.

Salaries of school officers and county treasurer,

Art. 11, § 4.

School districts, Art. 11, § 5.

School officers, Art. 11, § 3.

Compensation, Art. 11, §§ 3, 4.

Election and appointment, Art. 11, § 3.

Qualifications, powers and duties, Art. 11, § 3.

Salaries of school officers and County Treasurer,

Art. 11, § 4.

Sectarian institutions:

Property or credit if State shall not benefit sectarian institutions, Art. 11, § 9.

Separate schools, Art. 11, § 7.

Special laws prohibited, Art. 3, § 34.

State Board of Education.

See "State Board of Education."

State school fund, Art. 11, § 11.

State University—Clemson Agricultural College

—Land scrip—Claflin University—Colored A. &

M. College, Art. 11, § 8.

Superintendent of Education:

See "Superintendent of Education."

SCHOOLS (Cont'd)

- Taxation, Art. 11, § 11.
- Taxes may be levied for corporate purposes—Share of stockholders—Limit of bonded debt, Art. 10, § 5.
- Enrollment—Trustees—Poll tax—Supplementary tax—School district tax, Art. 11, § 6.
- Trustees—Enrollment—Poll tax—Supplement tax—School district tax, Art. 11, § 6.
- Universities and colleges, Art. 11, § 8.

SCRIP

- Scrip, Art. 10, § 88.

SEALS

- Seal of State, Art. 4, § 7.

SEARCHES AND SEIZURES

- Searches and seizures, Art. 1, § 16.
- Unreasonable searches and seizures, Art. 1, § 16.

SEARCH WARRANTS, Art. 1, § 16.

- Description, Art. 1, § 16.

SECRETARY OF STATE

- Compensation, Art. 4, § 24.
- Duties, Art. 4, § 24.
- Elections, Art. 4, § 24.
- Term of office, Art. 4, § 24.

SENATE

- See "General Assembly."
- Absent members, Art. 3, § 11.
- Adjournments, Art. 3, § 21.
- Bills:
 - See "Statutes."
 - Bills of revenue, Art. 3, § 15.
 - Classification of senators, Art. 3, § 8.
 - Compensation of members, Art. 3, § 9.
 - Composition, Art. 3, § 6.
 - Doors open, Art. 3, § 23.
 - Each house judge of elections, returns, Art. 3, § 11.
 - Each house judge of qualifications of its own members, Art. 3, § 11.
 - Election of senators, Art. 3, § 8.
 - Elections "Viva Voce," Art. 3, § 20.
 - Expulsion, Art. 3, § 12.
 - Holding two offices, Art. 3, § 24.
- Impeachment:
 - Senate try impeachment—Chief justice preside, Art. 15, § 2.
- In what house bills should originate, Art. 3, § 15.
- Journal—"Yeas" and "nays," Art. 3, § 22.
- Members of Senate acting as Governor, Art. 4, § 8.
- Oath of office, Art. 3, § 26.
- Officers, Art. 3, § 12.
- President pro tempore of Senate, Art. 4, § 7.
- Privileges of members, Art. 3, § 14.
- Protection of members, Art. 3, § 14.
- Qualification of Senators, Art. 3, § 7.
- Quorum, Art. 3, § 11.
- Removal of officers, Art. 3, § 27.
- Right of punishment, Art. 3, § 13.
- Rules, Art. 3, § 12.
- Statutes:
 - See "Statutes."
 - Term, Art. 3, § 6.
 - Term of office, Art. 3, § 10.
 - Vacancies, Art. 3, § 25.
 - "Yeas" and "nays," Art. 3, § 22.

SENTENCE AND PUNISHMENT

- Commutation of sentence, Art. 4, § 11.
- Corporal punishment, Art. 1, § 19.
- Cruel and unusual punishment, Art. 1, § 19.
- Sentence to labor on highways, Art. 5, § 33.

SEPARATE DEPARTMENTS

- Separate departments, Art. 1, § 14.

SEPARATE PROPERTY OF MARRIED WOMEN

- Separate property of married women, Art. 17, § 9.

SEPARATE SCHOOLS

- Separate schools, Art. 11, § 7.

SESSIONS

- See "Courts."

SESSIONS OF GENERAL ASSEMBLY

- Sessions of General Assembly, Art. 3, §§ 9, 19.

SHERIFFS AND CONSTABLES, Art. 5, § 30.

- Appointment of constables, Art. 5, § 20.

SHERIFFS AND CONSTABLES (Cont'd)

- Default, Art. 5, § 30.
- Disqualification, Art. 5, § 30.
- Lynching:
 - Prisoner lynched through negligence of officer—Penalty on officer—County liable for damages, Art. 6, § 6.
- Residence, Art. 5, § 30.
- Term of office, Art. 5, § 30.
- SOLICITOR, Art. 5, § 29.
- Election, Art. 5, § 29.
- Salary, Art. 5, § 29.
- Term of office, Art. 5, § 29.

SOUTH CAROLINA

- See "State."

SPECIAL ASSESSMENT

- Certain cities may levy assessment on abutting property—Proviso, Art. 10, § 14.
- Drainage, Art. 1, of the Amendments of the Constitution.

STATE

- Claims against State, Art. 17, § 2.
- Credit of State—For what purposes tax levied or bonds issued—Proviso, Art. 10, § 6.
- Expenses of State government, Art. 10, § 2.
- Public debt—State bonds, Art. 10, §§ 11, 12.
- Receipts and expenditures, Art. 10, § 8.
- Script, certificate, or evidence of State debt, Art. 10, § 7.
- Seal of State, Art. 4, § 18.
- State bonds, Art. 10, §§ 6, 7, 11.
- Title, Art. 14, § 2.

STATE BOARD OF EDUCATION

- State board of education, Art. 11, § 2.

STATE HOSPITAL FOR INSANE, Art. 12, § 2.

- Directors of benevolent and penal State institutions, Art. 12, § 4.
- State Hospital for Insane, Art. 12 § 2.

STATE SUPERINTENDENT OF EDUCATION

- Compensation, Art. 4, § 24.
- Duties, Art. 4, § 24.
- Elections, Art. 4, § 24.
- Term of office, Art. 4, § 24.

STATE TREASURER

- Compensation, Art. 4, § 24.
- Duties, Art. 4, § 24.
- Elections, Art. 4, § 24.
- Term of office, Art. 4, § 24.

STATE UNIVERSITY

- State University, Art. 11, § 8.

STATUTES

- See "General Assembly."
- Bills:
 - In what house bills must originate, Art. 3, § 15.
- Revenue bills to originate in house of representatives, Art. 3, § 15.
- Codification of laws, Art. 6, § 5.
- Code Commissioner, duties, election, compensation, etc., Art. 6, § 5.
- Effect of adoption of constitution, Art. 17, § 11.
- Enactment, Art. 3, § 18.
- Formalities of act, Art. 3, § 18.
- Governor, Art. 4, § 23.
- Great seal, Art. 3, § 18.
- Laws inconsistent with constitution, Art. 17, § 11.
- Laws now in force, Art. 17, §§ 10, 11.
- Local or special laws, Art. 2, of the Amendments of the Constitution.
- Public laws, Art. 6, § 4.
- Reading, Art. 3, § 18.
- Signatures, Art. 3, § 18; Art. 4, § 23.
- Special laws prohibited, Art. 3, § 34.
- Style of laws, Art. 3, § 16.
- Subject:
 - One subject, Art. 3, § 17.
- Suspension of laws, Art. 1, § 13.
- Title:
 - Subject to be expressed in title, Art. 3, § 17.
- Veto, Art. 4, § 23.

STOCK AND STOCKHOLDERS

- See "Corporations."

STREET RAILWAYS

- Municipal corporations, Art. 8, § 4.
- Use of streets, Art. 8, § 4.

STREETS

See abutting property.
Greenville, city of, Art. 10, § 14.

SUFFRAGE

See "Elections."
See "Right of Suffrage;" "Qualification of Suffrage."

SUMMONS AND PROCESS, Art. 5, § 31.

Corporations:
Agent of corporation, Art. 9, § 4.
Office of corporation, Art. 9, § 4.
Service of process, Art. 9, § 4.
Right to compulsory process, Art. 1, § 18.

SUPERINTENDENT OF EDUCATION

See "State Superintendent of Education."
Superintendent of Education, Art. 11, § 1.

SUPREME BEING

Supreme Being, Art. 17, 4.

TAXATION, Art. 10; Art. 10, § 1.

See "Schools."
Animals, Art. 10, § 1.
Assessment:
Greenville, city of, Art. 8, § 14.
One assessment for all taxes, Art. 10, § 13.
Bills for revenue:
Originate in House of Representatives, Art. 3, § 15.
Canals:
Transporting and transmitting corporations, taxed as such—Common-law liability, Art. 9, § 3.
Capitation tax on animals, Art. 10, § 1.
Carriers:
Transporting and transmitting corporations taxed as such—Common-law liability, Art. 9, § 3.
Consent of people or their representatives, Art. 1, § 7.
Corporations:
Share of stockholders, Art. 10, § 5.
Counties:
Taxes may be levied for corporate purposes—Share of stockholders—Limit of bonded debt, Art. 10, § 5.
Credit of State—For what purposes tax levied or bonds issued—Poviso, Art. 10, § 6.
Elections:
Payment of taxes necessary for voting, Art. 2, § 4; Art. 2, § 12.
Exemption, Art. 3, § 28; Art. 10, § 1.
Manufactories may be exempt from taxation, Art. 8, § 8.
Property exempt from taxation, Art. 10, § 4.
Expenses of State government, Art. 10, § 2.
Express companies:
Transporting and transmitting corporations taxed as such—Common-law liability, Art. 9, § 3.
General provisions, Art. 10, § 1.
Homestead, Art. 3, § 28.
Income tax, Art. 10, § 1.
Intangible property, Art. 10, § 1.
Mines and mining claims, Art. 10, § 1.
Municipal corporations:
Licenses must be graduated, Art. 8, § 6.
Manufactories may be exempt from taxation, Art. 8, § 8.
Restriction on municipalities, Art. 8, § 3.
Taxes may be levied for corporate purposes—Share of stockholders—Limit of bonded debt, Art. 10, § 5.
Taxes must be uniform, Art. 8, § 6.
Proportion of value, Art. 1, § 6.
Railroads:
Transporting and transmitting corporations taxed as such—Common-law liability, Art. 9, § 3.
Schools, Art. 11, § 6. Art. 11, § 11.
Taxes may be levied for corporate purposes—Share of stockholders—Limit of bonded debt, Art. 10, § 5.
Enrollment—Trustees—Poll tax—Supplementary tax—School district tax, Art. 11, § 6.
Tax shall be levied in pursuance of law, Art. 10, § 3.
Transporting and transmitting corporations
Telegraphs and telephones:

TAXATION (Cont'd)

Telegraphs and telephones: (Cont'd)
taxed as such—Common-law liability, Art. 9, § 3.
Townships:
Taxes may be levied for corporate purposes—Share of stockholders—Limit of bonded debt, Art. 10, § 5.
Transporting and transmitting corporations taxed as such—Common-law liability, Art. 9, § 3.
Uniform and equal rate of assessment, Art. 10, § 1.
Valuation, Art. 10, § 1.
Taxes laid upon actual value, Art. 3, § 29.
Value:
Proportion to value, Art. 1, § 6.

TAXES, IMPOSTS OR TOLLS

Taxes, imposts or tolls, Art. 1, § 28.

TELEGRAPHS AND TELEPHONES

Common-law liability, Art. 9, § 3.
Limiting liability, Art. 9, § 3.
May connect or cross lines of another, Art. 9, § 6.
Municipal corporations, Art. 8, § 4.
Streets, Art. 8, § 4.
Taxation:
Transporting and transmitting corporations taxed as such—Common-law liability, Art. 9, § 3.

TERMS OF COURT

See "Courts."

TIME

Date effective, Art. 37, § 11.

TITLE

State, Art. 14, § 2.
Ultimate property in lands, Art. 14, § 2.

TITLE OF NOBILITY

Title of nobility, Art. 1, § 8.

TOWNSHIPS

Taxation:
Taxes may be levied for corporate purposes—Share of stockholders—Limit of bonded debt, Art. 10, § 5.
Townships—Body corporate—Township government, Art. 7, § 11.

TREASON

Definition, Art. 1, § 22.
Evidence, Art. 1, § 22.
Witnesses, Art. 1, § 22.

TREASURY

How money drawn from treasury, Art. 10, § 9.

TRIAL, Art. 1, § 18.

Compulsory process for obtaining witnesses, Art. 1, § 18.
Confronted with witnesses, Art. 1, § 18.
Public trial, Art. 1, § 18.
Right to speedy trial, Art. 1, § 18.

TRIAL BY JURY

See "Jury."

TRUSTS

Trusts, Art. 9, § 13.

UNIVERSITIES AND COLLEGES

Universities and Colleges, Art. 11, § 8.

UNREASONABLE SEARCHES AND SEIZURES

Unreasonable searches and seizures, Art. 1, § 16.

VENUE

Change of venue, Art. 6, § 2

VETERANS

Pensions, Art. 13, § 5.

VETO

Veto, Art. 4, § 23.

VOTERS

See "Elections."

WARRANTS

Description, Art. 1, § 16.
Not to be issued but upon probable cause supported by oath or affirmation, Art. 1, § 16.

WATERS AND WATERCOURSES

Concurrent jurisdiction of State on all boundary rivers, Art. 14, § 1.
Highways, Art. 14, § 1.

WATERWORKS AND WATER COMPANIES

Municipal corporations, Art. 8, §§ 4, 5, 7.

WEAPONS

Right to keep and bear arms, Art. 1, § 26.

WHARVES AND WHARFINGERS

Tolls and taxes, Art. 1, § 28.

Wharves to be authorized by General Assembly.
Art. 1, § 28.

WITNESSES

Right of accused to be confronted with witnesses,
Art. 1, § 18.

WITNESSES (Cont'd)

Right of accused to compulsory process, Art. 1
§ 18.

Treason, Art. 1, § 22.

WOMEN

Age of consent, Art. 3, § 33.

WRITS, Art. 5, § 31; Art. 17, § 11.

Effect of adoption of constitution, Art. 17, § 11.

YEAR

Fiscal year, Art. 10, § 10.

Rules of Practice for the Courts of Probate of South Carolina

- | | |
|---------------------------------|--|
| 1. Calendar and Books. | 10. Proof of Service. |
| 2. Return of Process. | 11. Extension of Time to Answer. |
| 3-4. Guardian <i>Ad Litem</i> . | 12. Motion to Correct Pleadings. |
| 5. Service and Publication. | 13. Recording Judgment of Appellate Court. |
| 6. Pleadings. | 14. Orders after Issue Joined. |
| 7. No Argument after Decision. | 15. Rules of Circuit Court to Govern. |
| 8. Preparation of Papers. | |
| 9. Stipulations. | |

1

Books.—The Judge of Probate shall, in addition to the books required by law, keep a book, properly indexed, in which shall be entered the titles of all cases instituted in his Court, with proper entries under each, denoting the papers filed, the orders made, and the steps taken therein, with the dates of the several proceedings. Also, a calendar of all cases which are pending in his Court, until the same shall be disposed of by final decree or order.

The probate court is a court of record, Ellis Estate v. Brown et al., 162 S. C., 136, 160 S. E., 260.
and its orders, decrees, etc., should be in writing and properly entered of record.

2

Sheriff compelled to return process.—At any time after the day when it is the duty of the Sheriff or other officer to return, deliver or file any process, undertaking, order or other paper, by the provisions of the Code of Procedure, any party entitled to have such act done, may serve on the officer a notice to return, deliver or file such process, undertaking, order or other paper, as the case may be, within ten days; or show cause, at a time to be designated in said notice, why an attachment should not issue against him.

3

Guardian ad litem—decree—against infants.—No person other than the general guardian of an infant shall be appointed guardian *ad litem*, either on the application of the infant or otherwise, who has an interest adverse to that of the infant, or who is connected in business with the attorney or counsel of the adverse party; and no decree against an infant or other person not *sui juris* shall be made, except upon proof of the facts necessary to support such decree.

4

Duty of guardian ad litem.—It shall be the duty of every attorney or other officer of this Court to act as the guardian *ad litem* of any infant defendant, in any suit or proceeding, whenever appointed for that purpose by an order of the Court. And it shall be the duty of the guardian *ad litem* to examine into the circumstances of the case, so far as to enable him to make the proper defense for the protection of the rights of the infant.

5

Summons.—After a petition or complaint has been filed, it shall be the duty of the Judge of Probate to issue his summons, directed to each of the defendants named in said petition or complaint, notifying them of the filing of such petition or complaint, and that unless they plead thereto within twenty days from the time of such summons, judgment will be rendered against them for the relief demanded. Such summons shall be served in the same manner and according to the same rules as are prescribed by law in the case of a summons in the Court of Common Pleas.

Publication.—And, in case any of the parties defendant are absent from or reside beyond the limits of the State, or whose residence is unknown, upon such fact being made to appear to the satisfaction of the Judge of Probate, by affidavit, such summons shall be published, in the same manner as required by law, in the case of the publication of a summons for an absent defendant in the Court of Common Pleas.

Personal service.—Personal service on any absent party, under an order of the Court, shall be deemed sufficient without publication.

6

Pleadings—time of trial.—All pleadings in the Court of Probate must be in writing; and the only pleading necessary on the part of the defendant shall be an answer, in which issues both of law and fact may be raised.

When the petition or complaint is verified, the answer must also be verified.

Each case shall stand for trial at the session commencing on the first Monday in the month after the day on which the time for answering shall expire; but may, on just cause shown, be continued to such other day as may be appointed by the Probate Judge: *Provided*, however, That the case may be tried on any day after the time to answer has expired, with the consent of all parties interested, or their attorneys.

7

No argument after decision.—Counsel shall not attempt to argue or explain a case, or any matter arising therein, after he has been heard and the opinion of the Court has been pronounced.

8

Manner of preparing papers.—All pleadings and other proceedings shall be written on each page of legal cap paper. If more than two pages are used, they shall be fastened at the top, so as to be read continuously. Papers shall be folded from the bottom, in four equal folds, and endorsed with the style of the Court, the names of the parties, the nature of the paper and the name of the attorney.

9

Consent must be in writing.—No private agreement or consent between the parties or their attorneys, in respect to the proceedings in a cause shall be binding, unless the same shall have been reduced to the form of an order by consent, and entered; or unless the evidence thereof shall be in writing, subscribed by the party against whom the same shall be alleged, or by his attorney or counsel.

10

Proof of service.—Where the service of the summons, or notice accompanying the same, if any, shall be made by any person other than the Sheriff, it shall be necessary for such person to state in his affidavit of service, when and at what particular place he served the same, and that he knew the person served to be the person mentioned and described in the summons as defendant therein; and also to state that he left with the defendant a copy of the paper so served.

11

Extension of time to answer.—No order extending the time to answer shall be granted, unless the party applying for such order shall satisfy the Judge of Probate, by affidavit, that there are grounds therefor; unless such extension of time has been agreed upon, in writing, or orally in open Court, by the parties interested, or their attorneys.

12

Motion to correct pleadings.—Motions to strike out of any pleading matter alleged to be irrelevant or redundant, and motions to correct a pleading on the ground of its being “so indefinite or uncertain, that the precise nature of the charge of defense is not apparent,” must be noticed before answering the pleadings.

13

Judgment of appellate court.—When a judgment rendered in the Circuit Court or in the Supreme Court, upon an appeal from the Judge of Probate, is certified to the Judge of Probate, the same shall be recorded with other judgments of the Probate Court, with proper references made to the judgment appealed from.

14

Orders after issue joined.—After issue has been joined in any case in the Court of Probate, no order shall be granted therein except at the time appointed for the hearing thereof, unless two days' notice, in writing has been given to the parties to be effected thereby, or their attorneys, where they reside in the same county; but where they reside in different counties, four days' notice shall be given.

15

Rules for circuit court to govern.—In all cases not provided for by any of the foregoing Rules, the Rules of the Circuit Court, so far as they can be made applicable, shall govern.

16

When to take effect.—These Rules shall go into operation on the first day of July, A. D. 1879.

INDEX

RULES OF PRACTICE FOR THE COURTS OF PROBATE OF SOUTH CAROLINA

- AMENDMENTS, MOTION TO CORRECT PLEADINGS, Rule 12.
- ANSWER, Rule 6.
 - Extension of time to answer, Rule 11.
- APPEALS, JUDGMENT OF APPELLATE COURT, Rule 13.
- ARGUMENT OF COUNSEL, NO ARGUMENT AFTER DECISION, Rule 7.
- BOOKS, Rule 1.
- CALENDAR, Rule 1.
- CIRCUIT COURT, RULES OF CIRCUIT COURT TO GOVERN, Rule 15.
- CONSENT, CONSENT MUST BE IN WRITING, Rule 9.
- DECREES, INFANTS, Rule 3.
- EXTENSION OF TIME TO ANSWER, Rule 11.
- GUARDIAN AD LITEM, Rule 3.
 - Duty, Rule 4.
 - Who to be, Rule 3.
- INDEXES, Rule 1.
- INFANTS
 - Decrees, Rule 3.
 - Guardian ad litem, Rules 3, 4.
 - Judgments, Rule 3.
- JUDGMENTS
 - Infants, Rule 3.
 - Judgments of Appellate Court, Rule 13.
- ORDERS, ORDERS AFTER ISSUE JOINED, Rule 14.
- PAPERS, MANNER OF PREPARING PAPERS, Rule 8.
- PLEADINGS, Rule 6.
 - Manner of preparing papers, Rule 8.
 - Motion to correct pleadings, Rule 12.
 - Written, Rule 6.
- PROCESS, Rule 5.
 - Proof of service, Rule 10.
 - Sheriff compelled to return process, Rule 2.
- PUBLICATION, Rule 5.
- RETURN OF PROCESS, Rule 2.
- SERVICE OF PROCESS, Rules 2, 5.
 - Proof of service, Rule 10.
- SHERIFF, SHERIFF COMPELLED TO RETURN PROCESS, Rule 2.
- STIPULATIONS, CONSENT MUST BE IN WRITING, Rule 9.
- SUMMONS, Rule 5.
- TIME
 - Extension of time to answer, Rule 11.
 - When rule to take effect, Rule 16.
- TIME OF TRIAL, Rule 6.
- VERIFICATION, Rule 6.
- WRITTEN PLEADINGS, Rule 6.

Rules of Practice for the Circuit Courts of South Carolina

As amended March 27, 1942.

1. Custody of Statutes and Rules.
2. Custody of Books.
3. Entry of Judgment.
4. Affidavits on Arrest.
5. Return of Process.
6. Guardian *Ad Litem*.
7. Change of Attorney.
8. Dress of Attorneys.
9. Officers Not to Be Sureties.
10. Security for Cost.
11. Argument and Request to Charge.
12. Preparation of Papers.
13. Preparation of Pleading.
14. Stipulations.
15. Default Orders.
16. Reference.
17. Notice of Appearance or Retainer.
18. Pleading.
19. Extension of Time.
20. Order of Motions.
21. Defense of *Plene Administravit*.
22. Defense of Owner in Action against Tenant.
- 23-24. Jurors.
25. Jury in Criminal Cases.
26. Common Pleas Calendar.
27. Continuance.
28. Jury Trial in Equity Causes.
29. Verdict and Non-Suit.
30. Non-Suit in Hearing before a Referee.
31. Examination of Witnesses and Limit of Argument.
32. Papers Furnished on Motions.
33. Change of Venue.
34. Custody and Opening of Commissions.
35. Presence of Accused at Trial.
36. Surveys.
37. Default Judgment.
38. Judgment after Service by Publication.
39. Judgment Roll.
40. Recording Supreme Court Judgments.
41. Sale of Land at Auction.
42. Guardian of Infant.
- 43-6. Discovery of Books and Papers.
47. New Trial.
48. Amendment of Case or Exceptions.
- 49-50. Preparation of an Appeal.
51. Failure to Answer in Mortgage Foreclosure.
52. Judgment for Sale of Mortgaged Premises.
53. Claims for Surplus Money.
54. Order for Partition.
55. Reference as to Title Where No Defense Interposed.
56. Bringing Questions before Court.
57. Statements of Facts on Motions.
58. Opening and Reply Arguments.
59. Costs of Non-Suits.
60. Applications for Order after Refusal.
61. Affidavit in Mitigation in General Sessions.
62. Time for Complying with Orders.
63. Orders on Petitions.
64. Order to Stay Judgment.
- 65-6. Sureties.
- 67-8. Filing Papers.
69. Receivers.
70. Action for Malicious Prosecution.
71. Damages on Breach of Bond.
72. Arrest of Judgment.
73. Law When No Rule or Statute Applicable.
74. Removal of Case to Federal Court.
75. Filing Pleadings and Papers.
76. Insufficiency of Evidence.
77. Affidavits.

1

Statutes and rules.—Every Clerk of the Circuit Court who cannot produce the Statutes at large, the Rules of Court and the Bar Calendar, when required, shall be fined ten dollars for each default.

2

Clerk to keep books.—The several Clerks of the Circuit Courts shall keep in their respective offices a book, properly indexed, in which shall be entered the titles of all civil papers filed, the orders made, and the steps taken therein, with the dates of the several proceedings; also, an index of all undertakings filed in the office, stating in appropriate columns, the title of the cause or proceeding in which it is given (with a general state-

ment of its condition) or a reference to a Statute under which it is given, the date, when and before whom approved, and when filed, with a statement of any disposition or order made of or concerning it; and such other books, properly indexed, as may be necessary to enter the minutes of the Court, record judgments, enter orders and all necessary matters and proceedings.

3

Entry of judgment.—The Clerk shall not enter, without special leave of the Court, any judgment until the expiration of five days after the Court has adjourned for the term.

It is presumed that a judgment is not entered until after expiration of five days. Nor is defendant presumed to have notice of a default judgment until such entry, and a motion to set it aside noticed within one year after entry is within time. *Farmer's, etc., Bank v. Holiday*, 108 S. C. 116, 93 S. E. 333. See also, *British, etc., Mtg. Co. v. Strait*, 84 S. C. 141, 65 S. E. 1038, Ann. Cas. 14D, 234.

4

Sheriff to file affidavits on arrests.—The Sheriff shall file with the Clerk the affidavits on which an arrest is made, within five days after the arrest.

5

Sheriff compelled to return process.—At any time after the day when it is the duty of the Sheriff or other officer to return or deliver or file any process, undertaking, orders, or other papers, by the provisions of the Code of Procedure, any party entitled to have such act done may serve on the officer a notice to return, deliver or file such process, undertaking, order or other paper, as the case may be, within ten days, or show cause, at a time to be designated in said notice, why attachment should not issue against him.

See generally, *Emory v. Davis*, 4 S. C. 23, 33.

6

Appointment of guardian ad litem.—No person other than the general guardian of an infant shall be appointed guardian *ad litem*, either on the application of the infant or otherwise, who is not fully competent to understand and protect the rights of the infant; who has any interest adverse to that of the infant, or who is connected in business with the attorney or counsel of the adverse party; nor shall the attorney of the adverse party represent the guardian *ad litem*. And the same rule as to appointment of guardian *ad litem* shall apply to other persons incapable of representing ing themselves.

7

Change of attorney.—An attorney may be changed by consent, or upon cause shown, and upon such terms as shall be just, upon the application of the client, by order of the Circuit Judge, and not otherwise.

Refusal of continuance because of withdrawal of counsel is not an abuse of discretion. *Brunson v. Hamilton Ridge Lbr. Co.*, 122 S. C. 436, 115 S. E. 624. **Applied** in *Cusack v. Southern Ry. Co.*, 116 S. C. 143, 107 S. E. 30; *Poore v. Poore*, 105 S. C. 206, 89 S. E. 569.

8

Dress of attorneys.—The habit of the gentlemen of the Bar and all officers of the Court except constables shall be black coats; and no gentleman of the Bar shall be heard if otherwise habited; and it shall be the duty of the Sheriff to attend to the execution of this Rule.

9

Attorneys and other officers not to be sureties.—No attorney or other officer of the Court shall become surety upon any recognizance in the Court of General Sessions, or upon any undertaking in the Court of Common Pleas. Attorneys and other officers violating this rule shall be punished as for a contempt of Court.

See generally, *Safran v. Safran*, 107 S. C. 452, 93 S. E. 140.

10

Security for costs—form of undertaking.—If the plaintiff resides beyond the State, security for costs may be required. Whenever security for costs shall be required the following form and no other shall be regarded as a compliance with the order:

STATE OF SOUTH CAROLINA,
 _____ County.

A. B.

vs.

C. D.

Complaint For

I (or we as the case may be) acknowledge myself (or ourselves) liable for the costs of this case in the sum _____ dollars, and consent that if the plaintiff fail to recover, the defendant may have execution for his costs against me (or us, as the case may be) for not exceeding said sum.

Given under _____ hand this _____ day of _____ A. D. 19 ____.

E. F.

Witness:

Approved:

G. H.

C. C. P. & G. S.

The amount to be inserted therein shall be fixed by the Clerk after careful examination of the whole case: *Provided, however*, That if the same be, in the opinion of any party to the cause, insufficient, application may be made on notice, as in the case of any other interlocutory application, for an order fixing the amount for which such security, or any additional security shall be given.

Deposit in lieu of undertaking.—This rule shall not be construed as to prevent the plaintiff or others for him when security for costs is required from the deposit of a sum of money, as authorized by the Act entitled "An Act to authorize the deposit of money in proceedings in the Courts of this State as security in lieu of bonds and undertakings," approved 17th February, 1897; the sum to be deposited to be fixed by the Clerk as hereinbefore provided.

This rule is constitutional.—The South Carolina statute and rule of court, requiring non-residents to give security for costs, are not unconstitutional as abridging the privileges and immunities of citizens of other states, their provisions relating only to residence, and not to citizenship. *Cummings v. Wingo*, 31 S. C. 427, 10 S. E. 107, 25 Am. St. Rep. 873, Ann. Cas. 13D, 576.

Undertaking must be in form prescribed by this rule.—Where court granted nonsuit unless nonresident plaintiffs filed security for costs, and instrument filed was not in form prescribed by this rule nor witnessed and approved by clerk, nonsuit became absolute on expiration of time fixed for compliance with court order. *Lamborn v. Merchants' Gro. Co.*, 157 S. C. 150, 154 S. E. 94.

And must be witnessed and approved by clerk of court.—*Wilson v. Muehlberger*, 158 S. C. 58, 155 S. E. 230.

With amount fixed on its face.—Where, on motion of defendant, a rule for security of costs was entered, providing that the amount for which the surety should be bound should be inserted in the bond, a bond, with affidavit of sureties that each is worth a sum certain, is not a compliance with the rule, where no amount is fixed on its face. *Taylor v. Dempsey*, 66 S. C. 513, 45 S. E. 78.

And entered within time prescribed.—An order requiring security for costs to be entered within a prescribed time, and, on default, that plaintiff be nonsuited, is final after the expiration of the

time limited, and cannot be reversed or modified by the succeeding judge. *Cummings v. Wingo*, 31 S. C. 427, 10 S. E. 107, 25 Am. St. Rep. 873, Ann. Cas. 13D, 576, following *Bomar v. Asheville, etc.*, R. Co., 30 S. C. 450, 9 S. E. 512.

Security can only be required in circuit court. *C. C. & A. R. Co. v. Earle*, 13 S. C. 44.

It may be required from relator. *Tharin v. Seabrook*, 6 S. C. 113, 114.

Resident beneficiaries of action to collect stockholders' liability not required to give security for cost. *Griffin et al. v. Allendale Bank*, 170 S. C. 212; 170 S. E. 149.

Rogers v. Aetna Life Ins. Co., 172 S. C. 139; 173 S. E. 306.

Sufficiency of security.—Security for costs whereby the parties acknowledge themselves liable for the costs of the case, and consent that, if plaintiffs fail to recover, defendant may have execution for for his costs against them, is sufficient. *Dunton v. Harper*, 64 S. C. 338, 42 S. E. 153.

See generally. *Dulany & Co. v. Elford*, 22 S. C. 304; *McMillan v. McCall*, 2 S. C. 390. As to when succeeding judge may or may not grant further time to give security, see *Williams & Co. v. Connor*, 14 S. C. 621; *Burke v. Dillingham*, 8 Rich. 256. As to what is not a compliance with order, see *Willis v. Potter*, 9 Rich. 411. As to how security may be enforced, see *Earle v. Cureton*, 13 S. C. 19; *Stuckey v. Crosswell*, 12 Rich. 273.

11

Argument and request to charge.—Counsel shall not attempt to argue or explain a case, or any matter arising therein, after he has been heard, and the opinion of the Court has been pronounced: *Provided*, No argument shall be had on any objection to the admissibility of evidence unless especially requested by the presiding Judge; nor shall one attorney interrupt another in the course of his argument without first obtaining the permission of the Court.

Amended Dec. 18, 1896.—Before the argument of the case commences the counsel on either side shall read and submit to the Court in writing such propositions of law as they propose to rely on, which shall constitute the request to charge: *Provided, however*, That nothing herein contained shall prevent either counsel at the close of the argument from submitting such additional requests as may be suggested by the course of the argument, or from withdrawing any or all of the requests submitted at the beginning of the argument. When required by the Court, counsel shall note in the margin opposite each request the authorities relied on in support of the propositions of law therein contained, and also produce the same.

Requests must be presented before argument to be entitled to the consideration of the Court. Those suggested dur-

ing the course of the argument should be presented at the close. *State v. Glenn*, 88 S. C. 162, 164, 70 S. E. 453.

They must be submitted.—McPherson v. McPherson, 21 S. C. 261, 267, 31 L. R. A. 634, 36 L. R. A. 345; Youngblood v. South Carolina, etc., R. Co., 60 S. C. 9, 38 S. E. 232, 85 Am. St. Rep. 824, 97 Am. St. Rep. 891, 6 L. R. A. (N. S.) 986, 13 L. R. A. (N. S.) 1154; Lowrimore v. Palmer Mfg. Co., 60 S. C. 153, 38 S. E. 430, 16 L. R. A. (N. S.) 137; State v. Wine, 58 S. C. 94, 36 S. E. 439, 22 A. L. R. 273; Wagner v. Kirven, 56 S. C. 126, 34 S. E. 18.

And a trial judge may refuse to consider a request not submitted as required, and failure to respond to such request raises the presumption it was refused for noncompliance with this rule. Morrison v. Mutual Benev. Ass'n, 78 S. C. 398, 59 S. E. 27; Cutter v. Mallard Lbr. Co., 99 S. C. 231, 250, 83 S. E. 595, L. R. A. 1917E, 156.

This rule is not complied with by reading extracts from statutes, and orally requesting that the same be charged. State v. Davis, 50 S. C. 405, 27 S. E. 905, 4 L. R. A. (N. S.) 156, 5 L. R. A. (N. S.) 811.

And failure to respond to such request raises presumption that it was refused for noncompliance. — Where a request to charge is tendered orally at the conclusion of the court's charge, and not in conformity with this rule, it will be assumed that the failure to respond to it was based on noncompliance with the rule. Union Bleaching, etc., Co. v. Barker Fuel Co., 124 S. C. 458, 117 S. E. 735, 736.

But where court does respond then request is subject to rules applicable to formal requests.—When court responds to oral request for instruction, it is subject to all rules of law applicable to formal requests to charge, though it might have refused request for noncompliance with this rule. Hall v. Aiken County, 132 S. C. 420, 129 S. E. 160.

If any part of a request to charge is unsound, the judge may refuse to charge it. Earle v. Post, 63 S. C. 439, 41 S. E. 525.

But criticism of requests in accord with this rule is ground for reversal.—The action of court in criticizing requests to charge tendered in compliance with this rule because of their length and number, and in stating that it was impossible for any human being "to have gone over them with any degree of intelligence", in declining to consider requests was ground for reversal. Powers v. Rawles, 119 S. C. 134, 112 S. E. 78.

And where judge fails to require counsel to read requests he cannot refuse to pass on same on such grounds.—The provision that before the argu-

ment of the case the counsel on either side shall "read and submit" to the court requests to charge, is for the benefit of the court; and, where the judge did not require counsel to read the requests submitted, the counsel was not guilty of such violation of the rule as to destroy his right to a new trial for the judge's error in inadvertently failing to pass on the charges. Herskovitz v. Baird, 59 S. C. 307, 37 S. E. 922.

Counsel handed to the court requests to charge, without reading them, as required by this rule, and the judge inadvertently omitted to pass on them to the jury. Counsel was present and heard the charge to the jury, and did not call the judge's attention to his failure to give the charges requested. It was held that since a judge should not read an erroneous charge in the presence of the jury, and it did not appear that counsel knew why his requests were not charged, his silence did not preclude his right to a new trial on account of the omission. Herskovitz v. Baird, 59 S. C. 307, 37 S. E. 922.

As to time to present request, see State v. Hutchings, 24 S. C. 142, 145.

As to the necessity for a request for more specific statement of law, see Smith v. South Carolina, etc., R. Co., 62 S. C. 322, 40 S. E. 655; Kirby v. Southern Ry., 63 S. C. 494, 41 S. E. 765, 49 L. R. A. (N. S.) 817.

Refusal to charge requests not error when judge, before argument begun, directed that requests to charge be handed up, counsel stated they had none, but had read theirs into the record. Youmans v. Charleston & W. C. Ry. Co., 175 S. C., 99; 178 S. E., 671.

Defendant requesting no instructions could not complain that charge did not sufficiently cover principles involved. Parker v. Boswell et al., 172 S. C. 411, 174 S. E. 234.

And if a more comprehensive charge was desired, it was the duty of appellants to call it to the attention of the trial judge before the case was submitted to the jury. Dodenhoff v. Nilson Motor Express Lines et al., 190 S. C. 60, 2 S. E. (2d) 56.

Appellant cannot charge as error trial judge's reading of quotations from law books as part of charge at appellant's request. Porter-Constructors v. Dixon Motor Service Co., 171 S. C. 396, 172 S. E. 419.

Counsel desiring additional charge to jury must present request therefor. Porter-Constructors v. Dixon Motor Service Co., 171 S. C. 396, 172 S. E. 419.

ings shall be written on legal cap paper, or printed in accordance with the requirements of Rule 6 of the Supreme Court.

Amended Dec. 17, 1895.—Typewriting will be permitted only when black indelible ink is used, with ordinary spacing upon linen paper weighing not less than four pounds to five hundred single cap sheets, eight by thirteen inches in size; and each page of typewriting shall be numbered and initialed by the attorney, officer or person signing such paper.

It shall be the duty of the Clerk of the Court to see that papers are numbered and initialed as herein prescribed before filing.

Papers in handwriting or in typewriting must have a blank margin of an inch and a half on the left. If more than two pages of handwriting or typewriting be used, they shall be fastened at the top so as to read continuously.

Papers in handwriting or in typewriting shall be folded from the bottom in four equal folds and endorsed with the style of Court, the venue, the name of the parties, the nature of the paper, and the name of the attorney or officer.

The object of this rule is to prevent mistake or imposition. Edgefield Mfg. Co. v. Maryland Cas. Co., 78 S. C. 73, 58 S. E. 969, 971, 33 L. R. A. (N. S.) 514, 38 L. R. A. (N. S.) 64, Ann. Cas. 12D, 910, 12 A. L. R. 384.

The term "proceedings" embraces taking of testimony de bene esse.—In

a broad sense, the term "proceedings" used in the rule would embrace the taking of testimony de bene esse. Edgefield Mfg. Co. v. Maryland Cas. Co., 78 S. C. 73, 58 S. E. 969, 971, 33 L. R. A. (N. S.) 514, 38 L. R. A. (N. S.) 64, Ann. Cas. 12D, 910, 12 A. L. R. 384.

13

Pleadings to be legibly written and endorsed.—All pleadings and other proceedings, and copies thereof, shall be fairly and legibly written or printed, and endorsed with the title of the cause; and if not so written or printed and endorsed, the Clerk shall not file the same, nor will the Court hear any motion or application founded thereon.

14

Consent must be in writing.—No agreement or consent between the parties, or their attorneys, in respect to the proceedings in a cause shall be binding, unless the same shall have been reduced to the form of an order by consent and entered; or unless the evidence shall be in writing, subscribed by the party against whom the same shall be alleged, or by his attorney or counsel; or unless made in open Court and noted by the presiding Judge or the Stenographer on his minutes by the direction of the presiding Judge.

Rule does not apply where an agreement is admitted or has been carried into effect. Ex parte Pearson, 79 S. C. 302, 60 S. E. 706, Ann. Cas. 13B, 154; Lummus Cotton Gin Co. v. Counts, 98 S. C. 136, 82 S. E. 391.

The marking of a case "heard" by the judge on the calendar in open court was not an agreement in writing not to re-

quire exceptions to referee's report to be filed within 10 days, nor was it a memorandum of such agreement noted by the presiding judge with the consent of plaintiff's attorney under this rule. Brown v. Rogers, 71 S. C. 512, 51 S. E. 257.

Applied in Brewton v. Inter-Carolinas Motor Bus Co. et al., 167 S. C. 151, 166 S. E. 85.

15

Orders by default taken by counsel.—When any order is obtained by default the counsel obtaining the same shall endorse his name as counsel on the paper containing the proof of notice, and the Clerk in entering the order shall specify the name of such counsel.

16

Master or referee to file report in clerk's office.—The Master or Referee in all cases of reference, having prepared his report, shall file the same in the Clerk's office, and at the same time give notice to the attorneys engaged in the cause of such filing, and the party who shall be dissatisfied therewith shall, within ten days after such notice, serve his exceptions thereto. Such notice of the filing of the Master's or Referee's report shall be deemed and taken as service of such report.

Applied in *Fogel v. McDonald*, 159 S. C. 506, 157 S. E. 830.

17

Notice of appearance or retainer.—Service of notice of appearance or retainer generally by attorney for the defendant shall in all cases be deemed an appearance, and the plaintiff on filing such notice, at any time thereafter, with proof of service thereof, may have the appearance of the defendant entered as of the time when such notice was served.

18

Numbering causes of action or ground of defense.—In all cases of more than one distinct cause of action, defense, counterclaim or reply, each shall be separately stated and numbered; and where the defendant intends to set up a counterclaim it shall be distinctly entitled and designated as such.

Demurrer.—A demurrer must, in every case, be accompanied by a certificate of the counsel filing it that it is meritorious, and not intended merely for delay.

Motion to dismiss complaint.—A motion to dismiss a complaint or answer on the ground that the complaint does not state facts sufficient to constitute a cause of action, or the answer does not state facts sufficient to constitute a defense, may be made orally, but the grounds upon which said motion is made must be reduced to writing by the counsel submitting the same, or taken down by the Stenographer under the direction of the Court, stating wherein the pleading objected to is insufficient.

Amended Dec. 17, 1895.—A motion for a nonsuit must be reduced to writing by the moving counsel, or by the Stenographer, under the direction of the Court, stating the grounds of the motion.

Grounds not stated in motion for nonsuit and not passed on by the court will not be considered on appeal. *Graham v. Seignious*, 53 S. C. 132, 31 S. E. 51; *Sloan v. Pelzer*, 54 S. C. 314, 32 S. E. 431, 138 Am. St. Rep. 812, 838, Ann. Cas. 13D, 168; *Shull v. Caughman*, 54 S. C. 203, 32 S. E. 301, 302; *Burns v. Southern Ry. Co.*, 61

S. C. 404, 39 S. E. 567, 569; *Hicks v. Southern Ry. Co.*, 63 S. C. 559, 41 S. E. 753, 125 Am. St. Rep. 857, 6 L. R. A. (N. S.) 603, 14 L. R. A. (N. S.) 760, L. R. A. 1917E, 156.

And where the only ground for such motion was that it did not state a sufficient cause of action, it cannot be con-

sidered on appeal. *Lawson v. Gee*, 57 S. C. 502, 35 S. E. 759.

It is sufficient compliance with this rule to serve a written demurrer stating that the complaint does not state facts sufficient to constitute a cause of action, and then to submit at the hearing the specific grounds of objection in writing. *Riggs v. Home Mut. Fire Protection Ass'n*, 61 S. C. 448, 39 S. E. 614, 615, 11 L. R. A. (N. S.) 1021; *Exchange Bank of Meggett v. Bennett*, 193 S. C. 320, 8 S. E. (2d) 515.

But this rule shuts off the consideration of any other grounds of demurrer, except those brought to the attention of the circuit judge. *Norris v. Hartford Fire Ins. Co.*, 55 S. C. 450, 33 S. E. 566, 567, 74 Am. St. Rep. 765; *Hickson v. Early*, 62 S. C. 42, 39 S. E. 782, 784.

The Supreme Court cannot consider whether respondent complied with this rule, by submitting grounds of demurrer in writing, where the "case" fails to show such question was made on circuit. *Elkins v. South Carolina, etc., R. Co.*, 59 S. C. 1, 37 S. E. 20. Nor can the court consider additional defects not brought to

the attention of the court below, to sustain demurrer. *Id.*

A demurrer to complaint on ground that it did not state facts sufficient to constitute a cause of action was not insufficient because of alleged failure to comply with court rule requiring demurrer to state wherein pleading was insufficient, where some of alleged grounds of error in overruling demurrer were argued before trial judge, and there was nothing in record to show that question of sufficiency of demurrer had been passed upon by circuit judge. *McLeod v. Southern Ry. Co. et al.*, 188 S. C. 14, 198 S. E. 425.

Separate counterclaims sounding in tort cannot be jumbled in single statement. *Miller v. Johnson*, 126 S. C. 321, 119 S. E. 902.

In action against owner of truck and insurer for damages sustained in collision with truck, insurer held entitled to have cause of action against it on contract separately stated from that in tort against truck owner. *Miles v. Thrower et al.*, 181 S. C. 392, 187 S. E. 818.

19

Time to answer not extended without certificate of merits—subsequent extension.—No order extending the time to answer or demur to a complaint shall be granted unless the party applying for such order shall present to the Judge to whom the application shall be made a certificate of the attorney or counsel retained to defend the action, that, from the statement made to him by the defendant, he verily believes that the defendant has a good and substantial defense upon the merits to the cause of action set forth in the complaint or to some part thereof. And if any extension of time to answer or demur has been previously granted by stipulation or order, the fact shall be stated in the certificate.

This rule does not apply where two of the defendants are out of the United States, and the other two are dependent on them for information necessary for

their defense. *Fishburne v. Minott*, 72 S. C. 567, 52 S. E. 648.

See also, *Stewart et al. v. Ficken et al.*, 165 S. C. 396, 164 S. E. 14.

20

Motions to amend pleadings.—Motions to strike out of any pleading matter alleged to be irrelevant or redundant, and motions to correct a pleading on the ground of its being "so indefinite or uncertain that the precise nature of the charge or defense is not apparent," must be noticed before demurring or answering the pleading, and within twenty days from the service thereof.

Under this rule a circuit judge can grant an order at chambers, striking irrelevant matter from a pleading; the authority to hear the motion to strike necessarily implying power to decide. *Guignard v. Evans*, 80 S. C. 491, 61 S. E. 1003, Ann. Cas. 16A, 1229.

This rule does not apply to an answer; and a motion to strike out part of an answer is not too late, when made after six terms and two mistrials, after submitting an argument on a similar motion to a judge who did not rule on it, but who declared a mistrial. *Johnson v.*

Finger, 102 S. C. 354, 86 S. E. 673; Lenhardt v. French, 68 S. C. 297, 47 S. E. 382.

Stipulation extending time for pleading does not extend time for motion under this rule.—A stipulation extending the time for “answering, pleading, or

demurring” to a complaint does not extend the time within which to make a motion to make the complaint more definite and certain. Whaley v. Lawton, 53 S. C. 580, 31 S. E. 660.

See also, Stewart et al. v. Ficken et al., 165 S. C. 396, 164 S. E. 14.

21

Defense of plene administravit.—The defense of *plene administravit* shall not be effected unless the party making such defense shall file with the pleading, on oath, a full and particular account of the administration of the estate, with a certified copy of the inventory and appraisement; or, if the party be charged as executor of his own wrong, a full statement, on oath, of all the assets which have come into his possession, and the value thereof, and an account showing the manner in which the same may have been disposed of.

See generally, Willis v. Tozer, 44 S. C. 1, 21 S. E. 617, Ann. Cas. 16C, 402, Ann. Cas. 16E, 134, 14 A. L. R. 74.

22

Real owner admitted to defend action against tenant.—Where a tenant is sued for land of which he is in possession, the real owner may, on motion, be admitted as a defendant to the action, and shall be entitled to the service of a copy of the complaint, and to answer or demur thereto, as if he had been the original defendant.

Whenever an action to recover the possession of real estate shall be brought against any person claiming to be the owner thereof, and such person intends to vouch any grantor under and through whom he claims title, he shall vouch such person in writing and before the time for answering has expired; and the person so vouched may, if he desires, be permitted to apply to the Judge of the Circuit Court in which the action is brought, within twenty days from being so vouched, to come in and make such additional defenses as he may desire.

23

Venire and summons for jurors.—To all writs of *venire* for jurors, the Sheriff and his deputies shall make a return, on oath, before the Clerk of the Court from which the *venire* issues, including in *one* class the names of those who have been summoned personally; in the *second* class, of those for whom summonses have been left at their house; in the *third* class, of those for whom could not be found. The summonses for each juror shall state the day, the hour, and the Court at which he is to appear, the penalty for default, and, also, whether he is to serve as a grand or petit juror.

In equitable actions, framing of issues is a matter of discretion. Keese v. Par-

nell, 132 S. C. 360, 128 S. E. 172; S. C., 134 S. C. 207, 208, 132 S. E. 620, 621.

24

Defaulting jurors—judgment against.—If any juror, in attendance upon the Court, shall refuse or neglect to attend punctually, and to answer to his name whenever the same shall be called, the Clerk shall note such default,

and the defaulter shall forthwith be served with a rule to show cause why he should not be fined therefor. Upon the adjournment of each term of the Court, the Clerk shall cause to be served by the Sheriff on each and every juror noted for non-attendance at that Court, a notice, requiring him to show cause by affidavit, at ten o'clock on the first day of the next regular term, why he should not be fined, according to law, for failing to attend and serve as a grand or petit juror, as the case may be.

And on or before the first day of the next regular term the Sheriff shall make return of all such notices to the Clerk, who shall, after entering the same on the Contingent Docket, deliver them to the Attorney General or Solicitor, and Attorney General or Solicitor shall, upon the call of the Docket, move for the judgment of the Court thereon.

25

Jury in criminal cases.—In the empanelling of a jury in criminal cases, where the right of preemptory challenge is claimed and allowed a child under ten years of age shall, in the presence of the Court, draw one from the names of all the jurors in attendance, which one, having answered, shall be presented to the accused; and so on until, in regular course, the panel is exhausted or a jury formed.

When it is agreed between the State and defense to waive this rule and to object alternately to the full box, the State may object to one originally drawn, after declining to object twice and after three new jurors have been put in the box to fill defendant's objections. *State v. Fullbright*, 88 S. C. 126, 70 S. E. 445; *State v. Tidwell*, 100 S. C. 248, 255, 84 S. E.

778.

Applied in *State v. Campbell*, 35 S. C. 28, 31, 14 S. E. 292, 89 Am. St. Rep. 696, 17 L. R. A. 663, L. R. A. 1916A, 824, 836; *State v. Cardoza*, 11 S. C. 195, 196, 51 Am. Dec. 94, 27 L. R. A. 787, 52 L. R. A. 839, 53 L. R. A. 538, L. R. A. 1916A, 835; *State v. White*, 15 S. C. 381.

26

Common pleas calendar.—No clerk shall enter a cause on the Calendar until the pleadings are made up. And no cause shall be entered on the Calendar except by the Clerk or his Deputy.

No cause shall be on more than one Calendar at the same time; except in cases in which some of the defendants have pleaded and others have made default.

Causes may be entered on Docket 3 at any time after the time for answering has expired and before the beginning of the term; after the beginning of the term no cause shall be entered on said Docket by the Clerk or his Deputy except by leave of the Court.

Where an issue has been settled by an order of the Court, the Clerk shall give it a place on the Calendar according to the date of the order.

The Clerk shall preserve the Calendars as records of the Court. He shall not only number the causes thereon but shall indicate the number of terms they may have been at issue; and he shall, also, in a separate column, copy the memoranda of the disposition of the case at the previous term.

During the daily sessions of the Court the Calendars shall not be subject to the inspection of the Bar; but it shall be the duty of the Clerk to make a copy of the several Calendars, in a Book designated "Bar Calendar," for the use of the Bar.

Applied in *Steffens v. Bulwinkle*, 48 S. C. 357, 26 S. E. 666.

27

Motions for continuance.—No motion for the postponement of trial beyond the term, either in the Common Pleas or General Sessions, shall be granted, on account of the absence of a witness, without the oath of the party, his counsel or agent, to the following effect, to wit: That the testimony of the witness is material to the support of the action, or defense of the party moving; that the motion is not intended for delay; but is made solely because he cannot go safely to trial without such testimony; that he has made use of due diligence to procure the testimony of the witness or of such other circumstances as will satisfy the Court that his motion is not intended for delay. In all such cases where a writ of subpoena has been issued, the original shall be produced, with proof of service, or the reason why not served, endorsed thereon, or attached thereto; or, if lost, the same proof shall be offered, with additional proof of the loss of the original subpoena.

A party applying for such postponement on account of the absence of a witness shall set forth under oath in addition to the foregoing matter what fact or facts he believes the witness if present would testify to, and the grounds of such belief.

A motion for continuance is addressed to the sound discretion of the trial judge. *King v. Smith*, 148 S. C. 419, 146 S. E. 237.

And his ruling thereon will not be disturbed unless manifestly erroneous. — *King v. Smith*, 148 S. C. 419, 146 S. E. 237; *Merchants Fertilizer & Phosphate Co. v. American Land & Building Corp.*, 165 S. C. 394, 164 S. E. 17.

Thus denial of motion because of counsel's illness is proper. — Denial of defendant's motion for continuance beyond term because of counsel's illness held not abuse of discretion, where it appeared plaintiff might not live beyond term. *King v. Smith*, 148 S. C. 419, 146 S. E. 237.

Denial of defendant's motion for continuance on ground that one defendant, whose assistance to counsel was essential to proper defense of action on note, was ill in hospital, was not abuse of discretion, where defendants submitted no affidavit, with statement of facts, as to what such defendant would have testified to and defendants' counsel had appeared for them shortly before in trial of action in similar note. *Lerner v. Bluestein*, 175 S. C. 59, 173 S. E. 265.

Denial of motion because of witness' illness is proper when it is not shown to court by affidavit of witness, his agent or attorney. *Merchants Fertilizer & Phosphate Co. v. American Land & Building Corp.*, 165 S. C. 394, 164 S. E. 17.

Likewise motion is properly denied when defendant does not use due dil-

igence in procuring attendance of witnesses.—Refusal of motion for continuance based on failure of witness to attend, which had not been arrested or bound over, the crime having been committed in June, case continued at June term and tried at October term, warrant for witnesses issued ten days before trial, is not an abuse of discretion. *State v. Hiers*, 107 S. C. 411, 93 S. E. 124; *State v. Waring*, 109 S. C. 52, 57, 95 S. E. 143; *State v. Box*, 66 S. C. 402, 44 S. E. 969.

The mere subpoenaing of witnesses by defendant in homicide case does not show due diligence in procuring their attendance. *State v. Hutto*, 66 S. C. 449, 45 S. E. 13, 19 L. R. A. (N. S.) 493, Ann. Cas. 12C, 50, Ann. Cas. 13C, 488.

Particularly where facts witness would swear to are admitted. — It is not an abuse of discretion in a trial Judge to order a homicide case to trial in the absence of a witness who has been bound over and in attendance, but has left against the protest of defendant's counsel, after issuance of bench warrant for the witness at instance of defendant's counsel, but before returning thereon, in the absence of any showing according to this rule of the materiality of the witness and what facts he would swear to, the solicitor having agreed to admit what the witness would swear to. *State v. Pope*, 78 S. C. 264, 58 S. E. 815.

On defendant's application for continuance, where plaintiff agreed to admit the affidavit of defendant that an absent witness would testify to certain facts, but

not that the testimony was true, plaintiff cannot on the trial impeach defendant's affidavit by introducing an affidavit made by absent witness 10 days after the collision which was the basis

of the action. *Coffey v. Jenkins*, 117 S. C. 321, 109 S. E. 117.

Applied in *Ilderton v. Charleston Consol. Ry., etc., Co.*, 113 S. C. 91, 101 S. E. 282.

28

Issues in equity causes—how tried by jury.—In equity cases where a trial by jury of issues of fact may be desired, the party desiring a jury trial shall within ten days after issue joined give notice in writing of his intention to move the Court, upon the first day of the next term, immediately after the call of Docket No. 3, for an order requiring that the whole issue of certain specified questions of fact involved be tried by a jury. With the notice of motion shall be served a copy of the questions of fact proposed to be submitted to the jury for trial and in proper form to be incorporated in the order. (If the adverse party desires to submit any other issue of fact to the jury, he shall within four days from the service of such motion upon him notify the party giving the notice, in writing, of his intentions to move the Court, at the same time, to submit certain issues to the jury for trial, specifying the issues.)

The Court on hearing the motion may settle the issues, if they are deemed necessary.

"After issue joined" means "when the issue on appeal is joined", and the issues on appeal are made by the exceptions, or grounds of appeal, and they determine whether the issues will be of law or of fact. *Meir v. Kornahrens*, 113 S. C. 270, 102 S. E. 285, quoted in *Johnson v. Johnson*, 160 S. C. 158, 158 S. E. 264.

Question of will or no will, on appeal to circuit court, fact issues are tried de novo. *Johnson v. Johnson*, 160 S. C. 158, 158 S. E. 264.

Compliance with rule necessary.—Where a party desiring that certain issues be submitted to the jury in a proceeding, on appeal in the Circuit Court for the appointment of an administrator, failed to comply with this rule, his exceptions to the court's failure to submit such issues to a jury will be overruled on appeal to the Supreme Court. *In re Williams*, 98 S. C. 211, 82 S. E. 402.

Although judge may submit issues to jury of his own will.—If a plaintiff fail to give the notice required, he cannot demand a submission of issues to a jury in an equity cause as a right, but the judge may send out issues to enlighten his conscience. Where such issue is framed by one judge, but not tried by him, nor ordered continued, and tried by a succeeding judge after insistence of defendant, after objection to change in issues proposed by plaintiff, he, having made no objection to issue as first framed, is precluded from making any objection to the trial of the issue as framed. *Goodwin v. Wiles*, 76 S. C. 507, 57 S. E. 547.

Or within his discretion.—In a suit in equity for a division of crops between

partners or joint owners, it is not error to refuse to submit issues to a jury, where no abuse of discretion is shown, as this rule gives the court discretionary power to frame issues of fact for a jury in all equity causes. *Neal v. Suber*, 56 S. C. 298, 33 S. E. 463.

Or judge may refer issues to referee in absence of application under this rule.

—A complaint asking that a cloud upon the title to land be removed and the paper purporting to be a deed be canceled presents a cause for equity cognizance, and hence, where no application was made under this rule to refer any issues to a jury, the court could, in its discretion, refer the issues for trial to a referee, the action not being for the recovery of money or of specific real or personal property. *Shute v. Shute*, 79 S. C. 420, 60 S. E. 961, Ann. Cas. 12D, 1137.

But reference preparatory to hearing does not interfere with rule.—A reference "preparatory to the hearing of the case on the merits," made on a foreclosure to ascertain the amount due, does not interfere with the defendant's rights as to another mode of trial of the issues of fact, in pursuance of this rule. *Bank of Hampton v. Fennell*, 55 S. C. 379, 33 S. E. 485.

Section is inapplicable in actions on mechanic's liens.—Since a mechanic's lien is only enforceable by the prescribed statutory proceeding, this rule is inapplicable. *Metz v. Critcher*, 83 S. C. 396, 65 S. E. 394, Ann. Cas. 13B, 284.

And in action to foreclose mortgages.—An action to foreclose a mortgage covering real and personal property is an

equitable issue and defendants are not entitled to a jury trial on the issue as to plaintiff's ownership of the bond. *Tollner v. American Pub. Co.*, 125 S. C. 317, 319, 118 S. E. 619.

Applied in *In re Shiers*, 35 S. C. 417, 14 S. E. 931, 127 Am. St. Rep. 554, Ann. Cas. 17B, 904; *Mullaly v. Smyth*, 96 S. C. 14, 79 S. E. 634; *Osteen v. Bultman*, 90 S. C. 452, 73 S. E. 874; *Forrest v. City Council*, 65 S. C. 500, 43 S. E. 952, Ann. Cas. 17A, 1189; *Montague v. Best*, 65

S. C. 455, 43 S. E. 963.

See generally. *McCarter v. Armstrong*, 32 S. C. 203, 10 S. E. 953, 22 Am. St. Rep. 238, 68 Am. St. Rep. 754, 8 L. R. A. 625, 59 L. R. A. 883; *Lucken v. Wichman*, 5 S. C. 411, 412, 48 Am. Dec. 188; *DeLoach v. Sarratt*, 55 S. C. 254, 33 S. E. 2, 35 S. E. 441; *McLaurin v. Hodges*, 43 S. C. 187, 20 S. E. 991, Ann. Cas. 14C, 853; *Muldrow v. Jeffords*, 144 S. C. 509, 514, 142 S. E. 602.

29

Calling plaintiff submitting to non-suit.—It shall not be necessary to call the plaintiff when the jury return to the bar to deliver their verdict, and the plaintiff shall have no right to submit to a non-suit after the jury have gone from the bar to consider of their verdict.

30

Submitting to non-suit or dismissal before a master or referee—form of master's or referee's report.—On a hearing before a Master or Referee, the plaintiff may submit to a non-suit or dismissal of his complaint, or may be nonsuited, or his complaint be dismissed, in like manner as upon a trial, at any time before the cause has been finally submitted to the Master or Referee for his decision; in which case the Master or Referee shall report according to the fact, and judgment made thereupon be perfected by the defendant.

Proceedings on references other than of the issues.—Upon a trial by a Master or Referee, he shall in his decision or report, state the facts found by him and his conclusions of law separately, a copy of which shall be served with notice of the judgment; and the time within which exceptions may be taken to the report shall be computed from the time of such service.

In references other than for the trial of the issues in an action, upon the coming in of the report of the Master or Referee the same shall be filed, and a note of the day of filing shall be entered by the Clerk in the proper book, under the title of the cause or proceedings; and the said report shall become absolute and stand as in all things confirmed unless exceptions thereto are filed and served within ten days after service of notice of the filing of the same. If exceptions are filed and served within such time, the same may be brought to a hearing on the notice of any party interested therein.

See generally, *Verner v. Perry*, 45 S. C. 262, 22 S. E. 888; *Cureton v. Mills*, 13 S. C. 409, 410, 36 Am. Rep. 700, 35 Am. Dec. 484, 27 L. R. A. 116, L. R. A. 1915A,

431; *Bollmann v. Bollmann*, 6 S. C. 29, 30, 13 Am. Dec. 547, 132 Am. St. Rep. 159, Ann. Cas. 18C, 974; *Moore v. Johnson*, 7 S. C. 303.

31

Examination of witnesses—how conducted—time for summing up or hearing.—On the trial of issues of fact, one counsel only, on each side, shall examine or cross examine a witness and not more than one counsel on each side shall sum up or be heard in any cause; and during such examination the examining counsel shall stand; and the testimony, if taken down in

writing, shall be written by some other persons than the examining counsel, but the Judge who holds the Court may otherwise order, or may dispense with this requirement: *Provided*, That the time of two hours, allowed by Statute, may be distributed among as many counsel on each side as they may desire.

Applied in *Barnett v. Gottlieb*, 98 S. C. 189, 82 S. E. 406.

32

Papers to be furnished and by whom.—The papers to be furnished on motions shall be a copy of the pleadings, when the question arises on the pleadings or any part thereof, or of such parts only as relate to the question raised by the demurrer; a copy of the special verdict, return or other papers on which the question arises.

Penalty for failure.—The party whose duty it is to furnish the papers shall serve a copy on the opposite party (except upon trial of issues of law) at least four days before the time the matter may be noticed for argument. If the party whose duty it is to furnish the papers shall neglect to do so, the opposite party shall be entitled to move, on affidavit and notice of motion, that the cause be stricken from the Calendar (whichever party may have noticed it for argument), and that judgment may be rendered in his favor: *Provided*, however, That in mortgage and partition cases where the plaintiff's rights are not contested no copies of pleadings need be furnished the Court.

Who to furnish papers.—The papers shall be furnished by the plaintiff when the question arises on special verdict, and by the party demurring in cases of demurrer, and in all other cases by the party making the motion.

33

Order to stay with view to change venue—revoking stay—notice of revocation.—No order to stay proceedings for the purpose of moving to change the place of trial shall be granted unless it shall appear from the papers that the party moving has used due diligence in preparing the motion for the earliest practicable day after the issue joined. Such order shall not stay the plaintiff from taking any steps except subpoenaing witnesses for the trial without a special clause to that effect.

34

Commissions—how executed and how opened.—Commissions when executed shall be sealed up by the Commissioners who shall have executed the same, and directed to the Clerk of the Court from which they were issued. Upon the envelope shall appear the names of the Commissioners, written by themselves across the place where the same is sealed, the title of the cause, and when sent by mail, the proper postmark. Commissions shall not be opened but upon motion in open Court before a Master or Referee or Referees, hearing the cause, or by consent of the parties, in writing, or by the Clerk or Master, or Referee, upon request of any of the parties, and four days' notice to all parties of the time and place of such opening.

Whenever an original document or paper is enclosed in a commission, and such commission is opened in the manner hereinbefore provided, it

shall be lawful, and the Clerk is hereby authorized to take such original document or paper out of such Commission and deliver the same to the party entitled thereto, to be used in taking other and further testimony in reference to such document or paper, the same having first been marked for identification.

See generally, *Leaphart v. Leaphart*, 1 S. C. 199.

35

Presence of accused on trial.—No person shall be tried on an indictment unless personally present, except for misdemeanors; and upon the trial of any person charged with an offense for which the law requires that he should be arraigned the prisoner shall be placed in the dock.

And after arraignment the prisoner shall remain in custody of Sheriff until discharged therefrom by due process of law, and that the condition of all recognizances in cases of felony be so drawn as to require the accused to appear and plead to such indictment as may be preferred against him.

Applied in *State v. Rabens*, 79 S. C. 542, 60 S. E. 442, L. R. A. 1917B, 350 Ann. Cas. 17E, 183.

36

Surveys—how made when ordered by the court—notice of.—Surveys of land in any quantity of two hundred acres or less shall be laid down by a scale of ten chains to the inch; all over that quantity, by a scale of twenty chains to the inch.

No survey made under an order of the Court shall be received in evidence unless it appear that at least ten days' notice of the time and place of commencing such survey has been given to the parties.

Particulars required.—Every surveyor shall represent in his plat, as nearly as he can, the different enclosures of the parties, and the extent or boundaries within which each party may have exercised acts of ownership. He shall also represent a fence, buildings, or the like, by a mark in due proportion in size, according to the scale of the plat. He shall, by some small but distinct letter or figure, distinguish every corner, station, blazed tree, or other point which is likely to be the subject of dispute. He shall take care not to render the plat confused or indistinct by crowding too much upon it; but he shall rather refer the letters or figures to a table (which may contain the course and distances of lines, the marks at corners, stations and noted points, explanations and remarks), than attempt to write much on the lines, or near to points on the plat. He shall also make two drafts or duplicates of the plat, so that on the trial there may be one for the use of the Judge, and the other for the parties in Court.

Objections.—After a cause has gone to a jury, and any evidence has been heard on it, neither party shall be allowed to make any objection to the order or survey, or the manner in which it may have been obtained or the survey executed.

Copy of rule.—A copy of this Rule shall be appended to every order of survey served on a surveyor.

This rule provides for a survey in actions to recover land, but does not require it. *Patterson v. Grenshaw*, 32 S. C. 534, 11 S. E. 390.

37

Judgment on failure to answer—when to be applied for.—When the plaintiff in the action is entitled to judgment upon failure of the defendant to answer the complaint, and the relief demanded requires application to be made to the Court, such application must be made in the Circuit Court in the county in which the action is triable.

Resident judge of circuit had jurisdiction to give default judgment when record showed that action was triable in another county in same circuit. *McInnis v. Caulk*, 176 S. C. 399, 180 S. E. 340.

38

Judgment after service by publication—affidavit—undertaking.—In actions for the recovery of money only, when the summons has been served by publication, under Section 436 of the Code of Procedure, and the defendant is a non-resident of the State, no judgment shall be rendered unless the plaintiff or his agent at or before the time of making the application for judgment shall have been examined on oath respecting any payments that have been made to the plaintiff or to any one for his use on account of the demand mentioned in the complaint, and shall show by affidavit that an attachment has been issued in the action and levied upon property belonging to the defendant, which affidavit shall contain a specific description of such property, and a statement of its value and shall be filed with the proof of publication.

Before judgment is rendered the plaintiff shall (unless the Court in its discretion dispense with the same) cause to be filed an undertaking in such amount as shall be ordered by the Court with security to be approved by the Court or the Clerk thereof, that the plaintiff will abide the order of the Court touching the restitution of any estate or effects which may be directed by such judgment to be transferred or delivered, or the restitution of any money that may be collected under, or by virtue of, such judgment, in case the defendant or his representative shall apply and be admitted to defend the action and shall succeed in such defense.

39

Judgment roll—how made up.—The Clerk shall record in the Judgment Book, at length, all judgments entered in his office, with the names of all parties, plaintiff or defendant, who have appeared, or been served with a summons therein, and the names of the attorneys, with the time and place of the rendition of such judgment and the number of the roll; and when, by any judgment, any matter shall be adjudged, or act or thing commanded, other than the payment of money, space sufficient shall be left after the entry thereof for the entering of such proceedings as may be thereafter had for the enforcement or satisfaction of such judgment.

40

Recording judgments of Supreme Court—adjusting costs thereon.—When a judgment rendered by the Supreme Court shall be certified to the

Circuit Court it shall be the duty of the Clerk of the Circuit Court to adjust the costs and disbursements in the Supreme Court to which any party may be entitled upon due notice, as provided in the case of the adjustment of costs in the Circuit Court; and he shall record such judgments and enter an abstract thereof in like manner as is provided in the case of judgments rendered by the Circuit Court. At the foot of such record a reference shall be made to the page at which the judgment appealed from is recorded and a like reference shall be entered at the foot of the entry of the original judgment to the page at which the judgment on appeal is recorded.

Respondent sustaining judgment on appeal to United States Supreme Court is entitled to costs for printing her brief in

that court and for transcript of record. *Ford v. Atlantic Coast Line R. Co.*, 170 S. C. 93, 169 S. E. 834.

41

Sales of land at auction.—When lands are directed to be sold at auction, notice of sale shall be given for the same time and in the same manner as is required by law on sales of real estate by sheriffs on execution.

42

General guardian of infant—security.—After the appointment of the general guardian of an infant he shall not be entitled to receive any money or other property to which the ward shall thereafter become entitled until the Court is satisfied, upon due inquiry, that he has given a good and sufficient bond to account therefor.

It is the duty of a probate judge to require the general guardian of a minor to strengthen his old bond or give a new one, when it is brought to his attention that such guardian is about to receive funds not in contemplation when the

original bond was executed, and in taking and approving such bonds, he acts in a ministerial capacity. *Williams v. Weeks*, 70 S. C. 1, 48 S. E. 619, 44 L. R. A. (N. S.) 176.

43

Application for discovery—how made.—Applications may be made in the manner provided by law to compel the production and discovery of books, papers and documents relating to the merits of any civil action pending in this court or any defense in such action in the following cases:

1. By the plaintiff, to compel the discovery of books, papers or documents in the possession or under the control of the defendant which may be necessary to enable the plaintiff to frame his complaint or to answer any pleading of the defendant.

2. The plaintiff may be compelled to make the like discovery of books, papers or documents when the same shall be necessary to enable the defendant to answer any pleadings of the plaintiff.

3. Either party may be compelled to make discovery, as provided by Section 673 of the Code of Civil Procedure.

See section 747 and notes thereunder.

Examination of records of bank and trustee.—Pleadings, affidavit, and exhibits showing that bank, to which testator had assigned life policies to secure debts, and trustee, to whom testator directed bank to pay balance for specific purpose,

failed to account for proceeds and to turn over to executrix mortgages and notes allegedly paid out of proceeds, held to warrant granting of bill of discovery to executrix permitting examination of bank's and trustee's records. *Floyd v. Victory Sav. Bank*, 182 S. C.

357; 189 S. E. 462.

Courts should carefully guard against abuse of right to inspect private books and papers in considering application for discovery. *Floyd v. Victory Sav. Bank*, 182 S. C. 357; 189 S. E. 462.

Manager of store under contract whereby his remuneration depended upon operating results, the record of which was kept by store owner, is entitled to discovery of books and records in possession of store owner in order to enable manager to intelligently draw his complaint. *Whitman v. National Manufacture & Stores Corporation*, 175 S. C. 464, 179 S. E. 478.

In action for injuries to alleged employee, order refusing motion made after trial to permit examination of books and records of defendant veneer corporation and of logging corporation having same officers and stockholders was sustained without prejudice to renew motion, where notice failed to disclose why plaintiff sought discovery after conclusion of case. *Hyman v. Carolina Veneer & Lumber Co.*, 194 S. C. 67, 9 S. E. (2d) 27.

For order of discovery held too broad, see *Boykin v. Hermitage Cotton Mills*, 180 S. C. 364, 185 S. E. 863.

44

Moving papers—what to state.—The moving papers, upon the application for such discovery, shall state the facts and circumstances on which the same is claimed, and shall be verified by affidavit stating that the books, papers and documents whereof discovery is sought are not in the possession nor under the control of the party applying therefor. The party applying shall show to the satisfaction of the Court or Judge the materiality and necessity of the discovery sought and the particular information which he requires.

See notes under rule 43

45

Order for discovery.—Discovery may be compelled by requiring the party to produce and deposit the matters to be discovered with the Clerk for the county in which the trial is to be had, or by requiring him to deliver sworn copies thereof to the moving party, or in such other manner as may be directed by the Court. The order therefor shall specify the mode of making the discovery and the time within which it is to be made; and when papers are required to be deposited the order shall specify the time that the deposit shall continue.

See notes under rule 43

46

Order for discovery to operate as a stay of proceedings.—The order directing the discovery of books, papers, or documents shall operate as a stay of all other proceedings in the cause until such order shall have been complied with or vacated, and the party obtaining such order after the same is complied with or vacated shall have the time to prepare his complaint, answer, reply or demurrer to which he was entitled at the making of the order; but the judge in granting the order may limit its effect by declaring how far it shall operate as a stay of proceedings.

See notes under rule 43

See generally, in *Hydrick v. Fairey*, 132 S. C. 335, 338, 128 S. E. 358, 359.

47

NEW TRIAL AND APPEAL

Settling cases, exceptions and special verdicts.—Whenever it shall be intended to move the Circuit Court for a new trial (except for irregularity, surprise, or on the minutes of the Judge), in an action tried by a jury, a case or exceptions, or case containing exceptions, as may be proper and the party may elect, shall be prepared by the party intending to make the motion or to renew the trial, and a copy thereof shall be served on the opposite party within ten days after trial, if by a jury, or within ten days after written notice of the filing of the decision, if the trial be by referee; and the party served within ten days thereafter, propose amendments thereto and serve a copy on the party proposing the case or exceptions, who may then, within four days thereafter, serve the opposite party with a notice that the case or exceptions, with the proposed amendments, will be submitted at a time and place to be specified in the notice to the Judge or Referee before whom the cause was tried for settlement. The Judge or Referee shall thereupon correct and settle the case as he shall deem consistent with the truth of the facts. The time for settling the case must be specified in the notice, and it shall not be less than four nor more than twenty days after service of such notice.

The lines of the case shall be so numbered that each copy shall correspond. Cases reserved for argument, and special verdicts, shall be settled in the same manner.

See Rules 1, 5, and 8 of the Supreme Court.

Right to move for new trial is waived by appeal from judgment. *Murdock v. Courtenay Mfg. Co.*, 52 S. C. 428, 29 S.

E. 856, 30 S. E. 142.

As to manner of settling case, see *McNamee v. Huckabee*, 20 S. C. 190, 195, Ann. Cas. 12A, 199.

48

Exceptions—what to contain—amendments—how to be marked.—Exceptions shall only contain so much of the evidence as may be necessary to present the questions of law upon which the same were taken on the trial; and it shall be the duty of the judge upon settlement to strike out all the evidence and other matters not necessarily inserted.

Whenever amendments to a case or exception are proposed, the party proposing such case or exceptions shall, before submitting the same to the judge for settlement, mark upon the several amendments his proposed allowance or disallowance thereof.

It seems that this rule is no longer in force. *Croswell v. Connecticut Indem-*

nity Ass'n, 49 S. C. 374, 27 S. E. 388.

49

Mode of preparing a case on appeal.—In every appeal to the Supreme Court from matter appealable, the appellant, or his attorney, shall within ten days after written notice of the filing of such matter appealable, or, if filed within term time, within ten days after the rising of the Circuit Court, give written notice to the opposite party, or his attorney, of his intention to appeal therefrom, and within thirty (30) days after such notice the appellant, or his attorney, shall prepare a case or exceptions, or a case containing exceptions (which exceptions shall have been taken and served within the

time prescribed by law), and serve them on the opposite party, or his attorney, or within such further time as, upon ten (10) days' notice to the opposite party, or his attorney, the Judge who tried the cause may for good cause grant. But should the parties within the time above named, be unable to agree upon a case, then the proposed case, with the proposed amendments, and allowances and disallowances, shall be within ten days after failing to agree, referred for settlement to the Circuit Judge who heard the cause, who shall settle the same within the time and in the manner provided for settling a case in Rule 47.

The parties, if they agree on a case, or the Circuit Judge who may settle the same, must see that the case shall, as to the matter it contains, conform to the requirements of the Rules of Supreme Court in regard to the form and substance of a case for hearing before that Court.

As to contents of case, see Rule 4 of the Supreme Court.

Time to serve case may be extended by circuit judge or supreme court justice.—The time within which the case should be served may be extended either by the Circuit Judge under this rule or by a justice of the Supreme Court. Under Rule 50 of the Circuit Court, the motion for extension should ordinarily be made before the time has expired. See *Stribling v. Jones*, 16 S. C. 112, 115.

If made in the Circuit Court, it must be before the judge who tried the cause, and his decision is final. *Stribling v. Johns*, 16 S. C. 112, 115.

But Circuit Court cannot enlarge time for perfecting case on appeal after time for extension has elapsed. *Brock v. Brock*, 123 S. C. 361, 362, 116 S. E. 442.

Except under peculiar circumstances.—Relief may be granted even where notice is served after expiration of time under peculiar circumstances. *Bryson v. Whilden*, 55 S. C. 50, 32 S. E. 1038.

Time does not commence until judgment is entered up.—Where notice is served of intention to appeal from judgment to be entered up, the time within which the case must be served does not commence to run until judgment is entered up. *Parsons v. Gibbes*, 59 S. C. 215, 37 S. E. 753.

As to time for giving notice of appeal, see *Molair v. Port Royal, etc.*, Ry. Co., 31 S. C. 510, 10 S. E. 243, 15 L. R. A. 39; *Willoughby v. Northeastern R. Co.*, 49 S. C. 372, 27 S. E. 273. As to computation of time within which to appeal, etc., see *Bigham v. Holliday*, 52 S. C. 528, 30 S. E. 485.

The motion to settle the case must be made before the circuit judge, the Circuit Court having jurisdiction until the

return has been filed in Supreme Court and the papers in the cause are records of that court. *Sullivan v. Thomas*, 3 S. C. 531, 548; *Gibson v. Gibson*, 7 S. C. 356.

And the Supreme Court has power to require conformity to the order of the Circuit Court settling a case for appeal to the Supreme Court, and may remand a case to the Circuit Court for further settlement. But the Supreme Court has not the power itself to say what the case shall contain. *Baker v. Irvine*, 62 S. C. 293, 40 S. E. 672.

The provision of this rule that where parties fail to agree on a "case," it may be referred to the circuit judge for settlement, does not include "exceptions;" and a failure to file the exceptions in the Circuit Court, so that they can, within the prescribed time, be certified to the Supreme Court as a part of the return, is not excused by the fact that they were mistakenly submitted with the "case" for settlement by the judge, and are beyond the control of appellant. *Croswell v. Connecticut Indemnity Ass'n*, 49 S. C. 374, 27 S. E. 388.

Such failure, following due notice of intention to appeal, is within the statute providing that the Supreme Court may, in its discretion, and on such terms as may be just, relieve a party from the consequences of any omission in perfecting an appeal, arising from mistake or inadvertence. *Croswell v. Connecticut Indemnity Ass'n*, 49 S. C. 374, 27 S. E. 388.

As to the procedure before the circuit judge on motion to settle the case, see *Chalk v. Patterson*, 4 S. C. 98, 99; *Croswell v. Connecticut Indemnity Ass'n*, 49 S. C. 374, 27 S. E. 388.

Case—how waived and what deemed settled.—If the party shall omit to make a case, or exceptions, or statement of facts, within the time above

limited, he shall be deemed to have waived his right thereto, and when the same is made, and the parties shall omit, within the several times above limited, the one party who proposed amendments, and the other to notify an appearance before the judge, master or referee, they shall respectively be deemed, the former to have agreed to the case as proposed, and the latter to have agreed to the amendments as proposed.

51

If in an action to foreclose mortgage, defendant fail to answer.—If in an action to foreclose a mortgage the defendant fails to answer within the time allowed for that purpose, or the right of the plaintiff as stated in the complaint is admitted by the answer, the plaintiff may have an order referring it to the Master, Clerk, or some suitable person as Referee, to compute the amount due to the plaintiff, and to such of the defendants as are prior incumbrances of the mortgaged premises, and to examine and report whether the mortgaged premises can be sold in parcels, if the whole amount secured by the mortgage has not become due. If the defendant is an infant, and has put in a general answer by his guardian or if any of the defendants are absentees, the order of reference shall direct the person to whom it is referred to take proof of the facts and circumstances stated in the complaint, and to examine the plaintiff or his agent on oath, as to any payments which have been made, and to compute the amount due on the mortgage, preparatory to the application for judgment of foreclosure and sale.

The plaintiff in such case, when he moves for judgment, must show by affidavit or otherwise, whether any of the defendants, who have not appeared are absentees; and if so, he must produce the report as to the proof of the facts and circumstances stated in the complaint, and of the examination of the plaintiff, or his agent, on oath, as to any payments which have been made. And in all foreclosure cases the plaintiff, when he moves for judgment, must show by affidavit or by the certificate of the Clerk for the county in which the mortgaged premises are situated, that a notice of pendency of the action containing the names of the parties thereto, the object of the action, and a description of the property in that county affected thereby, the date of the mortgage, and the time and place of recording the same, has been filed at least twenty days before such application for judgment, and at or after the time of filing the complaint, as required by Section 432 of the Code of Procedure.

As to proof of payments in case of absentees, see *Clemson Agri. College v. Pickens*, 42 S. C. 511, 20 S. E. 401, 60 Am. St. Rep. 655.

52

Judgment for sale of mortgaged premises—what to contain.—Unless otherwise specially ordered by the Court, the judgment shall direct that the mortgaged premises, or so much thereof as may be sufficient to raise the amount due to the plaintiff for principal, interest and cost, and which may be sold separately without material interest to the parties interested, be sold by or under the direction of the Sheriff of the county, or Clerk or Master, and that the plaintiff or any other party may become a purchaser on such a sale; that the officer making the sale execute a deed to the pur-

chaser; that out of the proceeds of the sale he pay to the plaintiff or his attorney the amount of his debt, interest and cost, or so much as the purchase money will pay of the same, and that he take receipt of the plaintiff or his attorney for the amount so paid and file the same with his report of sale; and that the purchaser at such sale be let into possession of the premises on production of the deed.

All surplus moneys arising from the sale of mortgaged premises under any judgment shall be paid or deposited by the Sheriff or other officer making the sale, within five days after the same shall be received in the manner provided by law for the securing of moneys in the custody of this Court.

Rule is in the nature of writ of assistance. *Crotwell v. Boozer*, 1 S. C. 271; *Armstrong v. Humphreys*, 5 S. C. 128; *Trenholm v. Wilson*, 13 S. C. 174, 84 Am. Dec. 572; *Ex parte Jenkins*, 48 S. C. 325, 26 S. E. 686, 93 Am. St. Rep. 164, Ann.

Cas. 13D, 1124.

As to requiring payment of cash at time of sale, see *Tyer v. Charleston Co.*, 32 S. C. 598, 10 S. E. 1067, 24 A. L. R. 1336.

53

Claims for surplus money.—On filing the report of the sale, any party to the action, or any person who had a lien on the mortgaged premises at the time of the sale, upon filing with the clerk where the report of sale is filed, a notice stating that he is entitled to such surplus money or some part thereof, and the nature and extent of his claim, may have an order or reference to ascertain and report the amount due to him or to any other person, which is a lien upon such surplus moneys, and to ascertain the priorities of the several liens thereon, to the end that on the coming and confirmation of the report on such reference such further order may be made for the distribution of such surplus moneys as may be just. Every party who appeared in the cause, or who shall have filed such notice with the Clerk previous to the entry of the order of reference, shall be entitled to service of a notice of the application for the order of reference and to attend on such reference and to the usual notices of subsequent proceeding relative to such surplus. But if such claimant has not appeared or made his claims by an attorney of this Court, the notice may be served by putting the same into the postoffice directed to the claimant at his place of residence, as stated in the notice of his claim.

As to what is not a report of sale, see *Barnwell v. Marion*, 62 S. C. 446, 40 S.

E. 873. See also, *Prudential Inv. Co. v. Connor*, 120 S. C. 42, 112 S. E. 539.

54

Requisites for obtaining order for partition.—No partition of real estate of a deceased person shall be had unless the legal representative or representatives of such deceased person be made parties to the action and it be made to appear to the court that the debts of such deceased person are fully paid, or that the personal estate in the hands of personal representative or representatives is sufficient for the payment of the debts of such deceased person, or unless in the decree due provision is made for the payment of the debts.

Where several tracts or parcels of land lying in this State are owned by the same persons in common, no separate action for partition of a part

thereof only shall be brought without the consent of all the parties interested therein; or if brought without such consent the share of the plaintiff may be charged with the whole cost of the proceeding. And when infants are interested, it shall be stated whether the parties own any other land in common.

This rule is only a rule of practice and is not jurisdictional in its nature. De-Hay v. Smith, 118 S. C. 78, 109 S. E. 800.

The showing of payment of intestate's debts is indispensable, and is not cured by a recital in the order that it is "without prejudice to the rights of creditors." Williams v. Mallory, 33 S. C. 601, 11 S. E.

1068, 119 Am. St. Rep. 591. See also, Burnett v. Burnett, 17 S. C. 545, 16 L. R. A. (N. S.) 1159.

Separate writs should issue from each county in which lands are situate. Daniels v. Moses, 12 S. C. 130, 69 Am. Dec. 374, 87 Am. Dec. 748.

55

Reference as to title where no defense is interposed.—Where the rights and interests of the several parties, as stated in the complaints, are not denied or controverted, if any of the defendants are infants or absentees, or unknown, the plaintiff, on an affidavit of the fact, and notice to such of the parties as have appeared, may apply for an order of reference, to take proof of the plaintiff's title and interest in the premises and of the several matters set forth, and to ascertain and report the rights and interests of the several parties and an abstract of the conveyances by which the same are held.

56

How questions brought before court.—All questions for argument and all motions shall be brought before the Court on a notice or by an order to show cause; and if the opposite party shall not appear to oppose, the party making the motion of obtaining the order shall be entitled to the rule or judgment moved for on proof of due service of the notice, or order, and papers required to be served by him, unless the Court shall otherwise direct.

Order to show cause—when granted.—Such order to show cause shall only be granted when a special reason for a notice, less than four days, appears on the papers presented; and the party shall in his affidavit, state the present conditions of the action, and whether at issue.

And when the motion is for irregularity, the notice or order shall specify the irregularity complained of.

Restraining order—when granted.—No restraining order pending return to a rule to show cause shall be granted unless it shall be made to appear by affidavit to the satisfaction of the Judge that irreparable injury is likely to result to the moving party in the meantime.

This rule is intended to regulate practice in motions to vacate attachment, and where motion is made on the ground of irregularity, the notice should specify the irregularity complained of. Coker & Co. v. Barfield, 73 S. C. 179, 53 S. E. 174, 123 Am. St. Rep. 1053.

Notice is necessary to the validity of order. State v. Parker, 7 S. C. 235, 240.

And on motion for irregularity, spe-

cific notice is required. Guckenheimer v. Libbey, 42 S. C. 162, 19 S. E. 999; Addison v. Sugette, 50 S. C. 192, 27 S. E. 171, Ann. Cas. 17D, 120, Ann. Cas. 18B, 281, 11 A. L. R. 378, 51 S. C. 305, 28 S. E. 948; Lipscombe v. Rice, 47 S. C. 14, 24 S. E. 925, L. R. A. 1918B, 347; Smith v. Walker, 6 S. C. 169, 56 Am. Dec. 151, 123 Am. St. Rep. 1060; Green v. Charlotte, etc., R. Co., 6 S. C. 342, 344.

If made without notice, party aggrieved should move to vacate. *Earle v. Stokes*, 5 S. C. 336, 339, 100 Am. Dec. 514; *Ex parte Williams*, 7 S. C. 71, 77.

The judge cannot decide on motion any question not covered by the motion papers. *Ford v. Calhoun*, 53 S. C. 106, 30 S. E. 830.

Prior proceedings referred to in notice of motion may be referred to in consideration of motion. *In re Wells*, 43 S. C.

477, 478, 21 S. E. 334, 78 Am. St. Rep. 56, 109 Am. St. Rep. 141, L. R. A. 1917F, 1012, Ann Cas. 13E, 844.

As to notice referring to other papers, see *Standard Sewing, etc., Co. v. Henry*, 43 S. C. 17, 20 S. E. 790, 113 Am. St. Rep. 645.

Applied in *Lester v. Fox Film Corp.*, 114 S. C. 414, 103 S. E. 775; *Palmetto Guano Corp. v. Green*, 138 S. C. 106, 136 S. E. 132.

57

Points on motions—discussions on facts.—In all calendar motions, each party shall briefly state upon his points the leading facts which he deems established, with a reference to their folios where the evidence of such facts may be found; and the Court will not hear an extended discussion on a mere question of fact.

58

OPENING AND REPLY

Argument and reply.—On all rules to show cause where a party failing to answer would be in contempt, the party called on shall begin and end his cause; and on all motions of special matters, either springing out of the cause or otherwise, the actor or party submitting the same to the Court shall in like manner begin and close; and so shall the defendant, where he admits the plaintiff's cause by the pleadings, and takes upon himself the burden of proof, have the like privilege.

The party having the opening in an argument shall disclose fully the law upon which he relies if demanded by the opposite party.

The right of defendant to open and reply depends upon the state of the pleadings; the rule of court providing that it shall exist only when the defendant admits the plaintiff's case by the pleadings and takes upon himself the burden of proof. This rule has been construed in numerous cases to mean that the defendant is entitled to open and reply only when under the pleadings alone without evidence on either side, a verdict should be directed for plaintiff. *Strode v. Barnes*, 124 S. C. 403, 411, 117 S. E. 420, 422; *Martin v. Suber*, 39 S. C. 525, 18 S. E. 125, 61 L. R. A. 555; *Thompson v. Security, etc., Ins. Co.*, 63 S. C. 290, 41 S. E. 464, 61 L. R. A. 515, 11 L. R. A. (N. S.) 93; *Early v. Early*, 75 S. C. 15, 54 S. E. 827; *Gaffney Live Stock Co. v. Bonner*, 92 S. C. 122, 75 S. E. 369; *Sternheimer v. Order of United Commercial Travelers*, 107 S. C. 291, 93 S. E. 8; *Yancey v. Southern Wholesale Lbr. Co.*, 129 S. C. 48, 51, 123 S. E. 767, 768.

A defendant is not entitled to open and reply unless he admits in his answer the plaintiff's cause of action, and sets up an affirmative defense. *Thompson v. Security, etc., Ins. Co.*, 63 S. C. 290, 41 S. E. 464, 61 L. R. A. 515, 11 L. R. A. (N. S.) 93; *Addison v. Duncan*, 35 S. C. 165, 14

S. E. 305, 61 L. R. A. 517, 555; *Beckham v. Southern Ry. Co.*, 50 S. C. 25, 27 S. E. 611.

In beneficiary's action on life policy, insurer denying beneficiary's allegation that insurer had failed and refused to pay after demand held not entitled to open and close case, notwithstanding insurer admitted every other material allegation of complaint and relied on affirmative defense. *Crumel v. Metropolitan Life Ins.*, 179 S. C. 338; 184 S. E., 169.

In actions on life insurance policies, in which defendant set up affirmative defense of fraud and rescission because of false answers in application, defendant's request to open and close arguments to jury were properly refused, where defendant waited until plaintiff had rested and until defendant's witnesses had testified and its motion for directed verdict had been refused. *Sirgary v. Equitable Life Assur. Soc. of United States*, 173 S. C. 120, 175 S. E. 209.

Statement of defendant's counsel that he assumed the burden of proving the real issue cannot alter the rule as to opening the reply in evidence and argument which must be settled by the

pleadings. *Kennington v. Catoe*, 68 S. C. 470, 47 S. E. 719, 126 Am. St. Rep. 263, 36 L. R. A. (N. S.) 257, Ann. Cas. 12D, 251; *Barnett v. Gottlieb*, 98 S. C. 180, 181, 82 S. E. 406; *Floyd v. New York Life Ins. Co.*, 110 S. C. 384, 388, 96 S. E. 912.

Court must require solicitor to make opening speech to jury.—Court's refusal to require solicitor to make opening speech to jury before arguments of defendant's attorneys is reversible error. *State v. Atterberry*, 129 S. C. 464, 124 S. E. 648.

Court's erroneous denial of right to open and close may be cured.—Where after denying right to open and close, court offered defendants right to reply to plaintiff's argument, error was cured. *Pinson v. Bowles*, 116 S. C. 47, 106 S. E. 775.

The right to open and close is waived,

where not claimed. *Pinson v. Bowles*, 116 S. C. 47, 106 S. E. 775.

Applied in *Allen v. Cooley*, 53 S. C. 414, 31 S. E. 634, 117 Am. St. Rep. 37, 9 L. R. A. (N. S.) 74, 104, 116, Ann. Cas. 12C, 370.

See generally, *Boyce v. Lake*, 17 S. C. 481, 484, 43 Am. Rep. 618, 88 Am. Dec. 590, 18 Am. St. Rep. 382, 61 L. R. A. 537, 1 A. L. R. 781, 798; *Mitchell v. Fowler*, 21 S. C. 298, 299, 61 L. R. A. 517; *State v. Huckie*, 22 S. C. 298, 299; *Addison v. Duncan*, 35 S. C. 165, 14 S. E. 305, 61 L. R. A. 517, 555; *Beckham v. Southern Ry. Co.*, 50 S. C. 25, 27 S. E. 611; *Columbia v. Tindal*, 43 S. C. 547, 22 S. E. 341, 132 Am. St. Rep. 320, L. R. A. 1915A, 1119, 3 A. L. R. 1453; *Brown v. Kirkpatrick*, 5 S. C. 267, 269, 61 L. R. A. 529; *Davis v. Win-smith*, 5 S. C. 332, 335; *Bennett v. Sandifer*, 15 S. C. 418, Ann. Cas. 12D, 252.

59

MISCELLANEOUS

Costs of former suits.—Where a party has suffered a non-suit, or discontinuance, or has otherwise let fall his action, all proceedings in any new action, for the same cause, shall be suspended until all costs and disbursements as may be taxed by the Clerk of such former actions have been paid.

This rule must be complied with before another action can be prosecuted to judgment. *Duncan v. Duncan*, 93 S. C. 487, 76 S. E. 1099.

No second action permitted by nonresident, who has given security for cost, and refuses to pay same, until costs in first action have been paid. *McEachern v. Wilson et al.*, 165 S. C., 485, 164 S. E., 133.

A special proceeding by the state to estreat a recognizance does not fall within this rule so as to bar the state because of its failure to pay costs of action by state against the surety on the recognizance on the civil side of the court. *State v. Cornell*, 70 S. C. 409, 50 S. E. 22, 5 L.

R. A. (N. S.) 404.

Nor does a discontinuance before verdict.—In case of a discontinuance before verdict, such proceedings cannot be set up as bar in new suit. *Ball v. Trenholm*, 45 F. 588.

Case dismissed on demurrer, because the complaint does not state a cause of action, fails under this rule. *Hadwin v. Southern Ry.*, 67 S. C. 463, 45 S. E. 1019.

See generally, *Blakely v. Frazier*, 11 S. C. 122, 123, 72 Am. Dec. 545, 71 A. L. R. 932; *Daniels v. Moses*, 12 S. C. 130, 69 Am. Dec. 374, 87 Am. Dec. 748; *Tibbetts v. Langley Mfg. Co.*, 12 S. C. 465, 466, 52 L. R. A. (N. S.) 553; *Lewis v. Hinson*, 57 S. C. 193, 35 S. E. 519.

60

Subsequent applications for order after refusal.—If any application for an order be made to any Judge and such order be refused in whole or in part or be granted conditionally or on terms, no subsequent application upon the same state of facts shall be made to any other Judge, and if upon such subsequent application any order be made, it shall be revoked; and in the affidavit for such order the party or his attorney shall state whether any previous application for such order has been made.

In action for damages against corporation which contended that action was barred because process was served more than two years after corporation had been legally dissolved, circuit judge was without power to grant compulsory order of reference to determine validity of service of process prior to expiration of

two year period where such order had been refused by another circuit judge, since order vitally affected merits of case and was not a ministerial order, which could be altered by another judge. *LaCount v. General Asbestos & Rubber Co.*, 175 S. C. 110, 178 S. E. 500.

61

Affidavit in mitigation—how submitted.—In the Court of General Sessions, the defendant, after verdict against him, shall not be permitted to submit any affidavit to the Court which goes to deny matters of facts, but he may submit affidavits as to matters in extenuation or mitigation; *Provided*, They are filed so as to allow the attorney general or solicitor a reasonable time to answer them.

See generally, *Josey v. Reynolds*, 152 S. C. 339, 349, 150 S. E. 67; *Georgian Co. v. Britton*, 141 S. C. 136, 143, 139 S. E. 219.

62

Time for complying with orders.—In all cases where a motion shall be granted on payment of costs or on the performance of any condition, or where the order shall require such payment or performance, the party whose duty it shall be to comply therewith shall have twenty days for that purpose unless otherwise directed in the order, but where costs to be adjusted or to be paid the party shall have fifteen days to comply with the order after the costs shall have been adjusted by the Clerk on notice unless otherwise ordered.

Filing of amended complaint pursuant to order of court was not "performing a condition" within this rule; hence rule did not authorize dismissal of action for failure to serve amended complaint within twenty days. *White v. Harby et al.*, 176 S. C. 36, 179 S. E. 671.

But see *Jordan v. State Highway Department*, 188 S. C. 83, 198 S. E. 174, where it was held that although an order

permitting the filing of an amended complaint contained no time limitation, time was not unlimited in view of this rule of the Circuit Court.

Applied in *Brown v. Easterling*, 59 S. C. 472, 38 S. E. 118; *Meinhard v. Youngblood*, 37 S. C. 223, 15 S. E. 947, 35 L. R. A. 772, Ann. Cas. 15E, 463; *Brown v. Brown*, 27 S. C. 153, 3 S. E. 69, Ann. Cas. 12B, 249.

63

Orders on petitions.—Orders granted on petitions or relating thereto shall refer to such petitions by the name and description of the petitioners and the date of the petition if the same be dated, without reciting or setting forth the tenor or substance thereof unnecessarily. Any order or judgment directing the payment of money, or affecting the title to property, if founded on petition, where no complaint is filed, may, at the request of any party interested, be enrolled and docketed as other judgments.

64

Order to stay judgment—how obtained.—No order to stay a sale under a judgment in partition, or for the foreclosure of a mortgage, shall be granted or made by a Judge out of Court except upon notice of at least four days to the plaintiff or his attorney.

Undertaking to be required.—No order to stay a sale under execution shall be granted without requiring a written undertaking, with sureties, from the moving party to the effect that he will pay to the adverse party such damages not exceeding an amount to be fixed by the order and specified in the undertaking, as he may sustain by reason of the injunction, if the court shall finally decide that he was not entitled thereto. Such damages may be ascertained by a reference or otherwise as the court shall direct.

Circuit Court rule requiring bond of litigant seeking order to stay sale under execution held not applicable to proceeding by judgment debtor for order directing sheriff to set off homestead in land and staying sale of land to satisfy judg-

ment until homestead was set off in such land. *Bonebrake v. Morrow*, 183 S. C. 170; 190 S. E. 506.

See generally. *Rice v. Mahaffey*, 9 S. C. 281, 283.

65

SURETIES

Sureties to justify.—Whenever a Justice or other officer approves the security to be given in any case or reports upon its sufficiency it shall be his duty to require personal sureties to justify. And all bonds and undertakings shall be duly proved by a subscribing witness, or acknowledged in like manner as deeds of real estate before the same shall be received or filed.

In general.—This rule, providing that there must be a subscribing witness to an undertaking in attachment, is inconsistent with the statutes. *Grollman v. Lipsitz*, 43 S. C. 329, 21 S. E. 272.

This rule does not apply to special stat-

utory proceedings. *Sharp v. Palmer*, 13 S. C. 444, 10 S. E. 98.

See generally. *Continental Inv. Co. v. Matthews*, 121 S. C. 213, 114 S. E. 325; *Sullivan v. Williams*, 43 S. C. 489, 21 S. E. 642, 49 L. R. A. 318.

66

Where sureties shall justify.—Wherever sureties are required to justify they shall justify within the county where the defendant shall have been arrested, or where the sureties reside.

67

FILING PAPERS

Where paper to be filed.—Papers shall not be filed in the county specified in the complaint as the place of trial, or in the county to which the place of trial has been changed. And in case the place of trial is changed for the reason that the proper county is not specified, papers on file at the time of the order making such change shall be transferred to the county specified in such order; and all other papers in the cause shall be filed in the county so specified.

68

What papers to be filed and when.—It shall be the duty of the plaintiff's attorney forthwith to file with the Clerk for the proper county all undertakings given upon procuring an order of arrest, an injunction order or an attachment, with the approval of the Judge or officer taking the same endorsed thereon; and in case such undertaking shall not be filed within ten days after the order for arrest, or injunction or attachment has been granted, the defendant shall be at liberty to move the Court to vacate the proceedings for irregularity, with costs, as if no undertaking had been given. It shall also be the duty of the attorney to file, within the same time and under the like penalty, the affidavits upon which an injunction or attachment has been granted, and also the affidavit upon which an order for the service of a summons by publication or an order for a substituted service of a summons has been granted, together with the order for such service.

Rule formerly contravened § 436.—This rule in so far as it required the clerk to indorse on bond his approval before warrant of attachment is issued, contravened § 436 and to that extent was invalid; and an attachment issued without such approval indorsed is valid where there is no question made as to the sufficiency of the bond. *Watson v. Paschall*, 73 S. C. 413, 53 S. E. 646.

Applied in *Blair v. Morgan*, 59 S. C. 52, 37 S. E. 45; *Alexander v. Jamison*, 56 S. C. 409, 34 S. E. 695; *Doty v. Boyd*, 46 S. C. 39, 24 S. E. 59, 1 A. L. R. 1572; *Meinhard v. Youngblood*, 37 S. C. 223, 15 S. E. 947, 35 L. R. A. 772, Ann. Cas. 15E, 463; *Ketchin v. Landecker*, 32 S. C. 155, 10 S. E. 936; *Townsend v. Sparks*, 50 S. C. 380, 27 S. E. 801.

69

Powers of receiver of debtor's estate.—Every receiver of the property and effects of the debtor shall, unless restricted by the special order of the Court, have general power and authority to use for and collect the debts, demands and rents belonging to such debtor, and to compromise and settle such as are unsafe and of a doubtful character. He may also sue in the name of the debtor where it is necessary or proper for him to do so.

Receiver has only such general powers, rights, and duties as may be conferred upon him by the rules of court or by statute law; or more expressly by the special orders and decrees of court. *Hannon et al. v. Mechanics Building & Loan Ass'n et al.*, 177 S. C., 153; 180 S. E., 873.

Possession of property of insolvent debtor in hands of receiver as an officer of

court is possession of court which appointed him. He is medium through which the court acts in the execution of its orders and decrees. *Hannon et al. v. Mechanics Building & Loan Ass'n et al.*, 177 S. C., 153; 180 S. E., 873.

Applied in *Dilling, etc., Co. v. Foster*, 21 S. C. 334, 335, 100 Am. Dec. 507, 72 Am. St. Rep. 36, 94, 33 L. R. A. 551.

70

Action for malicious prosecution—how commenced.—No action for malicious prosecution based upon an indictment tried by the Court of General Sessions shall be commenced unless a copy of the indictment has been first obtained by order of the Judge before whom the case was tried.

As to effect on costs, see *Bratton v. Massey*, 18 S. C. 555, 560.

71

Damages on breach of bond—how recovered.—After a judgment has been recovered on an official bond it shall stand as a security for any former or subsequent breach of it, and any one who may conceive himself aggrieved by the misconduct of the officer shall have a right to come in and suggest the breach of the bond of which he complains and pray execution of his damages; and upon serving a twenty-day rule upon such officer and his sureties, or such of them as judgment has been rendered against in the first action, requiring them to plead to the suggestion, shall in default of such plea, or upon issue joined, have his damages assessed by the verdict of a jury and have execution for the penalty to enforce the payment of the damages assessed.

72

Motion for arrest of judgment—when made.—If a motion in arrest of judgment or for a new trial in a criminal case be intended to be made, the party shall give notice thereof and of his grounds within two days after verdict.

No motion in arrest of judgment shall be heard after a motion for a new trial, but the motion in arrest of judgment and for a new trial may, in the first instance, be made simultaneously.

73

All former rules repealed.—All Rules heretofore adopted for the government of the practice of the Circuit Courts of this State shall be, and they are hereby, repealed. In cases where no provision is made by Statute or by these Rules, the proceedings shall be according to the practice as it has heretofore existed in the Courts of Law and Equity of this State in cases not provided for by Statute or the written Rules of the Court.

See generally, *Brown v. Dunlap*, 3 S. C. 101.

74

Removal of causes to federal courts.—In any case where a petition and bond for the removal of any cause pending in any Court of this State to any Court of the United States shall have been filed, no order accepting the said petition and bond, or directing the cause to be removed, shall be made except after due notice of the application therefor to the other parties to the action, as in the case of interlocutory applications requiring notice.

As to practice on removal to U. S. Courts, see *Sparkman v. Supreme Council*, 57 S. C. 16, 35 S. E. 391, 17 L. R. A. (N. S.) 248, 38 L. R. A. (N. S.) 573, 8 A. L. R. 397; *State v. Port Royal, etc.*, R. Co., 45 S. C. 470, 23 S. E. 383, 7 A. L. R. 16.

75

Time for filing pleadings and papers.—Whenever any pleading or other paper in an action is not filed within the time required by Section 451 of the Code of Procedure, any party to the action may apply after due notice to the Court or a Judge thereof at Chambers, for an order requiring the party or attorney having served such pleadings or in possession of such paper to file the same (or a copy, if the original pleading or paper be lost or destroyed) within a time limited, and on failure so to do, such party or attorney may be proceeded against as for contempt.

76

Objections for want of evidence—remedies.—The point that there is no evidence to support an alleged cause of action shall be first made either by a motion for non-suit or a motion to direct the verdict; and the point that there is no evidence to support a defense shall be first made by motion to direct a verdict.

Motion for directed verdict is prerequisite to motion for new trial because evidence does not support verdict. *Wilson v. Southern Ry.*, 123 S. C. 399, 115 S. E. 764; *E. F. A. Wieters & Sons v. Davis*, 181 S. C. 522; 188 S. E. 241.

Failure to move for directed verdict precluded Supreme Court from reviewing order overruling motion for new trial on ground of insufficiency of evidence to sustain verdict. *E. F. A. Wieters*

& Sons v. Davis, 181 S. C. 522; 188 S. E. 241.

And failure to make such motion precludes Supreme Court reviewing exceptions.—*State v. Bowman*, 137 S. C. 364, 135 S. E. 360; *Builders' Lbr., etc., Co. v. Cheek*, 139 S. C. 299, 137 S. E. 734; *Wilson v. Kearse*, 145 S. C. 155, 143 S. E. 15; *Sumner v. Seaboard, etc., Ry. Co.*, 128 S. C. 131, 121 S. E. 472; *Dempsey v. Western Union Tel. Co.*, 92 S. C. 577, 75 S. E.

977, Ann. Cas. 17C, 548; *Rogers v. Wunderlich*, 135 S. C. 307, 133 S. E. 545; *State v. Carson*, 131 S. C. 42, 126 S. E. 757; *State v. Criddle*, 125 S. C. 264, 118 S. E. 424; *Sloan v. Lee*, 121 S. C. 426, 114 S. E. 408; *Lucius v. DuBose*, 114 S. C. 375, 103 S. E. 759; *Holden v. Cantrell*, 100 S. C. 265, 84 S. E. 826, L. R. A. 1918D, 19, 64, 81; *Tant v. Southern Ry.*, 87 S. C. 184, 69 S. E. 158; *Evans v. Blue Ridge Ry. Co.*, 92 S. C. 77, 75 S. E. 275, Ann. Cas. 13E, 1100; *Fogle v. Southern Ry. Co.*, 83 S. C. 200, 65 S. E. 206; *Ohio Pottery, etc., Co. v. Talbert*, 90 S. C. 564, 73 S. E. 1037.

In a criminal case, the doubt whether an important point was made in a motion to direct a verdict will be solved in favor of defendant.—*State v. Daniel*, 83 S. C. 309, 65 S. E. 236, Ann. Cas. 12C, 800, 17 A. L. R. 912, 923. *Applied, Pendarvis v. General Asbestos, etc., Co.*, 101 S. C. 347, 349, 85 S. E. 773; *Porter v. Poe Mfg. Co.*, 102 S. C. 488, 491, 87 S. E. 418, L. R. A. 1917E, 56, 156; *Scott v. Seymour*, 105 S. C. 42, 43, 89 S. E. 398; *Ragin v. Northwestern R. Co.*, 108 S. C. 171, 177, 93 S. E. 860; *Bellamy v. Grand Lodge*, 110 S. C. 315, 318, 96 S. E. 293; *Beauchamp v. Winnsboro Granite Corp.*, 113 S. C. 522,

101 S. E. 856; *State v. Stevens*, 116 S. C. 210, 211, 107 S. E. 906.

And the court may waive the failure to comply with this rule. *State v. Ray*, 147 S. C. 329, 145 S. E. 192.

This is so especially where defendant's liberty is involved. *State v. Hayes*, 138 S. C. 155, 135 S. E. 799; *State v. O'Shields*, 163 S. C., 408, 161 S. E., 692.

The point that there is no proof of the venue must be first made in a motion to direct a verdict for accused; this rule applying to criminal, as well as civil, cases. *State v. McCain*, 118 S. C. 26, 110 S. E. 79.

This rule has no application to motions for new trials, being intended solely to regulate appeals from orders refusing motions on ground stated therein. *State v. Smith*, 139 S. C. 315, 137 S. E. 739.

And the question of sufficiency of evidence should not be made by motion for new trial.—That the evidence was too remote, speculative and consequential to support the verdict should not be made by motion for new trial. *Guess v. Atlantic, etc., R. Co.*, 88 S. C. 87, 70 S. E. 427; *Wyatt v. Cely*, 86 S. C. 539, 540, 68 S. E. 657, Ann. Cas. 14C, 1129.

77

Conduct of attorney in argument before jury.—No attorney shall, in argument of any cause before a jury, address or refer to by name any member of the jury he is addressing, or otherwise personally appeal to any member thereof.

78

Motion require plaintiff elect cause of action—notice—hearing.—No motion to require the plaintiff to elect as to which cause of action alleged in the complaint he will rely on shall be made, unless previous notice thereof in writing, stating the grounds, is given not less than four days before the hearing. But if such notice be given the motion may be heard upon the call of the case for trial or at any time prior thereto.

This rule shall be effective as of June 1, 1942.

79

Motion non obstante veredicto—motion for new trial.—Whenever a motion for a directed verdict, made by either party at the close of all the evidence, is denied, or for any reason is not granted, the trial court may, after verdict, upon motion made therefor, order judgment to be entered notwithstanding the verdict in favor of the party who was entitled to have a verdict directed in his or its favor. Such motion non obstante veredicto must be made after the reception of the verdict, and before the adjournment of the court in which the case was tried. A motion for a new trial may be joined with the motion non obstante veredicto, or a new trial may be prayed for in the alternative.

INDEX

RULES OF PRACTICE FOR THE CIRCUIT COURTS OF SOUTH CAROLINA

- ACKNOWLEDGMENTS, UNDERTAKINGS,** Rule 65
- ACTIONS, NUMBERING CAUSES OF ACTION OR GROUND OF DEFENSE,** Rule 18.
- AFFIDAVITS**
Affidavit in mitigation—How submitted, Rule 61.
Sheriffs, sheriff to file affidavits on arrests, Rule 4.
- AMENDMENTS**
Case, Rule 48.
Exceptions, Rule 48.
Motions, motions to amend pleadings, Rule 20.
- ANSWER, TIME TO ANSWER NOT EXTENDED WITHOUT CERTIFICATE OF MERITS—SUBSEQUENT EXTENSION,** Rule 19.
- APPEAL,** (See "Case").
- APPEARANCE, NOTICE OF APPEARANCE OR RETAINER,** Rule 17.
- ARGUMENT OF COUNSEL,** Rule 11.
Jury, to, Rule 77.
Time for, Rule 31.
- ARREST OF JUDGMENT, MOTION FOR ARREST OF JUDGMENT—WHEN MADE,** Rule 72.
- ARREST, SHERIFFS: SHERIFF TO FILE AFFIDAVITS ON ARRESTS,** Rule 4.
- ATTORNEY**
(See "Argument of Counsel") argument of counsel, Rule 11.
Attorneys and other officers to be sureties, Rule 9.
Change of attorney, Rule 7.
Demurrer, certificate of counsel, Rule 18.
Dress of attorneys, Rule 8.
Notice of appearance or retainer, Rule 17.
Remarks to jury, Rule 77.
- AUCTIONS, SALES OF LAND AT AUCTION,** Rule 41.
- BAIL AND RECOGNIZANCE,** (see "Undertaking")
Condition of recognizance, Rule 35.
Sureties to justify, Rule 65.
Where sureties shall justify, Rule 66.
- BAR CALENDAR,** Rule 26.
Clerk to be fined who cannot produce the statutes at large, the rules of court and the bar calendar, Rule 1.
- BONDS,** (see "undertakings")
Damages on breach of bond—How recovered, Rule 71.
Guardian and ward, Rule 61.
- BOOKS,** Rule 2.
Dates of the several proceedings, Rule 2.
Discovery, Rule 43.
Indexes, Rule 2.
Index of undertakings, Rule 2.
Orders, Rule 2.
Title of causes, Rule 2.
Titles of civil papers, Rule 2.
What books clerk may keep, Rule 2.
- CALENDAR,** Rule 26.
Bar calendar, Rule 26.
Causes on more than one calendar, Rule 26.
Inspection by bar, Rule 26.
Number of causes, Rule 26.
Place of cause on calendar, Rule 26.
Records, Rule 26.
When cause to be entered, Rule 26.
Who may enter cause on, Rule 26.
- CASE**
Amendments, Rule 48.
How waived and what deemed settled, Rule 50.
Mode of preparing a case on appeal, Rule 49.
Setting case, Rule 47.
Charge of attorney, Rule 7.
- CHANGE OF VENUE, ORDER TO STAY WITH VIEW TO CHANGE OF VENUE—REVOKING STAY—NOTICE OF REVOCATION,** Rule 33
- CHARGE OF COURT, REQUEST TO CHARGE,** Rule 11.
- CLERK OF COURT,** Rule 2.
Calendar, Rule 26.
Clerk to be fined who cannot produce the statutes at large, the rules of court and the bar calendar, Rule 1.
Dates of the several proceedings, Rule 2.
Entry of judgment, Rule 3.
Indexes, Rule 2.
Index of undertaking, Rule 2.
Orders, Rule 2.
Sheriff to file affidavits on arrests, Rule 4.
Title of causes, Rule 2.
Titles of civil papers, Rule 2.
What books clerk may keep, Rule 2.
- COMMISSIONS, HOW EXECUTED AND HOW OPENED,** Rule 34.
- COMMON PLEAS CALENDAR,** Rule 26.
- CONSENT, WRITINGS: CONSENT MUST BE IN WRITING,** Rule 14.
- CONTINUANCE**
Absence of witnesses, Rule 27.
Facts to which witnesses would testify, Rule 27.
For what cause granted, Rule 27.
Motions, Rule 27.
Use of diligence, Rule 27.
When granted, Rule 27.
- COSTS,** Rule 59.
Deposit in lieu of undertaking, Rule 10.
Recording judgment of Supreme Court—Adjusting costs thereon, Rule 40.
Security for costs—Form of undertaking, Rule 10.
- COUNSEL** (see "Attorneys").
- COUNTERCLAIM, ENTITLING AND DESIGNATING,** Rule 18.
- CRIMINAL LAW, PRESENCE OF ACCUSED ON TRIAL,** Rule 35.
- DAMAGES AFFIDAVIT IN MITIGATION—HOW SUBMITTED,** Rule 61.
- DEFAULTS**
Judgments and decrees, Rule 37.
Mortgages, if in an action to foreclose mortgage, defendant fail to answer, Rule 51.
Orders by default taken by counsel, Rule 15.
- DEMURRER**
Attorney: Certificate of counsel, Rule 18.
Papers to be furnished, Rule 32.
- DEPOSIT, DEPOSIT IN LIEU OF UNDERTAKING,** Rule 10.
- DIRECTING VERDICT, OBJECTION FOR WANT OF EVIDENCE—REMEDIES,** Rule 76.
- DISCOVERY**
Application for discovery, Rule 43.
Books, Rule 43.
Motions, Rules 43, 44.
Moving papers, Rule 44.
Orders, Rules 45, 46.
Papers, Rule 43.
- DISMISSAL**
Motion for nonsuit, Rule 18.
Oral motion to dismiss complaint, Rule 18.
Reducing grounds to writing, Rule 18.
- DOCKET** (see "Calendar").
- DRESSES OF ATTORNEYS,** Rule 8.
- ELECTION**
Causes of action, Rule 78.
- ENTRY OF JUDGMENT,** Rule 3.

EQUITY, ISSUES TO JURY, Rule 28.**EVIDENCE**

- Objections for want of evidence—Remedies, Rule 76.
- Witnesses, Rule 31.

EXCEPTIONS

- Amendments, Rule 48.
- How to be marked, Rule 48.
- Objections for want of evidence—Remedies, Rule 76.
- Settling case and exceptions, Rule 47.
- Surveys, Rule 36.
- What to contain, Rule 48.

EXCEPTIONS, BILL OF, Rule 47.**EXECUTIONS, Rule 37.**

- Order to stay sale, Rule 64.

EXECUTORS AND ADMINISTRATORS, DEFENSE OF PLENE ADMINISTRATIVIT, Rule 21.**FEDERAL COURTS**

- Filing papers, Rules 2, 12.
- Master or referee to file report in Clerk's office, Rule 16.
- Pleadings to be legibly written and endorsed, Rule 13.
- Removal of causes to Federal Courts, Rule 74.
- Time for filing pleadings and papers, Rule 75.
- What papers to be filed and when, Rule 68.
- Where papers to be filed, Rule 67.

FINES, CLERK TO BE FINED WHO CANNOT PRODUCE THE STATUTES AT LARGE, THE RULES OF COURT AND THE BAR CALENDAR, Rule 1.**FORECLOSURE OF MORTGAGES, IF IN ACTION TO FORECLOSE MORTGAGE, DEFENDANT FAIL TO ANSWER, Rule 51.****FORMER RULES REPEALED, Rule 73.****GUARDIAN AD LITEM**

- Appointment of guardian ad litem, Rule 6.
- Bond, Rule 42.

GUARDIAN AND WARD, RIGHT TO RECEIVE MONEY AND PROPERTY OF WARD, Rule 42.**INDEXES, Rule 2.**

- Infants (see "Guardian and Ward").
- Appointment of guardian ad litem, Rule 6.

INSTRUCTIONS, REQUEST TO CHARGE, Rule 11.**ISSUES TO JURY Rule 18.****JUDGMENT ROLL, Rule 39.****JUDGMENTS AND DECREES**

- Defaults (see "Defaults"), Rule 37.
- Entry by clerk, Rule 3.
- Judgment after service by publication—Affidavit—Undertaking, Rule 38.
- Judgment roll—How made up, Rule 39.
- Mortgages, judgment for sale of mortgaged premises—What to contain, Rule 52.
- Motion for arrest of judgment—When made, Rule 72.
- Order to stay judgment, Rule 64.
- How obtained, Rule 64.
- Notice, Rule 64.
- Undertaking, Rule 64.
- Recording judgments of Supreme Court—Adjusting costs thereon, Rule 40.

JUDICIAL SALES, Rule 41.

- Claim for surplus money, Rule 53.
- Judgment for rent of mortgaged premises—What to contain, Rule 52.
- Order to stay sale, Rule 64.
- How obtained, Rule 64.
- Notice, Rule 64.
- Undertaking, Rule 64.

LANDLORD AND TENANT, REAL OWNER ADMITTED TO DEFEND ACTION AGAINST TENANT Rule 22.**LAWYER (see "Attorney").****MALICIOUS PROSECUTION, ACTION FOR MALICIOUS PROSECUTION — HOW COMMENCED, Rule 70.****MASTER**

- Master or referee to file report in clerk's office, Rule 16.
- Submitting to nonsuit or dismissal before a master or referee—Form of master's or referee's report, Rule 30.

MITIGATION, AFFIDAVIT IN MITIGATION — HOW SUBMITTED Rule 61.**MORTGAGES**

- Claims for surplus money, Rule 53.
- Defaults, if in action to foreclose mortgage, defendant fail to answer, Rule 51.
- Judgments and decrees, judgment for sale of mortgaged premises—What to contain, Rule 52.
- Order to stay sale, Rule 64.
- How obtained, Rule 64.
- Notice, Rule 64.
- Undertaking, Rule 64.

MOTIONS

- Amendments, motions to amend pleadings, Rule 20.
- Continuance, Rule 27.
- Discovery, Rules 43, 44.
- Dismissal, motion for nonsuit, Rule 18.
- Oral motion to dismiss complaint, Rule 18.
- Reducing grounds to writing, Rule 18.
- Elect cause, Rule 78.
- How questions brought before court, Rule 56.
- Motion for arrest of judgment—When made, Rule 72.
- Motions to strike out, Rule 20.
- New trial, Rule 79.
- Non obstante verdicto, Rule 79.
- Nonsuit, reduction to writing, Rule 18.
- Points on motions—Discussions on facts, Rule 57.

MOVING PAPERS, Rule 44.**NEW TRIAL**

- Motion, Rule 79

NONSUIT

- After jury has gone from bar to consider verdict, Rule 29.
- Motions, reduction to writing, Rule 18.
- Objections for want of evidence—Remedies, Rule 76.
- Submitting to nonsuit, Rules 29, 30.
- Submitting to nonsuit or dismissal before a master or referee—Form of master's or referee's report, Rule 30.

NOTICE

- Election of cause, Rule 78.
- How questions brought before court, Rule 56.
- Judgment after service by publication—Affidavit—Undertaking, Rule 38.
- Notice or appearance or retainer, Rule 17.
- Order to stay sale, Rule 64.
- Surveys, Rule 36.

OBJECTIONS (see "Exceptions").**OFFICERS**

- Attorneys and other officers not to be sureties, Rule 9.
- Damages on breach of bond—How recovered, Rule 71.

OPEN AND CLOSE, Rule 58.**ORDERS**

- Discovery, Rules 45, 46.
- Orders by default taken by counsel, Rule 15.
- Order to stay judgment, Rule 64.
- How obtained, Rule 64.
- Notice, Rule 64.
- Undertaking, Rule 64.
- Petitions, orders on petitions, Rule 63.
- Subsequent application for order after refusal, Rule 60.
- Surveys, (see "Surveys").
- Time for complying with orders, Rule 62.
- Verdict, overrule, Rule 79.

ORDER TO SHOW CAUSE, Rule 56.**PAPERS, Rule 12.**

- Demurrer, Rule 32.
- Discovery, Rule 43.
- Filing papers (see "Filing Papers").

PAPERS (Cont'd)

- Manner of preparing papers, Rule 12.
- Papers to be furnished and by whom, Rule 32.
- Penalty for failure to furnish papers, Rule 32.
- Pleadings to be legibly written and endorsed, Rule 13.
- Who to furnish papers, Rule 32.

PARTIES

- Real owner admitted to defend action against tenant, Rule 22.
- Vouching grantor, Rule 22.

PARTITIONS, REQUISITES FOR OBTAINING AN ORDER FOR PARTITION, Rule 54.**PETITIONS, ORDERS, ORDERS ON PETITIONS, Rule 63.****PLEADINGS**

- Demurrer, Rule 32.
- Filing pleadings (see "Filing Papers").
- Manner of preparing papers, Rule 12.
- Numbering causes of action or ground of defense, Rule 18.
- Papers to be furnished and by whom, Rule 32.
- Penalty for failure to furnish papers, Rule 32.
- Pleadings to be legibly written and endorsed, Rule 13.
- Who to furnish papers, Rule 32.

PLENE ADMINISTRATIVIT, Rule 21.**POINTS, POINTS ON MOTION—DISCUSSIONS ON FACTS, Rule 57.****POSTPONEMENT (see "Continuance").****PRESENCE OF ACCUSED ON TRIAL, Rule 25.****PRINCIPAL AND SURETY**

- Attorneys and other officers not to be sureties, Rule 9.
- Security for costs—Form of undertaking, Rule 10.
- Sureties to justify, Rule 65.
- Where sureties shall justify, Rule 66.

PROCESS, SHERIFF COMPELLED TO RETURN PROCESS, Rule 5.**PRODUCTION OF DOCUMENTS, Rule 43.****PUBLICATION, JUDGMENT AFTER SERVICE BY PUBLICATION — AFFIDAVIT — UNDERTAKING Rule 37.****RECEIVERS, POWERS OF RECEIVERS OF DEBTOR'S ESTATE, Rule 69.****RECOGNIZANCE**

- Attorneys and other officers not to be sureties, Rule 9.
- Conditions, Rule 35.
- Deposit in lieu of undertaking, Rule 10.

RECORDS. (see "Calendar") Rule 27.

- Recording judgments of Supreme Court—Adjusting costs thereon, Rule 40.

REFEREE, SUBMITTING TO NONSUIT OR DISMISSAL BEFORE A MASTER OR REFEREE —FORM OF MASTER'S OR REFEREE'S REPORT, Rule 30.**REFERENCE**

- Master or referee to file report in clerk's office, Rule 16.
- Proceedings in reference other than of the issues, Rule 30.
- Reference as to title where no defense is interposed, Rule 55.

REMOVAL OF CAUSES, REMOVAL OF CAUSES TO FEDERAL COURTS, Rule 74.**REPEAL OF FORMER RULES, Rule 73.****REPORT, MASTER OR REFEREE TO FILE REPORT IN CLERK'S OFFICE, Rule 16.****RESTRAINING ORDER, Rule 56.****RETAINER, NOTICE OF APPEARANCE IN RETAINER, Rule 17.****RULES, CLERK TO BE FINED WHO CANNOT PRODUCE THE STATUTES AT LARGE, THE RULES OF COURT AND THE BAR CALENDAR, Rule 1.****RULES TO SHOW CAUSE, Rules 56, 57, 58.****SECURITY FOR COSTS, Rule 10.****SHERIFFS**

- Affidavits, sheriffs to file affidavits on arrests, Rule 4.
- Arrests, sheriff to file affidavits on arrests, Rule 4.
- Custody of accused after arraignment, Rule 35.
- Sheriff compelled to return process, Rule 5.

SHERIFF'S SALE, Rule 60.

- Order to stay sale, Rule 64.

SPECIAL VERDICTS, Rule 47.**STATEMENT OF CASE (see "Case").****STATUTES, CLERK TO BE FINED WHO CANNOT PRODUCE THE STATUTES AT LARGE, THE RULES OF COURT AND THE BAR CALENDAR, Rule 1.****STAY OF PROCEEDINGS**

- Order for discovery to operate as a stay of proceedings, Rule 46.
- Order to stay judgment, Rule 64.
- How obtained, Rule 64.
- Notice, Rule 64.
- Undertaking, Rule 64.
- Order to stay with view to change of venue—Revoking stay—Notice of revocation, Rule 33.

STIPULATIONS, CONSENT MUST BE IN WRITING, Rule 14.**SUMMONS (see "Process").****SURETIES, ATTORNEYS AND OTHER OFFICERS NOT TO BE SURETIES, Rule 9.****SURPLUS MONEY, Rules 52, 53.****SURVEYS**

- Copy of rule appended to order of survey, Rule 36.
- How made when ordered by court, Rule 36.
- Notice of, Rule 36.
- Objections to order, Rule 36.
- Particulars quoted, Rule 36.

TIME, TIME TO ANSWER NOT EXTENDED WITHOUT CERTIFICATE OF MERITS — SUBSEQUENT EXTENSION, Rule 19.**TRIAL, PRESENCE OF ACCUSED ON TRIAL, Rule 35.****TYPEWRITING, Rule 12.****UNDERTAKING (see "Bail and Recognizance").**

- Acknowledgments, Rule 65.
- Attorneys and other officers not to be sureties, Rule 9.
- Damages on breach of bond—How recovered, Rule 71.
- Deposit in lieu of undertaking, Rule 10.
- Index of, Rule 2.
- Judgments after service by publication—Affidavit—Undertaking, Rule 38.
- Order to stay sale, Rule 64.
- Security for costs—Form of undertaking, Rule 10.
- Sureties to justify, Rule 65.
- Subscribing witnesses, Rule 65.
- Where sureties shall justify, Rule 66.

UNITED STATES COURTS, REMOVAL OF CAUSES TO FEDERAL COURTS, Rule 74.**VENIRE (see "Jury").****VERDICT**

- Calling plaintiff, Rule 29.
- Motion non obstante veredicto, Rule 79.
- Special verdict, Rule 47.

VOUCHING, Rule 22.**WITNESSES**

- Examination of witnesses — How Conducted — Time for summing up or hearing, Rule 31.
- Taking testimony in writing, Rule 31.

WRITING, Rule 12.

- Consent, consent must be in writing, Rule 14.

Rules of the Supreme Court of South Carolina

RULE 1.

For the purpose of an appeal the case containing exceptions, as agreed upon or settled, shall constitute the Return for this Court. The original shall be filed with the Clerk of the Lower Court, and fifteen copies thereof filed with the Clerk of this Court, one of which shall be certified, and three copies served upon the respondent, or his attorney; all within twenty days after the case containing exceptions shall have been agreed upon or settled. In lieu of said certified copy, a copy agreed to, in writing, by all parties, or their respective attorneys of record, as being a true and correct copy of the original, may be filed. The failure of the appellant to comply with these requirements shall amount to a waiver of his appeal, and upon such failure appearing by the certificate of the Clerk of this Court and the affidavit of the respondent's attorney, the Court below may by order dismiss the appeal and proceed as if no notice of intention to appeal had been given. After the certificate above referred to has been issued by the Clerk, the case shall not be docketed, except by leave of the Court, after notice to the respondent. The docketing fee of \$3.00 and the remittitur fee of \$1.50 to be paid when the case is docketed.

This rule is not to be applied retrospectively. *Archer v. Long*, 42 S. C. 545, 20 S. E. 539.

It will be enforced when invoked.—*Johnson v. Johnson*, 44 4S. C. 364, 22 S. E. 419, 92 Am. St. Rep. 697; *Trimmier v. Thomson*, 39 S. C. 554, 17 S. E. 782, 851; *Lysaght v. Berkeley County Land, etc., Co.*, 41 S. C. 554, 19 S. E. 747; *Rice v. Mahaffey*, 9 S. C. 281, 283.

But the court will not let form override substance. *Gibbes v. Greenville, etc., R. Co.*, 14 S. C. 385.

This rule gives appellant the whole of 20 days after agreement to file the agreed "case" with the clerk of the court, and the fact that such "case" and return were not delivered at the clerk's office till after he had left it, on the twentieth day, and so were not marked "filed" by him till next day, did not make them too late. *Newman v. Clyburn*, 40 S. C. 5494, 18 S. E. 889.

When case agreed.—The fact that amendments proposed by one party to a "case" are served on the opposite party after service of the proposed case, and after notice of an application to the court to settle the "case," indicates that the parties have not agreed upon a "case"; and a return is therefore necessary under this rule. *Geddes v. Hutchinson*, 39 S. C. 550, 17 S. E. 560.

When appeal reinstated.—An appeal

dismissed by the clerk for failure to file return in accordance with this rule will not be reinstated; neither unavoidable cause for the default, nor mistake or inadvertence, being shown. *Venable v. Chavous*, 40 S. C. 545, 18 S. E. 943.

Under this rule which provides for notice of motion before the clerk to dismiss an appeal for failure to file a return, an appeal will be reinstated where the dismissal was without such notice. *Hayes v. Sease*, 49 S. C. 388, 27 S. E. 406.

Presumption that order of dismissal was granted on clerk's certificate.—Under this rule it will be presumed that an order of dismissal was granted on the clerk's certificate, where the certificate was indorsed on the same sheet of paper, and bore the same date, as the order. *Crosswell v. Connecticut Indemnity Ass'n*, 49 S. C. 374, 27 S. E. 388.

An order in a cause is not a rule of court. *Scott v. Alexander*, 27 S. C. 15, 2 S. E. 706.

As to when rules may be waived, see *Barnett v. Gottlieb*, 98 S. C. 180, 82 S. E. 406.

As to effect on statutory rights, see *Knobeloch v. Germania Sav. Bank*, 43 S. C. 233, 21 S. E. 13, 40 L. R. A. 62; *Grollman v. Lipsitz*, 43 S. C. 329, 21 S. E. 272; *Columbia Water Power Co. v. Columbia Land, etc., Co.*, 42 S. C. 488, 20 S. E. 378, 540, Ann. Cas. 14C, 739.

Applied in *Whitman v. Seaboard, etc.*, Ry., 107 S. C. 198, 92 S. E. 861; *O'Leary v. Bradley*, 40 S. C. 551, 18 S. E. 933; *Marjenhoff v. Marjenhoff*, 40 S. C. 545, 18 S. E. 942; *Donahue v. Enterprise R. Co.*, 33 S. C. 608, 12 S. E. 560; *McNair v. Craig*, 34 S. C. 9, 12 S. E. 367; *Coleman v. Keels*, 31 S. C. 601, 9 S. E. 735; *Bal-
lew v. Anderson*, 31 S. C. 602, 9 S. E.

743; *Talbird v. Whipper*, 31 S. C. 600, 9 S. E. 742; *Davis v. Pollock*, 35 S. C. 584, 13 S. E. 897; *Nabors v. Latimer*, 30 S. C. 607, 10 S. E. 390; *State v. Atkins, et al.*, 169 S. C. 170, 168 S. E. 540.

See generally, *Lysaght v. Berkely County Land, etc., Co.*, 41 S. C. 554, 19 S. E. 747.

RULE 2.

The Court may, upon motion of either party, or of its own motion, require copies of all or any part of the record or testimony which was before the Court below to be sent up for its inspection and consideration, and it may likewise require a report of the trial, or of any matter relative thereto, to be made by the trial Judge.

See rule 1 and notes thereto.

Applied in *Venable v. Chavous*, 40 S. C. 545, 18 S. E. 943; *Geddes v. Hutchinson*, 39 S. C. 550, 17 S. E. 560; *Donahue*

v. Enterprise R. Co., 33 S. C. 608, 12 S. E. 560.

See generally, *Smith v. Lowery*, 55 S. C. 50, 32 S. E. 1038.

RULE 3.

The attorneys and guardians *ad litem* of the respective parties in the Court below, shall be deemed the attorneys and guardians of the same parties respectively in this Court, until others shall be retained or appointed, and notice thereof shall be served on the adverse party. When any party to a judgment, brought by appeal into this Court, shall die pending such appeal, any party in interest shall be entitled to move the Court, for an order making the proper representative of such deceased person a party to such appeal; and when, by reason of such decease, the proper parties appellant are not before the Court, and due means to have the parties represented on the record of this Court are not taken at the next ensuing term, the respondent shall be entitled on due proof of such facts, to move this Court to dismiss such appeal.

See *Aultman v. Utsey*, 35 S. C. 596, 14 S. E. 289, 351, 20 L. R. A. 148, Ann. Cas. 12A, 1254, 3 A. L. R. 1419, as to practice

of substitution of legal representative, see also, *Poore v. Poore*, 105 S. C. 206, 89 S. E. 569.

RULE 4.

Section 1. The "Return" filed in this Court shall be designated the "Transcript of Record", and shall contain as near as possible, in the following order: the title; index; statement; pleadings (testimony, charges, orders, judgments or other proceedings); exhibits; exceptions; agreement of counsel on preparation of Case containing Exceptions, or order of trial Judge settling the case.

Exceptions must be referred to by number. Reference to pages of testimony is not sufficient. *State v. Small*, 161 S. C. 197, 159 S. E. 555.

Exceptions are deemed abandoned unless argued in appellant's printed brief. *Echols v. Seaboard Air Line Ry. Co.*, 174 S. C., 537; 178 S. E., 139.

Disregard of trial court's ruling. — Plaintiff's counsel, whose persistent dis-

regard of trial court's rulings by offering evidence previously excluded as irrelevant and incompetent was responsible for defendant's numerous and repetitious exceptions, cannot take advantage of such violation of Supreme Court rule on motion to dismiss defendant's appeal from judgment on verdict for plaintiffs. *Cox v. American Oil Co.*, 183 S. C. 519; 191 S. E. 704.

Applied in *Sullivan v. Charleston, etc.*, (N. S.) 809, L. R. A. 1916A, 935.
Ry., 85 S. C. 532, 67 S. E. 905, 29 L. R. A.

Section 2. The Title:

THE STATE OF SOUTH CAROLINA

In The Supreme Court

Appeal from _____ County

_____ Judge

A. _____ Appellant or Respondent

vs.

B. _____ Appellant or Respondent

TRANSCRIPT OF RECORD

C. _____ Attorney for Appellant with P. O. Address.

D. _____ Attorney for Respondent with P. O. Address.

Nothing shall be printed on the title page except the title.

When more than one attorney or firm of attorneys are noted on the Transcript of Record as counsel for either party, service of notices and copies of the Transcript of Record and Briefs on the first named attorney or firm of Attorneys whose names appear will be sufficient service of notice to all.

Every Transcript of Record shall contain an index to the principal matters therein, and every Brief when it contains more than ten pages shall contain a like index.

See generally, *Archer v. Long*, 35 S. C. 585, 14 S. E. 24.

Section 3. The “statement” shall contain in concise, connected and narrative form, but not necessarily in the order herein mentioned, the following information: The date of the commencement of the action; the issues made by the pleadings; the term of the Court below at which it was tried; the mode of trial; the amount involved on appeal; the date and nature of the order of judgment appealed from; and of such other orders, judgments and proceedings in the Court below as may have affected it, or may throw light upon the questions involved in the appeal; any changes made in the parties by death, substitution or otherwise; and a concise narrative of the facts or evidence as agreed upon or settled. Nothing should be omitted that is necessary to a proper understanding and decision of the questions to be decided, and nothing else must be inserted. Pleadings, orders, judgments, charges and exhibits must not be set out in full, unless it be necessary to a proper construction of them, and only when that is desired. Even then all formal allegations, such as the incorporation of a party, appointment of guardian *ad litem* or other representatives, must be omitted, unless necessary to support a ground of appeal. In setting out the pleadings, etc., where that is necessary, the title and verification must be omitted, unless the form of verification is questioned.

An appeal may be taken from a verdict.—See section 775-1 which changes the rule of *Durst et al. v. Southern Railway Co. et al.*, 161 S. C. 498, 159 S. E. 844, and *Hanner v. Hillcrest Land Co., Inc.*, 165 S. C. 297, 163 S. E. 727, in this respect.

The failure of transcript of record to show that judgment rendered in trial court's order was entered did not require dismissal of appeal, where statement of transcript of record gave date and nature of the judgment granted. *Spartan Mills et al. v. Law*, 186 S. C. 61,

194 S. E. 653.

See *Twiggs v. Williams*, 98 S. C. 431,

454, 82 S. E. 76; *Lancaster v. Columbia*,
104 S. C. 228, 88 S. E. 463.

Section 4. Undisputed facts must be stated without the testimony, and only the testimony as to disputed facts shall be stated, omitting all that is irrelevant to the issues to be decided.

When it is necessary to print the testimony, or any part thereof, the same shall be printed in question and answer form as taken by the official stenographer, unless otherwise agreed to by parties or attorneys. Only the necessary and pertinent testimony to which one or more exceptions relate shall be printed, and in case more than the necessary testimony is printed, then the Court shall tax the cost of all testimony unnecessarily printed against the offending party.

Appellant, proposing to print only testimony to which exceptions referred, should not be required to pay for addi-

tional printing insisted upon by solicitor and circuit judge. *State v. Singleton*, 167 S. C. 543, 166 S. E. 725.

Section 5. Photographs, plats and diagrams must, where practicable, be reduced or drawn on a size which permits them to be printed and inserted in the case, without folding more than one time. Where they are necessarily larger, they must not be attached to the case, but must be filed separately.

Section 6. Each exception must contain a concise statement of one proposition of law or fact which this Court is asked to review, and the same assignment of error should not be repeated. Each exception must contain within itself a complete assignment of error, and a mere reference therein to any other exception then or previously taken, or request to charge will not be considered. The exceptions should not be long or argumentative in form.

Exceptions where not misleading are to be liberally construed. *McMahan v. Wallhalla Light, etc., Co.*, 102 S. C. 57, 60, 86 S. E. 194. See also, *State v. Atkins*, 126 S. E. 459, 120 S. E. 487.

If such an examination of an exception as may be necessary to disclose that it is framed in violation of this rule also discloses that the exception clearly embraces a meritorious assignment of prejudicial error, the Supreme Court will ordinarily waive the breach of the rule and consider the exception, but otherwise the exception will not generally be considered. *Jackson v. Carter*, 128 S. C. 79, 121 S. E. 559.

But exception must specify errors.—An exception containing three distinct propositions with no specification of error to any one of them in violation of this rule will not be considered. *Adams v. Wilkes*, 118 S. C. 93, 109 S. E. 804; *State v. Adams*, 100 S. C. 43, 84 S. E. 368, L. R. A. 1918C, 169, Ann. Cas. 17E, 625, 1 A. L. R. 636; *Southern Realty, etc., Co. v. Keenan*, 99 S. C. 200, 217, 83 S. E. 39.

Under this rule exceptions should state

the grounds of the motion for new trial and the requests to charge, or so much as appellant wishes to have the court consider, and then state in the record that the exceptions correctly stated the ground of motion and requests to charge. *Holden v. Cantrell*, 100 S. C. 265, 84 S. E. 826, L. R. A. 1918D, 19, 67, 81.

An exception which charged only that trial judge abused his discretion in granting new trial, without stating wherein error of law was committed, was too general to be considered. *State v. Glenn*, 195 S. C. 410, 11 S. E. (2d) 859.

Must contain complete assignment of error.—Exception which does not contain within itself a complete assignment of error, as required by this rule, will not be considered on appeal. *Nolf v. Patton*, 114 S. C. 323, 103 S. E. 528.

And concise statement of one proposition of law or fact.—An exception which does not contain a concise statement of one proposition of law or fact will not be considered. *State v. Cooper*, 118 S. C. 300, 110 S. E. 152.

An exception containing two distinct

propositions of law violates this rule. *Honour v. Southern Public Utilities Co.*, 110 S. C. 163, 96 S. E. 250.

An exception assigning error in the admission of two exhibits is obnoxious to this rule. *Union Bleaching, etc., Co. v. Barker Fuel Co.*, 124 S. C. 458, 117 S. E. 735.

As to useless repetition of same assignment of error, see *Lancaster v. Columbia*, 104 S. C. 230, 88 S. E. 463; *Newson v. Poe Mfg. Co.*, 102 S. C. 77, 81, 86 S. E. 195.

As to how grounds of motions and requests should be stated in exceptions and case, see *Stanford v. Cudd*, 93 S. C. 367, 76 S. E. 986; *Holden v. Cantrell*, 100 S. C. 265, 276, 84 S. E. 826, L. R. A. 1918D, 19, 67, 81.

Exceptions referring to other exceptions.—Exceptions on matter of error in denying new trial, which referred court to other exceptions for grounds upon which motion was made, violated this rule and would not be considered. *Green v. McDaniel, et al.*, 165 S. C. 533, 168 S.

E. 197.

Applied in *Hickson v. Early*, 62 S. C. 42, 39 S. E. 782; *McIntosh v. Zeigler*, 130 S. C. 287, 125 S. E. 636; *Kirkpatrick v. Hardeman*, 123 S. C. 21, 115 S. E. 905; *American Fruit Growers v. King*, 122 S. C. 69, 114 S. E. 861; *State v. Cooper*, 120 S. C. 280, 113 S. E. 132; *State v. Ashley*, 121 S. C. 15, 113 S. E. 305, 22 A. L. R. 262; *Bonnette v. Clow*, 118 S. C. 376, 110 S. E. 794; *Southern Pine Lbr. Co. v. Martin*, 118 S. C. 319, 110 S. E. 804; *Neville v. Kelly*, 94 S. C. 112, 77 S. E. 743; *Spears v. DuRant*, 76 S. C. 19, 56 S. E. 652; *Barrett v. Moise*, 61 S. C. 569, 39 S. E. 755, Ann. Cas. 13B, 444; *Tucker v. Charleston, etc., Ry. Co.*, 51 S. C. 306, 28 S. E. 943; *Dantzler v. National Surety Co.*, 159 S. C. 463, 157 S. E. 802; *Blackwell v. Faucett*, 117 S. C. 60, 108 S. E. 295; *Hydrick v. Fairey*, 132 S. C. 335, 128 S. E. 358; *State v. Underwood*, 127 S. C. 1, 120 S. E. 719.

See generally, *State v. Terrell*, 131 S. C. 438, 128 S. E. 409.

Section 7. When the appellant shall serve a proposed case, the pages and the lines of each page of which shall be numbered consecutively, with exceptions separately numbered, the respondent shall, within ten days thereafter, serve upon appellant any proposed amendment thereto, including any additional grounds upon which this Court will be asked to sustain the rulings or judgment below; and on failure to do so, he shall be deemed to have agreed to the proposed case. If all amendments proposed are not agreed to, the appellant shall, within four days after service upon him, serve upon respondent notice of his allowance or disallowance of each proposed amendment, and at the same time, serve notice of the time and place at which the case will be submitted to the trial Judge for settlement, which shall be not less than four nor more than twenty days after the service of such notice. Any party aggrieved by the order of settlement, may appeal therefrom and insert in an appendix to the case as settled, such matters as may be necessary for the proper consideration of his appeal. Should the trial Judge be disabled by death or otherwise from settling the case, the same may be settled before the resident or presiding Judge of the Circuit. In the final preparation of the case for use in this Court, where amendments have been allowed, they must be incorporated at their proper place.

Supreme Court will assume that proposed case is the agreed or settled case.—Except on appeal from an order settling a case, the Supreme Court will assume that the proposed case is the "agreed" or "settled" case, and that all corrections and amendments have been properly inserted therein as required by this rule, unless special permission is obtained to otherwise present the case. *Andrews v. Sumter Commercial, etc., Co.*, 87 S. C. 301, 69 S. E. 604, 38 L. R. A. (N. S.) 445.

Where the violation of this rule has not been willful, the appeal will not be dismissed, but respondent may elect to require appellant to reprint the case, or eliminate from the court's consideration such parts of the case as were inserted in violation of the rule. *Crosswell v. Connecticut Indemnity Ass'n*, 51 S. C. 221, 28 S. E. 402.

Right, given by rule of Supreme Court, to appeal from order settling transcript of record, cannot be restricted or enlarged by circuit judge. *Copeland et al.*

v. Craig et al., 193 S. C. 484, 8 S. E. (2d) 858.

The purpose of rule regarding right to appeal from order settling transcript of record is to provide a method of review in case prejudicial error should be committed in the order settling the transcript of record. Ibid.

Party appealing has right to print necessary matters.—A party appealing from order settling transcript of record has the right to print, at his own expense in the first instance, and subject to final determination of Supreme Court in regard thereto, such matters as are necessary for proper consideration of his appeal and should an appellant abuse the privilege or print matters in the appendix that are not necessary or proper, the Supreme Court may tax costs against him. Copeland et al. v. Craig et al., 193 S. C. 484, 8 S. E. (2d) 858.

Where circuit court's order, that if appeal was taken from order settling case on appeal, the proposed transcript, proposed amendments and order should be printed in connection with any such appeal, had a confusing effect and resulted in repetition of portions already printed, cost of printing appendix would not be imposed upon appellants except so much thereof as touched upon a proposed hearing which had no possible bearing upon any issue involved in appeal from order settling transcript of record. Copeland et al. v. Craig et al., 193 S. C. 484,

8 S. E. (2d) 858.

Allowance of respondent's amendments was not error because appellant was compelled to print the entire record. McLaurin v. Eddins, 114 S. C. 193, 103 S. E. 531.

Supreme Court, in reviewing action of trial court in directing verdict for defendant, was confined to consideration of sole ground upon which verdict was directed, where other grounds relied upon by defendant were not passed upon by trial court, defendant had given no notice that it intended to rely on such grounds to sustain trial judge, and complete transcript of testimony had not been furnished Supreme Court. Kizer v. Woodmen of the World, 177 S. C. 70, 180 S. E. 804.

Where it was not shown that appellee served upon appellant notice of additional grounds upon which the reviewing court would be asked to sustain the rulings of the court below, and appellee's counsel, in their brief and orally before the reviewing court, argued an exception not decided or passed upon by the court below, to which objection was made by appellant's counsel, reviewing court was not required to consider additional grounds presented by the appellee. Green v. City of Bennettsville, 197 S. C. 313, 15 S. E. (2d) 334.

Applied in Federal, etc., Bank v. Epstein, 151 S. C. 67, 148 S. E. 713; Nott v. Thomson, 35 S. C. 589, 14 S. E. 23.

Section 8. While respondent may be restricted in argument to such additional sustaining grounds as noticed by him, this Court reserves the right to sustain any ruling, order or judgment upon any grounds appearing in the record.

Applied in Marlow v. Conway Iron Works, 130 S. C. 256, 125 S. E. 569.

RULE 5.

All Transcripts of Record shall be printed in book form, on white, machine finished, book paper of sixty pound weight and in the same type and style and on pages of the same size as the reports of this Court. Twenty-five copies shall be printed for the use of the Court and of counsel. Fifteen copies shall be filed with the Clerk for the use of the Court and three copies forwarded to the attorney for the respondent. The folios (or one hundred words) numbering from the commencement to the end of the record, shall be printed on the outer margin of the page. Emphasis may be added only by italics or blackfaced type; not by capitals. Strict conformity with the foregoing provisions will be required and the Clerk is directed to return to the appellant any Transcript of Record which fails to conform with the rules of this Court.

The failure to have folios of transcript of record numbered as required by rule of Supreme Court was not prejudicial error, where it did not appear that omis-

sion had been called to attention of clerk who had duty to return record to appellant, and no motion had been made during term in regard to omission. Mc-

Leod v. Southern Ry. Co. et al., 188 S. C. 14, 198 S. E. 425.

RULE 6.

Section 1. Typewritten Records in Extraordinary Cases. If a party shall file with the Clerk an affidavit that he is unable to pay for printing the Transcript of Record or Briefs, he shall be permitted to use typewritten copies.

Typewriting will be permitted only when double spaced upon linen paper eight by thirteen inches in size; carbon copies of the same grade may be used, provided they are clearly legible.

Papers in typewriting must have a blank margin of an inch and a half on the left. If more than two pages be used they shall be fastened at the top so as to read continuously.

In every case where printing is dispensed with, the attorney for the party must file an affidavit that he believes his client to be unable to pay for printing.

It shall be the duty of the Clerk of the Court to see that this rule is complied with before filing any of said papers.

Section 2. Such party may in lieu of said typewritten copies of the Transcript of Record and Briefs herein authorized, serve and file mimeographed or machine duplicated copies thereof; provided, however, that such mimeographed or machine duplicated copies must be made upon white paper of not less than 20 pounds weight and conform in size and be bound together just as the Rule provides for printed Transcripts of Record and Briefs.

In such cases in the taxation of costs in the Supreme Court, a party using such mimeographed or machine duplicated copies shall be allowed to tax only the actual cost of the mimeographing or machine duplicating of the required number of copies of the Transcript of Record and Briefs.

Applied.—Green v. McDaniel, 168 S. C. 533; 168 S. E. 197.

RULE 7.

The fifteen copies of the Record required by Rule 5 shall be disposed of as follows: One copy to each of the Justices, one for the Reporter, one for the West Publishing Company, one for the Library of the Supreme Court, one for the Trial Judge, and the remainder for the use of the Court.

RULE 8.

Section 1. All Briefs must be printed on white, unglazed book paper in the same style, size and type as required for Transcripts of Record.

An admirable specimen brief on appeal is published in appendix to 10 Rich. L. 554-576.

See generally, Brown v. Barrineau, 102 S. C. 441, 86 S. E. 769; McElwee v. Kennedy, 59 S. C. 335, 37 S. E. 920; New England Mtg., etc., Co. v. McMillan, 41 S. C. 547, 19 S. E. 692; Union Mtg., etc., Co. v. Brown, 39 S. C. 552, 17 S. E. 724; Trimmier v. Thomson, 39 S. C. 554, 17 S. E. 782; Booker v. Smith, 33 S. C. 611, 12 S. E. 628; Veronee v. Bell, 33 S. C.

612, 12 S. E. 664; Wade v. Couch, 32 S. C. 583, 10 S. E. 1103; Vaughn v. Morgan, 31 S. C. 602, 9 S. E. 743; Bell v. Bell, 103 S. C. 95, 87 S. E. 540; Cave v. Cave, 101 S. C. 40, 42, 85 S. E. 244; Lorenzo v. Atlantic, etc., R. Co., 101 S. C. 409, 411, 85 S. E. 964, Ann. Cas. 16A, 511; Jordan v. Southern Ry. Co., 100 S. C. 284, 291, 84 S. E. 871, L. R. A. 1918D, 1032; Phillips-Patterson Co. v. Northwestern R. Co., 108 S. C. 166, 93 S. E. 868.

Section 2. The Brief of appellant shall be preceded by a statement of the questions involved and a brief statement of the facts necessary for understanding the exceptions.

This statement of the questions involved must be set out in the briefest and most general terms. It should never exceed one page, unless the questions involved absolutely require it and must always be printed on the first page of the Brief, without any other matter appearing thereon. Ordinarily no point will be considered which is not set forth in the statement of the questions involved or suggested thereby.

Exceptions not argued in appellant's printed brief are abandoned. Seaboard Air Line Ry. Co., 174 S. C. 537, Echols v. 178 S. E. 139.

Section 3. The statement of the facts involved shall state the form of action, followed by a brief reference to the pleadings upon which the case was tried or heard in the Court below, and must contain a closely, condensed, chronological statement, in narrative form, of all the facts which are necessary to be known in order to determine the points in controversy; but must not contain any argument or quotations from the testimony.

Section 4. The Brief of argument shall be divided into as many parts as there are questions to be argued; shall have at the head of each part in distinctive type, or in type distinctively displayed, the particular point treated therein, followed by such discussion and citation of authorities as is deemed pertinent; and under each head shall refer to the specific exception alleged to raise the question being considered therein.

Exceptions not argued in appellant's printed brief are abandoned. Seaboard Air Line Ry. Co., 174 S. C. 537, Echols v. 178 S. E. 139.

Section 5. Respondent's Brief need contain only his argument, but he may add a counter-statement of the facts and a counter-statement of the questions involved; unless he does so, or in his Brief otherwise challenges those of appellant, it will be assumed he is satisfied with them.

Section 6. The appellant, if he desires, may file a reply Brief.

Section 7. (Omitted as directed by Supreme Court of South Carolina, April 13, 1929.)

Section 8. This Court will not consider any fact which does not appear in the Transcript of Record, and, therefore, counsel must not embody in their Briefs, or in the statement of facts preceding the points and authorities required by this rule, any fact which does not appear in the Transcript of Record. Nor will any fact stated in an exception be considered, unless it appear from the Transcript of Record that it is true. If counsel desire to add any facts to those stated in the Transcript of Record they must either obtain the written consent of opposing counsel to the insertion of such additional facts, or they must, upon due notice, move this Court before the argument commences, for leave to insert such additional facts. All such

additional facts inserted by consent or by the permission of the Court shall be printed.

Section 9. No Brief or paper will be received either through the Clerk or otherwise, after a case has been argued or submitted, except upon leave granted at the time of the argument, or upon leave of one of the Justices.

Section 10. In all cases to be reached for hearing at any monthly term of the Court, the appellant shall, at least fifteen days before the commencement of such monthly term, serve three copies of his brief on counsel for the respondent and deliver to the Clerk fifteen copies thereof; five days before the commencement of any monthly term of the Court the respondent shall serve three copies of his brief on counsel for the appellant and deliver to the Clerk fifteen copies thereof; one day before the case is called for hearing the appellant may file with the Clerk fifteen copies of a reply brief and serve three copies thereof on counsel for respondent.

Upon the failure of the appellant to file and serve his brief within the time prescribed, the Clerk of this Court shall sign an order dismissing the appeal.

Section 11. Counsel desiring to attack or argue against a decision of this Court, with a view to asking the Court to review, modify, or overrule the same, must petition the Court in writing, at least four days before the call of the case in which such argument is sought to be made, asking permission to do so, and set forth the reasons why the decisions in question should be reviewed, modified, or overruled.

Rule disregarded by court in view of importance of questions presented. *Salley v. McCoy*, 182 S. C. 249, 189 S. E. 196.

Section 12. The South Carolina Equity Reports, beginning with 1 De Saussure Equity and ending with 14 Richardson Equity, shall be numbered in the following sequence, and they may be so cited in this and the other Courts of the State:

1 De Saussure	1 S. C. Eq.	2 Richardson	19 S. C. Eq.
2 De Saussure	2 S. C. Eq.	1 Strobhart	20 S. C. Eq.
3 De Saussure	3 S. C. Eq.	2 Strobhart	21 S. C. Eq.
4 De Saussure	4 S. C. Eq.	3 Strobhart	22 S. C. Eq.
Harper	5 S. C. Eq.	4 Strobhart	23 S. C. Eq.
1 McCord	6 S. C. Eq.	3 Richardson	24 S. C. Eq.
2 McCord	7 S. C. Eq.	4 Richardson	25 S. C. Eq.
Bailey	8 S. C. Eq.	5 Richardson	26 S. C. Eq.
Richardson's Cases	9 S. C. Eq.	6 Richardson	27 S. C. Eq.
1 Hill	10 S. C. Eq.	7 Richardson	28 S. C. Eq.
2 Hill	11 S. C. Eq.	8 Richardson	29 S. C. Eq.
Riley	12 S. C. Eq.	9 Richardson	30 S. C. Eq.
Budley	13 S. C. Eq.	10 Richardson	31 S. C. Eq.
Rice	14 S. C. Eq.	11 Richardson	32 S. C. Eq.
Cheves	15 S. C. Eq.	12 Richardson	33 S. C. Eq.
McMullen	16 S. C. Eq.	13 Richardson	34 S. C. Eq.
Speers	17 S. C. Eq.	14 Richardson	35 S. C. Eq.
1 Richardson	18 S. C. Eq.		

The South Carolina Law Reports, beginning with 1 Bay and ending with 15 Richardson, shall be numbered in the following sequence, and they may be so cited in this and the other courts of the State.

1 Bay	1 S. C. L.	Riley	22 S. C. L.
2 Bay	2 S. C. L.	Dudley	23 S. C. L.
1 Brevard	3 S. C. L.	Rice	24 S. C. L.
2 Brevard	4 S. C. L.	Cheves	25 S. C. L.
1 McMullan	26 S. C. L.	1 Richardson	30 S. C. L.
2 McMullan	27 S. C. L.	2 Richardson	31 S. C. L.
1 Spears	28 S. C. L.	1 Strobhart	32 S. C. L.
2 Spears	29 S. C. L.	2 Strobhart	33 S. C. L.
3 Brevard	5 S. C. L.	3 Strobhart	34 S. C. L.
1 Treadway	6 S. C. L.	4 Strobhart	35 S. C. L.
2 Treadway	7 S. C. L.	5 Strobhart	36 S. C. L.
1 Hill (Constitutional)	8 S. C. L.	3 Richardson	37 S. C. L.
2 Hill (Constitutional)	9 S. C. L.	4 Richardson	38 S. C. L.
1 Nott and McCord	10 S. C. L.	5 Richardson	39 S. C. L.
2 Nott and McCord	11 S. C. L.	6 Richardson	40 S. C. L.
1 McCord	12 S. C. L.	7 Richardson	41 S. C. L.
2 McCord	13 S. C. L.	8 Richardson	42 S. C. L.
3 McCord	14 S. C. L.	9 Richardson	43 S. C. L.
4 McCord	15 S. C. L.	10 Richardson	44 S. C. L.
Harper	16 S. C. L.	11 Richardson	45 S. C. L.
1 Bailey	17 S. C. L.	12 Richardson	46 S. C. L.
2 Bailey	18 S. C. L.	13 Richardson	47 S. C. L.
1 Hill	19 S. C. L.	14 Richardson	48 S. C. L.
2 Hill	20 S. C. L.	15 Richardson	49 S. C. L.
3 Hill	21 S. C. L.		

Section 13. Whenever a South Carolina case is cited in a brief of counsel, the volumes and pages of both the South Carolina Reports and the South Eastern Reporter shall be given if the case is reported in both publications.

RULE 9.

Section 1. A cause shall not be docketed by agreement of counsel but only upon filing of the Return in conformity with Rule 1. Causes will be docketed in the order in which the returns are filed.

Section 2. A cause reached for hearing shall not be continued beyond the next monthly term of the Court. If the cause so continued is not ready for hearing when reached at the succeeding term, it will automatically be stricken from the docket with leave to restore as of the date of the restoration, unless otherwise ordered by the Court.

RULE 10.

When a case is called for argument, if the appellant has filed a brief and is not ready to proceed with the argument, the Court may, in its discretion, consider the case as submitted on behalf of appellant and proceed with the argument on behalf of respondent. If respondent is not ready to proceed and has filed no brief, appellant shall proceed *ex parte*. If respondent has filed a brief, but is not ready to proceed with the argument, the case shall be treated as submitted by him and appellant shall proceed *ex parte*.

See generally, Booker v. Smith, 33 S. C. 611, 12 S. E. 628; Garrison v. Cagle, 33 S. C. 610, 12 S. E. 628; Veronee v. Bell, 33 S. C. 612, 12 S. E. 664; Barrett v. Faust, 33 S. C. 612, 12 S. E. 664; Har-

man v. Town Council, 32 S. C. 583, 10 S. E. 552; Wade v. Couch, 32 S. C. 583, 10 S. E. 1103; Vaughn v. Morgan, 31 S. C. 602, 9 S. E. 743.

RULE 11.

Causes shall have preference, and may be moved out of their order as provided by law.

RULE 12.

In the hearing of causes in this Court, counsel will be limited to 30 min-

utes on each side, with 10 minutes to appellant in reply, in which will be counted the time occupied in reading the case, and the time thus allowed may be apportioned amongst the counsel on the same side at their discretion. Such time may be extended upon special application, in writing, to be filed at least ten days before the case is placed by the Clerk on the roster for hearing, stating reasons satisfactory to the Court for such extension, or it may be further limited by the Court, when it appears from the record that a shorter time will be sufficient for oral argument.

Counsel will not be permitted to read from books, except by special leave of the Court, but written or printed extracts therefrom may be submitted.

No member of the bar will be heard unless wearing a black coat.

RULE 13.

No member of the bar or officer of the Court shall sign, as surety, any bond or other obligation which may be required by an order of this Court, under pain of being in contempt.

RULE 14.

No affidavit will be considered by the Court, or the Clerk thereof, which has been sworn to before any attorney or party interested in the cause or proceeding in which such affidavit may be offered.

RULE 15.

No private agreement or consent between the parties or their attorneys, in respect to the proceedings in a cause, shall be binding, unless the same shall have been reduced in writing to the form of an order by consent and entered.

Reinstatement of appeals. — Wade v. son, 160 S. C. 157; 159 S. E. 617. Brewton Gore, 154 S. C. 262; 151 S. E. 470, 471. v. Inter-Carolinas Motor Bus Co.; 167 S. Farm v. State Highway Dept., 160 S. C. C. 152; 166 S. E. 85. 156; 159 S. E. 617. Wannamaker v. John-

RULE 16.

All motions made to the Court or a Justice at Chambers must be reduced to writing, copies of which must be served on the opposite party with notice of the motion four days before the day on which such motion is to be heard; all such motions to be docketed in the office of the Clerk of this Court at least one day before the time set for the hearing thereof; all orders made thereon shall be filed with the Clerk of this Court immediately upon said orders being taken. Provided, That upon a proper showing for that purpose the Court or the Justice before whom the motion is made, may prescribe a shorter time for the service of notice on the opposite party.

Motions will be heard on the opening of the Court each day; arguments thereon, when permitted by the Court, shall be very brief.

RULE 17.

Section 1. The remittitur shall contain a copy of the judgment of the Court, shall be sealed with the seal and signed by the Clerk of the Court, and shall not be sent to the Court below until ten days have elapsed (the

day of filing being excluded) since the filing of the opinion, order, judgment or decree of the Court, unless otherwise ordered by the Court.

Section 2. Petitions for rehearing must be filed before the judgment of this Court has been remitted to the Court below. The petition for that purpose, together with five copies thereof, must be filed with the Clerk, stating particularly the points supposed to have been overlooked or misapprehended by the Court, without argument, with a certificate from some counsel not concerned in the case that there is merit in such grounds, accompanied with a consent in writing signed by the parties and not by counsel, that the stay of remittitur shall be granted upon condition that the status of the property involved in the case, where specific property is involved, shall not be disturbed until after the final determination of the case. Upon the filing of the required petition and copies, the Clerk will stay the remittitur, forward the original petition to the Justice who rendered the opinion, and a copy to each of the other Justices and file a copy with the record. The Justice to whom the original is forwarded will take the necessary steps in having the petition passed upon.

Petition for rehearing must show points supposedly overlooked or misapprehended and purpose is not to present points lawyers of losing parties overlooked or to have case tried in Supreme Court for second time. *Arnold v. Carolina Power & Light Co.*, 168 S. C. 163, 167 S. E. 234.

For form of certificate by disinterested attorney, see *Green et al. v. E. B. Gresham Co.*, 168 S. C. 395, 167 S. E. 659.

The counsel who signs a certificate of that nature should not simply read the petition for rehearing. He should go

further and study the transcript of record, the briefs of counsel, the decisions of the court cited therein, the opinion of the court, and the decisions referred to in the opinion. *Ibid.*

Although Supreme Court could disregard petition for rehearing because it failed to conform with court rule and was in form and content an argument, infirmities would be overlooked, in view of importance of issues decided and careful consideration given to subject by Supreme Court. *Craig v. Pickens County*, 189 S. C. 164, 200 S. E. 825.

RULE 18.

The time prescribed by these Rules for doing any act may be enlarged by the Court, or by either of the Justices thereof; and either of the Justices may make orders in any cause pending in this Court to stay proceedings in the Court below, which, when served with papers on which it was made, shall stay the proceedings according to the terms of the order. Any order may be revoked or modified by the Justice who made it, or in case of his absence or inability to act, by either of the other Justices.

The jurisdiction of this Court shall attach only for the purpose of granting a stay of proceedings in the court below, when a certified copy of the notice of appeal, with proof of service thereof, has been filed with the clerk; but for all other purposes the Circuit Court shall retain jurisdiction until the appeal has been perfected and docketed, as required by Rule 1.

Jurisdiction of circuit court ceases after an appeal has been perfected and docketed as required by court rule, even if an undecided motion to enforce a judgment upon which argument has been made is pending in circuit court. *McDonald et al. v. Palmetto Theaters et al.*, 196 S. C. 38, 11 S. E. (2d) 444.

Where a question arises which ought

first to be submitted to the circuit judge, after jurisdiction of the Supreme Court on appeal attaches, leave to do so may be granted by the Supreme Court on motion or petition. *McDonald et al. v. Palmetto Theaters*, 196 S. C. 38, 11 S. E. (2d) 444.

Applied in *State v. Thompson*, 122 S. C. 407, 115 S. E. 326; *Rylee v. Maret*, 121 S. C. 366, 113 S. E. 483.

RULE 19.

To make the service of an *ex parte* order, or rule to show cause, effectual, a copy of the affidavits, or other proofs on which it was granted, must be served with a copy of such order or rule; and in order to bring any person into contempt for the disobedience of an order the original order must be exhibited to such person, and a copy thereof left with him, or a certified copy thereof must be served upon him. When any person avoids the service of an order, on application to this court, or to one of the justices thereof, making proof of such fact, special directions will be given as to the service thereof.

RULE 20.

Section 1. Neither the court nor any justice thereof will entertain motions for issuance of writs in the original jurisdiction when such motions can be made before the circuit courts, or the judges thereof, in the first instance, without material prejudice to the rights of the parties. If the public interests are involved, or if special grounds of emergency, or other good reasons exist why the original jurisdiction of this court should be exercised, the facts showing such reasons must be stated in the moving papers which must be duly verified.

Section 2. The statutes and rules relative to printing and filing with the clerk the requisite number of copies of the record and arguments of counsel in cases in the appellate jurisdiction must be observed, as far as practicable, in cases in the original jurisdiction in the preparation thereof for hearing on the merits, unless otherwise ordered by the court or the justice hearing the same.

Section 3. Applications for writs or orders in the original jurisdiction will be heard on the opening of the court each day, or may be heard by any Justice of the court at anytime, and if the court takes jurisdiction, such cases will be assigned for hearing on the merits not sooner than thirty days thereafter unless it is made to appear that special grounds of emergency exist.

Section 4. This shall not apply to applications for the writ of habeas corpus in criminal cases.

RULE 21.

At least twice a year, the clerk shall have bound in suitable duplicate volumes the Transcripts of Record and Briefs in all cases heard and submitted, and shall keep one set in the library for the use of the bar and the other set shall be kept for the use of the court. Typewritten Transcripts of Record and Briefs shall not be bound.

RULE 22.

Thirty days prior to the commencement of any monthly term of the court, the clerk shall mail to the counsel of record of the respective parties to all causes which will probably be reached for hearing at said term, a list of said cases; and ten days prior to the commencement of any monthly term of the court the clerk shall mail to the counsel of record of all causes set for hearing at said term, a Roster showing the date fixed for the hearing of

the cause or causes in which counsel may be interested. No case will be put down for hearing unless the appellant's Brief has been filed.

RULE 23.

After the Return in a criminal action shall have been docketed in this court, the court in open session may dismiss the appeal where it is made to appear that the grounds thereof are manifestly without merit.

See *Starratt v. Cash*, 103 S. C. 527, 88 S. E. 259.

RULE 24.

The following practice shall be observed in the matter of motions for new trials upon after discovered evidence:

First: In a case in which the Circuit Court has not been deprived of jurisdiction by appeal or otherwise the motion may be made in the Circuit Court.

Second: In a case which is pending upon appeal in the Supreme Court, the motion may not be made in the Circuit Court until after the Supreme Court by order upon motion thereof, shall have suspended the appeal and granted leave to the movant to make the motion in the Circuit Court.

Third: In a case in which the appeal has been disposed of by the Supreme Court and the remittitur transmitted to the Circuit Court, the motion may not be made in the Circuit Court until after the Supreme Court, by order upon motion, shall have granted leave to the movant to make the motion in the Circuit Court; and when the defendant shall be under sentence of death the motion in the Supreme Court must be made not later than the 10th day before the day assigned for the execution of the sentence, (exclusive of said day), and upon four days previous notice to the Solicitor, with copies of the moving papers.

Cross references.—As to when circuit courts may grant new trials, see §§ 34, 1030, and notes thereto. As to extension of time and perfection of appeals, see §§ 784, 785, and notes, where *Wade v. Gore*, 154 S. C. 262, 151 S. E. 470 is treated.

Editor's note.—The purpose of this note, and the annotations following, is to point out what the law is, and what the practice should be, when it is desired by a party to move for a new trial upon after-discovered evidence after the case has been appealed to the Supreme Court, the appeal disposed of, and the remittitur sent down.

Particular attention is called to the fact that the rule laid down in *State v. Lee*, 80 S. C. 367, 61 S. E. 657, has been overruled by the case of *State v. Hawkins*, 121 S. C. 290, 114 S. E. 538.

Circuit courts have no power to grant new trials after jurisdiction is divested by appeal.—While § 34 provides that all circuit courts shall have power to grant new trials in cases where there has been a trial by jury for reasons for which new trials have usually been granted in

courts of law of the United States, such power is given to the circuit courts in those cases that are properly before them, and not in cases where the courts have been divested of jurisdiction by appeal to the Supreme Court, although the appeal has been disposed of and remittitur sent down. *State v. Hawkins*, 121 S. C. 290, 114 S. E. 538.

The circuit court is without jurisdiction, after an appeal has been taken, in any way to control the final judgment in the case; and since the power of control must rest somewhere, it has accordingly been held that it ought to rest with the court whose judgment it is. *State v. Hawkins*, 121 S. C. 290, 114 S. E. 538, 541.

Rule 24 of the Supreme Court, as construed in *State v. Hawkins*, 121 S. C., 290; 114 S. E., 538; 27 A. L. R., 1983, applies to civil cases as well as to criminal cases. *Ward v. Bruce*, 178 S. C., 286; 182 S. E., 759.

See generally *State v. Rector et al.*, 166 S. C. 312, 164 S. E. 874.

RULE 25.

When it is desired, for any reason whatever, that a case be passed at its regular turn on the list or continued to the next term, the Clerk must be notified before the roster is made up. The party desiring the continuance must secure the consent of opposing counsel.

RULE 26.

Where there is more than one appeal from the same order, judgment or decree, and where the same question is involved in two or more appeals in different cases, the Court may, in its discretion, order them to be argued together in all particulars as if but a single appeal.

Appeal from verdict. See § 775-1.

RULE 27.

When an appeal is sustained on the ground that a non-suit should have been granted because of a failure of evidence, or because the evidence is susceptible of but one inference, the reversal of the judgment shall have the same effect as if the non-suit had been ordered, except when the cause of action will be barred by the statute of limitations before a new action can be brought; and when an appeal is sustained on the ground that a verdict should have been directed, the reversal of the judgment shall have the same effect as if a verdict had been returned by the jury under the direction of the court; but this court will not sustain an appeal from the refusal to direct a verdict, when, under all the circumstances, a non-suit would have been the appropriate remedy.

An action commenced before the adoption of this rule is not affected thereby. Lee v. Unkefer, 85 S. C. 199, 65 S. E. 989, 67 S. E. 246, 40 L. R. A. (N. S.) 243. See also, German American Ins. Co. v. Southern Ry., 82 S. C. 1, 62 S. E. 1115.

This rule is inapplicable to appeals from a magistrate's court. Bridges v. Mills Mfg. Co., 85 S. C. 520, 67 S. E. 738, Ann. Cas. 12A, 861.

Or to reversals by Federal Supreme Court.—Where Federal Supreme Court reversed judgment for plaintiff and remanded case to State Supreme Court for new trial, defendant was not entitled to order directing judgment in its favor. Tyner v. Atlantic, etc., R. Co., 149 S. C. 89, 146 S. E. 663.

Discretion of Supreme Court.—Where

lower court erred in refusing to direct a verdict, the Supreme Court under this rule may in its discretion either remand the case for such direction or for new trial; and in the case of palpable defect in the state's case, in the interest of administration of justice, the remand for a new trial is to be preferred. State v. Klugh, 130 S. C. 160, 125 S. E. 922; State v. Phillips, 134 S. C. 226, 132 S. E. 610.

When it appears that plaintiff might be able to supply additional evidence to support the cause of action, the court will not order a directed verdict in favor of the defendant, but will sustain the motion for nonsuit when one has been made and the case remanded for a new trial that the plaintiff may offer additional evidence. 164 S. C. 191, 162 S. E. 94.

RULE 28.

No stay of any sentence in a criminal case which has been affirmed by the judgment of this Court shall be granted, except by order of this Court, or a justice thereof, if the Court be not in session, and after notice of the application therefor, as prescribed by Rule 16.

RULE 29.

All appeals in Civil cases which do not involve a constitutional question

and in which the amount involved is \$500.00 or less, and all appeals in civil cases in which there has not been a final judgment, shall be submitted, without oral argument upon the printed Transcript of Record and briefs of counsel. The brief of counsel for the appellant shall be filed and served within fifteen days from the date of docketing; the respondent's brief within 10 days after appellant's brief shall have been served upon him and the reply of appellant; if any, within five days thereafter. Upon the failure of the appellant to file and serve his brief within the time prescribed, the respondent may give the appellant's attorney notice requiring the same within five days thereafter; and upon failure to so comply, the Clerk of this Court shall sign an order dismissing the appeal.

Construction.—Court refused to construe this rule where same was not made an issue. *Lamb et al. v. Coker et al.*, 162 S. C., 391, 161 S. E., 117; *Coker et al. v. Bank of Darlington*, 162 S. C., 391, 161 S. E., 117.

On appeal from order striking plead-

ing that defendant charged that constitutional question was involved, did not of itself raise such question, entitling defendant to have case orally argued. *First Carolinas Joint Stock Land Bank of Columbia v. Stuckey*, 170 S. C. 86, 169 S. E. 843.

RULE 30.

Section 1. Two examinations for admission to the bar shall be held each year in the City of Columbia, on the first Wednesdays, Thursdays, and Fridays of May and November, or on such other days as the Board of Law Examiners may determine.

PROVIDED, that any person subject to immediate call in the military, naval, or other branches of the military forces of the United States, or who is in such service, by complying with the other provisions of Rule 30, and who possesses the necessary qualifications required by the rules of the Supreme Court, may have the privilege of taking the bar examination at times other than in the months of May and November, the time for the holding of such examination to be determined by the Board of Law Examiners.

Section 2. Applicants for admission to the bar must file applications in writing with the Clerk of the Supreme Court, who shall be *ex officio* Secretary to the State Board of Law Examiners. Such applications shall be filed not later than two weeks prior to the date fixed by the rule for the examination, and shall be accompanied by the required filing fee of \$5.00. Every such applicant must have attained his majority before filing the application for admission.

Section 3. Applications for admission must state the age, residence and occupation of the applicant; must show that prior to the commencement of the study of law the applicant had a preliminary general education equivalent to that required for graduation in a High School of this State, giving the names of the schools and colleges attended, and the courses of study taken. The applicant must further show that he has studied law in a law school in some part of the United States, or in the law office, or under the direction of a member of the South Carolina Bar for a period of two years during at least thirty-six weeks of each year; and that he has read the entire course of study prescribed by this rule, or its equivalent. Where applicant claims to have studied texts that are equivalent to the prescribed course, he shall state such equivalents in full.

Section 4. Every application for admission to the South Carolina Bar must be supported by the certificates of the instructors, professors and attorneys under whose instruction or direction the applicant had studied. In the case of graduates of law schools, the applicant must present his certificate or diploma for inspection by the Board of Law Examiners at the time of the examination, or if such certificate or diplomas are not obtainable, or cannot be produced, then such applicants must present such other evidence or proof of graduation as the Board, upon consideration of the matter, may require. And every application must be supported by the certificates of at least three reputable attorneys of this State, to the effect that the applicant is vouched for as a person of good moral character.

Section 5. The following course of study is hereby prescribed for applicants for admission, but the full course of study of any law school of the United States which may be deemed reputable by the Board, or reliable works covering the subjects prescribed, will be accepted as equivalent. The works designated as parallel reading are recommended to applicants, but are not absolutely required as part of the required course.

Course of Study

ELEMENTARY LAW

Robinson's Elementary Law, with the collateral reading by the author in Kent and Blackstone, or

Edmund M. Morgan's Introduction to the Study of Law.

PERSONAL PROPERTY

Scholuer's Law of Personal Property, or

Darlington on Personal Property, and

Warren's Cases on Property, or

Bigelow's Cases on Personal Property.

REAL PROPERTY

Tiedeman on Real Property, or

Tiffany's Outlines of Real Property.

Parallel Reading: Aigler's Cases on Property; Warren's Cases on Conveyances; Bigelow's Cases on Rights in Land.

CRIMINAL LAW AND PROCEDURE

Beale's Criminal Pleading and Practice, or

Clark's Handbook on Criminal Law (3rd Edition).

Parallel Reading: Murray's Criminal Law; Beale's Cases on Criminal Law; Mikel's Cases on Criminal Procedure; Bishop's Criminal Law.

TORTS

Cooley on Torts, or

Bohlen's Studies in the Law of Torts.

Parallel Reading: Bohlen's Cases on Torts; Pound's Cases on Torts; Green's Cases on Torts; Wilson's Cases on Torts; Ames & Smith's Cases on Torts.

CONTRACTS

Clark on Contracts, or
Anson on Contracts, or
Williston's The Law of Contracts.

Parallel Reading: Williston's Cases on Contracts; Corbin's Cases on Contracts; Costigan's Cases on Contracts.

DAMAGES

Hale on Damages.

Parallel Reading: Bauer's Cases on Damages.

NEGOTIABLE INSTRUMENTS

Bigelow's The Law of Bills and Notes and Checks, or
Daniel's A Treatise on the Law of Negotiable Instruments, or
Brannon on Negotiable Instruments.

Parallel Reading: Smith & Moore's Cases on Bills and Notes;

Britton's Cases on Bills and Notes; Campbell's Cases on Bills and Notes;
Norton's Negotiable Instruments.

DOMESTIC RELATIONS

Schouler's Law of the Domestic Relations.

Parallel Reading: Madden on Domestic Relations; Long on Domestic Relations.

BAILMENTS AND CARRIERS

Dobie on Bailments and Carriers.

Parallel Reading: Goddard's Cases on Bailments and Carriers.

AGENCY

Mechem's Outlines of the Law of Agency.

Parallel Reading: Huffcut's Cases on Agency.

PARTNERSHIP

Burdick on Partnership, or
Mechem's Elements of the Law of Partnership.

Parallel Reading: Crane and Magruder's Cases on Partnership; Gilmore's Handbook in the Law of Partnership; Clark and Douglas' Cases on Partnership.

CORPORATIONS

Clark on Private Corporations, or
Taylor on Private Corporations, and
Dillon on Municipal Corporations.

Parallel Reading: Warren's Select Cases; Richard's Cases on Private Corporations.

INSURANCE

Vance on Insurance.

Parallel Reading: Woodruff's Cases on Insurance; Vance's Cases on Insurance; Wambaugh's Cases on Insurance.

EXECUTORS AND ADMINISTRATORS

Schouler's Law of Wills and Administrations, or
Croswell's Executors and Administrators, or
Woerner's A Treatise on the American Law of Administrations.
Parallel Reading: Warren's Cases on Wills and Administration.

EQUITY

Pomeroy's Equity Jurisprudence (Student Edition), or
Maitland's Equity, or
Walsh's A Treatise on Equity.
Parallel Reading: Cook's Cases on Equity; Ames' Cases in Equity Jurisdiction.

CODE PLEADING

Pomeroy's Code Remedies, or
Clark's Code Pleading.
Parallel Reading: Hinton's Cases on Code Pleading; Throckmorton's Cases on Code Pleading.

EVIDENCE

Greenleaf on Evidence, Volume 1, 15th Edition, or
Jones on Evidence.
Parallel Reading: Wigmore's Cases on Law of Evidence; Thayer's Cases on The Law of Evidence; Wigmore's The Principle of Judicial Proof.

CONSTITUTIONAL LAW

Cooley's Principles of Constitutional Law (Student Edition).
Constitutions of the United States and of South Carolina.
Parallel Reading: McLain's Selection of Cases on Constitutional Law.

WILLS

Schouler's Law of Wills, or
Bigelow on Wills, or
Jarman on Wills.
Parallel Reading: Costigan's Cases on Wills.

ETHICS

Sherwood's Legal Ethics.
Parallel Reading: Costigan's Cases on Legal Ethics.

STATUTES AND RULES OF COURT

Code of Laws of South Carolina, and all acts of a public nature passed since its adoption; the Bankruptcy Acts; Rules of the Supreme Court, Circuit and Probate Courts.

Section 6. Upon the examination each applicant will be furnished with a copy of the questions to be answered in writing, numbered in regular order, together with the necessary stationery for the preparation of the answers, which should be numbered to correspond with the questions.

Section 7. As each applicant completes his answers he must sign a cer-

tificate to the effect that he has not, during the examination, given or received any assistance of any nature whatsoever in making his answers, and must attach the same to his questions.

Section 8. In all other respects applicants must comply with the statutes regulating admission to the bar.

RULE 31.

When any Justice of this court, or any judge of any of the courts of this State, has declined to grant any order or writ in any case, and thereafter application for the same order or writ, or an order or writ of a similar character, is made to a Justice of this court, it shall be incumbent upon the party, or his attorney, in his application to such Justice, to show therein the former refusal of the said order or writ, and the justice who refused the same, and if the declination to grant the said order has been reduced to writing, the original of the order thereabout, or a certified copy of the same, shall be presented to the Justice at the time the subsequent application is made.

RULE 32.

In the event any attorney-at-law, duly admitted to practice in the courts of this State, shall submit his resignation as such attorney, the same will be referred by the court to the Committee on Grievances of the South Carolina Bar Association for an investigation of the conduct as a member of the Bar of the said attorney, and for a recommendation of the said Committee as to the propriety of the acceptance of the said resignation; the said Committee to proceed in its investigation according to the provisions contained in sections 327 to 333, both inclusive, of the Code, upon the coming in of the report of the said Committee, and not prior thereto, the Court will take such action upon the same and the resignation submitted as it shall deem proper.

INDEX

RULES OF SUPREME COURT OF SOUTH CAROLINA

ADMISSION TO THE BAR, Rule 30.

AFFIDAVITS, Rule 14.

AGREEMENTS, Rule 15.

ARGUMENTS, ORAL, Rules 10, 12.

APPEALS

Agreed case, Rule 1.

Argument by counsel, after hearing, Rule 10, 12.

Limitations, Rule 12.

Attacking decisions of court, procedure, Rule 8, § 11.

Attorneys, Rules 3, 4, 13.

Briefs, Rule 8.

Case, Rule 1.

Amendments, Rule 4, § 7.

Distribution of copies, Rule 7.

Form and contents, Rule 4.

Number of copies, Rule 1.

Statement, contents, Rule 4, § 3.

Title, Rule 4, § 2.

Continuance, Rules 9, 25.

Death pending, Rule 3.

Dismissal, criminal action, Rule 23.

Docketing of cause, Rules 1, 9.

Guardians ad litem, Rule 3.

Inspection of record below, Rule 2.

Motions, hearing, Rules 16, 24.

Notice of date of hearing, Rule 22.

Order of docket, Rule 9.

Preference of causes, Rule 11.

Printed papers, preparation, Rule 5.

Private agreement or consent, Rule 15.

Record below, Rule 2.

Reading from books prohibited, Rule 12.

Reinstatements, Rule 9, § 2.

Remittitur, Rule 17.

Reversal, effect, Rule 27.

Roster of cases for hearing, Rule 22.

Statement of case, Rule 4.

Typewritten records, Rule 6.

Waiver, Rule 1.

When argued together, Rule 15.

When sustained, Rule 27.

Without merit, Rule 23.

APPLICATION FOR WRITS IN ORIGINAL JURISDICTION. PREFERENCE, Rule 22.

ATTORNEY

Admission to bar, Rule 30.

Wearing apparel, Rule 13.

BINDING CASES, Rule 21.

BRIEFS, Rule 8.

CASES

Citation, Rule 8, § 13.

Order, Rule 11.

CONTINUANCES, Rules 9, 25.

COSTS

Taxation Rule 6, § 2.

DOCKETING, Rules 1, 9.

EVIDENCE AFTER DISCOVERED, Rule 24

EXCEPTIONS, Rule 4.

JURISDICTION, Rules 6, 18, 24.

Original, Rule 20.

MIMEOGRAPHED RECORDS, Rule 6

MOTIONS, Rules 16, 24.

ORIGINAL JURISDICTION, EXERCISING, Rule 20.

PETITION, FOR REHEARING, Rule 17.

To attack decision, Rule 8.

PRINTING TRANSCRIPTS AND BRIEFS, Rules 5, 8.

PROPOSED CASE, Rule 4.

REHEARINGS, Rule 17.

REMITTITUR, Rule 17.

RETURN, Rule 1.

REVERSALS, WHEN THEY HAVE EFFECT OF DIRECTED VERDICT, Rule 27.

ROSTER OF CASES FOR HEARING, Rule 22.

SERVICE OF ORDERS AND RULES, Rule 19.

STAY OF PROCEEDINGS, Rule 28.

STAY OF SENTENCE, Rule 28.

SUBMITTED CASES, Rule 29.

TESTIMONY, HOW PRINTED, Rule 4.

TIME, ENLARGEMENT OF BY SUPREME COURT, Rule 18.

TRANSCRIPT OF RECORD, Rule 4.

Index, Rule 4.

TYPEWRITTEN RECORDS, Rule 6.

VERDICTS, DIRECTED, Rule 27.

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